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Newsletter Editors

Jane Colston
Brown Rudnick, London
jcolston@brownrudnick.com

Sandrine Giroud
Lalive, Geneva
sgiroud@lalive.law

International Bar Association

4th Floor, 10 St Bride Street
London EC4A 4AD, United Kingdom
Tel: +44 (0)20 7842 0090
Fax: +44 (0)20 7842 0091
www.ibanet.org

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This newsletter is intended to provide general information regarding recent developments in international litigation. The views expressed are not necessarily those of the International Bar Association.

From the Co-Chairs

Welcome to the September 2019 edition of the Litigation Committee's newsletter.

First, may we extend our great thanks to editors Jane Colston and Sandrine Giroud for their tireless work on this edition which, as with previous editions, continues to surpass expectations.

It seems only yesterday that many of us were gathered in Berlin at the 2019 Annual Litigation Forum, and it was a pleasure to see so many of our members there. The wonderful setting of the Reichstag for the opening reception and the Charlottenberg Castle for the gala dinner, together with the excellent sessions, made this year's Forum particularly memorable.

It was noteworthy that we had representation from more than 50 jurisdictions, underlining how the Litigation Committee is able to offer something of interest to lawyers across the globe. The comments received from delegates were enormously positive – including from many who were attending for the first time. We once again extend our profound appreciation to Peter Bert and the Host Committee for all their hard work.

We look forward to the IBA Annual Conference in Seoul in September with great excitement and anticipation. As usual, the Committee is leading and supporting a number of sessions this year and we strongly encourage you to attend them. The session chairs have been hard at work planning diverse and interesting topics, and we are sure delegates will not miss these opportunities for debate and enrichment.

Attendance by delegates is critically important in ensuring that the Committee receives session slots in future years – so please come along. We are delighted to be once again hosting the IBA Global Women Litigators' Breakfast on the Tuesday morning (both women and men are welcome) and our traditional Committee lunch cruise on the Thursday afternoon.

After Seoul, our Third Private International Law Conference will take place in Milan on 24–25 October, focusing on the rise of international commercial courts, sanctions and Brexit. We strongly encourage you to attend.

Planning is well under way for the 2020 Annual Litigation Forum in Buenos Aires, Argentina, on 6–8 May. The themes are third-party funding, lessons learnt from recent corporate scandals, securities litigation, threats and opportunities in enforcing judgments around the world, and interaction with quantum experts when assessing damages. This will be the first time that the Litigation Committee has taken its Forum to Latin America, and we are truly excited by this prospect. Buenos Aires is a fascinating city that will serve as an excellent host for the Committee.

Two regional litigation conferences are planned in Asia in 2020, organised by the Asia Pacific Regional Forum and which the Litigation Committee is delighted to support. The first is in India in January and the second is in Singapore in September. Details will be available on the 'Conferences and events' pages of the IBA website in due course.

Thank you for all of your support for the Committee – and see you soon.

Tom Price

Gowling WLG,
Birmingham
tom.price@
gowlingwlg.com

Angelo Anglani

NCTM, Rome
angelo.anglani@nctm.it

Jane Colston

Brown Rudnick,
London
jcolston@
brownrudnick.com

Sandrine Giroud

Lalive, Geneva
sgiroud@lalive.law

Editors' note

Over the last few editions of this newsletter, we have sought to make it more diverse in terms of content, with articles dealing with more than just legal topics and trends.

We have curated articles on wellbeing and diversity. We have interviewed some of our well-known Committee members and leaders on their thoughts and tips as litigators. We have obtained articles on building teams and expanded our focus on some of the 'soft' skills required to adjust to the changes of our always-evolving profession.

In this edition, we continue with our diversity series, collecting personal experiences and firms' initiatives from various litigators engaged in supporting changes for more inclusive and efficient teams. We also address the challenge of juggling work-life balance and explore why emotional intelligence is an underestimated treasure

for litigators, giving them a competitive advantage at a time when technology is making inroads into the practice of law. There are even some tips on the benefits of yoga.

Our 'Welcome to' series also continues, with a focus on Milan – the host city of the Litigation Conference on Private International Law in October – and on Buenos Aires, which is the location for next year's Annual Litigation Forum. All that and then a wealth of jurisdictional updates from our members worldwide.

We hope you enjoy this edition and learn as much as we have while curating it. We are now thinking of new articles, so if you have any ideas or feedback do let us know. Entries for a proposed new article on 'what will you do after work?' are also welcome.

Finally, please note that all the current and past newsletter articles are easily accessible on the Litigation Committee's webpages.

Committee Officers

Co-Chairs

Angelo Anglani
NCTM, Rome
angelo.anglani@nctm.it

Tom Price
Gowling WLG, Birmingham
tom.price@gowlingwlg.com

Senior Vice-Chairs

Yvette Borrius
Florent, Amsterdam
yvette.borrius@florent.nl

Tim Strong
Taylor Wessing, London
t.strong@taylorwessing.com

Vice Chairs

Frederick Acomb
Miller Canfield, Detroit
acomb@millercanfield.com

Christie Helmer
Miller Nash Graham & Dunn, Portland
chris.helmer@millernash.com

Secretary

Carlo Portatadino
Weigmann, Milan
carlo.portatadino@weigmann.it

Treasurer

Jacques Bouyssou
Alerion, Paris
jbouyssou@alerionavocats.com

PPID Liaison Officer

Peter Chaffetz
Chaffetz Lindsey, New York
peter.chaffetz@chaffetzlindsey.com

Scholarship Officer

Simon Hart
RPC, London
simon.hart@rpc.co.uk

Regional Representative Asia Pacific

Neerav Merchant
Majmudar & Partners, Mumbai
nmerchant@majmudarindia.com

Regional Representative Russian Federation & Eastern Europe

Feodor Viacheslavov
VLawyers, Moscow
fvyacheslavov@vlawyers.ru

Regional Representative Latin America

Rodrigo Fermin Garcia
Marval O'Farrell & Mairal, Buenos Aires
rfg@marval.com

Publications Officers

Sara Louise Chisholm-Batten
Michelmores, Exeter
sara.chisholm-batten@michelmores.com

Jeff Galway
Blake Cassels & Graydon, Toronto
jeff.galway@blakes.com

Newsletter Editors

Jane Colston
Brown Rudnick, London
jcolston@brownrudnick.com

Sandrine Giroud
Lalive, Geneva
sgiroud@lalive.ch

Conference Quality Officer

Urs Feller
Prager Dreifuss, Zurich
urs.feller@prager-dreifuss.com

Conference Coordinator Europe

Peter Bert
Taylor Wessing, Frankfurt
p.bert@taylorwessing.com

Committee Liaison Officer

John Reynolds
White & Case, London
johnreynolds@whitecase.com

Website Officers

Thera van Swaay de Marchi
Pinheiro Neto, São Paulo
tdemarchi@pn.com.br

Sverker Bonde
Delphi, Stockholm
sverker.bonde@delphi.se

Special Projects Officer

Marko Hentunen
Castrén & Snellman, Helsinki
marko.hentunen@castren.fi

Diversity and Equality Officer

Daan F Lunsingh Scheurleer
NautaDutilh, Amsterdam
daan.lunsingh@nautadutilh.com

Membership and Communications Officers

John P Bang
Bae Kim & Lee, Seoul
john.bang@bkl.co.kr

Clément Dupoirier
Herbert Smith Freehills, Paris
clement.dupoirier@hsf.com

Sponsorship Officer

Samaneh Hosseini
Stikeman Elliott, Toronto
shosseini@stikeman.com

Young Litigators Forum

Co-Chairs

Anna Grishchenkova
KIAP, Moscow
ag@kiaplav.ru

Andreas Frischknecht
Chaffetz Lindsey, New York
andreas.frischknecht@chaffetzlindsey.com

LPD Administrator

Cheveon Badi
cheveon.badi@int-bar.org



ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

IBA 2019 SEOUL
22–27 SEPTEMBER



Litigation Committee's sessions

Monday 0930 – 1045

Judges and arbitrators as adjudicators and settlement facilitators, and the Singapore Convention on Enforcement of Mediated Settlements

Presented by the Dispute Resolution Section, the Arbitration Committee, the Consumer Litigation Committee, the Litigation Committee, the Mediation Committee and the Negligence and Damages Committee

This session will discuss whether and to what extent judges and arbitrators should facilitate settlement, and the impact of the Singapore Convention on Enforcement of Mediated Settlements on international disputes.

Legal expense insurance schemes and access to justice

Presented by the Access to Justice and Legal Aid Committee, the Forum for Barristers and Advocates and the Litigation Committee

Legal expense insurance (LEI) is a well-established industry and a significant source of legal funding in many developed jurisdictions, notably in Europe. It is established, but less developed in some common law jurisdictions, including Canada and some parts of the United States. Elsewhere in the world, however, legal expense insurance has been a vexed aspect of the access to justice initiatives of the profession.

Over the course of 2018–2019, the Access to Justice and Legal Aid Committee has been researching LEI provision, and it will present a session on its findings, and proposed solutions to improve access to justice through LEI.

Monday 1430 – 1545

Litigation crisis management

Presented by the Litigation Committee

This panel intends to explore the interplay between different stakeholders who become involved in a corporate crisis as it evolves and their different roles and perspective. The panel will address how to balance the necessity of transparent and quick communication with the public and the different perspective needed when defending the corporation against civil claims or dealing with regulatory or criminal inquiries. The intention is to use a case study or a scenario and through that discuss what roles corporate counsel, outside counsel (litigation as well as investigative teams) and PR professionals will play at different stages; from when the crisis hits until the corporation begins to move on from it despite there – often – being years of litigation and investigation following thereafter. We will seek to involve the audience in the discussion, perhaps also through digital means (ie, by responding to questions/voting not only by a show of hands but digitally).

Tuesday 0800 – 0915

Global women litigator breakfast

Presented by the Litigation Committee and the Women Lawyers' Interest Group

Continued overleaf

Tuesday 0930 – 1045

The many faces of online infringement

Presented by the Intellectual Property and Entertainment Law Committee and the Litigation Committee

Traditional pre-digital forms of intellectual property (IP) rights are still alive and have adapted to the digital market. Counterfeited products and pirated works are offered for sale across the internet on dedicated websites or market places. The problem is particularly acute in East Asia. Who is liable and what technical and legal countermeasures should be adopted to deal with this phenomenon?

Tuesday 1615 – 1730

Ways to cope in practice management

Presented by the Litigation Committee

Legal practice has always been a taxing and stressful profession. In today's hyper-connected offices, the demands associated with being a lawyer have only increased. In order to be effective and productive in the long run, lawyers need to be prepared to cope with the mental and physical toll that the legal profession can exert on an individual. Fortunately, the legal profession as a whole is increasingly cognisant of the need for lawyers to develop the skills and practices necessary for effectively managing stress and increasing their productivity, such as preparedness, well-being, mindfulness and meditation.

Wednesday 0930 – 1045

Enforcing judgments around the Asia Pacific region

Presented by the Litigation Committee, the African Regional Forum, the Arab Regional Forum, the Asia Pacific Regional Forum, the European Regional Forum, the Latin American Regional Forum and the North American Regional Forum

The enforcement of a judgment that has been obtained by a plaintiff is perhaps the most important aspect of litigation, as it is in effect the whole point of undergoing the often arduous process. When that judgment is a foreign one, this process is made even more difficult, as the foreign judgment itself must be recognised by the court in which that judgment is sought to be enforced before the plaintiff can invoke the necessary steps or procedures in order that it be enforced. However, the procedures concerned will differ from jurisdiction to jurisdiction and nowhere is this more apparent than in the Asia Pacific region, which consists of a heady mix of common law countries, civil law countries and hybrid systems. A diversity of rules may be confusing for litigants, who would potentially have to navigate both substantial and subtle differences in the various laws. Harmonisation would obviously increase legal certainty and portability of judgments in the region, but is this even a possibility?

Our panellists will discuss some of the broad features of the systems in place in the Asia Pacific region, some of the challenges they have faced in enforcing foreign judgments, practical solutions in overcoming these challenges and their views on whether the existing rules are in fact necessary to preserve the integrity of the national legal systems.

Wednesday 1115 – 1230

Justice Machines: dystopia or opportunity? Judicial function and dispute resolution in the artificial intelligence era

Presented by the Litigation Committee and the Judges' Forum

In the recent years, technology has substantially developed and grown in the practice of law: from supporting and replacing certain human activities, to a disruptive role, which is even intended to reshape the adjudicative function. In this context, we already refer to artificial intelligence (AI).

It has been common opinion that the dispute resolution sector was safe from these developments, in the belief of the essentiality of the human intelligence in the decision-making process.

Is this assumption still valid?

The session will explore the state-of-the-art of AI applied to dispute resolution and debate consequences and perspectives for judges, lawyers and, ultimately, for the parties.

Thursday 0930 – 1045

Harnessing the experts: collaboration between lawyers and other professionals

Presented by the Academic and Professional Development Committee and the Litigation Committee

In most areas of legal practice, lawyers will at times be instructed by other professionals, or need to draw upon their skills and expertise on matters. A strong collaboration is essential to making these relationships work, to provide a cost-effective, professional and streamlined service to clients. How can this best be achieved? What lessons can be learnt from previous experiences? Can lawyers be better educated/trained to understand the requirements of other professionals?

All programme information is correct at time of print.

To find out more about the conference venue, sessions and social programme, and to register, visit

www.ibanet.org/Conferences/Seoul-2019.aspx.

Further information on accommodation and excursions during the conference week can also be found at the above address.



Carlo Portatadino

Weigmann, Milan
carlo.portatadino@
weigmann.it

Welcome to Milan for the IBA Litigation Conference

What characteristics of the Italian legal system would you highlight to someone looking to do business in Milan?

Italy is a traditional civil law jurisdiction. Whilst judges are usually competent and well prepared, it is hard to deny the common bias that proceedings can become quite lengthy, especially when carried on through the second instance and, even more, if brought before the Court of Cassation. This is due, basically, to the large number of disputes that crowd Italian Courts.

However, the Italian judicial system grants certain legal instruments that provide for reasonably quick decisions and/or an expedited enforcement where urgency is proved, such as, among others, payment orders, preliminary injunctions, ex-parte measures.

Furthermore, the need for quick and accurate decisions on complex matters, crucial for those who look to do business in Milan (and in Italy in general), has been addressed through the institution of a limited number of specialised sections across the territory, known as Courts for Enterprises, which have jurisdiction over disputes on corporate and intellectual property matters. Obviously, Milan is host of one of them.

Moreover, Milan is also seat to the Milan Chamber of Arbitration, an excellence in the national and international arbitral landscape.

What major developments do you expect to see in the Italian dispute resolution landscape in the next five years?

The first development to be expected is the completion of the 'Telematic Proceedings Reform', a reform started in 2011 for the implementation of a faster and more modern judicial system. At the moment, the use of online instruments for the service and filing of writs, briefs and decisions has already started in civil proceedings (with the exception of small claim courts and the Court of Cassation) as well as in administrative ones. Criminal proceedings will be next to come, as the reform allows for less time-consuming and more efficient administration of the proceedings.

The second major development is the very recent reform of Class Action Proceedings, set to take effect in April 2020. Up to now, the class action instrument has had very limited use, both because of profitability issues and because of a very strict regulation (an opt-in system, the exclusion of tort disputes, the limitation to consumers), as well as a reluctant judicial approach. The reform now also admits non-consumers to the action, and opt-in is open even after the decision is rendered.

We shall see how these innovations stand in practice and whether further adjustments will be made.

What are the tactical and strategic points of difference that you would highlight for foreign litigators overseeing disputes before the Italian courts?

Especially to foreign colleagues from common law systems, it can be useful to remember the key features of Italian civil procedure.

The civil proceedings are essentially written-based (this, quite ironically, despite the fact that the Italian Code of Civil Procedure, in principle, provides for the opposite).

Hearing activities are usually kept short, but can be spread across quite a long time span (for example, witness hearings can be held at months apart from one another). Also, the final decision might be rendered many months after the hearings have taken place (and even by a different judge, if meanwhile the original judge has been moved or retired). As a consequence, written briefs and minutes of the hearings are usually what the court will rely on, rather than lengthy oral remarks. Furthermore, the Italian legal system does not recognise the concept of discovery or disclosure: depending on the applicable procedural rules, documents are filed for the first time with the introductory brief or in the following evidentiary phase and there is a very limited case for having the judge order the counterparty or a third party to exhibit a certain document which was not willfully disclosed.



HOLA! WELCOME TO BUENOS AIRES FOR THE ANNUAL LITIGATION FORUM IN 2020

Another recurring question from foreign colleagues relates to awards on costs. Under Italian Civil Procedure Law, the losing party shall cover the counterparty's legal costs. However, judges have a wide discretion on this, and, especially if the dispute was particularly complex, they often rule that each party bears its own legal costs. Besides, even when they award legal costs, they do so on the basis of a Ministerial table, rather than of the evidence of the actual costs incurred. What is more, the Ministerial table determines the legal costs to be refunded based on the dispute's value and complexity. As a result, the costs awarded are usually insufficient to cover the actual costs incurred by the winning party.

Top tips for attending the IBA Litigation Conference in Milan in October?

Enjoy the weather, which can still be quite pleasant. If it is your first time in Milan, I would recommend visiting Leonardo's Last Supper (book well in advance) and the nearby renaissance Basilica di Santa Maria

delle Grazie, and pay a visit to the Duomo, Milan's gothic cathedral: do not forget to get to the rooftop, where you can enjoy a 360-degree view of the city and surrounding mountains. Next would be Castello Sforzesco, the XV century city castle, home to many exhibitions and surrounded by the city's biggest park.

While in Milan, do not miss the chance to make a stop at two little jewels: S. Maria sopra San Satiro, a small church famous for its astounding tromp-l'oeil by Bramante, and San Maurizio al Monastero Maggiore, dubbed the Milan Sistine Chapel.

If you have some extra time, Milan offers many museums hosting incredibly rich collections and internationally renowned exhibitions: Pinacoteca Ambrosiana, Palazzo Reale, Galleria d'Arte Moderna, and the more recent MUDEC and Fondazione Prada.

Needless to say, in Milan you will also have an endless choice of restaurants, bars and shopping spots.

For those who stay over the whole weekend after the conference, Lake Maggiore and Lake Como are just 50km away.

Hola! Welcome to Buenos Aires for the Annual Litigation Forum in 2020

Rodrigo Fermín García

Marval, O'Farrell & Mairal, Buenos Aires
rfg@marval.com

Describe Buenos Aires?

Buenos Aires is one of the most cosmopolitan cities in the world. It has a fascinating mix between its European heritage and the new vibrant Argentinean lifestyle. Its financial center, its architecture, its variety of neighbourhoods and its convivial atmosphere; are just a few of the characteristics which contribute to the essence of being a 'Porteño'.

Buenos Aires has several cultural centres and more than 100 museums and art galleries. It also offers big handicraft fairs and modern shopping centres as well as old bookstores, including the 'Ateneo Grand Splendid' which has been named as 'the most beautiful book store in the world' by *National Geographic* magazine in 2019. For going out, you can enjoy historical coffee houses;

bars featuring tango and milonga shows; discos and pubs with international music; restaurants serving delicious Argentinean meat, as well as all different kinds of cuisines. You may also find horse races, polo matches, casinos and the most passionate football (soccer) games.

Visitors may tour the city's variety of neighborhoods: the traditional ones: San Telmo and La Boca, the sophisticated ones: Recoleta and Belgrano, or the modern ones: Puerto Madero and Palermo, birthplace of the avant-garde design.

You can take thematic walks, following the steps of emblematic characters from either tango or Argentinean culture, such as Gardel, Evita or Borges; although the city streets entice free spirits to wander around.

Where would you recommend IBA litigators visit if they can extend their trip?

For those who enjoy sailing, the Río de la Plata offers many options; and if you fancy the countryside you can visit traditional Estancias, for a day trip or a weekend retreat, not far from the city.

If you would like to discover Argentina, the northern part of the country offers the magnificent Iguazu Falls, and the Calchaquí Valleys; known for its contrast of colours and its unique geography that ranges from the mountain desert to the subtropical forest. Along the Andes you can visit Mendoza which is famous for its vineyards. In Patagonia, you can enjoy nature by the mountains at Bariloche, or further south you can visit the Glaciars National Park and Ushuaia, which is the southernmost city in the world.

What are your favourite spots for a meal?

Although in Buenos Aires ‘meat is king’, there are excellent choices offering a more sophisticated cuisine than the traditional ‘*parrilla*’ (grill). At the Recoleta neighborhood we can find the Duhau Restaurant Located at the Hyatt Hotel; at Puerto Madero we can find Chila, which has been rated within the 50 Best Restaurants in Latin America by Relais & Chateaux. In the neighborhood of Palermo we can find the restaurant Casa Cavia, which is located in a wonderful house. At Belgrano we can also enjoy a gastronomical experience at Sucre.

If you have an evening to spend in Buenos Aires what would it be?

Buenos Aires is recognised for the wide range of cultural and recreational activities all year round. It is a city that never sleeps. The Opera House, *Teatro Colón*, is known for its beautiful architecture and outstanding performances. The city also offers a variety of smaller experimental theatres.

What is the best way to get around?

In Buenos Aires, taxis are a good option. It is advisable to order your taxi via the app ‘BA Taxi’.

What makes someone a *Porteño*?

A true *Porteño* is a passionate person, who likes to live life at its fullest and will never run out of words or plans. *Porteños* enjoy life

at a fast pace, rushing around, but will always make time to be with friends and family.

What characteristics of the Argentinian legal system would you highlight to someone looking to do business in the country?

The Argentinian legal system has been subject to a significant wide range of reforms during the last few years. A brand new Civil and Commercial Code (CCC) was enacted in 2015, which maintains the civil law tradition and blends the influence of the European countries’ legal system together with a Latin American identity and perspective. Among its key objectives, the drawing up of the CCC rules was clearly intended to promote legal certainty in commercial transactions, mainly by incorporating clear and innovative stipulations referred to commercial contracts that were not regulated before (such as agency and franchise agreements) and by adopting comparative law experiences and standards. Moreover, the CCC performs a ‘pioneering’ role in amalgamating technological developments with business affairs such as the digital and electronic signature, e-commerce, plus the possibility for corporations to hold virtual meetings and use computers to keep accounting and financial statements records. Last, but not least, the CCC regulates a complete and robust Chapter related to private international law.

The Argentinian legal system has also been improved and modernised by reforms with respect to corporations and arbitration. On one side, it has recently been incorporated the ‘single-member company’ (*Sociedad Unipersonal*) and the ‘simplified private company’ (*Sociedad Anónima Simplificada*). The latter can be incorporated digitally, saving costs and time, while doing less paperwork. On the other side, in July 2018, the Argentine National Congress enacted Law No 27.449 International Commercial Arbitration Law (based on the UNCITRAL Model Law 2006) marking a historical legal milestone in our national arbitration system.

In addition, some attractive investing frameworks have been recently set in relation to the infrastructure and energy sector. The regime for public-private partnership, established by Law No 27.328, triggers a new window of opportunities for investors who are willing to engage in transactions related to public works and concessions, in cooperation with the public sector. In relation to the energy sector, the National Congress has declared of



WHAT ARE YOU DOING TO PROMOTE DIVERSITY?

public interest the generation of electric power from sources of renewable energy and thus has set forth Investment Rules for the building of new plants to generate it (Law No 26.190).

The winds of innovation and changes are not only blowing in the fields of the regulatory affairs but also in the fields of the judicial system. The 'Justice 2020 Program' is a clear example of the latter, as it represents a digital platform – launched in May 2016 by the National Ministry of Justice and Human Rights – with the objective of strengthening the justice system in terms of independency, transparency and modernity. This program

became a finalist of a competition launched by the Organisation for Economic Co-operation and Development (OECD) Open Government Unit, the Observatory for Public Sector Innovation and the Open Government Partnership, which awards innovative open government proposal cases.

The aforementioned reforms and programmes have been followed by macro-level achievements – for example, the trade agreement concluded between the Mercosur and the European Union – and aims, such as the intention of Argentina to become part of the OECD.

What are you doing to promote diversity?



Preetha Pillai

Skrine, Kuala Lumpur
psp@skrine.com

In my firm, which is the second largest firm in Malaysia, the glass ceiling was shattered a generation of lawyers ago. When I joined the firm as a young, bright-eyed associate in 1998, the firm already had 30 per cent equity share in the hands of female partners. My

immediate partner in charge was a woman holding her own in the big bad world of litigation. Today she sits as a judge at the Federal Court, the apex court of the land. My peers were a good mix of men and women of different shapes, sizes and colours. Over 20 years we have worked hard, played hard and advanced as we should have – based on merit.

As an equity partner today, I can confidently say that not once has gender played a role in any discussion about hiring, salary or promotion. Our hiring policy is gender blind and we have refused to implement policies to pay graduates from better universities more than the others recognising that grit, more than smarts and privilege, will get you further. Not once has a lawyer been assigned to a particular practice area because of his/her gender or turned away from partnership for that reason. Everyone is judged on merits.

But the loaded word is 'merit'. What is merit in any law firm? We come together as a firm with the common intention to practice and profit. The two go hand in hand. Most of us can practice and do it well. But do we know how to make ourselves profitable? Do we know how to build the bill book, to network, market, promote ourselves and to be the trusted confidante of the C-suites, call ready with answers and strategies to complex legal questions?

I struggled, still struggle, as many women do with this aspect of practice. Is it because of my gender? Perhaps. Or is it my personality – is that even separable from my gender? Do I really want the C-suite calling me on a rainy Sunday afternoon when I'm snuggled up with hot chocolate and a good book?

So, what have I done for diversity? I keep it real. I let the juniors know that we are all-men and women – truly diverse. That we are driven by different things, have different needs, wants, hang ups and that not all of us have one way of achieving things. I tell them to look around and find that lawyer who has 'made it', who you think best represents your style and then observe and learn from them. I tell them that the most important things are to do the best lawyering possible and to maintain dignity and integrity – that almost invariably, everything else will fall into place.



Frederick A Acomb

Miller Canfield, Detroit
Acomb@MillerCanfield.com

In 2016, Stanford Law School, Bloomberg Law, and Diversity Lab (an incubator for innovative ideas and solutions that boost diversity and inclusion in law), hosted a Women in Law Hackathon. The goal of the Hackathon was to generate innovative ideas that would boost the retention and advancement

of experienced women in law firms. One of the results of the Hackathon was what became known as ‘The Mansfield Rule’. The Mansfield Rule requires that the applicant pool for each of the following roles consists of at least 30 per cent women, minorities, and members of the LGBTQ community:

- Chief Executive Officer;
- managing partner positions;
- office head leadership;
- practice group leadership;
- equity partner promotions;
- lateral partners;
- associates;
- client pitch teams.

Diversity Lab then partnered with approximately 50 United States law firms to pilot the inaugural version of the Mansfield Rule. Miller Canfield was one of the inaugural firms that volunteered to pilot the programme.

In the first year, in addition to demonstrating that Miller Canfield’s applicant pool for each of these roles consisted of 30 per cent women or minorities, the firm also demonstrated that 30 per cent of the attorneys who actually held these positions were women or minorities. Accordingly, we were designated as a Mansfield Certified Plus Firm in 2018. We anticipate again receiving this designation in 2019, and we intend to improve on our performance in the years that follow. The fact that 80 per cent of our 2019 summer associates are women and minorities is a harbinger of good things to come.

In furtherance of the firm’s commitment to diversity, the firm recruits at women and minority career fairs, and, on a quarterly basis, compiles and internally distributes diversity scorecards on each practice group and the firm as a whole. These scorecards track the demographics of all hires, departures, memberships on key firm committees, firm pitch teams, and the allocation of assignments to all non-principals. By tracking and distributing this information on a quarterly

basis we are able to identify trends and can take measures to self-correct as warranted before year-end.

Moreover, although we provide one-on-one business development coaching to all attorneys, the coaching for women and minorities is specifically tailored to address the challenges that women and minorities often face as they attempt to build their practices.

We are also launching a sponsorship programme in which sponsors will be responsible for ensuring that their mentees receive the support needed to advance at the firm, and for ensuring that they develop relationships with clients for succession planning purposes.

In addition to providing firm-wide LGBTQ training, we are launching a Generational Discussion Series in 2019 to promote understanding, awareness, communication, and better working relationships between the generations represented in the firm.

There is no question that having an increasingly diverse law firm obviously is the right thing to do from a business perspective. Indeed, our clients are increasingly diverse, and the more diverse they are the more diverse they expect us to be. But there are other advantages to having an increasingly diverse workforce. For example, being able to tap into people from multiple backgrounds helps us do a better job at creatively solving our clients’ problems. In addition, it makes working here more fun and more interesting.



As incoming President of the International Association of Young Lawyers in September 2019 – the fifth female lawyer to lead our association in the last ten years – I have chosen diversity as the theme of my presidency.

Paola Fudakowska

International Association of Young Lawyers (AIJA), Brussels
president@aija.org

So what do I mean by diversity? The dictionary definition suggests

different elements or qualities and variety, with the specific example of the inclusion of different types of people in a group or organisation.

AIJA is a truly international association for around 4,000 junior to mid-career lawyers from over 90 countries representing over 700 law firm of all sizes. Our statistics speak for themselves: 43 per cent of our members

WHAT ARE YOU DOING TO PROMOTE DIVERSITY?

are women and 43 per cent of the officer roles are held by women. There is currently a gender balance across the Association's executive board and during the past ten years 73 per cent of the senior leadership roles on our executive board were held by women. But we can do more.

When organising our high-quality seminars, our members are encouraged to ensure gender-diverse panels, with a wide representation of countries and different-sized law firms.

The Association's strategic focus is to increase geographic diversity by growing our membership in Asia, the Americas and Africa. Building on the success of events in Singapore and Hong Kong, during my presidency the focus is on the Americas as we host our half-year November 2019 conference in Miami and the August 2020 annual congress in Rio.

Our partnerships with other legal associations that have a strong presence in our target continents, such as the International Bar Association, offer existing networks to support our goals of long-term growth and development in our chosen geographic areas.

I am actively working with our African members and our motivated commission officers who want to deliver an event in Africa in late 2020/2021, so watch this space.

My promise of prioritising diversity is supported by the creation of a new diversity officer position to join our advisory board. That role will entail actively monitoring and promoting diversity among our membership and our events. It will also focus on leveraging our existing relationships with sponsors and legal association partners, as well as identifying new connections and opportunities to promote the Association's long-term commitment to diversity.

Churchill famously said, 'Diversity is the one true thing we all have in common – celebrate it every day'.

Our annual congress in the technicolour city of Rio on 24-28 August 2020 represents the end of my tenure. What better place in the world for our Association to make a public commitment to diversity while celebrating our existing success!



Liam Kennedy

A&L Goodbody,
Dublin

lkennedy@
algoodbody.com

A few decades ago, Dublin's leading law firms could be identified as either 'Catholic' or 'Protestant'. Such distinctions are long gone, and the firms which have flourished were those which led the way in discarding such divisions, promoting on merit and developing a culture of inclusion. Law

firms should foster diversity and inclusion because it is the right thing to do. It also makes business sense to secure and promote the best talent and to develop a sustainable business in a changing world.

Ireland was the first 50 per cent female legal profession in the world – our firm generally has a majority female trainee intake and over 30 per cent of our partners are female. However, women are underrepresented at senior levels within most firms and we must change this.

In our firm, we are committed to a culture of equality and inclusion (including gender, sexual orientation, disability, ethnicity, age). Our policies and practices reflect this. We have a strategic diversity and inclusion (D&I) plan that helps us improve our culture and environment.

Gender equality is an important part of our ethos. External consultants have helped us understand and implement best practice and we have listened to internal feedback. This has shaped programmes and initiatives we feel will make the best impact at ALG. An immediate focus is addressing the challenge for parents in balancing family life with the demands of a high performing law firm; changing how we work, becoming more flexible to facilitate diversity.

We have improved provisions for maternity, paternity and shared parental leave (including same sex relationships). We offer coaching, mentoring, networking and other supports for new parents (before and after baby's arrival). We support parents on leave and on their return (including phased returns). Paternity leave is in everyone's interest and helps ensure that parental responsibilities are shared.

More broadly, we are focused on initiatives that help to improve our work practices for all, while still maintaining an excellent level of service and commitment for our client. We have created a Gender Champion role to help embed and integrate these initiatives.

Our recently launched reverse mentoring pilot, focused on our management team, is also an important strategy in helping us to listen, learn and broaden our perspectives. We hope that this open dialogue will help bridge the gap between perspectives – creating greater understanding and sensitivity and driving behavioural change.

Our next step will build on the diversity training that all our partners have already received to apply this in practice to ensure that all our people continue to thrive equally at ALG.

We know there is more to be done and we want to tackle the issue. Our overriding goal is to give all our people the opportunity and recognition they deserve. Developing a strong and diverse team is an increasingly important part of every partner's responsibility. We need to address this challenge to be true to our values, to attract and develop the best talent and to get the best results for our clients.

As a member of an Irish Law Society taskforce, I am also personally engaged to encourage greater D&I both within the profession and within the Society's leadership – once again, there is work to be done, but there is an awareness of the challenge and a commitment to make concrete change to address it.



Andreas Frischknecht

Chaffetz Lindsey,
New York

Andreas.Frischknecht@
chaffetzlindsey.com

Chaffetz Lindsey was founded in 2009 and over the past ten years has grown from seven attorneys to more than 25 lawyers and a total of 40 employees. We committed at the start of the firm to create an inclusive environment that embraces and encourages diversity across all parameters. Today, despite our still relatively small size, we

are a truly international dispute resolution boutique with a multi-ethnic, cross-cultural and multi-lingual team in which any talented person can feel welcome and respected and find professional growth.

We firmly believe that diversity and inclusion directly improves the quality and depth of services we offer our clients. A majority of the cases we handle have a substantial cross-border component – either because the client (or the counterparty) is based abroad or the dispute otherwise

involves more than one jurisdiction. As a result, diversity of perspective, opinion and culture is not an abstract concept for us; it is an integral part of daily life at the firm.

As we celebrate our 10th anniversary, we are proud of what we have achieved and look forward to what is on the horizon. Recent concrete steps to add structure and rigor to our diversity efforts include the formation of a Diversity Committee made up of both attorneys and business services leaders. The Committee is assessing the measures we have already implemented and has identified additional actions to ensure our progress on diversity continues. These include internal diversity and bias training, supporting attorney pipeline programmes and, as discussed more fully below, partnering with organisations and individuals whose mission aligns with our firm's strategic objectives.

We also participate in and sponsor several women's networking forums and recently expanded our parental leave policy – an important factor in supporting and retaining our colleagues as they start their families. More generally, our attorneys are active members of bar associations and other legal and civic organisations and frequently speak on panels and participate in other diversity-related initiatives.

In addition, each year, we host several foreign attorneys. By having these young lawyers practice side by side with us, we expand the depth of our client offering while also learning more about different cultures and ways of doing business. In the past year alone, we have welcomed attorneys and trainees on a short or longer-term basis from Bolivia, Brazil, Chile, China, Ecuador, Germany, New Zealand, and Spain to our office.

Our commitment to diversity reaches beyond our own day-to-day operations. We are investing time and money in community service organisations that work to improve equality of opportunity in our city and country, and thereby to reduce one of the main barriers to full diversity in the legal profession. We believe these efforts will help to grow the number of diverse candidates who succeed in primary school, college, and ultimately law school.

WHAT ARE YOU DOING TO PROMOTE DIVERSITY?



Katrina Crossley

International Law Book Facility, London
kbccrossley@btinternet.com

The International Law Book Facility (ILBF) is a small London-based charity with a big impact: our mission is to support the rule of law and access to justice by sharing that priceless tool of the trade, legal knowledge. Since 2005 we have shipped 60,000 good quality legal textbooks to over 190 organisations in 51 countries, with support from all sectors of the United Kingdom legal community.

Our goal is to ship books to as diverse a range of legal institutions as possible, and in as many locations as we can physically reach. To that end, applications are encouraged from across the world, from the smallest jurisdictions in the middle of the Pacific, to some of the largest in Africa and Asia, and each one is treated on its merits. Consequently, we have shipped books to judiciaries and other government institutions, to law schools, universities, pro bono groups, small legal aid clinics and prison libraries. Users of the books are judges, law teachers, students, advisors, legislators, human rights campaigners and advocates for positive change. For the development and the long-term security of the rule of law, it is vital that access to legal information is shared across the whole of society.

When organisations apply for books, we ask for information about the users of the libraries/legal resources so that we can gain a picture of the user demographic. It is important to us that we signal to organisations the importance of open access to legal information and the promotion of diversity. We also strive to support diversity in other subtler ways, trying to ensure that our marketing reflects the diversity of our recipients for example.

Diversity is not just important in terms of who we support, but also in the way we are run. Our trustee body, which is chaired by Paul Lowenstein QC, is diverse not only in

terms of gender (five men, three women), but also in terms of professional perspective and approach. Our trustees and patrons are solicitors, barristers, judges, in-house counsel, and educators. It is very important for us to gather different points of view and insights as part of decision making. As Jane Colston, one of our trustees says: 'The key to embracing diversity is never to believe you have done all you can. There is always room for self-reflection and improvement. Supporting diversity, in all its dimensions, demands nothing less'.

The wider Operating Committee and fund raisers, such as the runners pictured above, include our student volunteers, our partner law firms, barristers and publishers. The process for recruiting student volunteers aims to break down barriers to access to the profession and over the years we have taken students from a wide variety of backgrounds and nationalities. The student volunteers, just about to start their legal careers, are encouraged to meet with the trustees and patrons who are senior members of the profession and can provide opportunities to the volunteers to shadow them and advise on applications. Working with the ILBF helps to hone skills that will be invaluable in practice.

Finally, the ILBF strives to work with as diverse a range of partners in the UK and internationally as it can. From greater diversity comes greater access to skills, contacts, and ultimately impact. Every one of our shipments will involve at least two or three, and sometimes up to seven, different partners. As a recent example, a shipment to Njala University Law School in Sierra Leone was funded by Anglo American and De Beers 'Ambassadors for Good' Programme, with the Group Legal team packing books and assisting in Sierra Leone; books were also collected and packed by the Junior Lawyers Against Poverty Group at Nottingham University; the recipient was identified with the assistance of the UK Sierra Leone Pro Bono Network who also provided invaluable logistics support in Sierra Leone; and the recipient received a grant from the British and Irish Association of Law Librarians to purchase shelving for the books.



Clarence E Dixon

CBRE, London

Clarence.Dixon@
cbre.com

While diversity and inclusion programmes have been a long-standing part of US business culture, to date, many European countries have not had a requirement

to implement and institutionalise such programmes. Businesses including CBRE in the UK are, however, now

active in promoting diversity as it has been recognised that change can only come from within and abatement needs to be raised. Foremost, the commercial property industry has traditionally been a very male-dominated industry, hence CBRE launched its Diversity programme in 2009 with the launch of the CBRE Women's Network. CBRE's Women's Network is industry recognised and has over 1,000 members which include numerous male members. CBRE wants to motivate those it does business with, including its lawyers, to take this issue as seriously as CBRE does.

As of 2019, CBRE has decisively evolved its D&I footprint. CBRE has a Diversity and Inclusion Steering committee, numerous D&I networks which include: the Proud Networks for LGBT+ staff and allies, the Veterans Network, the Multicultural Network which include BAME, the Wellness Network which supports mental health and disability, the PA Network and the Next Gen Network which support graduates and apprentices.

The diversity strategy behind these networks and other activities within CBRE is to highlight the diversity of our firm, our talent and the acceptance of this diversity.

CBRE believes the brightest ideas come from the brightest stars irrespective of the background, religion, sexual orientation or ethnicity. As a global organisation, with global clients, it is important that we reflect our clients' base within ourselves. Our clients are as diverse as we strive to be.

Two key highlights of the success of our journey have been the recognition of CBRE as the first UK commercial real estate firm to be certified with the National Equality Standard (NES) certification. The objectives of the NES are to provide an assessment tool which:

- aims to significantly impact the way diversity and inclusion is integrated into everyday business activity across the country;
- provides a single reference point incorporating all elements of the Equality Act 2010;
- enables businesses to undertake a comprehensive assessment specifically focused on equality, diversity and inclusion (EDI);
- consists of best practice standards that can be applied to any business sector or size;
- provides a pragmatic solution to EDI which rewards ambition;
- supports the private sector by providing one recognisable holistic framework for industry good practice;
- enables companies to showcase their businesses as leaders in this field;
- bridges the gap between legal requirements and best practice.

In addition to these, CBRE celebrates its D&I initiatives by hosting an Annual Diversity Week each September. Diversity Week allows CBRE Leadership and Network to celebrate the EDI achievements of the firm and highlight programmes and cultures to all CBRE staff and also its clients who are active participants.

Diversity and inclusion – working parents

Helen Sachdev

WOMBA

info@wombagroup.com

Businesses are getting wise to how challenging it can be to attract and retain the highest volume of the best talent. As a result, some are changing their policies and enhancing their support for working parents.

They also recognise how hard it can be for their employees to return to work after starting or adding to their family. Balancing a career and a family, especially in the early days, can be incredibly tough. If one thinks that only women find it hard to balance a career and a family, then think again. Employers, who two years ago provided ‘maternity coaching’, have already got wise to the challenges that dads are facing and have broadened their offer to, ‘parental leave coaching’.

Best in class

A number of organisations are now offering gender-neutral parental leave policies. In November 2018, one of them, Aviva announced that two-thirds of dads are now taking an average of six months’ parental leave.¹ This high take up is likely linked with their offer of six months’ basic pay to all employees who choose to take parental leave. It is worth noting that their offer is significantly enhanced v the standard statutory offer of two weeks’ paid paternity leave normally offered to dads. How can that stack up into a business case?

Given that many organisations employ highly technical skills, it is perhaps not as surprising as it might first seem. These organisations are looking to protect their investment. Aviva for example, employs top actuarial talent and is in the business of managing risk, so they have not made this decision lightly. Perhaps it is time for more of us to think about whether our current offer stacks up. If not, we are at risk of losing both our existing and potential top talent.

A case study

The Government Legal Department (GLD) has recognised the need to protect their talent pipeline and has taken the following approach:

- GLD arranged a number of facilitated focus groups to better understand the frustrations and challenges experienced by working parents;
- they reviewed the practical issues raised such as access to policies whilst on parental leave;
- they brought in a specialist² to build a programme of emotional support for parents and to supply the coaching service.

The GLD offering to parents now consists of a programme which comprises a series of workshops, each attended by typically six to twelve GLD parents. Workshop one, is attended by employees who are due to start parental leave in around two months. Workshop two takes place as parents are preparing to return to work. Workshop three, takes place around two months after the parent has returned to work. KPMG independently evaluated the programme and reported that over 86 per cent of all participants recommended other GLD parents should attend the workshops.

By supporting employees back into the workplace after starting or raising a family, firms will ensure that: its investment in people is protected; its talent pipeline is healthy and balanced; and its reputation as an employer of choice is enhanced.

Notes

- 1 See www.personneltoday.com/hr/aviva-uk-shared-parental-leave.
- 2 Womba is supplying this coaching service to the government.

Ronda Muir

Law People
Management,
Charleston

RMuir@lawpeople
management.com

Why litigators should care about emotional intelligence

What is emotional intelligence?

Emotional intelligence (EI, also known as emotional quotient or EQ) is the ability to make emotions work for you instead of against you. That involves the ability to recognise, understand and manage our own and others' emotions.

EI has been a scholarly field of inquiry since the early 1990s. Business, healthcare and education leaders around the globe – in locales as diverse as Thailand, Pakistan, the United Kingdom, the Netherlands, New Guinea, the United States, the Ukraine, Singapore, Argentina, China, Tasmania, Canada, Lebanon, South Africa, Russia, Brazil and Nepal – are now hailing emotional intelligence as an important, but neglected, attribute for personal and professional success.

What does EI have to do with lawyering?

Lawyers are rightfully proud of their academic accomplishments but being cognitively smart is simply not enough for lawyers to perform at their best. Lawyers on average score low in emotional intelligence – lower than the general public and other professionals, including doctors – and are particularly weak in recognising their own and others' emotions.¹ By raising emotional intelligence, lawyers can realise a number of important advantages.

Enhanced client service

First, as David Maister remarked, 'hiring a lawyer is an emotional act'.² Clients rely on lawyers for more than raw legal talent. They also look for someone who they feel comfortable with and comforted by – someone who can understand their concerns, draw out all the important factors in the matter and sympathetically guide them through the intricacies and stress of litigation. A Dutch study found that litigation clients most wanted communication and empathy from their lawyers, particularly in the beginning, 'even if later on the lawyer was more business-like'.³ They also wanted

to feel 'involved' – that their lawyer listened and responded to them. In fact, the primary reason for clients firing lawyers is often because of their personal style, not their legal performance or fees.⁴

Reduced liability exposure

Emotionally intelligent lawyers communicate better. Communication influences nearly every aspect of law practice, including pre-trial and court interactions and outcomes. By employing more emotionally intelligent communication, as doctors have learned to do,⁵ lawyers not only improve client and colleague relations but can also avoid what has been demonstrated to be the number one reason for disciplinary actions and malpractice claims in the United States and Canada: 'poor lawyer-client communication'.⁶

Another way emotional intelligence reduces liability exposure is by helping lawyers more accurately recognise, assess and address ethical issues, including dealing with the emotional fallout that can come from advocating for a position that is against their personal values.⁷ Studies undertaken to raise ethical behavior in hospitals conclude that higher EI – specifically the ability to manage emotions – predicts more ethical conduct.⁸

Competitive advantage

Emotional intelligence skills can give lawyers a competitive advantage at a time when technology is making inroads into the practice of law. An important study in 2016 announced that artificial intelligence reached the same conclusions as judges did in almost 80 per cent of the sample cases presented before the European Court of Human Rights, raising the question not only of whether technology may more accurately predict the outcome of court proceedings than our litigators, but also whether at some point a human judge is even necessary.⁹

Lawyers who can emotionally engage with clients will establish a stronger bond than the most sophisticated technology can.

In *Humans Are Underrated*, Geoff Colvin contends that as ‘Logic, knowledge and analysis... [are] being commoditized by advancing technology,... the skills of deep human interaction’ will only become more valuable. Or, as a Harvard Business Review article proclaims: ‘The Rise of AI Makes Emotional Intelligence More Important’.¹⁰

Optimal performance

Finally, lawyers are simply able to perform better if they employ emotional intelligence. As Daniel Goleman, an early advocate for emotional intelligence, points out, ‘once you’re in a high-IQ position, intellect loses its power... [S]oft skills... mark those who emerge as outstanding’.¹¹

Thousands of research studies have all concluded that people with EI skills, including those in high-pressure, high-IQ jobs like lawyers, outperform colleagues without those skills in virtually every aspect of their personal and professional lives.¹² Among the advantages research has identified, EI makes leaders more effective,¹³ improves the quality and speed of decision-making,¹⁴ makes the best teamwork and collaboration possible,¹⁵ improves risk analysis,¹⁶ elevates case management and settlement skills,¹⁷ where litigators have surprisingly mediocre track records,¹⁸ and, as mentioned, hones ethical judgment and lowers malpractice and disciplinary exposure.

A study of 78 leading American trial attorneys selected for their extensive trial experience and superior performance repeatedly attests to the importance of emotional intelligence in their work¹⁹ – in evaluating and influencing witnesses, fine-tuning the roles of supporting lawyers and staff and building a persuasive presentation to a judge or jury, where emotions are often more critical than the rationale of the law.

Dealing with heightened distress levels

Emotional intelligence also gives lawyers an advantage in managing stress. Litigators are often in personally demanding situations emotionally: trying to navigate the best resolution – despite insufficient administrative support, tight timelines and overbooked calendars – in what may be very important cases for clients who may themselves be highly stressed, and whose funds may be limited and tempers short.

While some lawyers flourish, many

lawyers suffer high distress levels that are widely incapacitating, with serious physical, behavioural and mental impacts. Law students in both the US and Australia have been identified as suffering – even before graduating from law school – from outsized levels of distress which was attributed to low emotional intelligence.²⁰ A 2016 study by the Hazelden Betty Ford Foundation and the American Bar Association found high levels of hazardous alcohol consumption (36.4 per cent), depression (28 per cent), anxiety (19 per cent), and stress (23 per cent) – levels substantially higher than in the general population, than among high-performers in other fields, such as surgeons, and also markedly increased from earlier studies of lawyers. The report concluded that ‘the consequences of attorney impairment... [are] profound and far-reaching’.²¹ Another national study found that male lawyers in the US are twice more likely to commit suicide than men in the general population.²²

Lawyers involved in litigation related to accidents and deaths may also become victims of ‘secondary traumatic stress’ (STS) that can be caused by sitting through repeated recitations of disturbing facts. Nearly half of recently surveyed judges indicated they had suffered from STS.²³ ‘Psychic battering’ by difficult clients who engage in problematic behaviour toward their counsel can also result in STS-type symptoms.²⁴

These levels of distress clearly interfere with even minimal attorney performance levels and further raise the specter of liability.²⁵ Emotional intelligence has long been recognised as a key strategy in significantly improving stress management and reducing job dissatisfaction, depression and burnout, a finding confirmed in a study of Greek lawyers.²⁶ By lowering stress, not only does overall cognitive functioning improve, but also general physical health improves, including lower blood pressure and greater immunity from disease.

Reaping profits

High emotional intelligence is profitable: high EI senior executives in a large, multinational professional services firm, for example, produced profits almost five times greater than their comparable but lower EI colleagues.²⁷ The advantages of EI – more effective leadership, higher performance and productivity, more satisfied clients and a competitive advantage against technology

and so many law practices low in EI, as well as lower expenses for attrition, mental and physical distress, and liability – all combine to produce greater profitability for individual lawyers and their law firms.²⁸

A few steps to raise EI

In a lengthy multi-step assessment, the University of Southern California, Berkeley, concluded that most American lawyers are ‘unlikely to exhibit [the] strong emotional development’ that the researchers found necessary in order to practice law well.²⁹ How do lawyers go about raising their emotional intelligence?

As mentioned, the emotional intelligence skill in which lawyers on average score lowest is recognising emotions – both their own and those of others. Lawyers’ tendency to suppress any emotions they do feel compounds this deficit, exacerbating the disabling impacts of difficult emotions and making it even harder to recognise others’ emotions. *Recognising emotional data* is critical to fully understanding the complexities of a situation – such as a negotiation, a partner’s complaint, a client’s dilemma, a judge’s query or a witness’s testimony – as well as our own reactions to that situation. It also gives a timeliness advantage over those who are relying solely on cognitive skills. Awareness of our own and others’ emotions is the basis of *emotional empathy* – ‘feeling with’ others, and grounds all other EI skills, like *understanding emotions* and *managing emotions*. So a deficit in emotion recognition skills undercuts those EI skills that lawyers have or try to develop.

Here are a few tips to help raise the ability to recognise emotions.

- take one of the recognised emotional intelligence assessments that identify personal strengths and weaknesses and can help formulate a personal development plan, such as the Mayer-Salovey-Caruso Emotional Intelligence Test, Version 2.0 (MSCEIT, 2.0), the Emotional Quotient Inventory 2.0 (EQ-i-2.0) and the Emotional and Social Competence Inventory (ESCI);
- learn to identify emotions and build an emotional vocabulary by periodically recording how you feel using simple programs, like Yale’s Mood Meter that has a downloadable app;
- name emotions out loud, which has been demonstrated to reduce the level of conflict in an interaction;
- practice mindfulness meditation – even for

a few minutes a day – by acknowledging your feelings and repeatedly redirecting your attention to a neutral mindset, a practice that can physiologically rewire the brain after only a few weeks;

- count to ten to allow the cognitive part of your brain time to catch up with any emotional reaction;
- watch TV or movies with the sound off to improve your reading of non-verbal emotional cues;
- finally, identify an ‘EI Buddy’ – someone in your office, a friend or spouse – who appears successful in the areas that you feel uncomfortable in and who can provide insight into colleagues or situations and your reactions.

The practice of law has many rewards but also some challenges. Courtrooms, in particular, can feel like theatres of war with the attendant emotional stress. Litigators around the world need to be armed with the best emotional intelligence skills to make the litigation process as just and healthy as possible for all involved.

Notes

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Being flexible litigators – top tips from a yoga teacher

Felicity Goodwin

felicity.w.goodwin@gmail.com

Eat, sleep, work, repeat. It is very easy to slip into this pattern. Demanding deadlines can leave one feeling chained to the desk, working late, only to get up early the next day to do it all again. As the days, weeks, months (even years for some of us) start to pass, this pattern can significantly impact how we breathe – increasing stress and potentially leading to pain through the loss of flexibility.

What is really happening to our bodies?

Firstly, your shoulders and upper back round forward, putting the thoracic spine into continuous flexion, shortening the pectorals

and lengthening the deltoid muscles. This is also known as the 'slouch'. Further down the body, abdominals become weakened and hip flexors become tight. And after a few hours of sitting, the sacrum bone that sits between our pelvic bones gets jammed up into the vertebrae of the low back and at the sacroiliac joints.

Your lungs produce less oxygen. With less space to expand as you breathe when you are sitting down, the lungs cannot function at their normal capacity and are no longer providing a healthy amount of oxygen to the rest of your body. Maintaining a bad posture is just not good for us.

Unfortunately, neither a 'mind-over-matter' nor a 'head-in-the-sand' approach will solve

this looming crisis. Soon enough, tell-tale signs that something is not right will appear, such as low energy, illness or injury.

Prevention is always better than cure

Today, there are more yoga studios and yoga classes than ever, but a lot of people remain confused about what happens inside those classes and how they should feel about it. Is it stretching, meditation, some combination thereof, or something else entirely?

Yoga promotes good range of movement, also known as flexibility. Regular stretching will make you feel freer and easier. Supple joints move better. Good flexible muscles use less oxygen-making movement, compared with when you are just fighting your own stiff, tight, stuck, tethered, glued muscles tissue. Put simply, your efficiency increases.

Yoga includes mindfulness – which means being present, not being distracted by our thoughts. That head space gives clarity and the ability to focus on what is happening now without becoming reactive, tense, angry or dispirited. This is a massive help in everyday life – especially to reduce stress. It reminds us how to breathe properly. Breathing more slowly, gently and deeply helps to calm and relax, and can also reduce tension and anxiety and improve concentration and memory.

My recommendation is to add yoga to your weekly routine, but to get you started here are a few stretches that are simple but effective.

Breathe

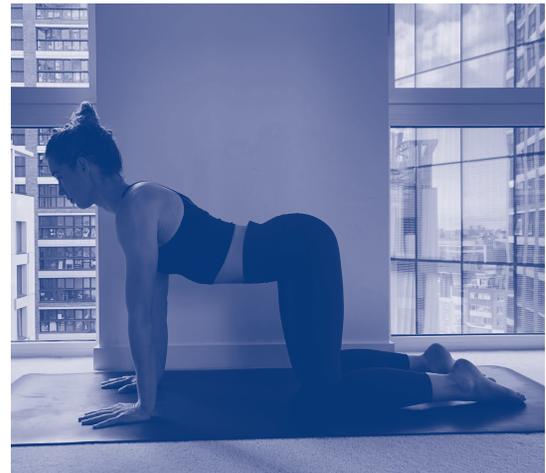
Before you get into any movement, it is really important to warm up with a simple diaphragmatic breathing exercise. This begins, first and foremost, with great posture. Sitting up straight allows the lungs to expand quickly and efficiently with every breath. Alternatively, I like to do this lying down, with one hand on my chest and the other on my stomach – it helps to have an extra physical connection to learn what is really going on.

Breathe in through the nose and out through the mouth, making a ‘HA’ sound (as if you want to fog up an imaginary mirror in front of you). Repeat this action three times. Now try this with your mouth closed – the contraction at the back of the throat will give off an ocean sound. Finally, make each inhale and exhale last for around five seconds and continue for 10 rounds.

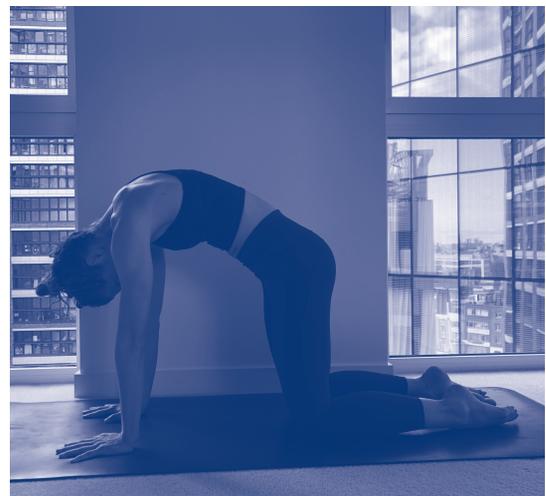
Cat and cow – a gentle way to warm up the spine

Start on your hands and knees in a ‘tabletop’ position. Make sure your knees are set directly below your hips and your wrists, elbows and shoulders are in line.

As you inhale, flatten your upper back and draw the shoulder blades together, allowing your belly to soften slightly toward the floor. Lift your head to look straight forward. This is called ‘cow’.



On your next exhale come into ‘cat’ pose, round your spine toward the ceiling, making sure to keep your shoulders and knees stay in stacked position. Release your head toward the floor, but do not force your chin to your chest. Continuously repeat – five to ten rounds.



Benefits

Helps build an understanding of ‘good’ spinal movement. Aims to release overall tension in the back by increased movement along the muscles of the spine.

Pectoral stretch

This move can be quite intense, especially if your chest is extremely tight. Move slowly into it and stop when you feel a stretching sensation – never work a stretch to the point of pain.

Lie flat on your belly. Reach your arms to the sides of the room to create a T-shape with your body. Bring your left hand to your hip as you slowly begin to roll to the right – leaving your right arm extended on the floor. You can also bend the elbow to create a 90-degree angle. See what feels better for your body. Pause when you feel the stretch in the right pec and hold for about 20 seconds. Repeat on the left side.



Benefits

Stretching your pectoral muscles helps to increase range of motion in the chest improving upper body posture (and pain-free movement of the shoulder).

Supine twist

Lay on the right side of your body and bend your knees to make a 90-degree angle at the hip, bring your palms together and extend your arms in front of your chest.

Exhale as you rotate your torso to your left, lifting your left hand over your body and bringing your left shoulder and arm to the floor. Repeat the drawing motion several times. Then repeat on the other side.



Benefits

Side-lying rotation exercises place your spine in the least amount of stress and increase thoracic spine mobility by stabilising your shoulders and lumbar spine in place while rotating your torso with deep, controlled breathing.

Tip – build the heat

For any home practice, it is really important to warm up before you get into the deeper postures. A warm-up gradually increases your cardiovascular system, raising your body temperature and increasing blood flow to your muscles.

Ligaments and tendons are more flexible when there is more blood flowing through them, as the surrounding fluid is at the right consistency to help your joints move easily.

A simple way to do this is to do a few ‘sun salutations’ – there are lots of good demonstrations online. Take a few breaths in each pose, as you begin. When you start to feel warm, increase your pace moving after a single breath.

Akima Paul Lambert

Debevoise & Plimpton,
London
apaul Lambert@
debevoise.com

Sara Chisholm-Batten

Michelmores, London
sara.chisholm-batten@
michelmores.com

Alexander Hansebout

Altius, Brussels
alexander.hansebout@
altius.com

REPORTS FROM THE COMMITTEE

The new Hague Judgments Convention: a report directly from the Hague

On 2 July 2019, the Hague Conference on Private International Law, the intergovernmental organisation responsible for the Judgments Project and the subsequent conclusion of the 2005 Hague Convention on Choice of Court Agreements (the 'Choice of Court Convention'), adopted the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the 'Judgments Convention').

A delegation comprising Sara Chisholm-Batten (Michelmores), Akima Paul Lambert (Debevoise & Plimpton) and Alexander Hansebout (Altius) were privileged to attend the 22nd Diplomatic Session on behalf of the IBA, in its capacity as an observer. This follows the IBA Litigation Committee's involvement since 2016 in the Special Commission Meetings, leading up to the finalisation and adoption of the Judgments Convention.

The Judgments Convention

The Judgments Convention is groundbreaking as it seeks both to complement and amplify the ambit of the Choice of Court Convention by creating a universal framework for the recognition and enforcement of foreign judgments among contracting states, where those judgments fall outside the Choice of Court Convention. This is so far unprecedented, and represents an important, strategic step in obtaining effective remedies for international disputes originating out of national court systems.

The framework the Judgments Convention provides is helpful for several reasons: it reduces transactional and litigation costs in cross-border dealings, increases certainty and predictability, and reduces the extensive administrative burdens that are attendant with multi-jurisdictional

enforcement. Overall, it provides minimum standards in securing universal access to justice.

Currently, Uruguay is the Convention's only recorded signatory. It is, however, anticipated that adoption of the Judgments Convention could extend to the same number of signatories as the Choice of Court Convention which was ratified by as many as 32 states, including the European Union on behalf of its Member States.

In the event that the EU adopts and ratifies the Convention, is likely to be particularly important for the United Kingdom post-Brexit. In circumstances where the UK could exit the EU with no deal, and therefore without any guarantees from Member States as to how they will apply jurisdiction and enforcement rules involving UK parties, the Judgments Convention provides a simplified mechanism for cross-border enforcement.

A regime for civil and commercial matters

The Judgments Convention itself is unsurprising in scope and mirrors the existing jurisdiction/enforcement landscape. It therefore applies to civil and commercial matters and does not extend, for example, to revenue, customs, or administrative matters. No definition of 'civil and commercial matters' is offered but the narrow ambit of the terrain to be covered is made clear in the enumerated exclusions.

The Judgments Convention is, nonetheless, different in its effect as it does not provide the automatic right to recognition and enforcement of a judgment from another Contracting State. Unusually – and in contrast to the approach taken to the principles of trust and cooperation in Brussels Recast, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, for example – Article 5 expressly provides that a judgment is



only eligible for recognition and enforcement if one of the 14 requirements set out in Article 5, or the condition set out in Article 6, is met. Those requirements operate to ensure a clear jurisdictional basis for the relevant judgment. This stipulation is not necessarily problematic: it is an additional hurdle for parties seeking to enforce under the Convention, but the conditions are broadly drafted and likely to apply in the majority of cases.

There are a significant number of exclusions. Predictably, the Judgments Convention excludes matters relating to status and legal capacity of natural persons, certain family law matters, insolvency, and arbitration. Perhaps more notable are the other exclusions to which it is subject: the Judgments Convention will not, for example, apply to defamation, privacy or intellectual property and the majority of anti-trust matters, or the carriage of passengers and goods. The exclusion relating to IP matters was subject to significant debate.

Also similar to other regimes are the grounds for refusing recognition and enforcement. Article 7 provides a court with discretion to refuse recognition or enforcement on one of six grounds, including the judgment having been obtained by fraud, incompatibility with public policy, inconsistency with earlier judgments, and where the initial proceedings were commenced in breach of a choice of court agreement. A further (and less unitary) ground for refusal is set out at Article 10, which applies ‘if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered’.

Flexible application

Interestingly, Article 18 of the Judgments Convention allows contracting states to make ‘declarations with respect to specific matters’ where it has a ‘strong interest in not applying the Convention’. This provision therefore enables a Contracting State to be selective as to which foreign judgments it will recognise and enforce: in circumstances where a state particularly objects to enforcing judgments from another state (or a person or agency of that particular state), the Convention provides an opportunity to do so, provided that the specific declaration is ‘clearly and precisely defined’ and ‘no broader than necessary’ (Article 19).

More generally, a Contracting State is allowed to notify that the ratification, acceptance, approval or accession of another state – or even its very own ratification, acceptance, approval or accession – shall not have the effect of establishing relations between itself and any state named in such notification (Article 29). This introduces a bilateral mechanism in the multilateral Convention.

Article 9 also allows recognition or enforcement of a severable part of a judgment, where that is applied for or where, for another reason, only part of the judgment is ‘capable of being recognised or enforced under [the] Convention’. This is a further example of the flexibility and adaptability enshrined in the new regime.

As a degree of protection (in terms of ensuring consistency of approach across Convention States), the explanatory note accompanying the Judgments Convention emphasises the importance of the principle of ‘non-discrimination’. In essence, the Court of the Requested State is expected to apply no greater barriers to the enforcement of a foreign judgment under the Convention than it would to a domestic judgment. Whether this guidance (which is not written into the body of the Convention itself) has the required effect remains to be seen, once the Convention has been put into practice.

Observations

The decision of the delegates and treaty-drafters to maintain the significant number of exclusions, including in relation to developing areas of law, such as privacy and IP (particularly when these matters are regularly intertwined in civil and commercial disputes) might be regarded as a missed opportunity.

Whether the extent of the flexibility offered will encourage or deter potential signatories remains to be seen. In circumstances where an international framework is introduced so as to encourage predictability and consistency, such a range of potential variable factors could be seen as vitiating the very aim of the Convention. This is particularly so when key provisions, such as Article 7 and Article 10, confer some judicial discretion. Predictability is potentially put further at risk by the introduction of Articles 18 and 29: while a state may be willing to enforce others’ judgments, there is no guarantee of their own judgments being enforced elsewhere. On that basis, it is easy to see the Convention giving rise to a similarly fragmented enforcement regime than the status quo it seeks to remedy.

It may be just that adaptability that encourages states to contract: other regimes have been criticised for being too rigid, taking a one-size-fits-all approach to enforcement of judgments. Providing a framework by which

states are able to guarantee a certain level of predictability and consistency, while allowing individual courts to retain a fair amount of discretion, could be the suitable alternative regime that parties have been waiting for.

**Anna
Grishchenkova**
KIAP, Moscow
ag@kiaplav.ru

It is never late to learn the art of cross-examination

A report from the IBA Young Litigators' seminar, May 2019

It is especially interesting to mix lawyers from common law and civil law jurisdictions and learn the art of cross-examination together, in order to share secrets, insights and sometimes astonishment. Inspired by success of its previous events in Zurich in 2017 and Chicago in 2018, the IBA Young Litigators' Forum staged a seminar on examination of witnesses, to coincide with the Annual Litigation Forum 2019.

The seminar was hosted by HÄRTING Rechtsanwälte PartGmbH and organised by joint efforts of Andreas Frischknecht (Chaffetz Lindsey), Sandrine Giroud (Lalive), Anna Grishchenkova (KIAP), Lucinda Orr (Enyo Law), Samaneh Hosseini (Stikeman Elliott), Hannes Arnold (Gasser Partner), Dominik Elmiger (Lalive), Christian Tuddenham (Jenner & Block London) and Neerav Merchant (Majmudar & Partners).

An impressive number of participants and their active involvement proved that the topic was of great interest for the lawyers, especially for young practitioners from civil law jurisdictions.

The seminar started with a presentation by Lucinda Orr, who shared some tips on effective cross-examination, including:

- Use the opponent's witness to: (1) highlight the good facts of your client's case; (2) bring out the bad facts in their client's case; (3) show the omissions in their client's case; and (4) prop up your case theory and closing speech objectives.
- Look at the statement of the witness – compare it to your case theory. Can this witness confirm/agree that a fact is more likely than not to be true?
- Remember that the object of cross-examination is not the collection of a complete series of facts, but the placing of

selected facts in such a light as to lead to a particular conclusion.

- Study the statement of the witness and extract facts that support your case theory and arrange the facts in an attractive order.
- Do not have too many objectives.
- Each fact or omission should form a topic arranged as a series of questions.
- Deliver cross-examination properly: use short, closed questions, watch the witness, listen to the witness, do not forget to watch the judge, put one fact per question, do not argue, do not comment on answers, do not cut off answers of the witness, save conclusions and speeches for closings;
- Use a proper style – always be polite; do not be aggressive or bullying, because this always goes down badly; avoid verbal tics; avoid notes – know your brief in your head and better than the witness knows his or her own evidence.
- Know when to finish – when you have earned the right to argue a conclusion, then you should sit down.

The presentation was followed by a short showcase, where Orr cross-examined a witness role-played by Andreas Frischknecht.

After that, participants were divided into several groups in order to practice prepared tools on each other. They received information on a study case with several documents and witness statements. This helped to create a common ground for further discussions and for preparation of the questions for a potential witness.

Participants from civil law jurisdictions confirmed that, in their countries, examination of witnesses almost never happens as judges put more weight on written evidence. Therefore, cross-examination is still an unknown territory for many of them.



Participation working in groups continued for about 40 minutes. In each group, the participants tried acting out the roles of a cross-examiner and a witness in order to better understand the overall process. The exercise was not easy, but it was definitely fun.

Preparation of the questions to the witness revealed an interesting cultural component. While preparing 'a case theory' on the case and crystallising the issues 'to be proven' by cross-examination, participants took quite opposite positions. It is fair to say that participants from common law jurisdictions mostly aimed to show the underlying story of the case, emotions and omissions of the parties during cross-examination; while those participants from civil law jurisdictions planned to show through the witness the weak points in the documents and,

therefore, weak points in the legal position of the opposite party.

Given that the influence of cultural specificities is a topic of interest and exploration to the author, witnessing this live example of differences in people was very revealing and richly instructive.

Taking into account the increase of cross-border litigation and further rise of international arbitration with mixed panels, it is valuable to learn and gain knowledge about cultural specifics and the expectations of judges and arbitrators. This exercise allowed us to appreciate once again our joint conferences and meetings of the lawyers from different jurisdictions, because such meetings provide a great opportunity to learn more and to become better in what we are doing.

FEATURES

Privilege in English law: three common problem areas for litigators

Protecting sensitive information through legal privilege is a key consideration in litigation and investigations in common law jurisdictions. In English law, privilege does not provide blanket protection. Rather, protected communications must fall within one or more of the established categories of privilege. These categories are based on rules developed and refined through legal precedent. The rules are constantly developing in order to adapt to changes in the legal and commercial landscape and to address novel factual situations arising in disputes over privilege.

In this article, we consider the current state of play in three common privilege problem areas for litigators under English law: non-UK lawyer communications, internal investigations and partially privileged documents.

Privilege and non-UK lawyer communications

Cross-border litigation, particularly in common law jurisdictions where broad

disclosure/discovery is available, frequently raises issues about the application of privilege to non-UK lawyer communications. Under English law, the application of privilege is a matter governed by the *lex fori* (ie, the law of the forum of the proceedings). As such, in English proceedings, the courts apply English law in determining whether communications with non-UK lawyers are privileged.

On one view, this approach has the advantages of being straightforward and avoiding the need to adduce evidence of law in other jurisdictions. However, crucially for litigators, it may result in communications attracting less (or more) protection than in the relevant jurisdictions, an outcome that the lawyer and their client are unlikely to have intended.

Contrast the English position with that of the US federal courts, where a choice of law approach generally applies. This considers which jurisdiction has the 'predominant' or 'most direct and compelling interest' in the

Ruth Cowley

Norton Rose Fulbright,
London
Ruth.Cowley@
nortonrosefulbright.com

Andrew Judkins

Norton Rose Fulbright,
London
Andrew.Judkins@
nortonrosefulbright.com

communication, which can lead to non-US law being applied if there is no US nexus.¹

The English approach dates from the mid-nineteenth century, an age where cross-border litigation was far less common than today. In a recent case involving US lawyer documents,² the disclosing party sought to persuade the court that, to the extent English law did not protect the documents from disclosure, the *lex fori* approach should be revisited. Although this was not accepted, the court provided a gloss which suggests that considerations of non-UK law are not precluded entirely. It acknowledged that in an appropriate 'special case', the court's general discretion under the English Civil Procedure Rules to refuse inspection might consider rights under non-UK law.

This particular matter was held to not be a 'special case'. The court cited a lack of 'legitimate expectation' of protection under US law, given it was accepted that the subject matter of the communications were relevant to English proceedings (the case also involved a UK corporate group). It was also unpersuaded by the overall circumstances of the case. It remains to be seen whether different circumstances would open the door wider to non-UK law, but the threshold is likely to be a high one, with compelling reasons required. In the meantime, the best practical advice for cross-border litigants is that taking steps to maximise privilege and anticipating potential forums for disclosure requests should be at the centre of their planning from the earliest stage.

Internal investigations relating to government enquires: does litigation privilege apply?

Internal reviews or investigations are frequently conducted in connection with both government enquiries and actual/potential civil claims. In English law, litigation privilege has a broader scope than legal advice privilege, meaning that where an internal investigation relates to a contentious matter, it is likely to be a last line of defence to disclosure. Litigation privilege applies to confidential communications where, at the time of the communication: (1) litigation is in reasonable contemplation; and (2) the communication is made for the dominant purpose of that litigation.

Applying these requirements is relatively straightforward where the 'litigation' is a civil claim. It is less clear where the 'litigation' is

action by a government authority. Very often, parties will need to conduct investigations for multiple purposes, including in response to government enquiries, which may also involve analysis linked to defending potential civil or criminal proceedings, and dealing with governance issues and regulatory disclosures. This can lead to uncertainty about whether the reasonable contemplation and/or dominant purpose requirements are met. Two recent cases support the position that, where a government enquiry has a realistic possibility of leading to civil/criminal proceedings (and is treated as such by the client, ie, the instruction of external lawyers), the English courts are willing to take a broad approach and apply privilege to internal investigations.

In *SFO v ENRC*,³ the defendant engaged external lawyers and other advisers to conduct investigations into allegations of wrongdoing. The lawyers advised that criminal and civil proceedings were in reasonable contemplation. This view was shared by members of the defendant's legal and compliance teams. A few months after the investigation was commissioned, the defendant received a letter from the Serious Fraud Office (SFO), a UK crime agency, about the possibility of self-reporting. The SFO subsequently sought disclosure of documents created in the investigations.

The Court of Appeal addressed when 'litigation', that is, an SFO prosecution in this case, was in reasonable contemplation and whether documents created in the investigation were for the dominant purpose of that litigation. Following a careful examination of the evidence, the Court of Appeal held that litigation was in reasonable contemplation when the defendant commissioned the investigation and certainly by the time of the SFO letter. The court relied on advice given by the external lawyers that prosecution was a serious risk, a view which appeared to be shared by the defendant. The SFO letter had also 'specifically made clear' the possibility of prosecution. The fact that the defendant had to conduct further investigations before it could ascertain whether prosecution was indeed likely did not prevent prosecution from being in reasonable contemplation. The court also held that the investigation documents were created for the dominant purpose of such litigation. It rejected arguments that this was precluded by the additional purposes of fact finding and dealing with ongoing compliance issues.

In *Bilta & Ors v RBS*,⁴ the claimants sought documents from the defendant created in an internal investigation concerning a tax issue. The investigation was commenced after the UK tax authority, HM Revenue and Customs (HMRC), informed the defendant in a letter that it took the view it had sufficient grounds to deny a substantial amount of tax. However, the letter did not oblige the defendant to repay the tax and HMRC's enquiries remained ongoing. In response, the defendant instructed external tax litigation solicitors who ultimately prepared a report to HMRC (shared without waiving privilege).

The claimants did not contest that litigation was in reasonable contemplation, but argued that the dominant purpose of the investigation was not litigation. They argued its purposes were: (1) fact finding; (2) compliance with taxpayers' obligations to cooperate with HMRC; and (3) to persuade HMRC to not issue a formal demand. These arguments were rejected. The court described the HMRC letter as a 'watershed moment', analogous to a letter of claim by a private claimant. The investigation was conducted for the dominant purpose of responding to it. The fact that HMRC had not made a formal demand was not determinative, particularly given the defendant's instruction of external lawyers. A duty to cooperate with HMRC also did not preclude the investigation being conducted for the dominant purpose of litigation.

While these decisions are undoubtedly supportive of protecting privilege in internal investigations, cases will always turn on their facts. Inevitably, parties will be faced with situations where the threat of proceedings is less clear cut than these cases. Parties can maximise privilege protection by careful documentation of when proceedings are in contemplation and the purpose of internal investigations. It is also notable that in both cases, the instruction of external legal advisers was a relevant factor.

Partially privileged documents

The redacted document is a near universal feature of modern litigation. Most litigators will be familiar with the feeling of a seemingly material, if not tantalising, document obliterated by rows of black lines. But what is the scope of redaction permitted under English law?

There are two grounds available in English civil litigation for redaction: (1) privilege; and (2) irrelevance to the proceedings (and

confidentiality). In England, this has recently been codified in the procedural rules for the ongoing disclosure pilot scheme in the English Business and Property Courts. Privilege tends to be the more controversial and contentious ground. In matters involving government authorities, with broad statutory powers to compel production of documents, in practical terms, privilege is often the only ground.

The most common situation in which a document is redacted for privilege is where it contains material which reflects legal advice or instructions (ie, actual advice or instructions would be withheld entirely). In English law, redaction of such material is permitted under the *Lye* test, which covers communications which would 'betray the trend of legal advice'.⁵ Some alternative formulations are: 'allow the reader to work out what legal advice is given',⁶ or 'give the other side an indication of the advice which being sought or [given]'.⁷ In a recent decision, the High Court endorsed a slightly more detailed but flexible interpretation: a 'definite and reasonable foundation in the contents of the document for the suggested inference as to the substance of the legal advice given'.⁸ Given the near infinite iterations of potentially privileged words and phrases, in practice, its application is highly subjective, with disclosing parties likely to adopt a generous interpretation.

In civil litigation, claims for privilege, including in relation to redaction, can be challenged by an application by the party seeking inspection. However, the applicant is not required to disprove that privilege applies: the burden of proof is on the party claiming privilege to show the documents are genuinely privileged. The court has discretion to order inspection of the potentially privileged documents, but otherwise will rely on the parties' evidence (ie, witness statement or affidavit). Considerations include the number of documents and their relevance. In any event, the court must take a cautious approach and be alive to the risk of reviewing documents out of context.⁹ As a result, in litigation involving a large quantity of redacted documents, whether the court inspects documents or not, the evidence of the party asserting privilege on the approach taken will be very important. Note also that the English disclosure pilot scheme has introduced a requirement that when redacted documents are disclosed, they must include an explanation of the redaction and confirmation that the redaction has been

reviewed by a legal representative with control of the disclosure process.

Practically speaking, the key issue for parties seeking to protect privilege through redaction is adopting and documenting a logical and defensible approach. While this has to be grounded in a robust interpretation of privilege law, the semantics of the various iterations of the *Lyell* test are secondary to a sound and consistent approach. In modern litigation, where privilege decisions are undertaken by supervised teams, the quality of review protocols, privilege-tagging procedures and quality assurance are central. The impact of failing to following a defensible approach can easily have consequences beyond disclosure of the challenged documents: withholding relevant material on unsustainable grounds will not be viewed favourably by the court.

Notes

- 1 See, for example, *Aktiebolag v. Andrx Pharmaceuticals, Inc.*, 208 F.R.D. 92 (S.D.N.Y. 2002).
- 2 *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch).
- 3 *Serious Fraud Office (SFO) v Eurasian Natural Resources Corp. Ltd* [2018] EWCA Civ 2006.
- 4 *Bilta (UK) Ltd (in Liquidation) & Ors. v Royal Bank of Scotland Plc, Mercuria Energy Europe Trading Limited* [2017] EWHC 3535 (Ch).
- 5 *Lyell v Kennedy* (No.3) (1884) 27 Ch. D. 1; *Ventouris v Mountain (The Italia Express) (No.1)* [1991] 1 W.L.R. 607.
- 6 *Barr v Biffa Waste Services Ltd* [2009] EWHC 1033 (TCC).
- 7 *Excalibur Ventures LLC v Texas Keystone Inc* [2012] EWHC 2176 (QB).
- 8 *Edwardian Group Ltd & Anor v Singh & Ors* [2017] EWHC 2805 (Ch).
- 9 *WH Holding Ltd & Anor v E20 Stadium LLP* [2018] EWCA Civ 2652.

Natalie Todd

PCB Litigation, London
nt@pcbllitigation.com

Beware of the duty of full and frank disclosure in the English courts

When seeking ex parte remedies such as freezing orders, search orders and applications for permission to serve out of the jurisdiction, the applicant is under an obligation of full and frank disclosure and fair presentation. This involves disclosing all matters, whether in the applicant's favour or not, which are material to the court in deciding whether to grant the order and on what terms, and to fairly present to the court those matters which the absent respondents might have presented had they had notice of the hearing.

In a recent case, PCB Litigation acted for Walid Giahmi in a claim brought against him by the Libyan Investment Authority (LIA). In a decision handed down in June 2019,¹ Giahmi successfully challenged jurisdiction and applied to set aside the service of the proceedings against him and the fourth defendant on a number of grounds, including

a failure on the part of the LIA to comply with its obligation of full and frank disclosure on the without-notice application for permission to serve out of the jurisdiction. This is one of a number of recent decisions concerning compliance with the full and frank disclosure and fair presentation obligations. It is important that every litigator understands the principles and practicalities involved.

The principles

The principle is that if you make an application without notice, you have a duty to make full and frank disclosure of all matters material to the application whether facts or law.

The duty to inform the court of the likely issues and possible difficulties with the case does not, however, require a detailed analysis of every possible point to be made.² The duty only extends to those issues which can be said



BEWARE OF THE DUTY OF FULL AND FRANK DISCLOSURE IN THE ENGLISH COURTS

to be material to the decision that the judge has to make on the application.

In *Alliance Bank v Zhunus*,³ Cooke J summarised the applicable principles as: ‘The test of materiality of a matter not disclosed is whether it would be relevant to the exercise of the court’s discretion. A fact is material if it would have influenced the judge when deciding whether to make the order or deciding upon the terms upon which it should be made’.

Materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers.⁴ This includes not merely material facts known to the applicant, but also additional facts which he would have known if he had made proper enquiries. It is no excuse for an applicant to say that they were unaware of their importance.⁵ Applications for freezing orders are to be treated differently to an application for permission to serve out of the jurisdiction. The nature of a freezing order means that it is a jurisdiction which requires great caution and a wide range of factors may have a bearing on the court’s decision.

As to the duty to disclose, there are degrees of relevance, and sensible limits have to be drawn when applying the broad test of materiality.⁶ The court would consider all the relevant circumstances, including the gravity of the breach, the explanations offered, the severity and duration of the prejudice caused to the defendant, and whether the breach could be remedied in deciding on the consequential relief.

The effects

The principles to be applied to breaches of full and frank disclosure were set out in *OJSC ANK Yugraneft v Sibir Energy plc*⁷ and include inter alia:

- that where the court finds that there have been breaches of the duty of full and frank disclosure, the general rule is that it should discharge the order obtained in breach and refuse to renew the order until trial;
- notwithstanding that rule, the court does have jurisdiction to continue or re-grant the order, but that jurisdiction should be exercised sparingly and take account of the need to protect the administration of justice and uphold the public interest in requiring full and fair disclosure; and
- the court should assess the degree and extent of the culpability with regard to non-disclosure. It will take into account if the breach was innocent, but there is no general rule that an

innocent breach will not attract the sanction of discharge of the order.

Meanwhile, in *National Bank Trust v Yurov and others*,⁸ the court dismissed an application to discharge a freezing order, despite finding that there had been material non-disclosure. In reaching this decision, the court also found that there was a real risk of dissipation. Although it was prepared to allow the freezing order to continue, it penalised the non-disclosing party in costs.

Some practicalities

Each case will be determined on the facts as to whether the non-disclosure is material to the decision before the court. If in doubt, it would always be prudent to include the matter in the application evidence and exhibit key documents and draw the court’s attention to the issue. Often the court will have had limited time to familiarise itself with the papers and is dependent upon the applicant’s legal team to bring matters to its attention as appropriate.

In heavy and complex commercial cases and particularly in fast-paced litigation, it can sometimes be easy in hindsight to seek to pick holes in the applicant’s compliance with its obligations. Respondents often seek to take a multitude of points, many of which are immaterial and peripheral, which can undermine the force of those points that do have some credibility.

In that regard, one interesting area concerns the extent to which the applicant has a duty to investigate. This is because the duty to give full and frank disclosure and fair presentation includes the need to make reasonable enquiries.⁹ This goes to the principle of full and fair presentation of your opponent’s case. The question then arises: how far does the duty of investigation go? In cases which are time critical, for example, if there is extreme urgency (eg, a risk of dissipation of assets), some balance will need to be drawn. In such cases, the court has recognised that there are degrees of relevance and that it is important to preserve a due sense of proportion. Mr Justice Toulson described the correct approach:¹⁰

The overriding objectives apply here, as in any matter in which the court is required to exercise its discretion;..the more complex the case, the more fertile is the ground for raising arguments about non-disclosure, and the more important it is, in my view, that the judge should not lose sight of the wood for

the trees. In applying the broad test of materiality, sensible limits have to be drawn. Otherwise there would be no limit to the points of prejudice which could be advanced under the guise of discretion.’

We recently acted on a case where time constraints meant that we had not yet fully prepared our worldwide freezing order and search order application papers before the limitation period on a claim was due to expire – and in particular, addressed sufficiently matters of full and frank disclosure and fair presentation. In order to protect the claim in circumstances where there was a risk of dissipation of assets if the respondent became aware of proceedings, we applied *ex parte* to anonymise the claim form based upon the material collated to date, with a view to seeking extensions of time in order to make the freezing and search order applications so that the duty could be complied with. The Court granted the anonymity orders (and subsequently extended the deadline for applying for relief further), exemplifying the flexibility of the English courts.

It should also be noted that there is a continuing duty of full and frank disclosure until the first hearing on notice (often the return date hearing) and so if, for example, any new material facts come to light or there is a change of financial circumstances of the applicant, it is the applicant’s duty to update the court and the defendant. In circumstances where the return date is

not listed for a number of weeks or even months, this can create a substantial burden on the applicant.

Conclusion

In summary, while it is the case that the English courts are often willing to grant *ex parte* relief and it is a reason why many parties turn to the English courts in the first place, careful presentation of the application needs to be made and the court will expect the applicant to carry out a substantial amount of work right at the outset in order to present the case in accordance with these duties.

Notes

- 1 *The Libyan Investment Authority v JP Morgan Markets Limited* [2019] EWHC 1452 (Comm).
- 2 *National Bank Trust v Yurov and others* [2016] EWHC 1991 (Comm).
- 3 [2015] EWHC 714 (Comm).
- 4 *Konameneni & Ors v Rolls Royce Industrial Power (India) Ltd* [2002] 1 WLR 1269 para 180.
- 5 *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd’s Rep 428.
- 6 *Crown Resources AG v Vinogradsky* (unreported 15 June 2001).
- 7 [2008] EWHC 2614 (Ch) at para 102 in which reference was made to *The Arena Corporation Limited v Schroeder* [2003] All ER (D) 199 (May) at para 213.
- 8 [2016] EWHC 1913 (Comm).
- 9 *Bank Mellat v Nikpour* [1985] F.S.R. 87; *Privatbank v Kolomoisky and ors* [2018] EWHC 3308 (Ch).
- 10 *Crown Resources AG v Vinogradsky* (15 June 2001) and was adopted by the Court of Appeal in *Kazakhstan Kagazy Plc v Arip* [2014] EWCA Civ 381, [2014] 1 CLC 451 at [36].

Commercial fraud litigation – London pow-wow, June 2019

Commercial fraud is a continuing global menace costing hundreds of billions every year. Crimes such as money laundering, asset misappropriation and insider trading are ever present in financial institutions and across other sectors.

Inadequate anti-fraud systems compound the problem, meaning clear red flags are often missed due to a lack of robust policies and procedures leaving fraudsters often ahead of the game.

To discuss current trends, the Commercial Fraud Lawyers Association met for a breakfast roundtable on 13 June 2019 at the offices of Brown Rudnick, London. The discussion was organised and hosted by partner Jane Colston who was helped in chairing the discussion by Ravinder Thukral, Gerald Byrne, Jessica Lee and Joanna Curtis.

The meeting focused on three topical issues and provided for a very open and thought-provoking discussion on some of the matters facing practitioners at present. Below is a summary of the matters addressed.

Topic 1: What frauds are members seeing and what should corporates and banks do to respond effectively?

Members cited a number of issues that they had come across in recent months such as consumer fraud, asset misappropriation, tax evasion, cybercrime and business misconduct. It was noted that internal actors, such as senior management and rogue employees, seemed to pose the most common threat of the most disruptive frauds. It was also noted that while cybercrime – mostly malware and phishing – has increased recently, asset misappropriation, in the form of embezzlement or false accounting, continues to be prevalent. Business misconduct, such as money laundering and bribery, also continue to make headlines.

Another development noted was the ever-increasing international nature of the many investigations in areas such as money laundering and data breaches. The rise of cross-border misconduct means more

complex investigations are being conducted by more regulators in more jurisdictions.

In terms of cultural shifts in companies, many senior executives and board members are thought to be becoming more sensitive to fraud risk and are more likely to ask questions or require additional reporting about fraud risk within the organisation. It was noted that often the hierarchy and culture of a company means a dishonest senior executive or director is not, however, questioned, which permits the dishonest actor to carry out the fraud assisted by other directors who turn a blind eye or are bullied or rewarded into silence.

It was noted that systems are needed so that honest directors play a vital role in detecting and preventing fraud. Those directors who fall below the standard of care required of them should expect to be held to account for any fraud the company suffers while they were ‘sleeping at the wheel’ or blindly following the dishonest actor.

Topic 2: How is artificial intelligence (AI) being used and what would be a good protocol to agree with opponents?

The use of AI was of particular interest to members both in terms of fraud prevention and as part of disclosure processes in proceedings or investigations.

Fraud prevention

Most members agreed with the proposition that companies needed to embrace AI in addressing fraud-prevention issues, but must ensure that it fits into a holistic approach in which proper systems and controls are in place, which include elements of AI together with human interaction.

It was remarked upon that AI is now capable of detecting fraud in real time and of being anticipatory rather than just reactive. It is also used to speed up internal investigations, with computer-assisted reviews now processing vast amounts of information, recognising patterns, removing duplicate information and determining relevancy unaided.

Gerald Byrne

Brown Rudnick,
London
GByrne@
brownrudnick.com

Jessica Lee

Brown Rudnick,
London
jslee@
brownrudnick.com

Joanna Curtis

Brown Rudnick,
London
jcurtis@
brownrudnick.com

Jane Colston

Brown Rudnick,
London
jcolston@
brownrudnick.com

In this regard, civil disclosure orders against banks often reveal that the banks' anti-money laundering systems are inadequate as banks are allowing accounts to be opened which are then used to receive and launder stolen monies. The risk for banks here is that they may become a more attractive target for both fraud claimants and regulators.

Members also raised matters relating to the limitations to the application of AI in fraud prevention. It was suggested that it is common in fraud cases that emails are written using code words (eg, jumbled numbers or particular codes), or that the necessary communications facilitating the fraud involve lots or oral conversations which would not be picked up by a document review using AI.

Disclosure exercises

In terms of disclosure exercises in proceedings or investigations involving instances of fraud, members recognised that the use of AI was here to stay and will be useful, but raised concerns that the sample set used by the AI may not capture some of the communications required for the system to be properly trained. To combat that issue, senior lawyers should review sample sets and conduct sampling on documents that the AI had discarded as being not relevant.

It was added that AI was also very useful for thematically categorising documents for human review and mapping communications between certain people to show how often they might be communicating, helping to identify areas of interest (eg, where two people should not really be communicating at all).

Finally, the discussion turned to the possible knowledge gap between the technical experts who facilitate AI platforms and the legal counsel tasked with making submissions on the scope of disclosure. To bridge that gap and to facilitate cooperation between practitioners when addressing disclosure matters and the new disclosure pilot scheme in the High Courts of England and Wales (see the IBA Litigation Newsletter, May 2019, for an article on such scheme), it was suggested that a very early discussion between the parties on the use of AI in the disclosure process was very important. In addition, it was suggested that at any hearing dealing with disclosure issues, a person with technical expertise should be present to assist the court with matters of AI.

Going forward, we will likely see more corporates using AI and smart technology to review disparate data quickly in order to

recognise irregularities and raise red flags for humans to investigate. This increase of use follows in the footsteps of regulators (such as the Serious Fraud Office) and the courts recognising the usefulness of AI in investigating fraud.

Topic 3: Discuss a sensible common practice regarding post-service dealing with freezing injunctions

A key area for discussion was the usefulness of first return date following service of a freezing order given the short timeframe and various asset disclosures/tracing a defendant is required to do in advance of any meaningful hearing. Rare was the experience of the first return date being used to seek a discharge of a freezing order, albeit there are now several cases where the courts have discharged injunctions, for example, on the basis of material non-disclosure by a claimant.

Often the first return date is used to get directions while reserving the position regarding any discharge of the freezing injunction until further return dates.

Difficulties are caused where a proprietary freezing injunction has been granted over assets held by a defendant, as well as a personal freezing injunction. If the defendant's cash assets are all subject to a proprietary injunction, then the defendant may have difficulty in funding its legal representation because to do so would breach the injunction and also risk that the claimant could ultimately enforce a proprietary claim over any money paid out in legal fees to the lawyers. This could mean that the lawyers would have to pay their fees over to the claimant. Possible solutions discussed included: (1) if there are other fixed assets available, apply to vary the injunctions such that money can be paid out from under the proprietary injunction, but that such monies are replenished from other assets, for example, fixed assets when they are sold; and (2) asking the claimant to undertake not to enforce a proprietary claim against the defendant's legal counsel.

Generally, it was acknowledged that the evidential and costs burden on an applicant to bring an injunction was high, and that claimants with smaller claims or limited funds may struggle to bring full injunction proceedings directly against the party who had committed a fraud. However, the courts of England and Wales have a myriad of remedies pre and post judgment which are available to claimants and can be adapted depending on the legal budget the claimant has.

Pleading fraud: getting your facts straight

There are strict rules in the English Courts when it comes to pleading fraud. It is not acceptable to make baseless and unfounded allegations in the hope or expectation that supporting evidence might materialise or that the accused might be cowed into submission. Legal representatives must satisfy themselves that on the material presented, on the face of it, there is a prima facie case of fraud.

Statements of case should plead the facts with particularity so that the defendant knows the case it has to meet and include all the essential ingredients of the cause of action (fraud) which would give a right to a particular remedy. Because parties to a fraud tend to act covertly and conceal their wrongdoing, it can be difficult for the pleader to be able to detail sufficiently a claim for fraud and meet the strict criteria of the English courts.

Within the arsenal of commercial and civil fraud practitioners, there is the ability to invite the court to draw an inference of fraud from the primary facts. The English Commercial Court has recently had to consider this very issue in the context of a strike-out application.¹ In an interesting case in 2013, the sole director of Grove Park brought separate proceedings against RBS relating to various guarantees entered into between the parties. In the course of these proceedings, RBS accused the professional director of forging the term of a loan agreement in order to fraudulently mislead potential investors in the company. RBS maintained these allegations against the director when it sought to amend its defence. RBS subsequently served late witness evidence that contradicted its allegations of fraud. This led to a withdrawal of the allegations against the director and the case settled on confidential terms.

In the subsequent proceedings (based on the same events and financial documents as the earlier proceedings), Grove Park set out in its particulars of claim its allegations against RBS in respect of the circumstances surrounding the forging of the loan agreement

and RBS's conduct in the earlier proceedings. Grove Park alleged that RBS knowingly put forward a false and misleading case in respect of the amendments to the loan agreement. RBS refused to plead a positive response regarding its conduct in the earlier proceedings, save that it would at trial rely on documents served in the earlier proceedings (ie, witness statements/documents) for their true meaning and effect. Just prior to the case management conference, RBS made an application to strike out these parts of Grove Park's pleadings, principally on the basis that they were irrelevant to the issues in the current action (ie, they did not deal with the forging of the loan) and because they did not disclose any reasonable grounds for a claim or defence. In his judgment, Males J (as was) commented that Grove Park's pleading in this regard 'appears to be no more than a prejudicial factual narrative.....If the allegation is to remain, its relevance must be explained so that the case can be understood.'²

An inference of fraud

Males J determined that if Grove Park was to cross-examine RBS's witnesses as to their conduct in the earlier proceedings then Grove Park must plead to the relevant facts. The pleadings should be concise and plead to the material facts – it should not include background facts or evidence.³

The pleadings should not be used as a weapon to try to obtain additional disclosure to which a party would not otherwise be entitled; in such circumstances the pleader will run the real risk of strike out early on in the proceedings.⁴

In cases where fraud is alleged, the pleader must set out the facts that are relied on to show that the defendant was dishonest and not merely negligent. If dishonesty can be inferred from the primary facts, these must be set out so that a party can rely on them. The courts do not, in matters of fraud, allow proof of facts unless they are pleaded. Further, the court cannot infer dishonesty from facts that have not been pleaded.

Lydia Danon

Cooke, Young & Keidan, London

lydia.danon@cyklaw.com

Rosie Wild

Cooke, Young & Keidan, London

rosie.wild@cyklaw.com

Males J pointed out that there is a difference between pleading ‘fact’ and pleading ‘evidence’ albeit the distinction can be elusive. Evidence is the material that proves the fact, for example, a document or a witness statement. A fact is a fact, which once supported by evidence will be relied upon to show that the defendant has perpetrated a fraud.⁵

At the interlocutory stage, the court is not concerned with whether the evidence at trial will or will not establish fraud, but only whether the facts as pleaded would justify a plea of fraud.⁶

Males J found that ‘[I]n the absence of any explanation of why a false allegation against [the director] had been made, it is a reasonable (although not necessarily an inevitable) inference that this was done knowingly.... in order to conceal reprehensible conduct’.⁷

Grove Park was therefore permitted to plead that RBS knowingly put forward a false and misleading case, as this is a fact, which if proved by evidence, is a fact from which an inference of fraud can be drawn.

In summary

Grove Park is a useful reminder to fraud practitioners as to the potential scope of pleading fraud. The pleader should

not stray into an overly long, prejudicial narrative nor should they try to broaden the pleading with the objective of obtaining additional disclosure (albeit the latter might prove more difficult with the advent of the Disclosure Pilot). In doing so, the pleader runs a real risk of having to resist a strike-out application, which could lead to a substantial adverse costs order and additional costs consequential on further amendments to the statements of case. In order to avoid/defeat such an application, pleadings should be drafted concisely, setting out the material facts from which an inference of dishonesty can be drawn. If the facts leave open an explanation of negligence or mistake, a party is unlikely to get over the hurdle of being able to justify an inference of fraud.

Notes

- 1 See *Grove Park Properties Ltd v The Royal Bank of Scotland* [2018] EWHC 3521 (Comm).
- 2 *Ibid.* at para 21.
- 3 *Tchenguiz v Grant Thornton LLP* [2015] EWHC 405 (Comm), [2015] 1 All ER (Comm) 961.
- 4 *Charter UK Ltd v Nationwide Building Society* [2009] EWHC 1002 (TCC) at (the second) [15].
- 5 *Grove Park Properties* at para 26.
- 6 See Flaux J in *JSC Bank of Moscow v Kekhman* [2015] EWHC 3037 (Comm) at [20].
- 7 *Grove Park Properties* at [34].

Lucinda Orr

Enyo Law, London
Lucinda.orr@
enyolaw.com

Daniel Mills

Enyo Law, London
daniel.mills@
enyolaw.com

The importance of full and frank disclosure in letters of request applications

In the recent case of *Picard v Ceretti & Grosso*,¹ the High Court of England and Wales considered applications by Ceretti and Grosso (the ‘respondents’) to set aside orders seeking oral and documentary evidence (the ‘Orders’) made pursuant to letters of request (‘LoRs’) issued by the US Bankruptcy Court for the Southern District of New York (the ‘New York Court’).

The respondents contended that in obtaining the Orders, the applicant had failed to make full and frank disclosure of all

matters material to its ex parte application.² In response, the applicant submitted that the court’s obligation was to assist foreign courts as far as possible under principles of comity, and that the English Court was therefore bound to uphold the Orders, regardless of the conduct of an applicant.

The Court found that there had been material non-disclosure by the applicant, and that there were no restrictions on its ability to impose sanctions on the non-disclosing party: it was not limited by principles of comity or otherwise.

This decision affirms the importance of full and frank disclosure in all ex parte applications, including those made pursuant to LoRs (which are treated no differently). Senior Master Fontaine stated that any sanction by the court did not imply disrespect to the requesting foreign court, such sanction being the result of actions either by the applicant or by the applicant's legal representative as officers of the court. This point had not previously been dealt with by any of the leading authorities, and *Picard v Ceretti & Grosso* provides useful clarification for prospective applicants by upholding the *obiter* comments of Mrs Justice Cockerill from *Mudan v Rose Healthcare*³ that the court does indeed have power to set aside, or impose some lesser sanction for, material non-disclosure.

The law

Letters of request

Where the evidence of a witness located in England is sought in aid of proceedings abroad (outside of the European Union),⁴ a LoR to the English Court is required, which will then consider whether to grant the order requested.

The application is made on paper, without notice, and must be supported by written evidence. The procedure governing LoRs is set out in the Civil Procedural Rules 1998, rule 34.17 and Practice Direction 34A, para 6.3.

The basis for compelling a witness to give evidence in aid of foreign proceedings is the Evidence (Proceedings in Other Jurisdictions) Act 1975 ('the 1975 Act'), which incorporates into English law the Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (the Hague Convention 1970). The evidence sought must be for the purpose of trial (ie, not mere clarification), and the 1975 Act does not apply to arbitration, non-civil and commercial matters, interlocutory hearings, or (currently) proceedings in EU Member States.

Full and frank disclosure

Where an application is made without notice, the applicant is obliged to disclose all matters, of fact or law, material to the court's determination of (1) whether to grant the order requested; and (2) the terms of any such order.

A matter is 'material' if it would be relevant to the exercise of the court's discretion

(ie, if it would have influenced the judge's decision), and materiality is strictly for the court's determination.⁵ Importantly, this includes matters *adverse* to the applicant (for example, if a particular defence may be available to the respondent). The duty applies to facts which are known to the applicant, or which would have been known had proper enquiries been made.

Where there is material non-disclosure, the court has a broad discretion as to the appropriate relief, including, for example, set aside of any order obtained, costs consequences, or a finding of contempt.

The facts

The respondents were individuals based in London who consulted on and managed London-based feeder funds, which lost approximately US\$800m as a result of the notorious Ponzi scheme orchestrated by Bernie Madoff. The LoRs related to proceedings in the New York Court (the 'NY Proceedings') arising out of the scheme, whereby the Trustee in Bankruptcy sought oral and documentary evidence from the Respondents.

The LoRs were approved in May 2018 by the Orders, which accordingly compelled deposition testimony and document production by the respondents.

The respondents challenged the Orders on the basis that (1) there had been material non-disclosure by the applicant; and (2) the Orders would be oppressive to the respondents and would therefore be an abuse of process. On the first ground, the respondents submitted that the Applicant had misled the Court by failing to disclose to the Court:

- that the dismissal of the respondents as defendants to the New York Proceedings was at that time subject to appeal;
 - that identical proceedings had been issued in England against the respondents (in which their evidence could be deployed free of collateral use restrictions);
 - the extent of disclosure already obtained in related proceedings; and
 - that the respondents were already being deposed in the New York Proceedings pursuant to orders obtained via separate LoRs.
- In response, the applicant submitted (among others) that the English Court has a duty to assist foreign courts as far as it possibly can and there was no jurisdiction to set aside an order giving effect to a LoR on account of material not disclosed by the applicant.

The Court's decision

The Court rejected the applicant's submission that the English court has a duty to assist foreign courts as far as it possibly can, and that duty is not contingent upon the conduct of the applicant.

The Court found material non-disclosure in the applicant's failure to disclose: (1) the possibility of the respondents' reinstatement in the New York Proceedings; and (2) the existing orders for the respondents' deposition. This was material because the Court's original decision to grant the Orders was influenced by such non-disclosure (in particular, the Court would have been more likely to order a hearing on notice to the respondents, rather than dealing with the letters of request on paper without notice).

While in the particular circumstances of the case at hand, the Orders were not set aside but varied,⁶ the Court found the applicant's conduct deserving of sanction, which was duly dealt with in its decision on costs.

Commentary

This case highlights the importance of complying with the English standards of full and frank disclosure, even in the context of LoRs issued in relation to foreign proceedings (which receive no special treatment). It is incumbent on an application for an order giving effect to a Letter of Request to address the matters which go to the existence of the jurisdiction and the exercise of the court's discretion and to actively draw the attention of the court to all relevant matters. Failure to do so may impact the outcome of such

requests and attract sanctions from the English court, including but not limited to a rehearing and/or costs consequences.

To avoid falling foul of full and frank disclosure provisions, applicants seeking to compel English witnesses for foreign proceedings should ensure that they fully understand the English law duty of full and frank disclosure, as it is a concept that may not necessarily have an equivalent in their home jurisdictions. Similarly, English solicitors assisting foreign lawyers and clients need to ensure that all the material facts are presented to the English court when they apply for orders giving effect to LoRs from foreign courts.

Notes

- 1 [2018] EWHC 2702 (QB).
- 2 The Respondents also argued as a second ground that the Orders would also be oppressive and therefore an abuse of process by the Applicant.
- 3 [2018] EWHC 307 (QB).
- 4 If the proceedings are based in the EU, the English Court will simply make an order under Regulation (EC) 1206/2001 (although it is unclear at the time of writing how Brexit will affect this).
- 5 The relevant law is summarised in *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350.
- 6 The Orders were not set aside as: (1) the respondents conceded that they did have relevant evidence to give; (2) the judge considered that the set-aside hearing had been dealt with as a re-hearing of the original CPR r34.17 application; and (3) the likely impact on the New York Proceedings would be inordinate. However, the Orders were varied which included the removal of several categories of documents and the ordering of a provision of a list of questions in advance of the depositions, together with a paginated bundle of documents to be referred to in the questioning, in order to safeguard against the potential for oppression of the respondents.

Potential problems for parties under foreign law when giving disclosure in English proceedings

Tom Ellis

Osborne Clarke,
London

Tom.Ellis@
osborneclarke.com

Michelle Radom

Osborne Clarke,
London

Michelle.Radom@
osborneclarke.com

English proceedings, in contrast to most civil jurisdictions, require disclosure of documents which not only support a party's case but which are adverse to its case as well, so long as they are relevant to the issues in dispute. As reported in the IBA Litigation Committee's newsletter, May 2019 (page 47), changes have recently been made regarding the nature and scope of the disclosure which has to be given. In any event the use of such documents for purposes which are unrelated to the proceedings in which they are disclosed could therefore prove onerous for parties. In recognition of that potential hardship, the civil procedure rules seek to preserve, as far as possible, a litigant's right to privacy and confidentiality and thereby also to promote compliance with the disclosure rules. More specifically, the rules control the use that may be made of such disclosed documents by providing that a party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed (unless, for example, the other side agrees or the court gives permission).

Two recent High Court cases have highlighted the difficult position in which litigants in England can find themselves, though, when torn between two competing duties owed in two different jurisdictions.

In the first, *ACL Netherlands v Lynch*,¹ the parent company of one of the parties in the case was served with a subpoena by the US courts, requiring it to provide documents within its control which, under US corporate law, included documents held by its subsidiaries. Those subsidiaries are parties to English proceedings and had received documents which had been disclosed to them by the defendants during those proceedings.

Accordingly, the subsidiaries sought permission from the English court to provide those documents to the FBI and argued that

they should not be put in a position where they would be unable to comply with the subpoena and potentially be in contempt of the US courts. The defendants argued that they would be prejudiced if permission was granted.

Prior case law has established that the permission of the court will be granted to allow the collateral use of documents if: (1) there are special circumstances which constitute 'cogent and persuasive reasons'; and (2) such collateral use will not occasion injustice to the person giving disclosure.²

The Judge in this case concluded that the permission of the court to use the documents for a collateral purpose will be almost impossible to obtain except where 'the Court is persuaded of some public interest in favour of, or even apparently mandating, such use which is stronger than the public interest and policy underlying the restrictions that the rules reflect'. Crucially, the fact of compulsion (in light of the subpoena) did not in itself establish 'a cogent and persuasive reason': instead, the test is whether the use for which permission is sought justifies an exception to the public interest which lies behind the restriction on the collateral use of documents.

Applying those principles to the fact of the case, the Judge concluded that it had not been shown that disclosure of the documents was necessary for the purpose of the US process and to determine whether or not there should be an indictment: 'However, in this case the fact is that the justification can only be that the documents in question are really needed to enable the Grand Jury to perfect a course already set (by amending or replacing an indictment they have already caused to be issued) or to investigate whether other persons than those thus far identified as (in its view) the main culprits should also be brought to trial'.

Neither had it been shown that the parties had legal control of the requested documents (because permission from the

English court was required); and so the Judge was not persuaded that they were ‘truly under compulsion’ (even accepting that the subpoena was entirely regular).

Permission to use the documents was therefore refused: placing the parent company of the claimants potentially in the position of breaching its duties to the US courts. However, this judgment makes it clear that the English court will not allow such considerations (in themselves) to override the underlying public policy that a litigant’s right to privacy and confidentiality should be preserved.

In the second case, *Bank Mellat v HM Treasury*,³ the issue was different. The appellant Iranian bank contended that it had a right to withhold inspection of documents which it had disclosed in redacted form, because production of the documents in un-redacted form would expose it to the risk of criminal prosecution in Turkey, Iran and South Korea (because they contained confidential information). The respondent instead sought un-redacted disclosure to members of a confidentiality ring.

The Court of Appeal reviewed prior case law and restated the principles governing such an application, as follows:

- The English court has jurisdiction to order production and inspection of documents even if compliance with that order would entail a breach of foreign criminal law. Foreign law does not override the English court’s ability to conduct proceedings in accordance with English procedures and law.
- However, the English court will not lightly make an order where compliance would entail a party to English litigation breaching its ‘home’ criminal law.
- When exercising its discretion, the English court will take account of the real (ie, actual) risk of prosecution in the foreign

country, but this risk is just one factor in the court’s balancing exercise.

- The English court can minimise concerns by, for example, imposing confidentiality restrictions.
- Where an order for inspection is made: ‘considerations of comity may not unreasonably be expected to influence the foreign state in deciding whether or not to prosecute the foreign national for compliance with the order of this Court. Comity cuts both ways’.

On the facts of the case, the Court of Appeal found that the Judge at first instance had applied these principles and her order (requiring inspection and imposing a confidentiality club (even though the appellant had not wanted a confidentiality club)) was upheld. The Court of Appeal upheld the Judge’s decision that the risk of prosecution was not as great as the appellant’s expert had presented it.

Accordingly, in this case too, the English courts adopted the position that although there can be a tension between the English law requirement for inspection of documents and the provisions of foreign law, that is not a reason, in itself, to override the English court’s policy and procedure. In short, if the parties choose to litigate in England, the starting position is that they will be bound by English procedural rules and it is only in rare cases that issues of foreign law will provide a basis for departing from those rules.

Notes

1 [2019] EWHC 249.

2 See *Crest Homes Plc v Marks* [1987] AC 829.

3 [2019] EWCA Civ 449.

Justice must come first – the #MeToo movement and non-disclosure agreements

Gerald J Byrne

Brown Rudnick,
London
GByrne@
brownrudnick.com

Nadine P Tollefsen

Brown Rudnick,
London
NTollefsen@
brownrudnick.com

In the wake of the #MeToo movement, the issue of non-disclosure agreements (NDAs) that prevent victims of sexual harassment and other illegal and inappropriate behaviour from speaking to relevant authorities came sharply into focus.

In the past, to address this issue, the Solicitors Regulation Authority (SRA), which regulate solicitors in England and Wales, and the Law Society of England and Wales have issued guidance to solicitors on NDAs to ensure that justice must come first. However, in the current climate, is it time for the guidance to be looked at again? This is what the House of Commons Women and Equalities Committee (the ‘Committee’) stated in its published report dated 11 June 2019.

Maria Miller MP, Chair of the Committee, said NDAs were having a ‘destructive effect on people’s lives’ and added that organisations have a duty of care to provide a safe place of work for staff, which includes protection from unlawful discrimination.

The report noted that although NDAs were originally designed to stop staff sharing trade secrets if they changed jobs, they are now being used to ‘cover up unlawful behaviour’.

Ms Miller stated that the use of NDAs in settling sexual harassment allegations is ‘at best murky and at worst a convenient vehicle for covering up unlawful activity with legally sanctioned secrecy’. Ms Miller added it was ‘worrying’ that gagging clauses were sometimes being traded by employers for job references.

The report stated that further guidance was needed from regulators to highlight the responsibilities of lawyers, professionals and managers to ‘report up’ to senior managers any concerns they may have about systemic issues with culture and discrimination, or about repeated or ‘especially worrying’ allegations of improper behaviour by a particular individual or in a particular business area.

The report stated that the SRA ‘must make it clear to those they regulate that they will take

rigorous enforcement action’ if they become aware of ‘actions and behaviours that do not meet the high ethical standards expected of legal professionals’. This, the Committee’s report said, ‘should be set out in guidance and followed up by appropriate action’.

The Committee repeated a previous recommendation that provisions in confidentiality agreements that can reasonably be regarded as potentially unenforceable ‘should be clearly understood to be a professional disciplinary offence for lawyers advising on such agreements’.

The Committee was ‘particularly struck’ by the evidence it heard that NDAs are used so routinely when settling employment disputes and, in particular, discrimination and harassment cases ‘that many employers and lawyers believe them to be integral to settlement agreements’. Lawyers were told by the Committee that they ‘must think more carefully about why they are requesting confidentiality and whether it is needed at all’. The Committee added that any use of confidentiality clauses needed to be clear and specific in scope.

Since the Committee’s report has been published, the Law Society has stated that ‘[w]e have sought to lead an open and frank discussion within the legal community about the use of NDAs and confidentiality clauses’ and that ‘[w]e regularly review our guidance to solicitors and update as law and regulations evolve’.

The SRA said recently that employees should be given a ‘cooling-off period’ before signing NDAs. The SRA also backed the idea that no NDA should prevent people from reporting concerns to law enforcement agencies, whether or not drafted by solicitors – which, they said, is specifically prohibited in the SRA’s NDAs warning notice issued in 2018. The SRA also commented on the usefulness of standardised wording ‘setting out what [NDAs] cannot exclude as a matter of law’.

It is clear from the Committee’s report that this matter needs to be addressed again.

As a start in that process, it would be beneficial for the SRA and/or the Law Society to revisit, update and clarify their guidance on NDAs for solicitors. In the meantime, practitioners should be cautious when drafting a NDA to ensure that it does not potentially restrict the rightful reporting of illegal or inappropriate behaviour.

The Law Society's practice note aimed at all solicitors who draft NDAs warns that, when drafting NDAs, solicitors need to remember that, under the SRA Code of Conduct, their duty to clients is subject to a duty to the court and to the administration of justice; '[w]here two or more mandatory principles come into conflict, the principle which takes precedence is the one which best serves the public interest in the circumstances, especially the public interest in the proper administration of justice'.

Nicola Kerr, Employment Partner at Brown Rudnick commented:

'The SRA and Law Society must be careful not to throw the baby out with the bath water. While NDA's should not be used to cover up discrimination and harassment, reciprocal confidentiality provisions in settlement agreements are an essential ingredient of commercial settlements, and a benefit to employees as well as employers. Without NDAs, settlement (including severance payments to employees) may not be achievable. Accordingly, confidentiality provisions should continue to play an important role in the private employment relationship, and its termination.'

Laura Feldman

Eversheds Sutherland,
London and King's
College London

laura.feldman@kcl.ac.uk

Case update: *Federal Republic of Nigeria v JP Morgan Chase Bank*

Facts of the case

JP Morgan Chase Bank NA (JPM) paid US\$875,740,000 from an account governed by a depository agreement held by the Federal Republic of Nigeria (FRN) in three tranches to companies in the Shell and Eni SpA groups. FRN alleged that the transfers were in circumstances that placed JPM on notice that the payment instructions were part of a fraudulent and corrupt purchase of an oil production licence.

The circumstances placing FRN on notice included that the funds were paid to corrupt former and current Nigerian government officials and were channelled back to facilitate payments to senior executives at Shell and Eni SpA.

As a result, FRN claimed JPM had breached the banker's *Quincecare* duty of care (named after the case of *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363), which requires a bank to refrain from making a payment (despite an instruction on behalf of its customer to do so) where it has reasonable grounds for believing that

the payment is part of a scheme to defraud the customer.

JPM applied for strike out or reverse summary judgment of the claim. For the purposes of the applications, the parties agreed that it was to be assumed that there was a *Quincecare* duty of care but JPM claimed it was not liable on several grounds. These included that the depository agreement:

- excluded liability for a *Quincecare* duty; and
- contained an indemnity provision which allowed the defendant bank to be indemnified against the claim by the claimant, therefore the claim failed for circularity.

JPM further alleged that any breach of duty did not cause FRN any loss because inquiries by the bank would not have prevented the funds being paid out, in circumstances in which the FRN accepted that the corrupt scheme spread to the top of the then Nigerian Government. On this basis, JPM alleged that if the Nigerian officials were part of the fraudulent scheme, there would be no parties disputing the payment, therefore, there would be no obvious route to a freezing injunction.

In response, FRN submitted that the duty could not be excluded and that had the defendant bank not paid out the money, a realistic possibility was that the account would have been frozen by court order pursuant to a clause in the depository agreement, which allowed the bank to apply to court to determine the rights of persons to the account where there was a dispute and/or uncertainty as to the rights over the account.

Decision

Justice Burrows QC dismissed JPM's applications, finding that that the *Quincecare* duty should not be confined to current accounts and did apply to depository accounts. The duty was based on an implied term or imposed by the tort of negligence and, as such, was not expressly excluded by the depository agreement. The duty required a banker to refrain from executing an order when 'put on inquiry' in the sense that he/she had reasonable grounds (although not necessarily proof) for believing that the order was an attempt to misappropriate the funds of the account holder. Although it was unnecessary to determine as part of the applications, the judge strongly inclined to the view that there was also an additional duty of enquiry as part of the *Quincecare* duty.

The judge held that the indemnity clause, correctly interpreted, did not entitle the bank to be indemnified against the claim by FRN. Therefore, the claim did not fail due to circularity.

The defence based on causation also failed. The judgment noted at least two potential grounds to a freezing injunction following further action by the bank, and which would have prevented payments were:

- (1) intervention by regulatory authorities, such as the Serious Organised Crime Agency; and/or
- (2) the bank seeking directions under the relevant terms of the depository agreement.

Practical guidance

The decision is a further illustration of parties encountering difficulties seeking summary determination of factually sensitive issues. It will only be in the clearest of cases that the courts will permit the resolution of a claim without a full trial. Nonetheless, summary determination can usefully be used to narrow the issues in dispute and the Shorter Trials Scheme can be an alternative way to resolve a dispute expeditiously.

The case also shows that it will not be possible for banks to exclude the *Quincecare* duty of care by entire agreement clauses or similar exclusions of liability in depository agreements unless clear and unequivocal wording is used. Similarly, an indemnification clause is unlikely to allow a bank to evade liability by seeking repayment of funds transferred in circumstances creating reasonable grounds for suspicion of fraud.

The decision is limited to an application for strike out or reverse summary judgment, but it does also suggest that banks will need to adopt a cautious approach when there are circumstances creating reasonable grounds for suspicion of fraud. It is implicit from the outcome that the steps that the bank should consider where there are grounds for suspicion are making further inquiries, which may extend to contacting regulatory authorities.

Banks should also assess the terms governing accounts to ascertain whether there are clauses similar to that in the depository agreement. Most relevantly, the clause that gave the bank the right to apply for directions or declaratory relief in the case of uncertainty in respect of the funds in the account, although the bank was not obliged to make any application. When such clauses are present, banks should seriously consider whether to apply to court to resolve uncertainty as to the probity of payment instructions.

Thomas Jones

Legis Finance, London
jones@legisfinance.com

Louise Trayhurn

Legis Finance, London
trayhurn@
legisfinance.com

Tools of the trade: marketing and managing risk-sharing at a law firm

There is a growing realisation among law firms that they are missing a trick: litigation funders are making attractive returns from assets that are the law firms' domain, and law firms are handing them those returns. In many respects, this is an example of the world coming full circle in a relatively short period of time. Litigation funding (also referred to as litigation finance or alternative litigation finance) was born out of a realisation that contingency fee arrangements gave law firms an effective monopoly to co-invest in litigation with their clients, especially in jurisdictions like the United States where contingent fee arrangements were an established feature of the legal landscape. Litigation finance broke that monopoly by giving outside capital a chance to participate in litigation returns, a prospect that turned out to be both lucrative for the funders and quite useful to law firms (especially those without the capacity or the culture to take on contingent fee cases) and their clients. Fast forward a decade or so. Now, law firms in jurisdictions like the United Kingdom, which only recently allowed US-style contingency fee arrangements in commercial litigation, are looking to the funder's attractive returns and exploring the tools available for capturing more of them.¹

To crystallise this shift in thinking, law firms must overcome two hurdles. Firstly, they must learn how to market a contingent fee solution (in the UK, a damages-based agreement (DBA)) to their clients; in other words, they must become conversant in the advantages a DBA arrangement can provide their clients over a traditional financing route. Secondly, law firms must grasp proper internal risk management techniques concerning contingent fee arrangements, particularly in the UK where the DBA regime restricts firms from contracting with their clients for a share of the recovery on anything other than an 'all or nothing' basis, that is, no win, no fee.

Managing this risk involves: (1) establishing a rigorous analytical framework for identifying

and quantifying the risk profile of a case; and (2) utilising financial tools recently available in the market to hedge against the risk of loss. In essence, claim investing requires law firms to think more like investment bankers, even portfolio managers, to build up an asset pool that can dramatically increase their revenues over time while minimising investment risk.

Marketing a willingness to share risk

Two themes permeate the conversation law firms have with their clients about engagement and relationship development to differentiate the law firm and secure cases: the use of innovative pricing structures and a willingness to share risk. In many cases, clients want law firms to demonstrate their understanding of the cost pressures that they face internally and take a collaborative approach to risk.

In response, the law firm often will propose helping the client arrange funding for the case from a third-party litigation funder coupled with a partial risk-sharing arrangement in the form of a conditional fee agreement (CFA), whereby the firm bills at a discounted rate in return for a catch-up and uplift payment on a successful conclusion of the case. An alternative approach would be to propose a DBA arrangement to the client, which can have significant economic and non-economic advantages for the client compared to the third-party funding option.

Economically, even if the contingent fee charged by the law firm costs the same as third-party funding (in terms of the percentage share of the recovery), the DBA structure can offer a better return to the client over a variety of settlement scenarios, especially at the lower end of the settlement spectrum. This is because the preferred/minimum return structure used by all litigation funders makes their alternative much riskier for the client at least where the return is at the lower end of expected recoveries. The simplicity inherent in a DBA

– pro rata sharing of all recoveries with no built-in preference – means that at a low- or mid-level recovery, the client keeps a greater share while still compensating the law firm for its risk (but see below for how the law firm can further manage its risk using its own financial tools).

There are numerous non-economic benefits for the client as well. There are fewer parties and moving parts to a DBA arrangement when compared to a third-party funding arrangement. The parties to the contract are already involved in the dispute, namely, the client and their lawyer, and the DBA itself is a less complicated document when compared to a typical litigation funding contract. This simplicity largely eliminates the ‘execution risk’ and shortens the deal process.

Going forward, the DBA arrangement should be less cumbersome to manage as with a DBA there are no reporting obligations to a third-party funder, with attendant risks to information leakage. By reducing the number of parties involved and streamlining the ongoing management of the case, there are fewer inherent risks to the litigation project, including the risk of disputes arising out of the dynamics and additional transactions between the litigation funder and the claim holder.

Importantly, law firms should never lose sight of the inherent professional ethics risks that can arise from brokering financial transactions between their clients and funders, let alone the risks of negotiating the contracts that are designed to get the lawyers’ fees paid. Lawyers introducing funders to clients, sharing client or case information with funders, and being in the middle of the funder-client relationship (especially where lawyers receive their payment from the funder), creates ongoing conflicts of interest that must be carefully managed by the lawyer. The DBA arrangement can solve most of these concerns.

Managing the risk of a contingent fee arrangement to a law firm

To date, solutions for coping with the internal economic risk to the firm of taking on a contingent fee case have been limited to essentially two options. One is to just accept the risk internally and hope the firm’s positive assessment of a successful outcome will not only result in the firm recovering its invested costs but also provide a substantial risk-adjusted return. For some firms with greater

experience with contingent fee arrangements, using an internal portfolio (multi-case investment) approach to manage the risk has been a vital component of their claim investment strategy. In either case, the firm needs rigorous processes not unlike third-party funders or other investors to assess all the risks inherent in the case and determine if it is not just a case worth taking on, but one that is also worthy of an investment of the firm’s capital. The risk categories that need to be considered include not just the merits of the case but also cost risks, settlement probabilities, realistic recovery quantum, collection risks and even counterparty risks (ie, is the claimholder telling you the whole truth and nothing but the truth?).

Valuing the case is both art and science, and is a vital exercise if the firm is to determine whether the investment in the case carries an adequate expected return relative to other investment opportunities. There are various methods and tools available to help model and estimate expected returns, but most involve determining a value based on a probability-weighted average of all possible outcomes. Only when all these factors are taken into consideration can a firm come to a reasoned investment decision to take on the case on a contingent fee basis.

The other option available to date for the firm has been to enter into their own funding arrangement with a third-party funder to effectively ‘sell’ a portion of their contingency fee in return for a limited recourse cash advance that will both defray some of the working capital costs of pursuing the case while also providing a buffer against lost fees if the case is unsuccessful. Several third-party funders offer this solution and it is an option to consider in jurisdictions like the UK where ‘partial DBAs’, that is, arrangements where the client pays some fees during the life of the case and then shares some of the recovery with the firm upon a successful conclusion, are not allowed. Moving to a pure no win, no fee arrangement can be an economic and cultural step too far for many law firms and finding some form of risk mitigation tool is necessary to smooth the path into the DBA realm. However, the range of risk-mitigation tools available to law firms is no longer limited to selling, or borrowing against, a portion of the firm’s contingent fee entitlement; new financial tools are now entering the market.

The worlds of insurance and law have been intertwined for decades and insurance

solutions to law firm risk management issues, such as professional negligence, are not new. But the potential for insurance solutions to manage contingent fee risk is a new development and is poised to act as a significant disruptor to the traditional funding model. For example, insurance cover for some or all of the firm's investment in a case can be used to calibrate the firm's risk; insurance-based solutions are even available on a fully-contingent-premium basis. The upshot is that the law firm can take on DBA cases and better manage the overall economic risk to the firm by tailoring its risk/reward appetite with a new set of risk management tools. In addition, insurance solutions are not necessarily either/or propositions, they can be combined with funding arrangements, too; for example, a firm could insure

against the loss of fees while financing ongoing out-of-pocket expenses.

The future of litigation finance is to move beyond 'selling money' to using the whole panoply of financial instruments to help firms adjust their mindset and appetite towards client acquisition and taking on risk. The most effective way to craft an appropriate solution bespoke to a law firm's needs is to use a modular or 'toolkit' approach, comprising the expanded range of financing and risk-mitigation options becoming available on the market. Happier clients and enhanced revenues for law firms? Things are changing, and the future looks bright.

Note

- 1 Although the points made in this article are applicable to many jurisdictions, for simplicity and ease of reading it will refer to the UK as its example market.

Joanna Fulton

Burness Paull,
Edinburgh
joanna.fulton@
burnesspaull.com

Collective redress – an update from Scotland

Last year, a new Act was passed in Scotland introducing for the first time a significant package of changes in relation to costs, funding and group proceedings. These changes reflect similar developments in other jurisdictions.

In particular, the introduction of a new group procedure reflects a pattern across the globe with forms of collective litigation models becoming increasingly prevalent. This includes a proposed new European Union Directive on representative actions, which would introduce a right of collective redress across the EU and, for instance, a new process adopted in Germany last year in the wake of the diesel emissions litigation (see the article 'Mass litigation in Germany' in the IBA Litigation Committee's newsletter, October 2018). Also, third-party funders are becoming increasingly active in a wider range of claims, and Scotland will be no exception when these new changes are brought in.

The impact

We predict an upturn in both the threat of litigation and the number of consumer claims

which are raised in Scotland. Organisations with operations or customers in Scotland should be alert to these changes, even if they are not based in Scotland.

Companies operating in sectors which are susceptible to consumer claims may be particularly affected, such as pharmaceuticals, medical devices, financial services, automotive, consumer products and energy suppliers, and companies dealing with personal data.

Key aspects of the Act

The key features of the Act are:

- a new group procedure will be available in the higher tier civil court in Scotland;
- success fee agreements will be permitted, meaning solicitors will be able to conduct litigation in return for a share of the damages awarded;
- the introduction of Qualified One Way Costs Shifting (QOCS) will mean that an unsuccessful claimant in a personal injury action will not be liable to pay a defendant's costs, save in limited circumstances; and
- there will be more transparency around third-party funding of litigation.



Next steps

At the time of writing, the Act is not yet in force. Secondary legislation is being developed but there is a risk that this does not address the shortcomings of the Act. A consultation is currently underway in relation to success fee agreements but it is not clear that this will happen on all aspects of the new Act.

For instance, in terms of the new group procedure, there are many fundamental questions of principle that are still unresolved, such as:

- will a finding of liability in one case be binding on other cases in the group?
- will the process allow for both opt-in and opt-out proceedings, or only one of these?
- will it apply to lower value claims?
- how easy will it be for consumers outside of Scotland to participate?

- can companies participate in group proceedings?
- what restrictions or qualifications will be imposed on representative parties who can bring group proceedings?
- when and how will the court decide whether claims should be allowed to proceed as a group, and is the 'same as, or similar or related to' test clear and workable?
- how will a costs liability be dealt with?

In our view, given the potentially far-reaching impact of the new Act, it is vital that views and experience are shared on all these questions in order that the detailed implementation of the Act is effective in practice and has the support of all stakeholders. If readers have experience of these issues, please get in touch.

Is France about to generalise civil fines as an alternative to punitive damages?

Benoît Javaux

Quinn Emanuel
Urquhart & Sullivan,
Paris

benoitjavaux@
quinnemanuel.com

Civil fines are perceived by the French public authorities as a means to enhance the ethical standards of private actors that remain outside the sphere of criminal law. These fines are set by the judge and must be paid by the liable party, in addition to the damages paid to the victim. In general, the fine is paid to the French Treasury.

There has recently been a noticeable increase in the use of civil fines in France. The law no 2018-670 of 30 July 2018, for instance, created a new civil fine in matters of business secrecy. More importantly, the draft reform of civil responsibility, if adopted in its current version, would generalise the application of civil fines by incorporating them into the Civil Code. The Senate's Legislation Committee has commissioned a task force to prepare the examination of the draft reform of civil liability. The reform should be discussed in Parliament in the coming years.

This article briefly presents the reasons for the expansion of civil fines in France, before considering their mechanism in more detail.

Reasons for civil fines in France

The principle of full reparation is a structuring principle of the French approach to civil liability. It implies that compensation must cover all of the damage incurred – no less, but no more. This principle thus precludes punitive damages such as allowed by legislation in the United States, which aim to dissuade and to sanction.

Punitive damages are not unknown to French law, however. They exist in certain fields, such as media (moral damages here used as punitive damages) or intellectual property law (through the application of European directives).

While the French public authorities have not extended the scope of punitive damages, they have nevertheless demonstrated a

desire to impose more severe sanctions on certain behaviours – in particular, certain wrongful procedural behaviors and lucrative misconduct (*fautes lucratives*). A case of lucrative misconduct is where the wrongdoer's profit is not neutralised by compensating the victim (for example, in case of practices that restrict competition or false advertising).

Ultimately, the French authorities have chosen the mechanism of civil fines to achieve this purpose. Civil fines, in their aim to sanction and to dissuade, share the same objectives as punitive damages, but without the enrichment of the plaintiff. The fine is paid to the Treasury or to a compensation fund, not to the victim.

The mechanism of civil fines

Here are some topical and/or recent examples of the development of civil fines.

Civil fines as a sanction for wrongful or dilatory procedural behaviour

Article 32-1 of the Code of Civil Procedure provides that 'anyone who acts in a dilatory or abusive manner may be sentenced to a civil fine of a maximum of €10,000, without prejudice to any damages that may be claimed'. Article 32-1 applies to all disputes before the courts in charge of civil, commercial and employment matters. The amount of this civil fine, which was increased in 2017, nonetheless remains a weak deterrent in disputes with significant amounts at stake. Depending on the interests involved and the objectives pursued, the implementation of delay tactics can still be an interesting strategy for one of the parties.

The law of 30 July 2018, on the protection of business secrecy, imposes a civil fine against litigants who might seek to make a dilatory or abusive use of the means provided by this law to prevent, stop or remedy an infringement of business confidentiality (Article L. 152-8 of the French Commercial Code). The amount of the fine may not exceed 20 per cent of the amount of the claim for damages; or, absent any claim for damages, the amount of the civil fine may not exceed €60,000.

Civil fines as a sanction for lucrative misconduct

Since profit-making misconduct is socially and economically harmful, the public authorities have provided in such cases for much more dissuasive civil penalties.

In matters of competition, Article L. 442-6 of the French Commercial Code thus allows the judge to impose a civil fine of up to €5m in the event of restrictive practices. This fine may be increased in proportion with the profit derived from the restrictive practice, up to 5 per cent of the author's turnover in France, excluding taxes. Restrictive competitive practices are numerous and include the sudden termination of an established commercial relationship, or the attempt to impose obligations on a business partner that create a significant imbalance in the rights and obligations of the parties.

The reach of civil fines could soon be further expanded by the projected reform of civil liability, which provides – in the future Article 1266-1 of the Civil Code – that 'in non-contractual matters, where the perpetrator of the damage has deliberately committed a fault with a view to obtaining a profit or a saving [lucrative misconduct], the judge may order them to pay a civil fine'. The fine may not exceed ten times the amount of the profit made. If the liable party is a legal entity, the fine may be increased up to 5 per cent of the amount of the turnover, excluding taxes. In this latest version of the draft reform, the scope of civil fines has been limited to 'non-contractual matters', which should not be underestimated. It covers, for example, misconduct committed prior to the signing of a contract (misleading advertising or fraudulent behaviour).

Risks associated with a general application of civil fines

The mechanism of civil fines is not uniform. For instance, there are variations with regard to the amount of the fine or its beneficiary (the Treasury and, in some cases, a specific compensation fund). More fundamentally, the persons entitled to apply to a court for the application of a civil fine also differ according to the hypotheses.

Thus, in matters relating to restrictive practices, only the Minister of Economy and the Public Prosecutor's Office may ask the court to order a civil fine. This is an important filter, although there is nothing to prevent the victim from soliciting the Minister of Economy or the Public Prosecutor's Office for this purpose.

The project for the reform of civil liability, for its part, allows the victim of the lucrative misconduct to request a civil fine, in addition to the Public Prosecutor's Office. Although

the text provides that the judge must give a specially reasoned decision on the civil fine, this possibility offered to the victim will most certainly be used to encourage the defendant to settle. The defendant will thus be encouraged to award a large amount

of damages to the victim as a settlement, in order to extinguish the risk of a civil fine if the action takes its course. It will therefore be necessary to closely monitor the parliamentary debates on the projected reform on this point in particular.

Theory and reality in the international litigation practice

This contribution deals with the European Union Member States cross-border notification system currently laid down by the Regulation (EC) 1393/2007 of the European Parliament and of the Council, dated 13 November 2007, on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, and repealing Council Regulation (EC) 1348/2000 (the ‘Service Regulation’) under the particular light of a Spanish case concerning the language requirement and the refusal to accept a document, and how this matter has evolved to date.

The facts

The case involved an insurance claim by subrogation against a German subsidiary in Spain and its parent company in Germany. The writ of summons and the statement of claim were officially translated into German, but the attached exhibits (evidence) written in Spanish, English and French were not. Under the Spanish procedural rules, the exhibits must be accompanied to the statement of claim.

The German parent company refused to accept the documents arguing that it did not speak or understand the languages in which the exhibits were written, and that the Service Regulation entitled it to receive a complete set of exhibits translated into German. In short, that the service was defective for that reason.

The claimant sought a ruling by default from the court if the German defendant did not enter an appearance and answer

the claim within the period prescribed by the Spanish procedural law. Such ruling would prevent the defendant from answering the claim and participating thereafter in the lawsuit, albeit the defendant could participate if it appeared at a later date, but only from that time onwards. The claimant understood that the translation requirement extended only to the writ of summons and the document instituting the proceedings (the statement of claim).

The Spanish court dismissed the application for the default ruling and the subsequent appeal of the claimant. It relied on its own personal interpretation of Article 8 of the Service Regulation, on domestic procedural rules and on ‘common sense’, to conclude that any exhibits or attachments to the document instituting the proceedings had to be translated for the benefit of the defendant, so that the defendant could prepare its defence adequately. Otherwise, the rights of the defence would be undermined. The court, therefore, required the claimant to produce a German translation of all exhibits that added up to several hundreds of pages, substantially increasing costs and time.

The Spanish court ignored or, to say the least, re-interpreted the autonomous definition of ‘the document instituting the proceedings’ as interpreted by the Court of Justice of the European Union (CJEU) and, particularly, its judgment in *Ingenieurbüro Michael Weiss und Partner GbR v Industrie und Handelskammer Berlin* (the ‘Judgment of 2008’). The original case involved a contractual dispute for damages in Germany instigated by a German client against an English architect.

Jorge Angell

LC Rodrigo, Spain
jangell@
rodrigoabogados.com

Rossana de la Cruz

LC Rodrigo, Spain
rdelacruz@
rodrigoabogados.com

The Judgment of 2008 concerned the former Regulation (EC) 1348/2000 of 29 May 2000, but it is equally applicable to the current Service Regulation. The German court had sought a preliminary ruling since the English defendant complained that the service was defective because the annexes had not been translated into English. This position was not shared by the German court. The relevant question submitted by the German court was whether Article 8(1) of the Service Regulation must be interpreted as meaning that the addressee of a document to be served does not have the right to refuse to accept service where only the annexes to the document are not in the language of the Member State addressed, or in a language of the Member State of transmission which the addressee understands.

As a preliminary point, the court clarified that among the several documents to which the Service Regulation applies, the case concerned a ‘document instituting proceedings’.

The Service Regulation, which must be given an autonomous interpretation so that it may be applied in a uniform manner throughout the EU, should reconcile two interests: the protection of the rights of the defence and the need to improve and expedite the transmission of documents, the refusal of which is confined to exceptional situations. The Court considered that a ‘document instituting proceedings’ must consist of the document or documents, where they are intrinsically linked, enabling the defendant to understand the subject matter and grounds of the claimant’s application and to be aware of the existence of legal proceedings in which he/she may assert his/her rights. Consequently, the information to be translated would not include every item of documentary evidence which makes it possible to prove the various facts and points of law on which the claim is based. It follows that documents which have a purely evidential function and are not necessary for the purpose of understanding the subject matter of the claim and the cause of action do not form an integral part of the document instituting the proceedings within the meaning of the Service Regulation.

The Court also emphasised that it is for the national court to determine whether the content of the document instituting the proceedings enables the defendant to assert his/her rights in the Member State of transmission and, in particular, to identify the subject-matter and the cause of action

as well as to be aware of the existence of the legal proceedings. The national court is entrusted with the task to resolve the problem in the light of its national procedural law, taking care to ensure the full effectiveness of the Service Regulation, in compliance with its objective, while according maximum protection to the interests of both parties to the dispute.

Clearly, the Spanish court took the view that the annexes were necessary for the defendant, not necessarily to understand the subject-matter of the claim and the cause of action, but to be able to prepare its defence despite that the annexes had a purely evidential function. The court’s approach was surprising since the statement of claim extended to more than 100 pages explaining in detail the subject-matter and the cause of action.

Evolution of the matter

Study on the application of the Service Regulation

A study on the application of the Service Regulation was published in 2014. It was based on 465 responses out of 13,375 invitations to participate in the relevant survey(s) extended to different stakeholders involved in the use of the Regulation. The following conclusions are noteworthy:

- the impact of the undeniable technical quality of the Service Regulation has been undermined by the lack of knowledge about its practical application by the professionals, bodies and institutions of the different Member States, who frequently are not familiar with the Service Regulation;
- there is no qualitative progress in comparison with the situation under the previous Service Regulation;
- there is still much room for improvement;
- there is no uniform application of the Regulation within the EU;
- major dysfunctions of the Service Regulation appear where there is a referral to national rules and traditions. Further uniformity of procedural solutions is required to achieve the aims and objectives of the Service Regulation;
- the current situation poses a risk of incoherent use of EU Regulations by legal practitioners. This risk should be prevented to establish an efficient European judicial area.

The Study also contained a suggestion for the amendment of Article 8(1) of the

Service Regulation. The proposed wording, however, did not define ‘document instituting proceedings’ neither in the sense set forth in the Judgment of 2008, nor in any other.

Case law further to the Judgment of 2008

To the authors’ knowledge, there has been no further decision since dealing specifically with the autonomous meaning of ‘document(s) instituting proceedings’.

There are, however, a few decisions that refer to *Ingenieurbüro Michael Weiss und Partner GbR v Industrie- und Handelskammer Berlin* on certain aspects of Article 8 of the Service Regulation but which do not address the issue of interpretation of ‘document(s) instituting proceedings’. These decisions do not reverse the rationale set forth in that judgment as to the autonomous meaning of ‘document(s) instituting proceedings’, which does not include annexes that have a purely evidential function, provided the document allows the defendant to identify the subject-matter of the claim and the cause of action. In fact, they seem to confirm it.

The first one is *Alpha Bank Cyprus Ltd v Dau Si Senh and Others* dated 16 September 2015. The second judgment is *Alta Realitat SL v Erlock Film ApS and Ulrich Thomsenmade*. In the latter case a Spanish court sought a preliminary ruling where a Danish defendant had refused to receive the document instituting proceedings on the basis that he did not speak or understand English, which was the language of several exhibits. The judgment quoted the previous case law and noted that the document must enable the defendant to be aware of the judicial proceedings brought against him and to identify the subject-matter of the claim and the cause of action.

On a side note, the judgment confirmed that once the defendant has refused to receive the document, the national court may decide on whether the defendant understands the language of the document instituting proceedings. In the case considered, the Danish defendant had argued that he did not understand English. The court found supporting evidence that he understood English perfectly well, it considered unjustified the refusal and applied the consequences of the applicable national procedural rules.

Proposal of the EC dated 31 May 2018 regarding the Service Regulation

On 31 May 2018, the EC issued a Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents). Regarding Article 8 of the Service Regulation, in line with existing case law, the proposal suggests to improve the procedure on the right of the addressee to refuse to accept the document if it is not drawn up or translated into an appropriate language.

The proposed amendment of Article 8 makes it clear that the Service Regulation solely applies to the document instituting proceedings, but it does not define what should be understood by that. Particularly, it does not seem to clarify whether the annexes to such a document that solely have an evidentiary function must be translated.

Recital 6 states that the court seised with the legal proceedings in the course of which the service became necessary, should verify whether the refusal of the document was justified. For that purpose, that court should consider all the relevant information on the file or at its disposal in order to determine the actual language skills of the addressee.

The issue is, however, whether the annexes that have a mere evidential function which must be attached to the claim as required by the applicable procedural law, need to be translated. In line with the existing case law, it would not be necessary to the extent that the document instituting proceedings clearly identifies the subject-matter and the grounds of the claim. In the Spanish case considered which related to a claim against a German parent company, the statement of claim ran to more than 100 pages, leaving no doubt whatsoever about the subject-matter and the grounds of the claim, and yet the court deemed that all annexes had to be translated.

In this context, in the absence of a clear definition of ‘document instituting proceedings’, there is the risk that national courts impose the translation of the evidentiary exhibits if they deem that a translation is necessary for the defendant to understand the claim and prepare an adequate defence. A uniform and consistent interpretation throughout the EU is not guaranteed to be achieved any time soon.

Conclusion

Considering the existing case law on the Service Regulation, each national court in the EU can opt for a solution of its own, without having to rely necessarily on the autonomous definition of ‘document instituting proceedings’. In fact, the degree of discretion is substantial. The proposal for the amendment of the Service Regulation, although it is clearly confined to a document or documents instituting proceedings, does not seem to increase certainty.

It is, therefore, for the claimant to decide if he/she wants to take the risk of not translating the annexes. Irrespective of how clear and exhaustive the document instituting proceedings may be, which would be enough to avoid the translation of the annexes in

the light of existing case law, it is advisable to file a translation thereof. Otherwise the proceedings could be stayed for a long time while the refusal to accept the document is sustained and decided by the national court.

Notes

- 1 Ordinary proceedings 826/2009, Section C, Court of First Instance No 5 of Gavá, Barcelona.
- 2 EU:C:2008:264.
- 3 EU:C:2008:264, para 64.
- 4 EU:C:2015:603.
- 5 EU:C:2016:316. As explained in para 44, the Court may give its decision by a reasoned order where the answer to a question referred to the Court may be clearly deduced from existing case law.
- 6 COM(2018) 379 final. The proposal is pending approval by the Council and the European Parliament.
- 7 Ordinary proceedings 826/2009, Section C, Court of First Instance No 5 of Gavá, Barcelona.

Josep Gálvez

Galvez Pascual, Spain
josep@galvezpascual.com

Doctrine of *force majeure* arising from bank intervention: A comment of the judgment of 30 October 2018 of the Andorran High Court of Justice

Force majeure (*força major* o *cas fortuit*, in Catalan) has its origins in the concept of Roman law of *vis major*. As set by the Civil Chamber of the Andorran High Court of Justice in its judgment of 27 November 2014, the doctrine of *force majeure* is based on certain unforeseeable or foreseeable but unavoidable circumstances, beyond the debtor’s control, making performance inadvisable, commercially impracticable, illegal, or impossible.

This article examines the application of this doctrine to an exceptional case regarding the intervention in support of *Banca Privada d’Andorra* (BPA). During a brief period, BPA’s instability, one of the main Andorran companies, led to a critical situation for the bank, forcing the authorities of the Principality to quickly intervene and transfer

BPA’s non-toxic assets to a bridge firm, *Vall Banc*, which was eventually auctioned and acquired on 14 July 2016 by the United States investment firm, JC Flowers & Co.

As a result of these exceptional circumstances, claims have been brought before the Andorran courts by BPA’s clients who were affected in their transactions by this unexpected situation. In a landmark judgment of 30 October 2018, the High Court of Andorra decided on one of these claims and considered the consequences of the Andorran Authorities’ intervention in support of BPA.

The facts

On Tuesday, 10 March 2015, the US Department of the Treasury’s Financial Crimes Enforcement Network (FinCEN)

issued a notice identifying BPA as a ‘primary money laundering concern’ under section 311 of the USA Patriot Act. The same day, FinCEN also issued a Notice of Proposed Rulemaking recommending imposing on BPA the special measure provided for in section 5318(b) (5). These measures were based on information indicating that, for several years, high-level managers at BPA had knowingly facilitated transactions on behalf of third-party money launderers acting for transnational criminal organisations.

On 11 March 2015, following the notice filed by FinCEN on BPA, the Andorran National Institute of Finance (INAF), Andorra’s former financial watchdog, decided to precautionary suspend the Chief Executive Officer and the Board of Directors of BPA from their duties, and appointed three joint provisional directors. INAF, which exercised regulatory authority over the financial sector prior to the Andorran Financial Authority (AFA), adopted precautionary measures consisting, in summary, of (1) the provisional suspension of all members of the Board of Directors of BPA; (2) the provisional suspension of three members of the general management of BPA; and (3) The appointment of three persons as joint provisional administrators of the firm. These measures were adopted by INAF in view of possible deficiencies in BPA’s praxis regarding the prevention of money laundering.

Nevertheless, the next day, BPA issued three bank cheques that were delivered to the claimant, Mr C. The first two for US\$2,010,000 and €3,360,000, after making the corresponding charge in his account. A third cheque, for US\$4,150,000 was charged to Mr C’s sole proprietorship company account at BPA. On the same day, Mr C cashed all three bank cheques on his company’s account held at another bank (the ‘Sued Bank’). These amounts were reflected in the Sued Bank’s books with corresponding annotations as accounting notes pending confirmation by the interbank clearinghouse. The following day, on Friday, 13 March 2015, the Sued Bank presented the cheques to the clearinghouse.

The next working day, that is, Monday, 16 March 2015, the official Andorran Gazette (BOPA) published a Decree of the Head of Government approving temporary precautionary measures concerning BPA’s operational customers (the ‘Decree’). The Decree authorised its provisional administrators to set quantitative limits on the

free disposal of balances, current accounts, credit accounts, as well as the transfer, endorsement or assignment of exchange bills.

The provisional administrators made immediate use of the powers granted by the Decree and, on the same day, limited the quantitative disposal by BPA’s clients to €2,500 per account per week. As a result, the cheques issued by BPA could not be cleared, given that their amount far exceeded the imposed quantitative limitation.

On 26 March 2015, the provisional administrators also filed an application for BPA’s receivership before the first instance court (*Batllia*) given the firm’s operational impracticability. Moreover, on 16 April 2015, the recently created Andorran State Agency for the Resolution of Entities (AREB) adopted the Resolution Plan that transferred BPA’s assets to bridging entity *Vall Banc* and ultimately its sale.

First instance judgment

Faced with the situation of his bank cheques not being cleared, on 15 April 2016, Mr C, along with his sole proprietorship company, filed a lawsuit against the Sued Bank based on breach of contract before the Andorran civil first instance court (*Tribunal de Batlles*) requesting the termination of the banking agreement and the payment of the outstanding cheques in the amounts of €3,360,000, US\$2,010,000 and US\$4,150,000, plus accrued interest and court costs.

The first instance court substantially upheld the lawsuit filed by the plaintiffs. Firstly, the judge declared the termination of the agreement for breach of contract by the Sued Bank. Secondly, the court stated that the amounts of the cheques had to be returned to the plaintiffs’ accounts at BPA. Finally, the court declared that the free disposal of these amounts by the plaintiffs had to be subject to the provisions of Law 8/2015 which regulates a procedure for the transfer of assets and liabilities to the bridging entity (*Vall Banc*), also ordering the defendant to pay court costs.

The decision of the High Court

Both parties appealed the first instance judgement before the Andorran High Court of Justice, which upheld in part the appeal filed by the Sued Bank, reversing the judgement of the first instance court.

In its decision, the Andorran High Court first considered, among others, the following points:

- the narrow temporal margin between the issuance of FinCEN's note on BPA and the implementation of the legal instruments to manage the crisis of the entity that included amongst others, the creation of AREB and the approval of a plan to ensure the stability and efficiency of banks and other Andorran financial institutions operating in the financial system;
- the fact that the BPA's accounts of the plaintiffs were not transferred to the new bridging bank, *Vall Banc*;
- the lack of formal evidence that BPA had reversed the transaction derived from the issuance of the three cheques.

Having noted the preceding, the High Court then considered whether there had been a default of payment of the cheques attributable to the Sued Bank. Given the evidence, the High Court concluded that the non-payment of the cheques was not attributable to the defendant.

Before analysing the case, the High Court considered whether it was necessary to specify the plea requested by the claimants and identify whether they were demanding the resolution of the payment obligation by the Sued Bank or its fulfilment. Contrary to the decision taken by the First Instance Court, the Andorran High Court confirmed that the plaintiffs were demanding the performance of the payment obligation by the Sued Bank (ie, payment of BPA's cheques on their account opened at the Sued Bank).

Having identified the specific claim by the plaintiffs, the High Court finally considered whether there was a breach of payment of cheques by the Sued Bank, concluding that the failure to pay the cheques was not attributable to the defendant due to *force majeure*.

The High Court considered it incomprehensible that on the day following INAF's decision to dismiss BPA's Board of Directors, cheques for such high amounts were issued and delivered to the claimant, who handed them to the Sued Bank and ended at the clearinghouse.

However, the High Court held that, from that moment onwards, the situation was no longer in the hands of the Sued Bank, and given the events, the clearinghouse was also unable to clear the cheques within the usual 48 hours (between Friday 13 and Monday 16). Thereafter, that is, the next working day of Monday, 16 March 2015, the Decree had already entered into force, conferring powers on the provisional administrators to take precautionary measures, which they

immediately did and as a result of which it was no longer possible to clear BPA's cheques.

The High Court concluded that the Sued Bank was faced with a *force majeure* case, which, although foreseeable (following INAF's decision to suspend BPA's Board of Directors on 11 March), was also unavoidable as it followed the Decree of 16 March. Therefore, the Decree prevented the three cheques from reverting back to Mr C's accounts at BPA, given the very high value of each cheque, which was significantly above the limits set by the provisional administrators. Consequently, it was the result of governmental and later legislative decisions, taken in an extremely exceptional situation due to the risks of non-intervention for the stability and reputation of the Andorran financial system.

The High Court further held that if there was no breach of contract attributable to the Sued Bank, the payment requested by the plaintiffs could not be granted either. It considered that in the absence of the state's intervention in support of BPA, the claimants would have had the sums claimed in their account at their free disposal. However, in view of the intervention, the procedure provided for in Law 8/2015 had to be followed for each client's account as it would otherwise lead to a result contrary to the law and the equal treatment of all other clients affected by the situation of BPA.

Comment

This case provides a useful analysis of the doctrine of *force majeure* and its application to bank transactions in Andorra, particularly as it relates to the exceptional circumstances of the Andorran authorities' intervention in support of BPA. It is particularly helpful in the sense that the High Court considered the specific timeline of the facts and BPA's cheque-clearing procedure in relation to the decisions taken by the authorities the same date. As the High Court pointed out in its judgment, there was no breach of contract as the defendant was under a *force majeure* situation. Although foreseeable, it was unavoidable as soon as the Decree entered into force, allowing the new directors to immediately set the limits for the transfer of money and thus frustrating the cheque clearance. This terminology echoes the common law doctrine of *frustration* whereby a party is relieved of any liability under a contractual agreement in the event of a breach of contract where a party to the

agreement is prevented from, or unable to, perform the obligations under the agreement, due to some event which occurs, which was outside of their sphere of control due to supervening illegality. The doctrine of frustration should be borne in mind in this case as an exception to the Sued Bank's duties under the *pacta sunt servanda* principle, which arose when the Andorran new regulation was passed and made the performance of the contract illegal and beyond the parties' control. As a consequence of this act of government, the agreement became impossible to perform, thus discharging the Sued Bank from its contractual liability.

Notes

- 1 The Andorran High Court of Justice or *Tribunal Superior de Justicia d'Andorra*, in Catalan, is the highest court in the Principality of Andorra for all matters not pertaining to the Andorran Constitution (which is monitored by the Constitutional Court) and is ultimately responsible for the uniform interpretation of private law jurisprudence in Andorra.
- 2 *Force majeure* is an expression universally used in French and familiar to civil law jurists. Although it is unusual to Common Law lawyers, other theories, such as impossibility, frustration of purpose and impracticability, come to practically the same result as *force majeure*. According to Black's Law Dictionary, *force majeure* is defined as 'An event or effect that can be neither anticipated nor controlled'.
- 3 Pursuant to section 311 of the of the USA Patriot Act, FinCEN is authorised to designate foreign financial institutions as being 'of primary money laundering concern' and to take any of five 'special measures' against institutions so designated. FinCEN can impose the most severe, fifth special measure – allowing it to prohibit or restrict domestic financial institutions from opening or maintaining correspondent accounts for designated foreign financial institutions – only by issuing a regulation under the Administrative Procedure Act.
- 4 By Law 12/2018 of 31 May 2018, INAF was renamed the Andorran Financial Authority (AFA), also assuming the supervision of the insurance and reinsurance sector.
- 5 Law No 8/2015 of 2 April 2015 on Urgent Measures to Implement Mechanisms for the Restructuring and Resolution of Banking Institutions encompass a set of rules applicable to the restructuring and resolution of banks, in line with Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms.

The Convention on the Contract for the International Carriage of Goods by Road and Food Safety: an original Luxembourg ruling

Hervé Michel

Bonn Steichen & Partners, Luxembourg
hmichel@bsp.lu

The issue recently before the Sixth Chamber of the Luxembourg District Court was who should pay for loss and damage caused by stowaways.

Demonstrating pragmatism but also originality, the Court handed down a decision that adds a new dimension to the jurisprudential structure built up over more than five decades around the application of the Convention on the Contract for the International Carriage of Goods by Road (CMR). It is therefore interesting to take a look at this ruling, especially since Luxembourg's decisions in this area are few and far between.

The case pitted a famous Italian agri-food company against an Austrian transport

company to which it had entrusted the transport of food products.

The transport contract, subject to the CMR, concerned the transport of 26 pallets of praline boxes between Germany and the United Kingdom. The chocolates were individually wrapped in aluminum foil, arranged by 24 in a hard plastic box, and grouped by six in boxes placed on pallets and wrapped in plastic film.

At the British checkpoint and before the truck boarded the ferry to Dover, the police discovered the presence of 14 stowaways in the truck's trailer. Once they had disembarked from the truck, it continued to its destination where the consignee refused to take delivery of the cargo. The inspection of all pallets

revealed that the upper layers had compressed, that some cartons were soiled and that some cartons had been opened and their contents eaten or destroyed. Some clothing was also found on the floor of the trailer.

The Italian agri-food company, the shipper, took the decision to destroy the entire cargo and brought an action for liability against the Austrian transport company, the carrier, who refused to compensate it. The case was brought before the Luxembourg Court, which had jurisdiction under a jurisdiction clause contained in a framework contract binding on the parties.

After having declared itself competent on the basis of this jurisdiction clause and having held that a presumption of liability was incumbent on the carrier from which it could not be exonerated on the basis of Articles 17 (2) and 17 (5) of the CMR, the Luxembourg Commercial Court examined the extent of the damage suffered by the shipper, namely the question of the total or only partial loss of the goods.

This is the most interesting point of this decision. The shipper claimed reimbursement for the entire cargo on the grounds that it had been obliged to destroy it completely, because the products intended for human consumption had been compromised.

The shipper availed itself in particular of the provisions of Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs (the 'Regulation') which provides that food safety is the responsibility of food business operators and aims to ensure the hygiene of foodstuffs at all stages of the production process, from primary production to sale to the final consumer.

Chapter IX of the Regulation, entitled 'Provisions applicable to food', states in point 3 that: '*At all stages of production, processing and distribution, food is to be protected against any contamination likely to render the food unfit for human consumption, injurious to health or contaminated in such a way that it would be unreasonable to expect it to be consumed in that state*' [emphasis author's own].

The shipper also relied on an expert report prepared at the request of its insurer, in the

presence of representatives of both parties. In the report it was stated that the migrants: 'move[d] all over the pallets and broke some of the top layers and opened some of the cartons. Due to these facts, in our opinion the goods are contaminated and cannot be sold without risk for the consumers. [...]. As a consequence of the above legislation [ie, the Regulation] when food is considered unsafe, like in the present case, business operators are obliged to withdraw or recall it to avoid even the risk of food being unsafe which is destined to human consumption and that must comply with the highest standard of hygiene. Consequently we have been recommended the destruction of the contaminated goods'.

For its part, the carrier argued that there were four layers of protection before reaching the food product, so it seemed obvious that the entirety of the goods could not have been affected by the stowaway's presence given the amount of packaging surrounding the products. The carrier also argued that tests could and should have been performed by the shipper to determine which products were at risk to the consumer.

The Court, after approving the conclusions of the expert, ruled that the precautionary principle on food matters requires the withdrawal of the goods in accordance with the Regulation and that it cannot burden the consignor with proof of positive demonstration of microbiological contamination of the entire cargo, insofar as such examination would entail in particular an exorbitant cost of analysis.

The Court, guided by a well-written and very convincing expert report, granted the shipper's claim for compensation for the entirety of the goods transported.

This decision highlights the precautionary principle that the food producer cannot take any risk in terms of quality and safety. This is not only for its brand image but also for consumer safety.

Note

- 1 Commercial Judgment 2019 TALCH15/00372, Case N°TAL-2017-00987.

Where does it hurt? Italian court recognises EU Court of Justice principles on international jurisdiction and the ‘place where the harmful event occurred’

One of the most debated issues in international legal literature and case-law concerns the determination of jurisdiction when different connecting criteria may potentially apply.

The general criterion for the assignment of jurisdiction under the European Union Regulation No 1215/2012, also known as the ‘Brussels I bis’ Regulation, is the domicile of the defendant. According to Article 4 of the Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. The Regulation also provides for certain exclusions to the general criterion of the domicile of the defendant.

Pursuant to Article 7 of the Regulation, in matters relating to tort, delict or quasi-delict, a person may be sued in the courts for the place where the harmful event occurred or may occur, even if domiciled in a different Member State. This special jurisdiction criterion is based on the existence of a particularly close link between a given dispute and the courts of the place where the harmful event occurred, or is likely to occur, which justifies the attribution of jurisdiction to such courts, in order to grant a proper administration of justice and procedural economy.

In that context, taking account of the place where the damage occurred enables the particular court which is most appropriate to deal with the case to take jurisdiction, in particular on the grounds of proximity and ease of taking evidence.

The potential time and space gaps which may occur between the harmful event and its consequences may give rise to transnational controversies in which the plaintiff claims his right before his national courts, assuming that he/she had suffered damages in his/

her country, while the defendant favours a restrictive interpretation of the criteria of the ‘place where the harmful event occurred’.

The European Court of Justice (ECJ) clarified the meaning of ‘place where the harmful event occurred’, stating that the latter could refer both to the place where the damage occurred and to the place where the event generating the event occurred. However, this notion could not be extensively interpreted as to include any place where the harmful consequences of an event that already caused damage in another place could be felt. Therefore, the place where the injured party claims to have suffered injury as a result of an ‘initial damage’ occurred in another State cannot be considered as the ‘place where the harmful event occurred’.

In compliance with the ECJ principles, the Italian *Corte di Cassazione*, by Judgment No 27164/2018 dated 26 October 2018, stated that only the place where the causal event has directly produced its effects towards the immediate victim can be considered the ‘place where the event occurred’. The Court of Cassation also clarified that, in case of tort, delict or quasi-delict, the ‘place where the harmful event occurred’ is the place where the causal event, generating the liability of a crime or an offence, produced its direct damages, regardless of the place where the victim may suffer future consequences. For the purposes of jurisdiction, the Italian Supreme Court attaches importance to the distinction between ‘damage-event’ and ‘damage-consequence’.

In view of the statement by the Italian Court of Cassation, the place of the harmful event coincides both with the place where the action or omission took place and with the place of the initial damage, whereas the

Giovanni Gigliotti

Pavia e Ansaldo Studio Legale, Rome
giovanni.gigliotti@pavia-ansaldo.it

Maurizio Vasciminni

Pavia e Ansaldo Studio Legale, Rome
maurizio.vasciminni@pavia-ansaldo.it

Giada Russo

Pavia e Ansaldo Studio Legale, Rome
giada.russo@pavia-ansaldo.it

additional damage arising as an indirect consequence of the same action or omission is considered irrelevant. Therefore, the decision of the Italian Court of Cassation denies that the *locus commissi delicti* can be identified with the place where the patrimony of the victim is affected by the (indirect) consequences of the damage event.

With its judgment, the Italian Court of Cassation intends to avoid the proliferation of the so-called ‘forum shopping’ which may

allow the plaintiff to sue the defendant before the national court that best suits its interests instead of the one having the strictest relation to the dispute.

Notes

- 1 ECJ, Judgment of 16 July 2009, Case C-189/08, *Zuid-Chemie*.
- 2 ECJ, Judgment of 11 January 1990, Case C-220/88, *Duméz France and Others v Hessische Landesbank and Others*; EU Court of Justice, Judgment of 16 July 2009, Case C-189/08, *Zuid-Chemie*.

Chiara Bicci

Grimaldi Studio Legale,
Milan

CBicci@grimaldilex.com

Enterprises face new risks under new Italian law on class actions

Italian Law No 31 of 12 April 2019 introduced noteworthy changes to the provisions on class actions as provided by the Italian Consumer Code. Such modifications aim at expanding the scope and the reach of the Code. The new provisions shall come into force 12 months after publication in the Official Gazette (ie 19 April 2020) and shall apply to all wrongdoings occurred after such date, without any possible retroactive effect.

The new rules, enshrined in the Italian Code of Civil Procedure¹ allow not only consumers and users, but also anyone with a claim for damages arising from the infringement of individual and homogeneous rights, to file a class action against corporations, public companies or public services’ providers for actions committed in their activities. Such an action might be initiated even by a single component of the class, as well as by entities and associations enumerated in a public list published by the Italian Ministry of Justice, in order to ascertain the liability (whether in contract, tort or otherwise) and obtain a sentence against the defendant company, which will be forced to provide compensation and refund.

The proceedings, which consist of three phases – admissibility of the lawsuit, judgement on the merits and settlement of the amount due to those undertaking the class action – will begin with a motion to be

filed with the Business Courts in the district of which the defendant holds its registered office. Said proceedings must follow the rules set forth by article 702-*bis* and the Italian Code of Civil Procedure on proceedings for interim relief, without any possibility of change in the procedural rules.

One of the important novelties is the possibility of joining in the class action (the so-called ‘opt-in’), not only after the decree allowing the lawsuit to be brought before the court, but also after a judgment has been rendered in the case, asserting the defendant’s liability. Such a circumstance – as well as the defendant’s obligation, in the event of a successful action by the plaintiffs, to provide further relief (adding to the sums already paid as a result of the judgment rendered in favour of the plaintiffs of the original class action) to the common representative of the participating parties as well as to the plaintiff’s attorneys – has brought many critics to consider such class action excessively punitive toward companies.

The new legal framework, also introducing some rules on collective enforcement proceedings² and on collective prohibitory injunction,³ is clearly aimed at expanding the scope of application, both in subjective and in objective terms, of a set of rules which, until today, has experienced little success in Italy due to its compelling requirements, which

had rendered it quite difficult to employ, therefore frustrating its effectiveness as a means of protection for consumers.

As a consequence, companies will increasingly risk being subject to collective actions seeking to sanction misconducts in various areas (eg, for environmental damages or health damages). This may be further complicated by:

- the difficulty in determining the true scope of the new class action, in terms both of the number of participants and of the exact amount of compensation companies will have to disburse;
- the power vested in the courts to use statistics and rebuttable presumptions in order to determine possible liabilities;
- the risk for the company to be subject to document production requests for corporate documents, in a shortened discovery phase (albeit with the adoption of proper guarantees against the disclosure of sensitive information); and
- the adverse publicity resulting from the publication of the notice of the action as

well as the final judgment on the Ministry of Justice's portal.

As a result, companies (as potential defendants in a class action) will be encouraged to settle, either on an individual or on a collective basis, disputes through out-of-court agreements, or even to engage in virtuous and socially responsible behaviours, increasing preventive measures. The introduction of these new rules – with the risk of strongly penalising Italian businesses, as well as encouraging speculative operations and determining a noticeable increase in litigation – has caused considerable concerns among Italian entrepreneurs. Only practical implementation and future experiences will show if these concerns materialise.

Notes

- 1 Title VIII-*bis*, on 'Collective proceedings', art 840-*bis* to 840-*sexiesdecies*.
- 2 Italian Code of Civil Procedure, art 840-*terdecies*.
- 3 *Ibid*, art 840-*sexiesdecies*.

Are television broadcasters responsible for unauthorised advertising of medical devices? The ruling of the Italian Supreme Court

Roberto Plutino

CMS, Rome

roberto.plutino@

cms-aacs.com

The Italian Supreme Court has recently ruled on a case involving the unauthorised advertising of a medical device by a television broadcaster.

The Italian Law on Medical Devices¹ in article 21 provides that advertising aimed to the public is: (1) prohibited for devices that can be purchased only with a medical prescription; and (2) must be authorised by the Ministry of Health for devices freely purchasable by consumers. The product that is the object of the dispute was a medical device that could be purchased without a prescription, and therefore it would have

been necessary for the advertising to be authorised by the Ministry.

The unauthorised advertising was disseminated by a television broadcaster and the Ministry of Health imposed an administrative fine to the manufacturer under article 201 of the Royal Decree No 1265 of 27 July 1934, as amended. The fine from the Ministry was not only imposed on the manufacturer, but also on the television broadcaster in its role of content provider.

Both the manufacturer and the broadcaster contested the fine before the Court of First Instance, which rejected their applications, since:

(1) the sanctioned conduct was no longer a criminal offence; and (2) it was not proven that the advertised device fell within the definition of a 'medical device'.

The decision was challenged before the Court of Second Instance which, while partially stating the erroneous conclusions of the judge of the First Instance, still rejected the appeal by the Ministry of Health. The judges of the Second Instance affirmed that: (1) the disputed conduct was no longer a criminal offence, but that it would instead be punished with an administrative fine; and (2) the device fell within the definition of 'medical device' since it was advertised stating that it was able to 'produce positive effects on physiotherapy rehabilitation, with benefits also to the skeletal and respiratory apparatus, to the nervous system, to the circulatory system'. However, the Ministry's appeal was ultimately rejected because it would not be possible to 'find any responsibility for the directors of the television broadcaster with reference to the legal obligation to monitor the contents of the broadcasted programs'.

The reasoning of the Court of Second Instance was based on a strict interpretation of Legislative Decree No 177 of 31 July 2005, which refers only to the responsibility of the newscast's directors. The responsibility of the television broadcaster's director on the content of the advertisements (except for 'obscene' material) should therefore be excluded.

The Ministry of Health appealed to the Supreme Court against the ruling of the Second Instance, claiming that from the set of rules applicable to the dispute, the television broadcaster should be responsible.

The Supreme Court decided on 7 May 2018 with the ruling No 10892, affirming the television broadcaster's responsibility.

The judges first stated that the definition of 'service provider' provided by the Italian Audiovisual Media Service Law applies to the television broadcaster's director and that the 'teleshopping service' must also be considered as an advertisement.

However, the argument used by the Court to establish the responsibility of the service provider did not consider the provisions of the Italian Audiovisual Media Service Law to be decisive, but rather referred to the interpretation of the sanction provided for in article 201 of Royal Decree No 1265 of 27 July 1934 as carried out by the Court itself in some previous decisions.²

The Court stated that the spirit of article 201 also included the protection of 'the broader and the delicate relationship between the source of information and citizens, which is a public interest of fundamental constitutional importance'. This interest remained the basis for the fine, and therefore had to be applied to both the manufacturer of the advertised device and the television broadcaster used for public dissemination of such advertisement. The Court also added that the natural person responsible for the publication, that is, the director, should be considered the author of the unlawful act.

In conclusion, this case establishes that the service provider bears the obligation to 'verify that the contents disseminated to the public, do not infringe the rules aimed to protect the interest in the correctness of advertising information of products that can affect collective health'. The importance of the protection of consumers' health is such that it imposes a supervisory burden on all the subjects involved in the processes concerning medicines. The Supreme Court extended this burden even to the broadcaster, which is, by definition, a mere service provider, on content that is disseminated through its broadcast. With the decision No 10892/2018, the Supreme Court has affirmed a principle that could be particularly incisive in the fight against unauthorised advertising by adding a 'filter' and imposing an obligation of control on all service providers involved.

Notes

- 1 Legislative Decree No 46 of 24 February 1997.
- 2 Decisions No 7775/1996 and No 1168/1993.

Aircraft objects and the International Registry: how and where to discharge improperly registered interests

Catherine Derrig

McCann FitzGerald,
Dublin

Catherine.Derrig@
mccannfitzgerald.com

Georgina O’Riordan

McCann FitzGerald,
Dublin

Georgina.ORiordan@
mccannfitzgerald.com

The International Registry for International Interests in Mobile Equipment (the ‘Registry’)¹ established under the Cape Town Convention (the ‘Convention’)² permits individuals and organisations to register ‘international interests’ in certain ‘aircraft objects’. The Registry is used to electronically record international interests for the purpose of establishing the priority of those interests. A clear benefit of the Registry is that the risk of lending against such assets can be better assessed and steps taken to reduce risks around enforceability of security.

The recent Irish High Court decision in *Unicredit Global Leasing Export GmbH v Business Aviation Ltd*³ demonstrates again the flexibility of approach of the Irish courts when accepting jurisdiction in applications seeking to procure the discharge of improper registrations from the Registry. Pursuant to Article 44.1 of the Convention, the Irish courts enjoy exclusive jurisdiction to make orders against the Registrar as the Registry has its centre of administration in Ireland.

Before examining the Irish jurisprudence, the following is a high-level overview of relevant aspects of the Convention and the Registry.

The Convention and the Registry

Under the Convention, the Registry was created to allow for the electronic recording of international interests and for establishing priority between them. The Convention and the Aircraft Protocol⁴ set out an international legislative framework allowing for the creation, registration and enforcement of security and other interests in aircraft objects as well as dealing with issues of priority between such interests.

The Registry operates on the basis that if an interest in an aircraft object is registrable under the Convention but is not registered

on the Registry, that interest will not have priority over a later interest in the same aircraft object which has been registered. The registration system is, for the most part, concerned with consensual rights and interests arising under security agreements, title reservation agreements, leasing agreements and (through the Aircraft Protocol) outright sales. Such registrations are made with the consent and input of the parties to the underlying transaction.

However, it is also possible to register certain legal rights and interests which are not created by agreement but are instead registered unilaterally, called registrable non-consensual right or interests (‘RNCRI’s’). A RNCRI is registrable pursuant to a declaration deposited by a contracting state under the provisions of Article 40 of the Convention. If a registrant seeks to rely on the declaration of a particular contracting state, it must establish that, under the laws of the contracting state, it holds an interest that falls within the scope of that declaration. Declarations made under Article 40 typically cover judgments or orders permitting attachment of equipment covered by the Aircraft Protocol and state liens for taxes or unpaid charges. A typical example of an RNCRI would be a lien registered by a judgment creditor.

In addition to certain administrative fees related to holding a Registry account, the fee for registering an interest with the Registry is currently US\$100. Article 40 registrations involve a multi-step process and, provided the Registry has no queries in relation to a registration application, are typically processed in a few days. The ability to register interests on a non-consensual basis opens up the possibility of registrations being made under the RNCRI process which lack proper legal foundation

but instead are made illegitimately, or strategically directed at extracting a benefit from an owner or operator in return for removing a registration. In this context, it is important to note that the Registrar has a purely administrative function and does not verify any individual registration made. As a result, disputes can arise in and around the unilateral registration of RNCRI's.

Where such a dispute does arise, the Convention envisages that as a first step, the parties should seek to resolve the matter without recourse to the courts. Article 25(4) of the Convention provides that: 'Where a registration ought not to have been made or is incorrect, the person in whose favour the registration was made shall, without undue delay, procure its discharge or amendment after written demand by the debtor delivered to or received at its address stated in the registration.'

Where a demand under Article 25 of the Convention is unsuccessful, proceedings can be brought under Article 44(2) seeking a discharge of the registration. It provides that: 'Where a person fails to respond to a demand made under Article 25 and that person has ceased to exist or cannot be found for the purpose of enabling an order to be made against it requiring it to procure discharge of the registration, the courts referred to in the preceding paragraph [courts of the place in which the Registrar has its centre of administration, ie, Ireland] shall have exclusive jurisdiction, on the application of the debtor or intending debtor, to make an order directed to the Registrar requiring the Registrar to discharge the registration' [emphasis author's own].

An application to court can also be brought under Article 44(3), which provides that:

'Where a person fails to comply with an order of a court having jurisdiction under this Convention or, in the case of a national interest, an order of a court of competent jurisdiction requiring that person to procure the amendment or discharge of a registration, the courts...' [of the place in which the Registrar has its centre of administration, ie, Ireland] ..'may direct the Registrar to take such steps as will give effect to that order' [emphasis author's own].

It is the application of these provisions concerning disputes around RNCRI's that are giving rise to a growing body of case law in Ireland.

Cases coming before the Irish courts

The Irish courts have demonstrated a willingness, in appropriate circumstances, to make orders directed to recalcitrant respondents and the Registrar to discharge invalid or improper registrations. The practice has been to make an order against the registrant directing it to procure the discharge of the registration, and at the same time make an order against the Registrar, to give effect to the order made against the registrant in the event that the latter does not comply with the order made against it.

The first case to come before the Irish High Court was *PNC Equipment Finance LLC v Aviareto Ltd and Link Aviation LLC*.⁵ The application was made under Article 44(3) of the Convention. In that case, a US court had already declared a RNCRI invalid and directed that it be discharged. This order was not complied with. The applicant brought successful proceedings in Ireland to compel the respondent to procure the discharge of the registration. The court also stipulated that in the absence of any appeal by the registrant, if that party did not discharge the registration within a specific time period, the Registrar should do so. The court also ordered that the registrant pay the costs of the applicant and the Registrar.

In *Transfin-M v Stream Aero Investments SA and Aviareto Ltd*,⁶ the applicant served a demand on Stream Aero Investments under Article 25 in respect of a RNCRI. That respondent did not comply and the applicant commenced proceedings seeking an order that Stream Aero Investments discharge the registration or, in the event of continuing non-compliance, directing the Registrar to discharge it.

The proceedings were of note as the identity of Stream Aero Investments was known and it had not ceased to exist (so Article 44(2) did not apply) and no court of competent jurisdiction had directed an amendment to or discharge of a registration (so Article 44(3) did not apply). However, the Irish High Court was satisfied to accept jurisdiction in the matter on the basis that certain alleged torts had been committed in Ireland, being slander on title, malicious falsehood and misrepresentation by submitting an invalid registration to the Registry which was maintained in Ireland. The order being sought therefore was, in substance, an injunction as to an activity performed within the jurisdiction. The High Court ordered Stream Aero Investments to procure

the discharge of the registration within a specified time, failing which the Registrar was to do so. The court also restrained Stream Aero Investments from making any other registration in respect of the aircraft concerned without an order of the court permitting it to do so and made various costs orders against it.

*Belair Holdings Ltd v Etole Holdings Ltd and Aviareto Ltd*⁷ was the first contested case to be heard by the Irish High Court revolving around a RNCRI. Again, although the dispute did not obviously fall within Articles 44(2) or 44(3) of the Convention, the High Court was satisfied that it could accept jurisdiction in the matter. It ultimately concluded that there was no valid RNCRI and made the usual order directing Etole Holdings to procure the discharge of the registration within a specified time failing which the Registrar should do so.

As mentioned above, Article 25(4) of the Convention provides that where a registration ought not to have been made or is incorrect, the person in whose favour the registration was made shall 'without undue delay' procure its discharge or amendment after written demand. Etole Holdings argued that the demand in this case that a discharge be 'procured within 24 hours' did not conform to Article 25(4). However, the High Court held that the obligation to procure the discharge was not affected by the setting of a legally ineffective time limit. The court reasoned that, had that respondent replied to the demand in a substantive manner, the fact that it could not give effect to the discharge within 24 hours could not have given rise to any complaint on the part of the applicant.

The most recent case of *Unicredit Global Leasing Export GmbH v Business Aviation Ltd and Aviareto Ltd*³ also concerned a RNCRI. Finding that there was no proper basis for the registrations, the court made orders directing the respondent to discharge the RNCRI and directing the Registrar to give effect to the order made against the respondent in the event that the latter did not comply within 48 hours.

The court found that there were no connecting factors to the Convention in this case as neither the debtor nor the aircraft were registered in contracting states to the Convention. The court held that the non-applicability of the Convention was a sufficient ground in itself to order the respondent to remove the registrations.

The court, for completeness, went on to consider whether the respondent's claim

was one capable of registration under the Article 40 declaration made in this instance by the United Arab Emirates (UAE). The court found that the only claim which the respondent could conceivably assert was an *in personam* claim, which was not capable of being registered under an Article 40 declaration. Thus, the court found that even if there was a relevant connecting factor with the Convention, this would not give rise to a right to register an RNCRI. The court also found that in any event the claim did not fall within any of the categories of RNCRI, the subject of the UAE declaration.

Finally, the court considered its jurisdiction to make the orders sought. The court was satisfied that it had jurisdiction to make an order against the respondent in light of (1) Regulation 5.4(f) of the Regulations and Procedures for the International Registry, which expressly requires, as a condition to the registration of an RNCRI, that the registrant agrees to submit to the jurisdiction of the courts where the Registrar has its centre of administration; and (2) the court in *Transfin* held that the court had jurisdiction against a non-EU respondent on the ground that the proceedings related to a tort committed within the jurisdiction and that the order sought was, in substance, an injunction as to an activity performed within the jurisdiction.

The court was also satisfied that it had jurisdiction to make an order directing the Registrar to give effect to the order made against the respondent in the event the latter did not comply in light of the provisions of Article 44(3), the long-standing practice of the court, the evidence in the case as to the manner in which the registrations were effected and the ongoing failure or refusal of the respondent to discharge the registrations.

The applicant also sought an order restraining the respondent from registering any further RNCRI against the relevant aircraft. The court commented that the mere fact that an applicant had succeeded in an application to require a registrant to discharge a registration did not, of itself, provide any basis for the grant of such an order. The court acknowledged that there might be circumstances where it was entirely appropriate to make such a restraining order, for example, where it had been demonstrated that a registration was effected abusively, such that a registrant might involve itself in further unconscionable registrations against the same aircraft.

The court noted that the registration in this case contained a false statement that the state of registry of the aircraft was the UAE and that there was no arguable basis that the claim could fall within the Article 40 declaration made by the UAE. The court also noted documentary evidence of the RNCRI was not submitted to the Registry as required. The court concluded that there would be a proper basis to find that the registration here was registered abusively and therefore good grounds on which to make a restraining order, but deferred making any order until the Registrar had an opportunity to make submissions.

Conclusion

The registration of an invalid or unregistrable interest on the Registry can have serious negative consequences for aircraft owners, lessors and financiers. It may cast doubt on the title of those parties to an aircraft object, the value of security

taken over that object and, in practical terms, may frustrate its sale to a third party. As can be seen from the foregoing cases, the Irish High Court has shown itself willing to make orders upholding the integrity of the Registry and plays a significant role in the ongoing success of the Convention in so doing. The Irish courts are well attuned to the objectives of the Convention and have demonstrated and developed a clear jurisprudence to protect and vindicate parties' rights in accordance with the terms of that instrument.

Notes

- 1 www.internationalregistry.aero/ir-web/.
- 2 The Cape Town Convention on International Interests in Mobile Equipment, 2001.
- 3 [2019] IEHC 139.
- 4 Protocol to the Convention on International Interests in Mobile Equipment in Matters Specific to Aircraft Equipment.
- 5 Unreported, High Court, 19 December 2012.
- 6 Unreported, High Court, 18 April 2013.
- 7 [2015] IEHC 569.

Orçun Çetinkaya

Moroğlu Arseven,
Istanbul
ocetinkaya@
morogluarseven.com

Burak Baydar

Moroğlu Arseven,
Istanbul
bbaydar@
morogluarseven.com

Turkey: mandatory mediation for commercial disputes

Turkey introduced new legislation which came into effect on 1 January 2019 providing for mandatory mediation as a prerequisite for commercial disputes before pursuing the dispute via the Turkish court system. The Law on Starting Legal Proceedings for Monetary Receivables Arising from Subscription Agreements No 7155 published in the Official Gazette No 30630, dated 19 December 2018, introduced new provisions to the Turkish Commercial Code No 6102 (TCC) and the Law on Mediation in Civil Disputes No 6325 (the 'Mediation Law').

As per the recently adopted legislation, parties to a commercial dispute pertaining to monetary receivables cannot bring their case before a court unless the mandatory mediation process is completed and a final report is issued by the mediator putting forth the parties' failure to settle the dispute. The parties must firstly apply for mediation; otherwise, the

case will be dismissed on procedural grounds without further examination of its merits.

The scope of mandatory mediation

The mandatory mediation requirement will apply for acts and operations deriving from private law at the parties' free disposal, in other words, matters that can be solely settled by a judge cannot be subjected to commercial mediation.

According to the recently introduced article 5/A of the TCC, it is mandatory to apply for mediation with regards to commercial lawsuits regulated under article 4 of the TCC and other legislation concerning monetary receivables and compensation claims. As per article 4 of the TCC, lawsuits arising from the following are considered as commercial lawsuits and within the scope of the mandatory mediation:

- issues regulated under the TCC;
- certain articles of the Turkish Code of Obligations;
- relevant articles of the Turkish Civil Code regarding pawn brokers;
- certain regulations under intellectual property legislation and legislation concerning banks and other financial institutions.

In addition, mediation is mandatory for issues and lawsuits that are not expressly stated under article 4 of the TCC that involve parties that are merchants on both sides of the dispute and disputes concerning the commercial enterprises of said parties.

With regards to cases that are within the scope of the abovementioned commercial disputes, mediation is prescribed as a compulsory prerequisite before filing a lawsuit. According to the Mediation Law's article 18/A-2, if such cases are filed without applying to mediation first, the courts must dismiss the case on grounds of absence of prerequisite without any further examination. With regards to lawsuits outside the abovementioned scope, parties can still choose to resolve their disputes through voluntary mediation. However, since mediation is not mandatory in these instances, filing a lawsuit without applying for mediation cannot be construed as a reason to dismiss the case at hand on procedural grounds due to non-fulfillment of the mediation precondition.

Similarly, mandatory mediation is not a prerequisite for provisional remedies such as interim injunction and interim attachment requests, however, as per the newly introduced article 18/A-16 of the Mediation Law, if such requests are granted by courts of first instance prior to filing a lawsuit, the term of litigation (two weeks and seven days respectively) stipulated under the Code on Civil Procedure No 6100 (CCP) and the Code of Execution and Bankruptcy No 2004 (CEB) will not lapse until the preparation of the final record by the mediator.

Pursuant to article 18/A-18 of the Mediation Law, if mandatory arbitration or alternative dispute resolution methods are prescribed for certain disputes under special laws or in the event of the existence of an arbitration agreement between the parties, these mandatory mediation provisions will not be applied.

Finally, as per provisional article 12 of the TCC, mandatory mediation will not be applied with regards to cases pending before courts of first instance, regional courts of justice and the Court of Cassation as of the date of these regulations' entry into force.

Effect of the new regulations on litigation

Under article 115 of the CCP, the existence of the precondition of mediation will be taken into consideration *ex officio* by the court and the parties to the dispute can argue the non-existence of such precondition at any stage of the proceedings.

In line with these general provisions set forth under the CCP, article 18/A-2 of the Mediation Law dictates that if a lawsuit is brought before the court without applying to mandatory mediation, the case will be dismissed on procedural grounds without any further examination of the merits of the case.

As per article 18/A-15 of the Mediation Law, during the period between the application to the mediation bureau and the preparation of the final report by the mediator, limitation periods and final terms will be suspended.

The mediation procedure

According to article 18/A of the Mediation Law, mediation applications will be made to the mediation bureau within the jurisdiction of the competent court with regards to the subject of the dispute at hand and a mediator will be selected by the mediation bureau from a list presented to the relevant presidency of justice commissions unless the parties agree on a mediator ranked within the list.

Upon the appointment of the mediation by the mediation bureau, the mediator can call the parties for an initial meeting during which the other party can put forth a jurisdiction plea regarding the jurisdiction of the mediation bureau and, in this instance, the case will be sent to the competent civil court of peace where the competent mediation bureau will be determined within one week and a new mediator will be selected.

As per article 5/A of the TCC, the mediation process will be completed within six weeks beginning from the appointment of the mediator, and this period can be extended for maximum of two weeks if deemed necessary by the mediator.

According to article 18/A-11 of the Mediation Law, if mediation fails due to one party's non-participation in the first mandatory session held by the mediator without a valid reason, this situation will be recorded in the final report by the mediator and such party will bear the total cost of the proceedings even if the court rules in its favor.

If the parties reach an agreement, the necessary expenses of the mediation will be paid by the parties equally, unless decided otherwise, and if the parties fail to settle these, expenses will be borne by the party against whom the court rules. However, in the event that the parties fail to reach an agreement, the mediator fees for the first two hours will be paid from the budget of the Ministry of Justice.

As per article 18/A-2 of the Mediation Law, if the parties fail to reach a settlement, the plaintiff must include the final report prepared by the mediator displaying that the parties have duly carried out the mediation process but failed to reach an agreement and a lawsuit can be filed before the competent courts of first instance.

In the event that the parties reach an agreement, a document of understanding will be signed by the parties and the mediator in accordance with article 18 of the Mediation Law. The parties can request an annotation regarding the enforceability of the document of understanding from the competent civil court of peace. As per article 18/4 of the Mediation Law, the document of understanding that is signed by the mediator and the parties along with the parties' attorneys does not require an annotation of enforceability. The document of understanding that is signed by the parties with an enforceability annotation or signed by the mediator and the parties along with their attorneys will be deemed to serve as a court judgment and can be enforced in the same manner. Consequently, the parties will not be able to file a lawsuit on the same subject.

Final notes

There remains some debate surrounding these new rules and, in particular, the scope of mandatory mediation as defined under article 5/A of the TCC. While the text of the article suggests that this new requirement can only be applied for lawsuits regarding receivables and compensation claims, it is also argued that these new provisions should be applied to other actions concerning monetary disputes, particularly negative declaratory actions and recognition and enforcement of foreign court judgments given the purpose and objective of the regulations.

In our view, arguing that a final foreign court decision must be subject to mandatory mediation would undoubtedly be against the prohibition of *revision au fond* which precludes courts from reviewing the substance of the decision rendered by a foreign court. This prohibition is expressly acknowledged in Turkish law by the Turkish Court of Appeal's General Assembly on the Unification of Judgements' decision which is binding for all Turkish courts of all levels.¹ Such prohibition, which is binding for courts on all levels, would be *a fortiori* binding for mediators. These issues would surely be discussed in time by case law and practice of the Court of Cassation.

The new legislation, once it has been fully established, will provide a time and cost-efficient alternative dispute resolution method for parties while decreasing the workload of the courts.

Note

- 1 Turkish Court of Appeal's General Assembly on the Unification of Judgements' decision dated 10 February 2012, No 2010/1 E, 2012/1 K.

Foreign litigants – legal aliens in the Ukrainian court

The contemporary ways of doing international transactions require parties to be flexible in different aspects of contractual arrangements, and dispute resolution provisions embedded into the contracts make no exception to this. For this reason, parties often enter into binding jurisdictional clauses opting for state courts to resolve any possible disputes arising out of their underlying transactions. In such circumstances, the designated mechanism may establish jurisdiction of state courts of one of the parties, while another party at the time of contracting might have no clue what the litigation in the foreign court means.

This article provides an overview of the main features foreign companies must consider when opting for litigation in Ukraine. Essentially, any foreign party participating in litigation in Ukraine is being provided by law with the same scope of procedural rights and obligations as any local company. Any differences, however, caused by the foreign background of one party, are efficiently governed by special law provisions to make the foreigner feel as much at home as possible. More details on this follow.

Choice of court agreements

Enforcement of choice of court agreements in Ukraine has always been quite a controversial matter. Over the time, Ukrainian courts have developed a more or less consistent approach towards recognition of choice of court agreements determining that such an agreement could be enforced where there was a clear indication of a particular court in the chosen state to consider the disputes between the parties.

On 21 March 2016, Ukraine signed the Hague Convention on Choice of Court Agreements but has not yet ratified it. Additionally, the new Commercial Procedure Code of Ukraine entered into force on 15 December 2017, changing regulation of choice of court agreements. In practice, this means that domestic courts, when dealing with the matter, must craft a whole new

approach towards the matter. As the latest court practice demonstrates, the process has already started and yields positive results.

In the recent case of *Coveris Rigid Ukraine v Coveris Rigid Polska*, the Ukrainian Supreme Court considered whether choice of court agreements are enforceable in Ukraine and under which circumstances. In the given case, a Ukrainian company, Coveris Rigid Ukraine, lodged claims against a Polish company, Coveris Rigid Polska, with the Ukrainian commercial court to invalidate assignment agreements signed between the two companies. Each of the agreements in question contained a choice of court agreement in favour of Polish domestic courts at the place of residence of the Polish company. Although the parties established the jurisdiction of the Polish courts, they did not specify which exact court in the Polish judiciary should consider the case.

The Supreme Court, when considering the issue, confirmed that choice of court agreements, referring the dispute with a Ukrainian party to resolution before a foreign court, are generally enforceable despite the missing identification of a specific foreign court authorised to resolve the matter. In substantiating its position, the Supreme Court stated that in deciding upon its jurisdiction to consider the case where one party is a foreign entity, the commercial court must consider rules enshrined in bilateral international agreements on legal assistance and other international instruments in force. In the case at hand, the Supreme Court referred to the 1993 Agreement between Ukraine and the Republic of Poland on legal assistance and legal relations in civil and criminal matters. This Agreement, among others, provides for the right of parties to agree upon the jurisdiction of which court will extend to their disputes. The Supreme Court, thus, noted, that when the issue of choice of court arises, the primary source to consider is contained in international instruments in force for Ukraine, which typically regulate the matter favourably to prorogation.

Markian Malsky

Arzinger, Kiev
Markian.Malsky@
arzinger.ua

Oksana Karel

Arzinger, Kiev
Oksana.karel@
arzinger.ua

Daryna Hrebeniuk

Arzinger, Kiev
Daryna.Hrebeniuk@
arzinger.ua

Notification of Ukrainian court proceedings abroad

One of the most striking procedural peculiarities for foreign litigants in Ukrainian court proceedings is the service of documents.

Ukraine is a party to the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. The Convention applies to the service of documents of Ukrainian court proceedings on foreign companies-respondents registered in any of the other 73 contracting states. Ukraine has made several reservations to the Convention, amongst which are restrictions to the means of notification. In particular, Ukraine does not recognise service of judicial documents directly per post, direct exchange between judicial officers of two countries, or direct notification by the interested person through the judicial officer of the state of destination.

Establishing applicable law and its contents

Under Article 5 of the Law of Ukraine on International Private Law (the 'PIL') the parties to the contractual relations may choose the law, governing their relations. In practical terms, Ukrainian courts generally adhere to the choice of law provisions that the parties agreed upon. In the most recent years, Ukrainian courts had an extensive experience of deciding cases upon foreign law provisions, including those of England and Wales, Germany and Austria.

If the parties failed to decide on the law applicable to their underlying transaction, the applicable law is determined by the court. In such a case, the court takes into account the bilateral agreements in force between Ukraine and the respective foreign state as well as conflict of laws rules, enshrined in the PIL.

At the same time, Ukrainian law allows the court to deviate from the parties' choice on applicable law in cases when the contents of foreign law cannot be established in reasonable time. In such circumstances, Ukrainian law shall apply but, in practice, Ukrainian courts generally do not trigger this provision.

When applying foreign law, Ukrainian courts establish the content of such law in accordance with its formal interpretation, its application in practice and its related doctrine in the respective state. To this end, Ukrainian law determines several ways on how to establish the contents of a foreign law, for example:

(1) the court may, at its own initiative or at the request of a party, file a formal request with the competent state authority of the foreign state concerned (typically the Ministry of Justice); or (2) a party may file documents confirming the contents of applicable law. When helping the court to establish the contents of foreign law, parties may on their own initiative obtain excerpts from applicable foreign law provisions/ case law and provide them to the court. Such excerpts must be duly certified and translated into Ukrainian. Practice shows that, depending on the details of the case, such excerpts may be sufficient for the court to establish the content of foreign law.

With entry into force of the new Commercial Procedure Code on 15 December 2017, the parties obtained procedural instrument in proving to the court the contents of foreign law. Particularly, the parties may now submit to the court opinions of experts on foreign law. At the same time such opinions are not treated as evidence but are of a supportive nature to the court.

Security measures in favour of foreign claimants

Ukrainian law allows foreign litigants to request security measures against Ukrainian counterparties. The principal requirements, standard of proof and criteria for granting interim relief do not vary from those applicable to Ukrainian nationals.

For a Ukrainian court to adopt security measures requested by the foreign entity, the latter will have to set out relevant circumstances triggering the necessity to introduce security measures and provide relevant proof and the court will decide upon the matter at its own discretion.

The difference with foreign litigants is the requirement established by law to provide security for cross undertaking. The cross undertaking will only be imposed if and when the request for security measures is granted.

As to the means of cross undertaking, the court typically requests that a creditor credits the amount, which the court considers appropriate, to its deposit account. Under certain circumstances, the court may request provision of bank guarantee, surety from a financially sound Ukrainian company or taking any other actions as it deems desirable.

Currency of monetary claims

The issue of a claim in foreign currency litigated in Ukraine has been causing some uncertainty over the past years. The reason for this uncertainty arises from the obligation imposed on a claimant to indicate the equivalent in Ukrainian hryvnia (UAH) as of the date of the statement of claim when such a claim is denominated in a foreign currency.

However, the entry into force of the new Commercial Procedure Code suppressed the obligation to state the UAH equivalent for foreign currency claims. Still, claimants keep on indicating the equivalent in order to facilitate calculation of the court fee (paid and calculated solely in UAH). The Supreme Court explicitly declared that such indication of equivalent shall not be considered as a change of currency and stated that in the case the underlying obligation was denominated in foreign currency, the court shall not have the power to change that obligation in any way, including its currency.

Compulsory enforcement of judgments in favour of foreign entities in the territory of Ukraine

Foreign companies enjoy the same rights as the domestic companies regarding compulsory enforcement. At the same time, certain issues, not encountered by domestic companies, do arise.

As described above, claims, when filed in a foreign currency, usually contain an indication of equivalent in UAH. Even where the court states in the judgment that foreign currency is to be recovered with equivalent in UAH being indicated, enforcement officers often interpreted the indication of the equivalent as an instruction to recover the debt in UAH.

Such enforcement in UAH inevitably caused difficulty in the recovery funds by foreign claimants. Unlike Ukrainian residents, foreigners typically do not hold any accounts in UAH either in Ukraine, or abroad. In practice, this meant that funds, recovered from the debtor in UAH, were credited to the account of the enforcement service and were difficult to be transferred further to the foreign creditor.

The Supreme Court unequivocally determined that in the case where a judgment provides for the recovery in foreign currency, but an equivalent in UAH is fixed, the creditor shall receive the amount indicated

in the judgment in the respective foreign currency and not in UAH.

Conclusion

It follows from the recent legislative developments and case law that Ukrainian procedural law generally puts foreign litigants as legal aliens in state courts in the very same position with their Ukrainian counterparties and provide a fair and efficient dispute resolution mechanism.

Notes

- 1 Article 23 of the Commercial Procedure Code of Ukraine: 'In cases, stipulated by law or international agreement, the binding force of which was consented to by Verkhovna Rada of Ukraine, a dispute, subject to jurisdiction of commercial court, may be referred to the court of a foreign state upon the agreement between the parties'.
- 2 Ruling of the Supreme Court dated 9 January 2018 in case No 910/10109/16.
- 3 Article 33 of the Agreement between Ukraine and the Republic of Poland on legal assistance and legal relations in civil and criminal matters: '1. Obligations, arising out of contractual relations, shall be governed by the laws of the Contracting Party, on the territory of which the contract was concluded, unless the parties subjected their relations to the law, chosen by them. 2. In cases, stipulated in paragraph 1, the court of the Contracting Party, on the territory of which the respondent resides or is registered, shall be the competent court. In case the subject of the dispute or respondent's property is located in the territory of the Contracting Party, in which the claimant has place of residence or registration, court of such Contracting Party shall be competent. 3. Competence, referred to in paragraph 2, may be changed upon the agreement by the parties'.
- 4 Declarations made by Ukraine when acceding to the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.
- 5 Ruling of Commercial Court of Zakarpattia Oblast dated 17 October 2016 in case No 907/1225/15 (application of English law). Ruling of High Commercial Court of Ukraine dated 14 July 2015 in case No 911/379/15 (application of German law). Ruling of Dnipropetrovsk appellate commercial court dated 2 September 2013 in case No 904/4566/13 (application of Austrian law).
- 6 Ruling of Commercial Court of Zhytomyr Oblast dated 5 July 2016 in case No 906/493/16.
- 7 PIL, art 8.4.
- 8 *Ibid*, art 8.1.
- 9 The European Convention on Information on Foreign Law. In force for Ukraine since 14 September 1994. PIL, art 8.2. The courts, when no support is provided by the parties, tend to rely upon the formal request to the competent foreign authority in establishing the contents of foreign law. See, eg, the ruling of the Commercial Court of the city of Kyiv dated 24 November 2017 in case No 910/16535/17. Similar requests, however, entail lengthy proceedings triggering stay of proceedings for four to six months.
- 10 PIL, art 8.3. Commercial Procedure Code of Ukraine, art 108.
- 11 In case No 905/577/18, ruling of the Commercial Court of Donetsk Oblast dated 14 June 2018, the Commercial Court of Donetsk Oblast used printouts of the Civil Code of the Russian Federation from the official website, containing e-versions of Russian legislative Acts.

12 Commercial Procedure Code of Ukraine, art 108.

13 The Code and court practice set a number of requirements for such opinions to be accepted; in particular, the fact that the expert must be a recognised scholar in the matter of foreign law which has to be established and the expert opinion shall not bear any reference to and expert shall not familiarise himself/herself with the case materials or facts.

14 This concerns typically cases where a foreign company does not possess UAH to credit it to the account of the

court, while the court does not have a deposit account in any foreign currencies.

15 Commercial Procedure Code of Ukraine, art 141.

16 Article 55 of the Commercial Procedure Code in the version in force until 15 December 2017.

17 Ruling of the Supreme Court dated 15 March 2018 in case No 638/1841/14-ц.

18 Ruling of the Supreme Court dated 4 July 2018 in case No 761/12665/14-ц.

Valentyn Gvozdiy

GOLAW, Kiev

v.gvozdiy@golaw.ua

Substantial developments in the restoration of lending in Ukraine

Over the past year the pace of lending in Ukraine has gradually started to gather momentum. This is due primarily to the adoption of the Law of Ukraine No. 2478-VIII On Amendments to Certain Legislative Acts of Ukraine Regarding the Restoration of Lending ('Law No. 2478-VIII'). Law No. 2478-VIII introduces important developments to the loan legislation of Ukraine, and above all, to protect the interests of creditors and mortgage holders. Such improvements also have a positive impact on the rights of debtors and mortgagors.

It is apparent that the dynamics of attracting foreign direct and domestic investments into the state economy directly depends on transparency, legal certainty and unity of law and judge-made law as regards to the lending. An unfavourable credit and investment environment threatens prudent secured borrowers who are interested in available credit resources, but due to inadequate credit policies in Ukraine, are deprived of the opportunity to attract bank financing on advantageous terms.

Each foreign or domestic creditor calculates all related risks before starting lending processes. When it comes to resumption of lending, it is first and foremost important that the borrower shall be interested in applying for a loan, as well as in lowering the cost of credit resources, which includes the amount of the interest rate.

Ukrainian judge-made law and law-enforcement practices are less than perfect,

but there are also some positive developments in the resumption of lending. In this article I will provide a summary of how lending renewal has changed and what problems still remain; and further analyse Ukrainian judge-made law and recent legislative improvements.

Legal changes

The law practice of the Supreme Court of Cassation has had an effect on the provisions of the Civil Code of Ukraine (Part 5 of Article 543). The amendments refer to the following: that liquidation of a joint debtor as a legal entity or the death of a joint debtor as an individual shall not alter the separate obligations of the remaining joint debtors to the creditor, and shall not affect the list of loan obligations which significantly reduces the risks for creditors.

Another important amendment concerns loan debt repayment. From now on, any subsequent requirements of the mortgagee concerning the execution by the corporate debtor or individual debtor of the main obligation are valid, unless otherwise provided by the contract. Now, unless otherwise provided by the contract, the creditor may demand the debt repayment in the amount remaining after recovering the object of mortgage but in an extrajudicial way. As for individuals, this rule does not apply by default, since such terms shall be pre-envisaged in the mortgage contract. The judge-made law of the Supreme Court follows the same path. The Supreme Court

(case No. 756/31271/15, ruling of 20 June 2018) took the position according to which the claim to recover from the defendant part of the debt that was not repaid due to the sale of the subject of the mortgage is null and void. However, the appearance of the relevant rules helps to increase creditworthiness and the procedure of loan debt repayment becomes more transparent and predictable for the creditor.

The problem of simultaneous collection of arrears and foreclosure on the subject of mortgages has also been resolved. The Supreme Court has unified the position regarding foreclosure on the subject of a mortgage in a ruling in an action raised to recover arrears under a loan contract. According to the previous judge-made law, the simultaneous collection of the debt amount from the debtor and recovery of the mortgage property belonging to the guarantor was unlawful. It was believed that such actions lead to the recovery in the interests of the creditor of the same debt amount simultaneously from both the debtor and the guarantor. The new Supreme Court has interpreted the simultaneous collection of arrears differently (case No. 921/107/15-g/16, ruling dated 18 September 2018), so that the foreclosure of a mortgage is a distinct requirement from the claim for recovery of arrears. The existence of a court ruling to recover from the debtor in favor of the creditor's debt under a loan agreement is not a ground for termination of the debtor's monetary obligation and termination of the mortgage. From now on the creditor is not deprived of the right to satisfy the claims under the main obligation by recourse to a mortgage in case of a decision to recover the debt. In the case

of execution of one of the court decisions, the main obligation ceases and another executive document is not enforceable.

The problem of determining the initial price of the mortgage item is now agreed. One of the main obstacles to the rapid settlement of such disputes was the question of determining the initial price of the mortgage item, since its indication is a mandatory part of any court decision to enforce a mortgage by its implementation. At the same time such price should be set at a level not lower than the typical prices for such kind of property basing on the evaluating assessment. So, there are some cases when the mortgagors, in order to postpone court decision, question the correctness of the initial property price for its further sale. At the same time, such arguments are taken into consideration by the courts in almost every case. As a result, courts conduct an appropriate examination, and resolution of the case can be delayed by up to one year. But the new Supreme Court (case No. 372/3785/15, ruling dated 27 June 2018) questioned whether it is necessary to conduct such forensic examination and, as a result, has transferred this procedure to the stage of enforcement proceedings and thus made it possible not to indicate the initial selling price of the mortgage item in a court decision.

Over the last year many of the issues relating to mortgage collection have been resolved. Such amendment facilitates the procedure for a foreclosure and clarifies the contradictory position of the Ukrainian Supreme Court in this matter. At the same time, however, some issues remain unresolved; of those, most arise at the stage of execution of a court decision on foreclosure for a mortgage.

Gary Gao

Zhong Lun, Shanghai
gaojun@zhonglun.com

China: the executive's potential liability in litigation and investigations

Companies, as basic units of society, play an important role in the modern economy. The will of the company is implemented by its agents, that is, its executives, and often their interests do not completely coincide.

In practice, it is sometimes difficult to distinguish between an 'individual's' crime and a 'corporate' crime. For example, a company's executive makes a fraudulent transaction with a third party. Has the managing board of the company made a decision to transfer the company's property on purpose? Or, is an individual executive seeking improperly to make a secret profit? In other words, is the company a law breaker or a victim? When the governmental authorities initiate a criminal investigation and/or make accusations of criminal wrongdoing, the companies or individuals often censure or blame each other so as to mitigate their own liabilities. In this respect, therefore, companies and individuals naturally have conflicts of interest, and precisely because of this, companies often set up 'firewalls' with their employees, and especially with senior executives, to try to isolate themselves from employees who are involved in a criminal investigation and/or allegations of wrongdoing or litigation.

When a company is accused of a crime, Chinese criminal law adopts the double-penalty system; that is, in addition to the penalty imposed on the company, the person in charge who is directly responsible and/or other persons directly involved may also face punishment, including imprisonment and/or fines.

Take the well-known bribery case of GlaxoSmithKline (China) Investment ('GSK') as an example. GSK was found guilty of bribing both hospitals and doctors to help promote their products in China, using a network of nearly seven hundred travel agencies to pay medical professionals, health-related organisations, and government officials. In this case, in addition to the

3bn RMB penalty imposed on GSK, five of its senior executives were arrested and subsequently found guilty of bribery. Among them, Mark Reilly, the Legal Representative and Chairman of the Board of Directors of GSK, was sentenced to three years' imprisonment under four years' probation, and deported from China as the person directly responsible for GSK's commercial bribery. The four other senior executives were sentenced as follows: the Director of Human Resources to three years' imprisonment under three years' probation; the Vice President and General Manager of Company Operations in China to two years' imprisonment under three years' probation; the Legal Director in China to two years' imprisonment under two years' probation, and the General Manager of Company Operations in China to three years' imprisonment under four years' probation.

Another significant case in recent years is the Hushi food-safety case. In July 2014, Shanghai Hushi Food, a Western fast-food supplier for McDonald's and KFC, was investigated for using expired and inferior meat. The court found that Shanghai Hushi Food and Hushi Food violated national laws and regulations. In the process of food production and marketing the companies replaced qualified products with unqualified inferior ones, and produced and sold fake and inferior products. As a consequence, Shanghai Hushi Food, Hushi Food and ten senior executives were all charged with the crime of producing and selling fake and inferior products. Shanghai Hushi Food and Hushi Food were each fined RMB1.2m. The ten senior executives involved were sentenced to periods of imprisonment varying from one year and seven months to three years.

During investigation and litigation (including if a company fails to comply with a judgment or order), executives may also risk being restricted from leaving the country or having their assets frozen to prohibit extravagant spending with the purpose of avoiding the enforcement of any judgment, as set out below.

The legal position

According to Article 255 of the Civil Procedure Law of the People's Republic of China (PRC), if the person subject to enforcement fails to fulfil the obligations specified in the legal documentation, for example, a court order, the court may by itself take steps towards or notify the relevant entities to assist in restricting such persons from leaving the country, record in the public credit system or publicise through the media the fact that such persons have failed to perform their obligation, or adopt other measures provided by the law.

Under the Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of Enforcement Procedures under the Civil Procedure Law of the People's Republic of China, issued on 30 January 2015, if the person subject to enforcement is a legal entity, the court may restrict the following natural persons from leaving the country: its legal representative, the principal person in charge or the direct responsible person who can influence the performance of debts. In practice, 'the direct responsible person who can influence the performance of debts' may be widely interpreted to include all senior executives.

According to the relevant provisions in the Administrative Regulations of the People's Republic of China on Entry and Exit of Aliens and the Several Provisions on Lawfully Restricting the Entry and Exit of Aliens and Chinese Citizens, where a person's sentence has not been fully executed, or if they are defendants or suspects in criminal cases, they will not be allowed to leave the country. Equally, where persons are involved in pending civil cases, the court may also decide not to allow them to leave the country.

In practice, the foresaid provisions will have a great influence on senior executives. To be specific, many companies' executives in China may be blacklisted by the creditors of their companies because of the dishonesty of their company or the company's civil disputes with other third parties. As a result, the executives themselves are severely restricted from leaving the country or even restricted from luxury consumption, including not being able to stay in hotels, not being able to take a flight, not being able to take high-speed trains, not being able to open bank accounts, with their children not being able to attend private schools and so on. Executives should therefore try their

best to urge the companies under their management to avoid the occurrence of dishonest behaviour. Once senior executives or their companies are blacklisted, they should inform their lawyers without delay, to ensure timely communications with both creditors and the courts.

Another common measure employed to mitigate risk is Directors & Officers Liability Insurance ('D&O Insurance') cover. Senior executives can benefit from this insurance as an indemnification/reimbursement for losses resulting from a legal action brought for alleged wrongful acts in their capacity as directors and officers. Yet, the D&O Insurance Agreement is normally entered into between the insurance company and the company as a group policy, whereby the executives' personal name will not show up in the insurance agreement. It is recommended that executives make doubly sure with their employer or the company's legal department that they are well covered under the company's D&O Insurance.

Non-PRC companies or companies with overseas investments should comply with both Chinese laws and foreign laws and regulations, such as the clauses stipulated in Sanctions against Iran and in the Foreign Corrupt Practices Act ('FCPA'). The senior executives of such companies may also risk sanction under other jurisdictions if their company is suspected of breaching the laws of that jurisdiction. This is particularly true in light of the escalating trade tension between China and the United States, where arising uncertainties may expose executives to greater risks.

In 2018, for example, a Chinese high-tech company was punished severely by the US government for violating Sanctions against Iran. In addition to costly fines and business restrictions being imposed, the company's management board was also overhauled in mid-2018, in order to comply with the relief agreement with the US Department of Commerce. Coincidentally, one of the top executives of another Chinese telecom giant was arrested in Canada and faced extradition to the US. According to public information, the detention of this top executive came after US authorities reportedly launched an investigation into suspected Iran sanctions violations by this Chinese telecom giant.

Under the FCPA, if the company and its executives are prosecuted at the same time, the foreign-based companies' executives may still face criminal charges and penalties

even if the company has already paid high penalties and reached a plea agreement with the Department of Justice.

In a nutshell, in light of the prevailing national and international business

environment, company executives should be prepared and take precautions against potential legal risks they may face in both domestic and foreign litigation and investigations.

Robert Johnston

Johnson Winter & Slattery, Sydney

Robert.Johnston@jws.com.au

Sara Gaertner

Johnson Winter & Slattery, Melbourne

Sara.Gaertner@jws.com.au

Nicholas Briggs

Johnson Winter & Slattery, Sydney

Nicholas.Briggs@jws.com.au

Recent Australian class action highlights

With a 25-year-old class action regime that is well established for all types of matters (consumer, competition and shareholder claims) and which does not face the significant interlocutory ‘hurdles’ which still beset collective redress in the United Kingdom and the European Union, the Australian class action space continues to evolve rapidly.

More and more funders are attracted to the market and there has been a spike in filings following the somewhat sensational findings flowing from the recent Royal Commission into the ‘bad behaviours’ in the banking and financial services sector.

We briefly summarise below major recent class action developments, further appeals to watch in 2019 and the key recommendations of the recent inquiry conducted by the Australian Law Reform Commission into class action proceedings and litigation funding.

Notable recent cases

Competing class actions

A dominant feature in the recent class action landscape in Australia has been the rapid rise of competing class actions and in particular shareholder class actions. Usually following well-publicised corporate wrongdoing or ‘stock drops’, this occurs where numerous parties represented by their own lawyers and funded by different litigation funders separately commence their own class actions against the same corporate defendant.

Australian courts do not have a North American style process of certification of class actions at a pre-commencement hearing. Instead, it has been left to Australian judges

to grapple with which action ought to proceed and which actions ought to be stayed, and which principles should be applied in coming to a decision – similar to the ‘carriage motions’ in Canada. Suffice to say the situation is still very uncertain and predicting the outcome is fraught. This makes for great uncertainty and is dissuading funders from investing significant sums in claims preparation when they may only have a one in four-or-five chance of ‘winning’. We may well see arrangements being made between lawyers and funders to jointly bring claims to avoid this ‘lottery’ style result.

The GetSwift case

Justice Lee’s decision in *GetSwift* in the Federal Court was the first major decision on this issue. His Honour chose to allow one of three competing class actions to proceed and to permanently stay the two other actions. Justice Lee was particularly attracted to the funding model in the winning action, which was based on the lesser of a multiple of expenses paid (either 2.2 times if settlement is reached on or before 12 April 2019 and 2.8 times after that date) or 20 per cent of the net proceeds. That was a relatively novel funding structure, and it appealed to Lee J because it would ‘prevent windfalls’ to litigation funders, in comparison with more conventional funding fees based on a flat percentage of a settlement sum or judgment. Lee J eschewed factors such as first to file or the equality of the legal firms in that case.

On appeal, the Full Court confirmed the court’s power to permanently stay overlapping proceedings. Other realistic options available include consolidation, declassing orders,

joint trials of all proceedings as open classes (ie, the ‘wait and see’ approach) and closing the classes in one or more proceedings, leaving one as open class, and a joint trial of them all. Which of these options is the most appropriate will depend on the particular case – there is no ‘one-size-fits-all’ approach.

The Full Court also emphasised that the first to file will not be determinative (in part to ‘strongly discourage’ the hasty filing of cases with insufficient due diligence), and that there should not be a ‘rush to the bottom’ in terms of funders’ commissions and legal fees, but rather there should be more focus on selecting the proceeding with a funding and costs model likely to best motivate the applicant’s solicitor and funder to achieve the best outcome for the applicant and class members.

The Applicant sought to appeal the Full Court’s decision in the High Court, but its special leave application was dismissed in April 2019.

BHP

Three separate ‘stock drop’ shareholder class actions were commenced against BHP Billiton Limited and BHP Billiton Plc over the Brazilian dam collapse in 2015 which killed 19 people (related proceedings have been commenced by SPG in the UK seeking US\$5bn). In a December 2018 judgment, Justice Moshinsky sought to apply the *GetSwift* selection principles and chose Phi Finney McDonald (PFM) to lead a class action, staying the two other competing actions (one of which was run by Johnson Winter & Slattery (JWS)). PFM’s action is funded by G&E KTMC Funding LLC, which will be entitled to a commission of ‘an amount less than 18% of the Gross Recovery’. The commission is inclusive of expenses paid by the funder in the course of funding the litigation, including legal costs and disbursements.

This decision was appealed by JWS and Maurice Blackburn. In May 2019, the Full Federal Court adjourned the appeal and gave the parties further time to see whether a joint proposal for the consolidation of the proceedings can be agreed.

Common fund orders

Most class actions in Australia are commenced on behalf of an ‘open class’ of class members who meet a particular group definition set

by the lead Plaintiff. Often, a significant proportion of class members in an open class have not signed a funding agreement with the litigation funder, which means they have no contractual obligation to pay any share of their settlement to the litigation funder.

To encourage litigation funders and lead Plaintiffs to continue commencing ‘open class’ actions, thereby promoting wider access to justice, the courts in 2016 began permitting ‘common fund orders.’ Such orders oblige *all* group members in a class action to pay a commission to the litigation funder, whether a funding agreement has been signed between them or not. Common fund orders have since been widely adopted.

However, the power of the Federal Court and the Supreme Court of New South Wales to make common fund orders was recently challenged. An unprecedented decision was made for the appeals to be heard by both the New South Wales (NSW) state and Federal appeal courts concurrently, which commenced on 4 February 2019. Each court issued judgments at the same time in March 2019, affirming the power of the courts to make common fund orders at any time during a proceeding. However, the cases are both on appeal to the High Court and so there is still a question mark over the power of a court to make common fund orders.

Court turf wars

Five separate shareholder class actions were commenced against AMP arising from adverse evidence given against that company in the Royal Commission. Four were commenced in the Federal Court and one in the NSW Supreme Court. The issue then was which court would claim sole jurisdiction to hear all of the cases. At one stage there were threats of anti-suit injunctions as between the judges and the two courts seeking to prevent the other from dealing with the cases. In August 2018, the Full Federal Court transferred the four class actions commenced in the Federal Court to the Supreme Court of NSW, where it was determined that only one case should proceed (which was consolidated with one of the other five proceedings by agreement between the applicants’ firms), and permanently stayed the other proceedings.

To avoid this unseemly ‘turf war’, the Federal and Supreme Courts are in the process of agreeing protocols for dealing with similar situations in the future.

Scrutiny of costs

The deduction of funding fees and the reimbursement to the funder for legal costs from settlement amounts must be approved by the court. The courts have recently demonstrated greater scrutiny over those deductions. The Victorian Court of Appeal in *Botsman* approved a \$64m settlement but rejected the funder's commission of \$12.8m and legal fees of \$4.75m, sending the matter back to the trial judge to assess the reasonableness of those amounts. Australian Funding Partners Ltd, the litigation funder, sought to appeal this decision to the High Court, but its special leave application was dismissed in May 2019.

This uncertainty increases funding risk and makes it even harder for funders to confidently 'model' returns as part of their initial due diligence and assessment processes before deciding to fund. Notwithstanding the above, the payment of unprecedentedly high funding fees has been approved by the Court in the last twelve months. For example, a litigation funding fee of \$92m was approved by the Court in August 2018 from a settlement of \$215m paid by S&P Global Inc.

Confidentiality of settlement terms

Traditionally, most settlements amounts paid out have remained subject to strict confidentiality terms. However, the courts have recently indicated that even if the parties agree to confidentiality, judges in approving settlements (which is required in class actions) may nevertheless reveal settlement amounts paid out, as well as amounts paid to funders and lawyers, as part of its 'open' justice principle which is important for the public in having confidence in the class action process actions. Both the Victorian Court of Appeal in *Botsman* and Justice Lee in *Liverpool* discouraged wide-ranging confidentiality orders being sought in the context of settlement approvals. They said parties should not assume that such orders will be made by consent, given that settlements of class actions have an important public dimension.

Orders for production of insurance policies

Australian courts have usually been reluctant to order that defendants disclose their insurance policies (and the limits of their insurance) to plaintiffs. This has also, until recently, been the case in class actions.

However, the Federal Court has recently in at least two class actions ordered the defendants to produce their insurance policies. The courts have taken the view that knowledge of likely 'recoveries' assists in the administration of justice, in either facilitating settlements or avoiding expensive cases where there may be no money at the end of the day. This trend will, we think, continue and be a factor insurers will need to take into account.

Settlements and insurance policies

Justice Stevenson's decision in *Bank of Queensland* highlights just how critical the wording of claim aggregation clauses can be in insurance policies in determining how many deductibles apply where companies are faced with 'related' multiple claims, multiple losses and multiple wrongful acts in class actions. Stevenson J found that the Bank of Queensland's (BOQ's) policy aggregation wording was not sufficient and that if 192 separate deductibles of \$2m each (one for each of the class action claimants) were to apply meaning, BOQ was effectively uninsured for the \$12m settlement agreed. This decision has been appealed and brokers and insurers are carefully reviewing their policy aggregation wordings.

Law Reform Commission inquiry

There has been increasing debate in Australia in response to the growing role and prevalence of litigation funders, particularly in class actions, and the related rise in the number of class actions filed. The Australian Law Reform Commission's Report on Class Action Proceedings and Third-Party Litigation Funders was submitted to the Attorney-General on 21 December 2018 and published on 24 January 2019. The Australian Law Reform Commission (ALRC) analysed the current litigation funding landscape against principles of fairness and efficiency, protection of litigants and maintenance of the integrity of the civil justice system, and formulated 24 recommendations to ensure these principles are met. The key recommendations, particularly as to the regulation of litigation funders, include:

- requiring that all class actions be initiated on an 'open class' basis;
- providing the court with an express statutory power to make 'common fund orders' and to resolve competing representative proceedings;
- allowing the Federal Court to appoint

an independent referee to assess the reasonableness of legal costs prior to the court approving settlement;

- allowing the court, where appropriate, to put out to tender the task of administering payments to class members (commonly done by the solicitors for the Plaintiffs) to outside third parties such as accounting firms (the process of assessing class member entitlements and paying class member settlement from the settlement sum);
- creating a statutory presumption that funders will provide security against adverse cost orders in a form that is enforceable in Australia and expressly empowering the court to award costs against funders and insurers who fail to comply with the overarching purposes of the Federal Court of Australia Act 1976 (Cth) (the ‘Act’), which is to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible;
- amending the law to provide that litigation funding agreements will only be enforceable following court approval, and to create an express statutory power for the court to reject, vary, or amend the terms of litigation funding agreements. The report also recommended requiring funding agreements to provide expressly for a complete indemnity in favour of the representative plaintiff against an adverse costs order and an irrevocable submission of the funder to the jurisdiction of the Australian courts;
- strengthening existing measures to mitigate conflicts of interest, particularly in the tripartite relationship of the funder, solicitor and plaintiff or class member; and
- permitting class action solicitors to charge percentage-based or ‘contingency’ fees to enable medium-sized class actions to proceed and provide a greater return to litigants (with a number of limitations including that actions funded by percentage-based fees cannot also be directly funded on a contingent basis).

The ALRC has also recommended a review of the enforcement tools available to regulators, around continuous disclosure obligations and obligations relating to misleading and deceptive conduct.

With the conservative government being returned to power (unexpectedly) in the recent May elections, contingency fees are unlikely to be introduced but there may be

a review of the laws around the continuous disclosure obligations on listed companies, which are some of the most plaintiff friendly in the world.

An inquiry was also conducted by the Victorian Law Reform Commission, with a report tabled in the Parliament of Victoria on 19 June 2018. The report made various recommendations, a number of which are similar to the recommendations made by the ALRC.

Outlook

The pace of development within the class action space in Australia is showing no signs of slowing. Developments to watch out for in the coming six to 12 months include:

- how the courts continue to grapple with and resolve competing class actions and whether we move more towards a US ‘certification’-type model or a Canadian ‘carriage-motion’-type model;
- what action may be taken by the Federal and Victorian governments following the reports arising from the Law Reform Commission inquiries. There is a good chance that there will be a legislative response in areas previously left to the courts, particularly in relation to costs management, resolving competing class actions, and the increased regulation of litigation funders;
- whether the government takes up the ALRC’s recommendation to commence a separate review of the law on continuous disclosure and misleading or deceptive conduct. Any changes arising from such a review would have wide-reaching consequences; and
- the High Court’s decision in the Westpac and BMW appeals, which could have significant ramifications in relation to common fund orders.

Notes

- 1 *Perera v GetSwift Ltd* [2018] FCA 732, delivered on 23 May 2018.
- 2 For example, an action may be commenced on behalf of all persons who bought shares in a company in a particular period and have suffered loss.
- 3 See *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148.
- 4 Arising from orders made in *Lenthall v Westpac Life Insurance Services Limited* [2018] FCA 142 in the Federal Court and in *Owen Brewster v BMW Australia Ltd* [2018] NSWSC 160 in the NSW Supreme Court.
- 5 *Westpac Banking Corporation v Lenthall* [2019] FCAFC 34; *Brewster v BMW Australia Ltd* [2019] NSWCA 35.
- 6 *BMW Australia Ltd v Brewster & Anor* [2019] HCATrans 94;

- Westpac Banking Corporation & Anor v Lenthall & Ors* [2019] HCATrans 95.
- 7 *Marion Antoinette Wignans v AMP Limited; Fernbrook (Aust) Investments Pty Ltd v AMP Limited; Wileypark Pty Ltd v AMP Limited; Andrew Georgiou v AMP Limited; Komlotex Pty Ltd v AMP Limited* [2019] NSWSC 603.
 - 8 *Botsman v Bolitho* [2018] VSCA 278.
 - 9 *Australian Funding Partners Ltd v Botsman & Ors* (M179/2018).
 - 10 See *Liverpool City Council v McGraw-Hill Financial, Inc* (now known as S&P Global Inc) [2018] FCA 1289.
 - 11 *Botsman v Bolitho* [2018] VSCA 278.
 - 12 *Liverpool City Council v McGraw-Hill Financial, Inc* (now known as S&P Global Inc) [2018] FCA 1289.
 - 13 For example, see *Kirby v Centro Properties Ltd* (ACN 078 590 682) [2009] FCA 695.
 - 14 Under a statutory power which allows the court to make orders it considers necessary or appropriate to ensure justice is done in the proceeding: see section 33ZF of the *Federal Court of Australia Act 1976* (Cth).
 - 15 *Bank of Queensland Ltd v AIG Australia Ltd* [2018] NSWSC 1689.
 - 16 *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders: Final Report* (ALRC Report 134, 2018).
 - 17 www.lawreform.vic.gov.au/sites/default/files/VLRC_Litigation_Funding_and_Group_Proceedings_Report_forweb.pdf.

Emily Chappelow

MinterEllison, Perth
emily.chappelow@
minterellison.com

David Suttner

MinterEllison, Perth
david.suttner@
minterellison.com

Michael Hales

MinterEllison, Perth
mike.hales@
minterellison.com

Witness statements abandoned

Witness statements are no longer to be used in the state courts of Western Australia. The decision was announced by Notice on 29 January 2019 and took effect just three days later on 1 February.¹

From now on, the courts will make orders requiring the parties to exchange witness outlines ahead of trial. However, these outlines do not constitute evidence, which will ordinarily be provided orally at trial. Witness statements will only be permitted in exceptional circumstances.

In pending cases where witness statements have already been exchanged, the court's practice is to require evidence of controversial events to be provided orally-in-chief.

Background

The announcement has surprised practitioners. The provision of witness statements substantially in advance of trial was designed to work hand in glove with the pleadings, to narrow the matters in dispute and in turn reduce the length and cost of trials. It was also designed to avoid ambush, allowing litigants to know, well in advance of trial, who would be giving evidence against them and what they would say. These are important matters.

While concerns have been expressed about witness statements in other jurisdictions, including England and Wales, they have not been particularly prevalent in Western Australia; and, while practitioners recognised the significant costs that can be incurred in drafting witness statements,

they still seemed a better alternative than reverting to the old procedure of witnesses providing evidence-in-chief.

Nevertheless, the judiciary felt plainly that witness statements were not achieving their purpose. The Supreme Court's Notice to Practitioners, published on 29 January 2019, states that:

'While the use of witness statements in this Court is intended to promote the efficient and just determination of civil disputes, in practice their use has not always met these objectives. In this regard, the preparation of witness statements and the process of objections can add significantly to the cost of preparation for trial, often without significant benefit to the just determination of the matter. This is particularly so when witness statements do not reflect the witnesses' own words or where they consist largely of the recitation of the documentary record. The inclusion of extraneous material in witness statements also has the potential to lead to unnecessary and lengthy cross-examination.'

So, what has gone wrong with witness statements and are the alternatives any better?

Criticisms

This may be a matter of perspective. As mentioned, there have been growing complaints in Western Australia and in other jurisdictions about witness statements and their ultimate utility at trial. It is said that they are



WITNESS STATEMENTS ABANDONED

too often drafted by lawyers on behalf of the parties; that they are overly long and unhelpful in simply reciting the contents of documents that will be in evidence in any event, and pay insufficient attention to the oral evidence that the witness can give about the key events in question, which cannot be explained by the documents alone. Courts recognise that lawyers spend a great deal of time considering the precise wording of witness statements, and that witness statements have become highly tactical documents. As a result, their value has diminished; there is no longer a perception when reading a witness statement that it is an accurate reflection of the witness' own words, even though the witness will have approved and signed the statement. As such, to the ultimate arbiter of any particular case, they appear to have become of little value.

From a judge's perspective, witness statements therefore do not justify the time and costs involved in their production. Judges would prefer to learn what truly happened by hearing the witnesses explain the events in their own words rather than through the words of their lawyers - which, on occasion, witnesses have been known to disown at trial. In short, judges appear to have lost trust in the statements.

It is possible also that at a policy level, the courts have decided that as only a very small percentage of cases reach trial, the impact of the reform will be of greater utility in saving costs in all of the cases that do not go to trial rather than in the marginal benefit that might arise from having witness statements available in the small number of cases that do go to trial. While evidence-in-chief will add to the length and costs of those trials, this will only arise in a small number of cases.

The practitioners' view may be slightly different. While the views from the bench reflect serious concerns, witness statements were a useful tool in preventing trial by ambush. They were also useful in forcing parties to address events which challenged their cases at an early stage rather than now being able to postpone that until a trial which may never happen. Witness statements were not required to anticipate questions that might arise in cross examination and were often drafted to avoid providing detailed evidence about sensitive events. It was still possible, however, to identify points of weakness which could help in assessing the merits of the case and to inform a settlement.

Further, although there is undoubtedly a significant cost saving in avoiding having to file formal witness statements, lawyers will still

need to take detailed proofs of evidence from the clients and have the same command of the facts. This will be essential in order to be able to successfully examine their witnesses-in-chief. Practitioners would argue that the majority of the costs in producing witness statements arise in the process of factual investigation and recording its outcome rather than in the refined redrafting needed to reduce a proof of evidence to a formal witness statement.

The re-introduction of witnesses providing oral evidence-in-chief will significantly increase practitioners' concerns about witnesses not coming up to proof. Practitioners may also feel that by losing witness statements, they will lose a degree of control about how a trial might proceed. Perhaps this was seen to be a collateral benefit of the reform! Increased risks at trial encourage settlement.

Another concern is that a trial can be unfair if it is simply turned into a test of the respective witnesses' memories. This can particularly be the case where one party feels that they have been seriously wronged in a transaction which, for the other, is simply one of many and therefore not the subject of clear recollection. A misrepresentation case brought by a customer against a bank is a possible example of this. Lord Neuberger commented publicly on difficulties of assessing witness evidence in his 2017 Neill Lecture, reflecting on the lessons that he had learned in his 20 years as a judge.² This included a suggestion that there is an argument that, at least in some cases, it is better to assess the evidence without oral evidence. The Western Australian reform increases the possibility of an earnest, honest but incorrect recollection of events succeeding at trial.

The judiciary's answer to this might be that, at least with commercial cases, courts consider that the documentary evidence provides the most compelling evidence about what took place and that the volume of documentation that now exists in most cases reduces the room for truly important clashes of oral evidence. Judges would also say that they are adept at finding the truth in competing oral evidence and, more importantly, that these clashes of evidence existed anyway regardless of witness statements. The ability of one witness to provide stronger evidence-in-chief than another is counterbalanced by the ability to cross examine, although, of course, the value of the cross examination will depend on the available evidence upon which it is based.

The reform has sought to address the issue of trial by ambush. The court will now

usually make orders requiring the parties to exchange witness outlines ahead of trial, identifying the topics in respect of which evidence will be given and the substance of that evidence (including the substance of any important conversations). These outlines do not become evidence. Orders may be made by the court for the exchange of witness statements which are to stand as evidence-in-chief in circumstances where the court is satisfied that this will better achieve ‘...the objects of efficiency, just determination of litigation and proportionality than if evidence were to be given orally in the usual way.’³

Joining the trend in Australia?

The Western Australian reform follows changes that have taken place in other Australian jurisdictions.

The Federal Court of Australia expects parties to discuss and decide the most effective method of exchanging witness evidence (including whether it should be oral or written), and states that witness evidence should be exchanged to avoid trial by ambush. Parties are also invited to exchange informal proofs of evidence, rather than formal signed witness statements.⁴

In the Commercial Court of the Supreme Court of Victoria, the usual practice is for evidence-in-chief to be given orally, with outlines of the evidence to be exchanged prior to the trial.⁵ In the Supreme Court of New South Wales, evidence is to be given orally in Court (although the Court has the discretion to order the evidence to be given by affidavit or by witness statement instead).⁶

Western Australia has therefore acted consistently with the zeitgeist on witness statements in Australia. It seems possible that England and Wales might follow suit.

England and Wales

In England and Wales, witness statements were first introduced in the High Court in the mid-1980s. In lower courts, evidence-in-chief continued to be provided by oral evidence. In time, the use of witness statements filtered through to other courts and by the mid-1990s it had become the common practice. However, the use of witness statements as evidence-in-chief quickly became the subject of extensive criticism, including that they were just an expensive exercise undertaken by lawyers rather than an accurate and helpful recollection of a witnesses’ evidence.⁷

As long ago as 1996, Lord Woolf remarked that witness statements had ceased to be an authentic account of the lay witness and instead had become an elaborate, costly branch of legal drafting.

In 2010, Lord Justice Jackson prepared a report on civil litigation costs in England. One of his recommendations was that courts should have the power to limit the issues covered and the volume of witness statements. In 2013, the Bar Council of England and Wales called for the eradication of witness statements in some courts, subject to the court’s discretion to use them when they would truly assist.⁸

Conclusion

Civil litigation is so expensive that it is inevitably disappointing when a well-intentioned reform, such as the introduction of witness statements, seems to have failed, at least in the eyes of the judiciary. It is all the more disappointing when the reason for the failure is laid at the door of lawyers for trying too hard to produce documents that were intended to assist their clients in winning the case – which, of course, is what the lawyer is being paid to do.

While it instinctively feels a retrograde step to return to lengthy examination-in-chief, litigation processes have improved in the intervening years. The greater use of statements of agreed facts and chronologies and strong case management might help to limit the events about which oral evidence is to be given and therefore narrow the scope of the examination.

It may therefore not be as much of a return to the past as might first appear. It is essential that civil procedure is kept under constant review to see where efficiencies can be generated. The Chief Justice is therefore to be applauded for a bold reform. As to how it works in practice, watch this space!

Notes

- 1 Supreme Court of Western Australia, Notice to Practitioners dated 29 January 2019.
- 2 Lord Neuberger, ‘Twenty Years a Judge: Reflections and Refractions’ (Neill Lecture 2017, Oxford Law Faculty, Oxford, 10 February 2017).
- 3 Consolidated Practice Directions, practice direction 4.5.
- 4 Federal Court of Australia Central Practice Note 2016 (Cth), 11.
- 5 Supreme Court (General Civil Procedure) Rules 2015 (Vic), order 40 rule 2.
- 6 Uniform Civil Procedure Rules (NSW), rule 31.1.
- 7 James Hope Vintage, ‘Witness Statements: the cost of gilding the lily’ (CDR News, 2014) www.cdr-news.com/categories/arbitration-and-adr/5071-witness-statements.
- 8 Civil Procedure Rules 1998, rule 32.2.

Experts in a hot tub – testifying concurrently as an expert witness

Hot tubs are not usually associated with the provision of expert evidence in court or arbitration proceedings, but the practice of expert witnesses testifying at the same time (concurrently, or in the ‘hot tub’) has been in place in Australia for several decades, and has found some limited favour in the United States Federal Courts.¹ The practice is entrenched in court rules and practice notes in multiple Australian jurisdictions, including the Federal Court,² and has been increasingly taken up in other jurisdictions such as Canada, the United Kingdom, Singapore, and New Zealand, as well as in international arbitrations. So, what is it, how does it work, and is it compatible with fundamental principles of American litigation?³

A flexible process

Wherever it has been used, the process of concurrent expert evidence has been flexible, and the contours of it differ from case to case. The trial judge retains discretion as to how the process will work, but it will typically involve the usual pre-trial disclosures, including expert reports, followed by a pre-trial expert conference (or ‘conclave’), the provision of a joint report, and then oral testimony from the experts, delivered together in the ‘hot tub’ or via a mix of solo and concurrent testimony. The process requires full participation of all parties to be effective as a tool to ‘enhance the efficiency, accuracy and ideally collegiality of the expert evidence process’.⁴

Pre-trial expert conference

The process typically commences in the traditional manner – experts exchange reports, followed by a series of rebuttals and replies. The experts then meet in a pre-trial conference to identify the areas in which they agree and disagree, the latter to be the focus of oral testimony at trial. Lawyers are not usually permitted to attend the conference, and experts are occasionally sequestered until

the joint report is finalised. Discussions in this forum are robust. Although the experts will usually ‘agree to disagree’ on many matters, the process can be extremely useful in narrowing the issues in dispute and provides the experts with a unique opportunity to understand where they have fundamental differences of opinion, and where their opinions might diverge for other reasons such as contrary assumptions.

While the pre-trial conclave is not designed for any expert to strong-arm other participants in the process, lawyers for both parties will carefully prepare their experts for the conference. The experts must attend ready to argue their positions; the discussions are not usually privileged from subsequent disclosure, and a concession by an expert during the conclave can have ramifications for a case (for example, if an expert testified in open court as to an unhelpful comment made by another expert during the conclave, that could be damaging even if the comment is inadmissible hearsay).

Preparation of a joint report

An especially useful part of the process is the preparation of a joint report following the expert conclave. The areas of agreement and disagreement between the experts are documented in a draft report usually prepared by one expert and circulated amongst the other experts for input. The report will be structured according to key topics for expert evidence, and the judge will often be involved in identifying and defining the topics with the parties. The process of swapping drafts of the joint report continues until each party is satisfied that the report satisfactorily describes the areas of agreement and disagreement.

When prepared well, the joint report is an extremely effective method of highlighting the areas where opinions actually differ and allows the court to ensure the focus at trial is on only the areas of continuing

Peter Munro

Quinn Emanuel
Urquhart & Sullivan,
New York
petermunro@
quinnemanuel.com

Alexander Canale

Alvarez & Marsal,
New York
acanale@
alvarezandmarsal.com

disagreement between the experts. Experts can be surprised to find that the true areas of disagreement are very limited. By highlighting where the true debate lies, the joint report also has the potential to significantly reduce the amount of time the experts are required to prepare for and testify at trial. The joint report can also be a very effective tool in settlement negotiations.

Concurrent testimony at trial

At trial, experts testifying concurrently sit together for the duration of the concurrent session(s). Matters of practicality are key – is there enough room for everyone and their materials? How many microphones are available? Who sits closest to the judge? The matter of space is particularly relevant when there are many experts giving evidence concurrently. At times the witness box is abandoned for more spacious areas of the courtroom, such as the jury box for a bench trial.

Lawyers for each party will lead evidence from their expert, which is sometimes undertaken by way of opening statements from each expert, and the parties will then ‘cross examine’ the experts. The process can differ between jurisdictions and depending upon the directions of the relevant court. For example, in the UK, court rules provide that ordinarily:

‘... the judge will initiate the discussion by asking the experts, in turn, for their views in relation to the issues on the agenda. Once an expert has expressed a view the judge may ask questions about it. At one or more appropriate stages when questioning a particular expert, the judge may invite the other expert to comment or to ask that expert’s own questions of the first expert.’⁵

Questioning of the experts is structured around the topics identified through the joint report process, and each expert will testify concerning a particular topic before the court moves on to the next topic. The experts can be asked to comment on evidence given by other experts and are free to ask each other questions. In this way, the various opinions can be lined up against each other in real time, and questions can be directed by the judge or by counsel to understand the impact of assumptions on the various opinions.

The process is much more conversational than a typical cross examination by an adversary’s counsel, with the judge taking an active role, and generally chairing the

discussion. Some lawyers lament the partial loss of control over the process, and view it as diluting the adversarial nature of a trial, by imposing inquisitorial elements controlled by the judge with limited influence of the parties.

Experts, however, can find this atmosphere makes the process of testifying much less daunting than ordinary cross-examination. Expert witnesses have anecdotally commented that part of the effectiveness of the process is that it removes the ‘lawyer filter’, and allows experts to more effectively explain highly technical issues in simple terms. Experts also emphasise the critical importance of ensuring the expert witness has an appropriate personality for the process – and that they will be on equal footing to opposing experts. More experienced experts often perform better in the hot tub, particularly if facing highly regarded experts in their field with intimidating reputations.

Does concurrent evidence have a place in American litigation?

Although other jurisdictions specifically provide for it in procedural rules, in the US, concurrent evidence is not specifically dealt with in the Federal Rules of Civil Procedure or Federal Rules of Evidence. However, district court judges are empowered to ‘exercise reasonable control over the mode and order of examining witnesses and presenting evidence’, including to ‘avoid wasting time’,⁶ and can call and examine witnesses.⁷ The Federal Rules of Civil Procedure themselves should be ‘construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding’.⁸ The process has generally been viewed as consistent with both sets of rules.⁹

For lawyers practicing in the US, the process may be viewed as diluting the expert’s role as advocate, and limiting the ability of counsel to effectively cross examine other parties’ experts. In Australia, the judge’s active role provides a valuable reminder to the experts that they have an overriding duty to the court, in the same way that Australian lawyers owe a duty to the court, and assists the court to understand the key issues by controlling the agenda for the discussion. This duty to the court is a significant difference between the expert’s role and function in litigation in Australia and the US and is one reason why the Australian system

might lend itself more readily to the expert conclave process.

Whether the use of expert evidence will dilute his/her role as advocate will be a product of how the process is applied, and some of the concerns can be met by the parties retaining rights to challenge the admissibility of evidence or conduct a further cross-examination. Despite some concerns, the process has found favour in various US jurisdictions which otherwise have strong adversarial traditions in litigation. ‘Hot tubbing’ has been viewed as potentially playing a useful role at several stages of US litigation, including joint expert conferences, depositions, *Daubert* hearings, summary judgment hearings, class certification hearings, injunction requests, judge-alone trials and potentially jury trials, as well as settlement negotiations.¹⁰ Outside the US, the process has been overwhelmingly used as a tool in bench trials. Given the prevalence of jury trials in the US, there is a real question over the extent to which the process might find favour in jury trials.

Concurrent expert evidence as a useful tool

Concurrent expert evidence can be a very effective time saver before, and at, trial, which is an increasing concern of judges and clients seeking to reduce the time and costs associated with litigation. Furthermore, judges in Australia and the US have viewed the process as more effective overall as a learning tool for key issues in complex or technical litigation than traditional methods of expert evidence.¹¹

From the expert’s perspective, the concurrent expert evidence process is viewed by many experts as giving them the best opportunity to ensure their key points are made; they are not constrained by the questioning of their cross-examiner and have more freedom to explain their opinions. Personality differences do create fears that the court will defer to the most forceful

speaker, but such concerns can be effectively managed by the judge, who can ensure that an impartial and objective view of the evidence is taken regardless of its form, and can order an associate judge or master to supervise the process.

The process can result in a much more streamlined expert evidence process and can allow the parties and the court to focus on the real issues in dispute, both in settlement negotiations and at trial. Concurrent expert evidence will not be appropriate in many cases, and it has rarely if ever been used in a jury case, but it is a potentially effective tool that parties to litigation in the US should consider.

Notes

- 1 For example, one US district court judge required experts to appear in a ‘hot tub’ together at a *Daubert* hearing and ‘found this “hot tub” approach extremely valuable and enlightening’. *In re Welding Fume Prods.*, 1:03-CV-17000, 2005 WL 1868046, at *23 (ND Ohio 8 August 2005). US District Judge Jack Zouhary adopted the process with respect to motions for class certification in an antitrust class action, *In re Polyurethane Foam Antitrust Litigation*, 152 F Supp 3d 968 (ND Ohio 2015), and is reported to have commented that ‘[i]t was great to have the experts in the courtroom at the same time, nearly face-to-face, with questions they could not duck, and to have the opposing expert comment on what he or she had just heard’. Thompson, Ryan, ‘Concurrent Expert Evidence: Hot Tubbing in America? Experts Jump In’, *The National Law Review*, 6 November 2018.
- 2 *Federal Court of Australia Rules 2011* (Cth) r 23.15; Expert Evidence Practice Note (GPM-EXPT), Annexure B: Concurrent Expert Evidence Guidelines.
- 3 For a discussion about the merits of concurrent expert evidence in Australia, see The Hon Steven Rares, ‘Using the “Hot Tub”, How Concurrent Expert Evidence Aids Understanding Issues’ (2013). Federal Court of Australia, accessed online 28 June 2017, www.federalcourt.gov.au/digital-law-library/judges-speeches/justice-raises/raises-j-20131012.
- 4 Adam Elliott Butt, ‘Concurrent Expert Evidence in US Toxic Harms Cases and Civil Cases More Generally: Is There A Proper Role for “Hot Tubbing”?’ 40 *Hous J Int’l L* 1, 4 (2017).
- 5 Practice Direction 35.11 to the UK Civil Procedure Rules.
- 6 Federal Rules of Evidence Rule 611.
- 7 Federal Rules of Evidence Rule 614.
- 8 Federal Rules of Civil Procedure Rule 1.
- 9 See, eg, Butt (n 4 above), at 49.
- 10 Butt, *ibid*, at 6.
- 11 Butt, *ibid*, at 63.

**Robert A
Schwinger**

Norton Rose Fulbright,
New York

robert.schwinger@
nortonrosefulbright.com

When blockchain transactions meet US limits on extraterritoriality

In *Morrison v National Australia Bank Ltd.*,¹ the United States Supreme Court limited the reach of securities laws by holding that those laws did not apply to foreign securities claims with only tenuous connections to the United States. The Supreme Court grounded its holding in a ‘longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’ The Supreme Court rejected various lines of thought from lower federal appellate courts that US law should also apply to fraudulent schemes that involve merely foreign conduct with US effects, or US conduct with purely foreign effects. Rather, the Supreme Court, holding there was no indication of congressional intent for the US securities laws to be applied extraterritorially, stated that it is ‘only transactions in securities listed on domestic exchanges, and domestic transactions in other securities,’ to which the anti-fraud provisions of those laws apply. Thus, in *Morrison*, so-called ‘F-cubed’ claims – brought against foreign companies by foreign claimants who purchased their shares on foreign exchanges – were not allowed to proceed.

But in the world of virtual currencies and blockchain transactions, where parties all over the globe may deal with one another through electronic systems and internet communications, and parties traffic in ‘virtual’ assets that have no real physical location, what is a ‘domestic transaction’ and what is not? When can US securities laws apply to such transactions? A California federal court recently confronted this question in *In re Tezos Securities Litigation*.² The court held that notwithstanding the defendants’ attempt to position the entity selling a new virtual currency as being European and its sales as taking place in Europe, the fact of a domestic US plaintiff making purchases through US-based websites

as a result of marketing that targeted the US, where the transaction was validated by blockchain nodes many of which were clustered in the US, it was not an improper extraterritorial application of US law to allow the plaintiff’s claim of alleged securities violations to proceed in a US court under US federal securities laws.

Tezos involved defendants who had developed plans for a new cryptocurrency called Tezos that they asserted would overcome claimed shortcomings of predominant digital currencies such as Bitcoin and Ethereum. Eventually they conducted an Initial Coin Offering (ICO) in which purchasers paid millions of dollars’ worth of Bitcoin and Ethereum to obtain Tezos tokens. However, the Tezos ICO was never registered under the US securities laws.

An Illinois resident who contributed 250 Ethereum coins to the Tezos ICO brought the *Tezos* case as a putative class action, seeking rescission of his Tezos purchase under Section 12 of the US Securities Exchange Act of 1934, based on his claim that the defendants had been running an unregistered securities sale. The plaintiff also sought additional relief under Section 15 of the Securities Exchange Act against various individual defendants who were alleged to be ‘control persons’ for these transactions.

The Tezos purchasers bought their Tezos tokens from the Tezos Foundation, a body that had been founded by two of the individual defendants who were from California. The Tezos Foundation was thus the primary defendant for the unregistered securities sale claim. The Tezos Foundation, however, was based in Alderney in the Channel Islands, and was governed by Swiss law. A provision within the ‘Contribution Terms’ drafted by the Foundation (which oddly were neither included in nor linked to any of the Foundation’s English-language websites) purported to make Europe ‘the legal situs of all ICO-related participation and litigation’ for Tezos. The terms stated that:

‘[t]he Contribution Software and the Client are located in Alderney. Consequently, the contribution procedure... is considered to be executed in Alderney.’ The terms further provided that ‘[t]he applicable law is Swiss law, and that ‘[a]ny dispute ... shall be exclusively and finally settled in the courts of Zug, Switzerland.’

Faced with the plaintiff’s California lawsuit under the US securities laws, the Tezos Foundation argued that the US securities laws could not apply to it in these circumstances. It predicated this argument on ‘where such a sale would have necessarily occurred.’ Pointing to the US Supreme Court’s 2010 *Morrison* decision, the Foundation contended that ‘any transaction taking place with [the plaintiff] could only have occurred in Alderney’, as Alderney had been ‘specified as the legal site of all ICO transactions by the Contribution Terms.’ Moreover, the Foundation argued, even if the Contribution Terms were deemed not to apply, the court should look to where any ‘ICO-related transfer of title or instance of ‘irrevocable liability’” took place, as these factors had been identified as ‘touchstones of the domestic transaction inquiry’ by New York and California federal appellate courts after *Morrison*. Under those tests, the Foundation contended, the sale location should be deemed ‘confined to Alderney, where the Foundation’s ‘contribution software’ resides.’

The California federal court disagreed. While conceding that the Foundation was ‘generally correct as to the scope of federal securities law,’ the court stated that the Foundation’s ‘reliance on the validity of the Contribution Terms’ was ‘misplace[d]’ and that those terms were ‘of little significance at this juncture.’ Rather, it said, what matters is to focus instead on ‘the actual (rather than contractual) situs of ICO transactions.’ Because of that, ‘the operative question’ was where does the sale of ‘an unregistered security, purchased on the internet, and recorded ‘on the blockchain,’ actually take place?’ The court found that under the facts alleged by the plaintiff, the answer must be the US.

‘Try as the Foundation might to argue that all critical aspects of the sale occurred outside of the United States,’ said the court, ‘the realities of the transaction (at least as alleged by [the plaintiff]) belie this conclusion.’ The court identified the following factors as supporting this conclusion:

- The plaintiff ‘participated in the transaction from this country.’
- ‘He did so by using an interactive website that was: (a) hosted on a server in Arizona; and

(b) run primarily by [one of the California-based individual defendants] in California.’

- ‘He presumably learned about the ICO and participated in response to marketing that almost exclusively targeted United States residents.’
- ‘Finally, his contribution of Ethereum to the ICO became irrevocable only after it was validated by a network of global ‘nodes’ clustered more densely in the United States than in any other country.’

The court concluded that ‘[w]hile no single one of these factors is dispositive to the analysis, together they support an inference that [the plaintiff’s] alleged securities purchase occurred inside the United States’, citing case law holding that where non-exchange listed securities are offered and sold over the internet, the sale takes place in both the location of the seller and the location of the buyer. ‘[P]roceeding with all due consideration of the limited reach of this nation’s laws, application of the [Securities] Exchange Act does not offend the mandate of *Morrison*.’ The court thus denied the defendants’ motion to dismiss the case based on an extraterritoriality defence. The court also rejected defendants’ forum non conveniens argument because the supposed forum selection provision in the Tezos Foundation documents were not specified or linked to in the user agreement onto which plaintiff had clicked his assent, thus raising at least a factual question for the present about whether the plaintiff had truly been put on notice of those provisions.

In summary, *Tezos* shows that even under *Morrison*’s presumption against extraterritorial applications of US securities laws, attempts to centre blockchain transactions in non-US jurisdictions may not be enough to overcome factors such as where the human parties and websites involved are based, where the underlying marketing had been directed, and whether the validating of those blockchain transactions was densely clustered in the US. *Tezos* suggests that *Morrison* may prove to be no panacea for those who hope creative structuring of blockchain ventures might suffice to bar US courts from applying US securities laws to blockchain transactions with US connections. When the realities of blockchain transactions meet US limits on extraterritoriality, it may require very contained and specific facts before the US courts will deem themselves barred from taking actions to address claimed wrongs under US law.

Notes

1 561 U.S. 247 (2010).

2 Case No. 17-cv-06779-RS, 2018 WL 4293341 (N.D. Calif. 7 Aug 2018).

Laurent Debrun

Spiegel Sohmer,
Montreal

ldebrun@
spiegelsohmer.com

To defend or not to defend oneself before a foreign court? That is the question

The case of *Barer v Knight Brothers*

In the case of *David Barer v Knight Brothers LLC*,¹ the Supreme Court of Canada reminds us of the serious legal consequences of certain actions which a Quebec resident prosecuted in a foreign court may take, and which a Quebec Court will later qualify as recognition of the jurisdiction of such foreign court.

The facts

David Barer resides in Quebec. He was sued by Knight, an American company, in the State of Utah, together with two companies he controlled, one of which, BEC, is an American company based in Vermont, and the other is a Canadian corporation. Knight claimed from them the difference between the price of a contract and additional work that Barer agreed to during a telephone conversation. Barer confirmed to Knight that the additional costs associated with the changes to the work order would be duly paid. Barer was not a party to the contract. Knight requested the corporate veil be lifted on the grounds of fraud, unjust enrichment and delict. Barer responded to the suit by requesting the summary dismissal of the suit and challenged the jurisdiction of the court over him.

Barer and the two corporate defendants accepted service of the complaint and entered their appearance before the Utah court. The three defendants then pursued a different strategy. BEC, the party to the contract with Knight, filed an answer, defence and counterclaim. BEC did not raise the issue of jurisdiction of the Utah court and was satisfied with denying the facts underlying the claim. The Canadian corporation presented a motion to allow its counsel to withdraw on the ground that it did not recognise the jurisdiction of the Utah court and would not participate in the proceedings. As it did not defend itself, the Utah court entered a default judgment. Barer brought a motion to have the claim asserted against him personally

dismissed on a preliminary basis. Barer denied that the two companies were his alter egos, that the fraudulent misrepresentation claim having caused the alleged pure economic loss was barred under Utah law and, finally, that the Utah court did not have personal jurisdiction over him. Barer's motion to dismiss and each of its grounds were dismissed and the court allowed the case to proceed to trial upon its merits. A default judgement was then rendered against the three defendants.

Knight then applied to the Superior Court in Quebec to have the Utah default judgment recognised and enforced against Barer in Quebec.

The decision of the Supreme Court of Canada

Barer's conduct

In order to contest Barer's motion to dismiss in Utah, Knight had filed as evidence various exhibits and an affidavit in support of its claim. Under Utah law, this evidence can be taken as proven for the court to decide the motion to dismiss. In the view of the Utah court, having the three defendants judged together, in one action, furthered the interest of the international justice system. The Utah court found that Knight's evidence supported its alter ego claim, *prima facie*. Barer did not file a defence, although he was invited to do so. Barer only took part in a settlement conference, which is an obligatory requirement in Utah. According to Barer, this did not mean that he submitted to the jurisdiction of the foreign court. So what positive action, taken by Barer in Utah, was successfully raised against him by Knight which led to the Quebec Superior Court recognising and enforcing the default judgement rendered in Utah?

Both the Superior Court and the Court of Appeal held that Barer, through his conduct, had submitted to the jurisdiction



TO DEFEND OR NOT TO DEFEND ONESELF BEFORE A FOREIGN COURT? THAT IS THE QUESTION

of the Utah court and therefore Quebec courts had to recognise and enforce the default judgment. By presenting substantive arguments in support of his motion to dismiss based on the Utah court lacking jurisdiction, a majority of the judges of the Supreme Court of Canada agreed that Barer submitted to the Utah court's jurisdiction in accordance with article 3168(6) of the Civil Code of Quebec (CCQ). This was sufficient to establish the requisite connection between the substance of the dispute, the parties and the Utah court. Therefore, Barer had no legal means to oppose recognition and enforcement in Quebec.

The dilemma for any resident of Quebec is therefore to choose between either defending oneself abroad or playing the 'empty seat' card. The risks and benefits of the strategy to be adopted in the event of prosecution abroad must be considered with extreme caution, even though the deadline in which to respond is often very short. This decision confirms once again the importance of a multi-jurisdictional analysis of the dispute from the very beginning and of a close cooperation between the Quebec and foreign attorneys so that sound decisions can be made before the foreign court.

Legal principles

The Supreme Court indicated that the objective of the CCQ is to ensure that any legal decision rendered outside of Quebec will be recognised and declared enforceable in Quebec, save for specific exceptions. This key principle dates back to prior judgments of the Supreme Court, such as *Beals v Saldanha*.² Dan Beals, a resident of Canada, had sold his property located in Florida for \$8,000. He was sued by the purchaser, but failed to defend himself, and a jury entered a default judgement against him in the amount of \$260,000. At the Supreme Court level, the judgment, with interest, was approximately \$1m. The Supreme Court concluded that Beals was barred from invoking in Canada defences that he could have raised in Florida. The judgment was therefore recognised in Canada.

There are only six exceptions under Quebec law which allow Quebec courts to depart from this general principle and to refuse to recognise a foreign decision, the main exception being that the foreign court had no jurisdiction over the dispute (article 3155 CCQ).

Anyone intending to have a foreign decision recognised in Quebec must prove the existence of one of the six grounds listed in article 3168 CCQ, so that the indirect international jurisdiction of the foreign authority is recognised (and only one of the six is required). Article 3168 CCQ provides:

'3168. In personal actions of a patrimonial nature, the jurisdiction of foreign authorities is recognized only in the following cases:

- (1) the defendant was domiciled in the State where the decision was rendered;
- 2) the defendant possessed an establishment in the State where the decision was rendered and the dispute relates to its activities in that State;
- (3) injury was suffered in the State where the decision was rendered and it resulted from a fault which was committed in that State or from an injurious act or omission which occurred there;
- (4) the obligations arising from a contract were to be performed in that State;
- (5) the parties have submitted to the foreign authorities the present or future disputes between themselves arising out of a specific legal relationship; however, renunciation by a consumer or a worker of the jurisdiction of the authority of his place of domicile may not be set up against him;
- (6) the defendant has submitted to the jurisdiction of the foreign authorities.'

According to the Supreme Court, this list is exhaustive. By filing arguments in Utah which, had they been found valid, would have resolved the matter in whole or in part, this constituted either an implicit or explicit recognition by Barer of the indirect international jurisdiction of the foreign court in accordance with article 3168(6) CCQ.

Barer argued in Quebec (but did not present evidence as to the state of Utah law) that he was required, according to that foreign law, to argue both the merits and substance of his defence while contesting jurisdiction at the preliminary stage, failing which he risked being barred from doing so at a late date. The Supreme Court noted that Barer had the burden of proving that this is the procedural law in this foreign state and he did not.

An application for recognition and enforcement of a foreign decision is a judicial demand giving rise to an adversarial relationship to which the general rules of civil procedure apply. Therefore, parties are not

exempted from the requirement imposed by article 2803 CCQ. The applicant must prove the facts on which the right to recognition of the foreign decision is based. Quebec courts must examine the evidence to ensure that the foreign court had jurisdiction in accordance with article 3168 CCQ.

Refraining from appearing or appearing only to contest the jurisdiction of the foreign court can show that the defendant did not recognise the jurisdiction of the foreign court. However, the Supreme Court rejected the theory that a defendant should be allowed to argue the merits while contesting jurisdiction, to lose and then claim lack of jurisdiction of the foreign court to contest recognition of an unfavourable foreign decision in Quebec. It would be unfair if the defendant had the opportunity of convincing the foreign authority of the merits of his case while maintaining his right to later challenge the jurisdiction of such authority if he is ultimately displeased with the decision. It would be giving him a second chance (a legal mulligan).

In his motion to dismiss in Utah, Barer presented at least one argument to contest the merits of the action against him, which, had it been accepted, would have led to a final conclusion in his favour. Barer attempted to take advantage of the proceedings in Utah to resolve the dispute in his favour and lost. He could not later ask the Quebec courts to shield him from the consequences of having lost a legal battle that

he chose to fight in Utah. This is contrary to both the principle of comity and the efficient use of international judicial resources.

Conclusion

A Quebec resident who believes that he is wrongfully prosecuted abroad must not take any action that could later be interpreted by a Quebec court as recognition of the indirect international jurisdiction of the foreign court. If he is required by local laws to contest simultaneously jurisdiction and the merits of the claim before the foreign court, he must be prepared to prove in Quebec that this is the state of the law abroad in order to avoid a Quebec court concluding that he recognised the foreign court's jurisdiction. If a challenge to the foreign court's jurisdiction is dismissed, the question is then what can the Quebec defendant continue to argue before the foreign court without it being later seen as recognition of jurisdiction. For example, if Barer had ceased taking part in the proceedings in Utah completely once his motion to dismiss was dismissed, the Quebec courts may have examined the situation differently and not found that he had recognised the foreign court's jurisdiction within the meaning of article 3168 (6) CCQ.

Notes

- 1 *David Barer v Knight Brothers LLC* 2019 SCC 13 (see: <http://canlii.ca/t/hxn82>).
- 2 (2013) S.C.R. 416.

The Hague Evidence Convention and pre-trial discovery in Brazil

As part of an effort to promote judicial cooperation in the context of cross-border litigation and international disputes, Brazil has acceded to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the ‘Hague Evidence Convention’, or, the ‘Convention’). Enacted in the Brazilian legal system under Decree-Law No. 9.039, the Hague Evidence Convention has been employed increasingly between parties in Brazil and those in dozens of other nations.

The Hague Evidence Convention desires ‘to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they [the Contracting Parties] use for this purpose’, in order ‘to improve mutual judicial co-operation in civil or commercial matters’.

Precisely for this purpose, the Hague Conference on Private International Law – a permanent international and intergovernmental organisation since the entering into force of the Statute of the Hague Conference on Private International Law on 15 July 1995 – has adopted many conventions and protocols over the years, including the Hague Evidence Convention, signed on 18 March 1970. Nevertheless, the validity and internal application of the Hague Evidence Convention in Brazil only began on 27 April 2017, through Decree-Law No. 9.039/2017.

The most considerable benefit experienced by the Hague Evidence Convention (in terms of procedural promptness and the effectiveness of cross-border judicial cooperation requests) consisted in the ‘elimination of diplomatic channels’; that is, the dismissal of bureaucratic procedures of letters of request alongside diplomatic representatives or the Ministry of Foreign Affairs and state ministers, with the establishment of a direct channel through a central authority – in Brazil’s case, the Ministry of Justice, by the Department of Assets Recovery and International Legal Cooperation (DRCI). Hence, collaboration within the scope of the Hague Evidence

Convention has already been established (through accessions and acceptances) between Brazil and the following countries: Albania; Andorra; Argentina; Armenia; Bosnia and Herzegovina; Bulgaria; China (including Hong Kong and Macao); Colombia; Costa Rica; Croatia; Cyprus; the Czech Republic; Denmark; Estonia; Finland; Germany; Greece; Israel; Italy; Kazakhstan; Korea (Republic of); Liechtenstein; Lithuania; Luxembourg; Mexico; Monaco; Montenegro; Morocco; the Netherlands (the European part and Aruba); Poland; Portugal; Romania; Russia; Serbia; Slovakia; Slovenia; Sri Lanka; Switzerland and Turkey. The United States reported that Brazilian requests based on the Hague Evidence Convention will be complied with, although the accession of Brazil was not yet been formally accepted.

With respect to the formal and procedural aspects of international cooperation requests, the Hague Evidence Convention has established basic requirements to be observed and, in particular, provided Contracting States with the power to make certain reservations and declarations in view of the adherence of the Hague Evidence Convention to the internal legal framework of each country. In Brazil’s case, due to the incompatibility of some of the Hague Evidence Convention’s provisions, the following declarations and reservations were stated when it came into force in the Brazilian legal system and as informed by the Ministry of Justice:

- Declaration under Article 4, second paragraph, pursuant to Article 33 – every letter of request sent to Brazil shall be accompanied by a translation into Portuguese;
- Declaration under Article 8 – the judicial authorities of a requesting state may be present at the execution of the letters of request in Brazil if approval has been granted by the enforcing authority;
- Reservation under Chapter II of the Convention, pursuant to Article 33 – in Brazil, the Convention does not apply to the taking of evidence by diplomatic officers, consular agents or commissioners; and

Júlio César Bueno

Pinheiro Neto,
São Paulo
jbueno@pn.com.br

Charles Ho Young Jung

Pinheiro Neto,
São Paulo
cjung@pn.com.br

Gabriel Guratti do Nascimento

Pinheiro Neto,
São Paulo
gnascimento@pn.com.br

- Declaration under Article 23 – Brazilian states will not comply with letters of request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries.

The Brazilian judicial authority, therefore, shall apply local legislation as to the formal and procedural aspects, and a denial of a request sent by a foreign authority will arise if the requested procedure is in conflict with the national law. Especially regarding the declaration under Article 23 of the Hague Evidence Convention (possibly its most controversial), Brazil, in the exercise of its national sovereignty and in accordance with its internal governance, has declared that it will not comply with requests that seek documents within the so-called pre-trial discovery procedure of common law countries, due to its incompatibility with Brazil's internal legal framework.

Pre-trial discovery is a concept known and adopted in common law countries (such as the United States) under the civil law system; and unknown and to a certain extent incompatible with the civil procedure adopted in Brazil. The Federal Rules of Civil Procedure of the US, for instance, outline this preliminary and investigative stage of document production between parties (ie, with minimal interference from the courts), designated as pre-trial discovery, in which the parties may mutually request the gathering, collection, production and sharing of several categories of documents, which will be assessed and may or may not be presented and used as evidence during trial (which also has differences in relation to the Brazilian civil procedure).

Pre-trial discovery is therefore essentially an instrument for taking evidence inherent to the civil procedure in common law countries, in which the parties, in an extensive and generic process that precedes the trial, provide one another with a wide and almost indistinct document set (which differs completely from the way it works in Brazil), albeit only some documents are selected as relevant during the preparation for trial and eventually used to support the case.

In light of this, Decree-Law No. 9.039/2017 enacted the Hague Evidence Convention in the Brazilian legal system, pursuant to its Article 1, and made the reservations and the declarations permitted to the Contracting States, and in particular about the non-execution of requests that seek evidence for the pre-trial discovery

of documents, as provided in the Hague Evidence Convention's Article 23, and attached to the Decree-Law, thus:

'Article 1. It is enacted the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, signed in the Hague, 18 March 1970, with reservation to paragraph 2 of article 4 and to Chapter II, pursuant to article 33, and the declarations permitted in article 8 and article 23, attached to this Decree-Law.'

'Article 23. A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.'

According to an explanatory memorandum by the Minister of Foreign Affairs, which accompanied the request referred to the Brazilian Congress at the time of approval of the Hague Evidence Convention by means of Legislative Decree No. 137/2013 (which preceded the deposit of the Brazilian accession in 2014 and the promulgation of the Hague Evidence Convention in 2017), the Article 23 declaration was made to protect the domestic legal system against incompatible provisions, notably the one related to pre-trial discovery.

In this context, the Brazilian executive and legislative branches, with the purpose of safeguarding the principle of public order and the national legal system, have stated that they will not comply with requests that fit the pre-trial discovery procedure of common law nations, thus preventing extensive comprehensive and exploratory requests, while the accession to the Convention aims to facilitate and harmonise international judicial cooperation on requests for specific and identified documents.

Responsible for assessing and eventually granting *exequatur* letters of requests, it falls to the Superior Court of Justice (STJ) to interpret the application of the Article 23 declaration of the Hague Evidence Convention and establish a consistent position for Brazil on the extension, limitations, declarations and reservations (pursuant to Article 105-I of the Brazilian Federal Constitution and Articles 216-O to article 216-X of the STJ Internal Procedure Rule) with a view to protecting national sovereignty, public order, the good manners and the due process of law.

Notes

- 1 The list and location of the signatory states can be found at: www.hcch.net/en/instruments/conventions/status-table/?cid=82 accessed 22 February 2019.
- 2 Available at www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/decreto/D9039.htm accessed 22 February 2019.
- 3 In conformance with article 26, IV, §4º, of the Brazilian Code of Civil Procedure.
- 4 The list of acceptances and accessions can be found at www.hcch.net/en/instruments/conventions/status-table/acceptances/?mid=1223 accessed 22 February 2019.
- 5 www.justica.gov.br/sua-protecao/cooperacao-internacional/cooperacao-juridica-internacional-em-materia-civil/acordos-internacionais/convencao-da-haia-sobre-provas accessed 22 February 2019.
- 6 ‘Article 23: A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.’
- 7 The Special Commission on the Hague Convention itself recognised in 2003 the controversial aspects regarding the nature of the pre-trial discovery, according to the article ‘Outline of the Convention’, available at www.hcch.net/en/instruments/conventions/full-text/?cid=82 accessed 22 February 2019.
- 8 ‘7. Based on the spirit of compatibility of its provisions with other national or conventional rules (articles 27, b and c, 31 and 32), the Convention adopts some clauses (article 28) that expressly allow the Parties to deny the enforcement of some of the Convention’s provisions. Considering that, it would be convenient that, in case of Brazil’s accession to the Convention, the following reservations and declarations were presented to the Ministry of the Foreign Affairs of the Netherlands : (...) Declaration under Article 23: Brazil declares that it won’t execute letters rogatory issued with the purpose of obtaining what is known in the Common Law countries as pre-trial discovery of documents’; available at www2.camara.leg.br/legin/fed/decleg/2013/decretolegislativo-137-19-fevereiro-2013-775378-exposicao-demotivos-142868-pl.html.

Three years of the new Brazilian Civil Procedure Code: what do we need to fully implement the new way of litigating?

In the civil and common law traditions, there are mainly two civil procedural systems: the adversarial system and the inquisitorial system.

Under the adversarial system, the claimant and the defendant adopt an active role on the proceedings development and evidence production. While the parties debate, the judge adopts a passive behaviour. The judge steps back to observe and ensure that the parties are following the *due process*, granting an award based on the analysis of what the parties alone brought to court.

By contrast, in the inquisitorial system, the judge is primarily responsible for the conduct of the proceedings, leaving to the parties a residual and almost passive role on its evolution. The relationship between the parties and the judge is therefore hierarchical, marked by the strong activism of the judge on the proceedings and evidence production.

The Brazilian Civil Procedure Code (CPC) enacted in 1973 sets forth an

inquisitorial system. However, in the attempt to modernise and grant more effectiveness to our system, the new CPC, enacted in 2015 and entered into force on 18 March 2016, was developed based on the idea that none of the two systems mentioned above is truly appropriate. The new CPC hence laid down legal changes with a view to put forward a third type of system: the so called ‘cooperative system’.

The main feature of the cooperative system is the conjunction of the inquisitive principle (that rules the judge’s dynamic and active practice) with the substantive adversarial principle, allowing the parties to also exercise an active role on the proceedings, evidence production and decision making. The fundamental idea is that the parties ought to participate substantially on the proceedings in order to grant the final decision more legitimacy. To this end, some common law civil procedure principles, as well as international arbitration principles,

Pedro Soares Maciel

Lefosse, Sao Paulo
pedro.maciel@lefosse.com

Rafael Stefanini Auiló

Lefosse, Sao Paulo
rafael.stefanini@lefosse.com

Isabela Albini Maté

Lefosse, Sao Paulo
isabela.mate@lefosse.com

Fernanda Marins Azeredo Coutinho

Lefosse, Sao Paulo
fernanda.coutinho@lefosse.com

were incorporated into the CPC, aiming at less bureaucratisation and enhanced justice, celerity and quality of our decision making.

However, some of the new CPC provisions have still not been put into practice by both judges and lawyers. These provisions set forth a profound change on the role and practice of all parties in the proceedings when compared to the old system, which is why its effectiveness encounters some resistance. In particular, three main changes have still not been implemented: (1) the joint pre-trial and case management phase (*saneamento compartilhado*); (2) the duty to consult the parties; and (2) the cross and direct examination. Each of these changes and reasons why they are not yet effective are analysed below.

Joint pre-trial and case management phase

The first example of legal modification in the CPC is the so called 'joint pre-trial and case management phase'. In such a phase, a decision is given over the definition of the factual and legal controversy, defects' rectification, evidence production, procedural acts, etc, similarly to what is decided at the case management conference and at the signing of the terms of reference in arbitration proceedings.

Under the CPC of 1973, at the beginning of the proceedings, the judge alone decided on preliminary matters and proceedings organisation, which would define the course of the whole proceedings. The new CPC almost reverses this inquisitorial logic. Alongside with the old method, the new CPC provides that the parties can also jointly agree on preliminary and proceedings matters, either during a preliminary hearing to be arranged by the judge (which is mandatory in 'complex' cases), or through an agreement proposal to be presented in court. In these instances, the role of the judge is limited to homologate what the parties have agreed on, when in accordance with the law. This is clearly inspired by court case management of English law, for instance, and international arbitration, which endorses the flexibilisation and modification of the proceedings by the parties, aiming to promote more legitimacy, effectiveness, procedural economy and promotion of dialogue between the parties.

Brazilian civil lawyers and judges are, however, resisting implementing such enhancement. On the one hand, Brazilian judges are used to being the protagonists

of the proceedings and are overloaded with cases and under pressure for increased productivity, and thus they assume it is simpler and faster to decide on these matters by themselves. On the other hand, most Brazilian lawyers are not prepared to effectively take part in these preliminary hearings, nor to negotiate and agree on preliminary and procedural issues with their opposing counsel. An effort must be made to comprehend the case as a whole, bearing in mind its procedural and merits developments, in order to be able to actually propose innovative and effective solutions. Preliminary hearings would otherwise be just a waste of time. Lawyers ought to be prepared to productively and creatively pursue a case management so as to render their clients the most suitable and effective solutions to their case development.

Duty to consult the parties

The new CPC expressly provides for the duty of the judge to hear the parties prior to any decision. This duty is also known as the 'principle of no surprise' to avoid that the parties are surprised by decisions based on unexpected arguments. Before the new CPC was enacted, judges were not expressly barred from deciding matters *ex officio* without observing the parties' right to be heard.

The new statutory rule provides that the judge cannot decide based on legal or factual grounds regarding which the parties were not given the opportunity to manifest themselves. This is applicable even if the matter can – and must – be decided *ex officio*, such as decisions on the lack of jurisdiction, the defectiveness of the complaint, the lack of standing to sue or to be sued, etc.

The inclusion of the duty to consult the parties in the CPC was inspired by the French *Code de procédure civile*, which provides, that the judge shall not base his/her decision on legal arguments that he/she has raised *sua sponte* without having first invited the parties to comment thereon. The Italian *codice di procedura civile* has a similar provision, which provides that the judge must indicate to the parties the matters that he/she may decide about *ex officio* in a preliminary hearing. The German *Zivilprozessordnung* also provides that the judge may not decide on legal matters that have not been submitted to the discussion of the parties.

The duty to consult is closely connected to the right to be heard and is an expression

of the cooperative nature of the procedure under the new CPC. As the cornerstone of the cooperative procedure is the dialogue between all persons involved (the parties and the judge), the duty to consult provides the judge with all necessary information to decide in the best and most fair manner.

Seen from the cooperative work point of view, the duty to consult transforms the procedure in a stage of democratic participation.

Nevertheless, it is still common to have decisions that surprise the parties. In the main, the most experienced judges are not supportive of changes that may narrow their power – or at least what seems like narrowing it. Judges and courts still decide on matters *ex officio* without hearing the parties, which results in appeals and review of the decisions that in many cases would not be necessary if the judge or court had previously heard the parties on the issue.

Cross-examination

Before 2015, Brazilian lawyers faced a ‘he said she said’ scenario. Attorneys had first to inform the judge what they wanted to ask, who would then repeat the question to the witness, whose response would later be dictated by the judge to a clerk who would finally write it down. Naturally, much of the statement was lost along the way.

To make the proceedings and hearings more expedite, the new CPC introduced the cross- and direct-examination into Brazilian civil procedure. Accordingly, the judge takes part in the hearing by not allowing the attorneys to make leading questions, questions that bear no relation to the issues of fact or questions that repeat others that have already been answered.

Although cross-examination was already possible in criminal procedures in Brazil, as well as in arbitration, it is an important innovation in the civil procedure inspired by the common law system. A well-prepared lawyer can use cross-examination techniques to bring out the truth and to avoid having the witness evading. This tool helps to show the judge, or the arbitral tribunal as the case may be, the truth of the facts.

The past three years have shown, however, that it will not be easy to implement cross-examination in the Brazilian courts. Judges’ and lawyers’ old practice is so deeply rooted that at times they may feel disrespected if a person suggests applying the new provision of the CPC. There are two main reasons for that. Firstly, cross-examination demands preparation from the lawyer, who needs to study and learn

the skills to do a successful cross. Secondly, judges in Brazil are used to having the last word and full control of the procedure, thus giving power to the lawyers to conduct the hearing is not something they are familiar with.

A summary

Considering the scenario described above and the experience from the past three years, there is still some way to go until we reach the full application of the changes set forth by new CPC. Brazilian lawyers and judges must commit to updating themselves on the new provisions of civil procedure in order to reach the main goals of the CPC – modernisation, less bureaucracy and increased expedition of proceedings.

These changes correspond with the worldwide trend of exchange and reciprocal influence between international arbitration, civil and common law traditions, as well as between inquisitorial and adversarial systems. The development of every legal system embedded in the globalisation passes through the flexibility and ‘import’ of (good ideas from) foreign civil procedure principles and traditions. Lawyers, on their side, must be in tune with these worldwide tendencies, to learn, adapt and develop skills. Furthermore, to implement these legal changes in the most effective way, practicing lawyers ought to analyse and take into account local culture and principles that enable or disable their performance, that is, act with the full picture in mind (local issues, limitations and advantages, aside from, of course, legal knowledge).

As lawyers, we face legal uncertainty in civil procedure, as it is not possible to know whether the judge and the opposing party in each case will collaborate or not to the adequate enforcement of the new provisions. Therefore, it is important that the parties are assisted by Brazilian lawyers and law firms who are up to date and are capable of representing their clients in any situation.

Notes

- 1 Of course, there is no such thing as a ‘pure’ system in practice. The distinction is made for theoretical purposes.
- 2 Rafael Stefanini Auilo, *O Modelo Cooperativo de Processo Civil no novo CPC*, (Salvador, JusPodivm, 2017), *passim*.
- 3 Paulo Hoffman, Saneamento compartilhado (São Paulo, Quartier Latim, 2011), pp 53–54.
- 4 Leonardo de Campos Melo and Larry Pozner, Cross-Examination in the Arbitration Practice: Art or Learned Skill? (CBAr, 2017). Available at: <http://www.cbar.org.br/blog/artigos/cross-examination-in-the-arbitration-practice-art-or-learned-skill>.

Camila Spinelli

Motta Fernandes,
São Paulo

camila.spinelli@
mottafernandes.com.br

Leonardo Meirinho

Motta Fernandes,
São Paulo

leonardo.meirinho@
mottafernandes.com.br

Cryptocurrency litigation in Brazil

Internet access is already a reality for 70 per cent of the Brazilian population base on the data released by the Brazilian Institute of Geography and Statistics (IBGE) in 2018.

In a widely connected country, where elections have been held through electronic voting devices since the 1990s, and in whose courts more than 20.7 million electronic lawsuits are filed each year, cryptocurrencies have gain traction and play an important role in the financial market. As a consequence of this evolution, courts have had to start addressing this phenomenon despite the lack of definition and regulation on the issue.

In this context, in September 2018, the Brazilian Securities and Exchange Commission (CVM) regulated indirect investment, allowing national funds to invest in cryptocurrencies abroad, provided they are admitted and regulated in the markets of origin. With this regulation, CVM overruled its own understanding issued on January 2018, when it had decided not to allow the acquisition of crypto assets by local investment funds.

Among the cases involving cryptocurrencies, one concerned a conflict of jurisdiction in a criminal action in which the Superior Court of Justice decided that cryptocurrency is not legally qualified as money or securities, since it is not regulated in Brazilian Law, nor covered by the jurisdiction of the Brazilian Central Bank and of CVM. In this case, the investigated party acted as a bitcoin trader, mediating the sale of cryptocurrencies and offering fixed profitability to investors. The Brazilian court had decided that crimes involving cryptocurrencies shall not attract the jurisdiction of the Federal Court, but the State Court. It is noteworthy that lawsuits regarding the mediation of sale and purchase of cryptocurrencies generally concern requests for an agreement's termination and indemnification filed by investors who no longer receive the agreed income.

In this context of uncertainty and ongoing debate, cryptocurrency brokers have recently stood against financial institutions

that unilaterally closed their accounts for alleged 'commercial disinterest'. The sudden closure of bank accounts of brokers operating in the cryptocurrency market gave rise to a procedure for the establishment of an administrative inquiry before the Brazilian Administrative Council for Economic Defense (CADE), to investigate anti-competitive practices and breaches of the economic order. According to one of the banks, cryptocurrency brokers had not proven the origin and destination of the funds detected in suspicious transactions, which is fundamental to identify and monitor transactions that may be considered as money-laundering activities.

The Superior Court of Justice decided in October 2018 that the closure of the accounts used to broker the sale of virtual currencies does not constitute an abusive commercial practice provided for in the Brazilian Code of Consumer Protection nor an unlawful act in terms of abuse of rights. The competitive aspect in the alleged breach to the economic order was not the subject of the appeal and therefore was not contemplated in the Court's decision.

Another recent discussion concerned the possibility of attachment of cryptocurrencies. According to the Court of Justice of the State of São Paulo, 'because it is an intangible asset with patrimonial content, in theory, there is no obstacle for the virtual currency to be pledged to guarantee execution'. However, the court considered that the attachment request cannot be generic and it is up to the creditor to prove the existence of the property that he/she intends to pledge, which does not allow the indiscriminate sending of letters in the absence of minimal evidence that the debtors are holders of such assets.

In the case considered, the creditor indicated two cryptocurrency broker firms acting in the intermediation of cryptocurrencies for dispatch of office to verify the existence and quantity of crypto coins owned by the debtors. The decision was criticised for imposing on the creditor the burden of presenting information that

it does not have, since if the creditor sought the brokers directly, no data would be provided through the claim of confidential information. Still, the decision indicates that the attachment of cryptocurrencies is possible in accordance with the Brazilian law, but its effectiveness has proven difficult.

As of August 2019, individuals, legal entities and brokerage firms that carry out cryptocurrency transactions will have to report it to the Brazilian Internal Revenue Service. The purpose is to avoid tax evasion and prevent crimes such as money laundering and illegal remittances abroad. According to the Normative Ruling, all cryptocurrency transactions must be reported to the Internal Revenue Service by brokerage firms, with no limitation of amount, or by the client, when dealing with transactions abroad whenever the monthly amount exceeds BRL 30,000.00. The Brazilian tax authorities will request information regarding the date and nature of the transaction, owners, crypto coins used in the transaction, number of encrypted transactions, amount of the operation and amount of service fees charged for execution of the transaction, in Brazilian reals, if any. The addresses of the online wallets of the parties involved in the transaction must also be disclosed. The data must be reported to the Internal Revenue Service by the last working day of the month following the

cryptocurrency transaction. The collection of such data by the Brazilian IRS will certainly facilitate the judicial seizure of these assets in favour of creditors.

As shown from the above developments, the legal aspects regarding cryptocurrencies in Brazil are still largely unsettled and will certainly lead to further debate.

Notes

- 1 According to the supplementary Technologies of Information and Communication of PNAD, published on 20 December 2018 by the IBGE.
- 2 Available at: www.tse.jus.br/imprensa/noticias-tse/2014/Junho/conheca-a-historia-da-urna-eletronica-brasileira-que-completa-18-anos. Accessed 22 July 2019.
- 3 *Justiça em Números* 2018, base year 2017, of the Brazilian Council of Justice.
- 4 Article 98 of Normative Ruling CVM No 555/2018.
- 5 Conflict of Competence No 161,123 – SP, Rapporteur Minister Sebastião Reis Júnior, Third Section of the Superior Court of Justice, judged on 28 November 2018.
- 6 Administrative Council for Economic Defense. Technical Note No 39/2018/CGAA2/SGAI/SG/CADE, Case No 08700.003599/2018-95, available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQA8mpB9yOq_PAOpP9dDSgD6LArOomnyuCuxWvMxZXH0h_hNIMOXVz24XbbZ7YVbHdLYBX85ikU5j-39JyCQbDhh5GXrOjb, accessed 22 July 2019.
- 7 Special Appeal No 1696214, Third Chamber of the Superior Court of Justice, Rapporteur Minister Marco Aurélio Belizze, judged on 9 October 2018.
- 8 Court of Appeal of São Paulo, Appeal No 2202157-35.2017.8.26.0000, 36th Chamber of Private Law, Reporting Judge Milton Carvalho, judged on 21 November 2017.

Initial considerations on a new judgment rendered by the Argentine Supreme Court on the extent of the review of arbitration awards

On 6 November 2018, the Argentine Supreme Court resolved, by the majority of its members, to confirm the dismissal of a motion to vacate judgment that had been filed by the National Government against an award rendered by an Argentine arbitrator after the unilateral

termination of the management contract that the National Government had with a temporary union of companies.¹ The award had ordered the government to indemnify the other party. The government had accepted that the disputes arising in the framework of said contract could be resolved

Hernan Martín Oriolo

Abeledo Gottheil,
Argentina

oriolo@
abeledogottheil.com.ar

by arbitration, hence the resulting award would be subject to appeal exclusively for the causes provided for in section 760 of the Civil and Commercial Code of Procedure of the Nation (essential failure of the procedure, because the arbitrators rendered the award out of term or on uncommitted issues). The Argentine Supreme Court determined that the issues raised in the case, did not prove that the arbitrator had incurred in any of these causes or that the public order was affected.

It must be recalled that the Civil and Commercial Code of Procedure of the Nation allows to waive the appeal of an arbitration award, but such waiver does not prevent the possibility to file a motion to vacate judgment with respect to the award grounded on: (1) an essential failure of the procedure; (2) because the arbitrators rendered the award out of the agreed upon term; (3) because the arbitrators rendered the award on uncommitted issues; or (4) the fact that the award includes decisions incompatible among them (sections 760 and 761 of the Code).

In its judgment, the Argentine Supreme Court pointed out that, in previous decisions, it had determined that the intervention of the judges was only legally admissible through the stage provided for in section 760, second paragraph of the Civil and Commercial Code of Procedure of the Nation.² It also highlighted that said position rested on previous general jurisprudence whereby freely agreed upon jurisdiction excludes judicial jurisdiction and does not admit remedies other than those set forth by the procedural laws.³

As regards the extent of the judicial review of an arbitration award within the context of a motion to vacate judgment, the Argentine Supreme Court pointed out that since many years ago it had adopted a restrictive criterion, denying the possibility to review the merits of said award. Hence, in *Otto Frank* of 1922, in view of the claim of defects in the procedure, the Argentine Supreme Court stated that ‘it lacks jurisdictional authority to analyze the merits of the case and review it, under the conditions in which it has been agreed upon, introduced and resolved’.⁴ Such doctrine was recently confirmed when the Supreme Court considered that the causes for review provided for in section 760 of the Civil and Commercial Code of Procedure of the Nation are restrictive and do not authorise the analysis of the merits on which the award was issued by the arbitration court.⁵

It may be considered that the concepts contained in the recent judgment of the Argentine Supreme Court shall constitute a rule to interpret section 1656 of the Civil and Commercial Code of the Nation since said regulation states that: ‘the arbitration agreement cannot waive the judicial objection to the final award that was contrary to the body of laws’. It seems that said regulation has opened the door for a broad objection of the award, which included the chance to review on the merits of the dispute.

However, Panel E of the National Appellate Court having jurisdiction in Commercial matters⁶ had already decided that section 1656 of the Civil and Commercial Code was referred to the causes of nullity provided for in the Code of Procedure. In said judgment, the Appellate Court considered that reference to ‘contrary to the law’ could be interpreted only as the impossibility of waiving the right to object to the award for nullity, but that said provision does not contemplate the impossibility of waiving the right to appeal the award, which may be validly waived. Said interpretation was confirmed by Panel D of the same Appellate Court.⁷

The Argentine Supreme Court, without specifically mentioning section 1656 of the Civil and Commercial Code, has now established that the causes for review of section 760 of the Civil and Commercial Code of Procedure of the Nation are restrictive and do not authorise the review or analysis on the merits of the arbitration court’s resolution. Hence, it seems to be confirmed that the proper interpretation of said section 1656 of the Civil and Commercial Code could not allow the judicial review of the merits of the award.

Said conclusion seems to be reinforced by the Argentine Supreme Court’s statement whereby:

‘the solution intended by the National Government, in fact, implies to assimilate the motion to vacate judgment regulated by said regulation with the appeal contained in sections 242 et seq of the Code mentioned above, in a clear surpassing of the limits set by section 760 of the Civil and Commercial Code of Procedure of the Nation for the motion to vacate judgment. Consequently, *the claim for the review of the merits of the arbitration award is inadmissible*’ [emphasis added].



The National Government's claim to apply the *Cartellone* judgment

It must be recalled that extraordinary appeals have only been admitted against judgments that have dismissed motions to vacate against arbitration awards under the limited causes provided in the Civil and Commercial Code of Procedure of the Nation.

It has been considered that the *Cartellone* judgment had admitted the judicial review of the awards beyond the limits allowed by the Code of Procedure, because the Argentine Supreme Court had set forth in its judgment that the award may be judicially reviewed due to public order matters and also when it is 'unconstitutional, illegal or unreasonable'. Consequently, some authors held that admitting the control of the constitutionality and unreasonableness implied submitting the awards to the doctrine related to arbitrariness and that the review of the legality included the effect of the appeal which was absolutely incompatible with the waiver that may be made thereto pursuant to the explicit authorisation of the legislation (section 760 of the Civil and Commercial Code of Procedure of the Nation).⁸

In the case considered, the National Government also intended a broad review of the arbitration award by claiming doctrine established in the *Cartellone* case and held that public order had been infringed. However, the Argentine Supreme Court considered that:

'Said precedent dealt with a voluntary arbitration in which it was decided both, in the bidding conditions of the contract and in the arbitration commitment that the decision of arbitrators was not open to appeal and final. As regards the interests set by the arbitration court, the Supreme Court considered that the judicial review was suitable because the decision of the arbitrators affected public order. For such reason, it considered that the parties' waiver to file an appeal against the award did not prevent the revocation of the decision contained in the award as regards the calculation of interest (see whereas clauses 1st, 2nd, 13th, 14th and 15th).'

When referring to *Cartellone*, the Argentine Supreme Court seemed to seize the opportunity to limit its scope and to circumscribe the judicial review of awards to the causes contemplated in the Civil and Commercial Code of Procedure of the Nation and cases in which public order is compromised, thus rejecting the application of

a broadest standard of review, inherent to an appeal that was subject to the parties' waiver.

On this aspect the Supreme Court pointed out that:

'The suitability of the National Government's presentation would affect also the autonomy of the parties' will since they agreed that the award was final and unappealable, what would involve a serious limitation in the contractual freedom protected by the National Constitution (sections 14, 17 and 19). The Argentine law protects both, the freedom to enter into contracts, which is one aspect of the personal autonomy, and the creation of the content of the contract, which is an assumption of law to engage in a lawful industry. This is compatible with the classic jurisprudence of this Supreme Court, stated in an orthodox manner in the '*Bourdieu*' precedent, according to which, section 17 of the National Constitution protects 'all the significant interests that a man may have excluding himself, his life and his freedom' and that "[e]very right having a value acknowledged as such by the law, either originated in private law relationships, or arising from administrative acts (private or public subjective rights)... makes-up the constitutional concept of property" (pursuant to Judgments: 145:307, especially page 327). On this basis, *the Government's intent to disclaim what was agreed upon as regards the extent of the judicial review from what was decided by the arbitrator cannot be upheld*. In any case, the complaint resulting from the lack of review of the award, if any, is the result of its own discretionary behavior (pursuant to quoted Judgments: 289:158, whereas clause 40, in which a case of labor arbitration freely agreed upon by the parties was considered). *To sustain the claim of the appellant would imply to validate a conduct contrary to the principle of good faith, that requires to behave according to the previous commitments voluntarily undertaken and that are rooted in regulations issued by the National Government itself, that set arbitration as a mechanism to solve controversies* (pursuant to subsection 1st article XII of the agreement approved by Act 23,396)...' [emphasis added].

Although the Argentine Supreme Court did not address the notions of unconstitutionality, illegality and unreasonableness set out

in *Cartellone*, it expressly mentioned the disruption of public order as a justified circumstance for judicial review. When it stressed again the unsuitability of the review of the merits of the arbitration award, the Argentine Supreme Court seemed to consider that, at least, the review for illegality referred to in *Cartellone* should not be admitted under the guidelines contemplated in this new judgment.

This judgment can be considered a step forward towards the promotion of arbitration as a mechanism for the solution of controversies.

Notes

1 *EN – Procuración del Tesoro Nacional c/ (nulidad del laudo del 20-Iii-09) s/ recurso directo*, CAF 12732/2009/CS1,

dated 6 November 2018 (at <http://public.diariojudicial.com/documentos/000/081/320/000081320.pdf>).

- 2 See *Cacchione*, Judgments: 329:3339, and case CSJ 694/2003 (39-P)/CS1 *Pestarino de Alfani v Urbaser Argentina SA*, judgment rendered on 24 August 2006.
- 3 See Gutiérrez Rafael, Judgments: 237:392; De Caro Antonio, Judgments: 274:323; Unión Obrera Metalúrgica de la República Argentina – Secc. Formosa, Judgment: 289:158.
- 4 *Otto, Frank*, Judgments: 137:33, especially p 41.
- 5 *Ricardo Agustín López*, Judgments: 340:1226.
- 6 *Olam Argentina SA v Cubero Alberto Martín et alius, Reconsideration for the Dismissal (Recurso de queja)*, Appellate Court having jurisdiction in Commercial matters, Panel E, 22 December 2015, La Ley (10 May 2016).
- 7 *Amarilla Automotores SA v BMW Argentina SA, Reconsideration for the Dismissal (Recurso de queja)*, National Appellate Court having jurisdiction in Commercial matters, Panel D, 14 April 2016, LL, RCCyC (16 December 2016).
- 8 Julio César Rivera, *Arbitraje Comercial, Internacional y Doméstico*, 2014 Abeledo Perrot, p 676.

**Nicolás
Fernández
Quesada**

Baker McKenzie,
Argentina

Nicolas.Fernandez@
bakermckenzie.com

Argentina: draft bill for the regulation of class actions

The Ministry of Justice is promoting legislation regulating class actions, which supporters hope will make significant progress in 2019. Although class actions have been possible in Argentina since 1994, there has been a lack of specific regulation. So far, the Supreme court issued one judgment in 2009 in the leading case of *Halabi*, establishing a guideline for these type of claims. It also issued two Resolutions (*Acordadas*) on the subject, although with limited scope, regarding the creation of the Public Registry of Collective Processes, rules on consolidation of collective claims with similar purpose and publication of a notice informing the members of the class of the existence of the claim.

The current bill includes provision for online case tracking and funding for public education on class actions. The bill recognises that individuals or groups of people have the right to effective jurisdictional protection and due process for the protection of rights of collective incidence. The rules that govern the collective process aim at facilitating access to justice.

The draft bill contains a set of requirements for the affected individual to act as a representative of a class, who – together

with his/her lawyer – must prove his/her professional suitability to act in that capacity during the entire process. Similarly, there are also specific requirements for consumer law associations that pretend to file this type of claims: they must be at least two years old in their constitution and must prove, in addition to their registration, the presentation and approval of the financial statements and a detail of the activities aimed at the protection of consumer rights, both for the last two years.

Before filing the claim, the plaintiff must make a query to the Public Registry of Collective Processes to find out if there is any other ongoing collective process with a claim with substantial similarity, and to inform – in an affidavit – of its result when filing the claim.

There is also reference made to the costs of litigating a class action, setting forth that plaintiffs are exempt to pay the litigation tax. However, other legal expenses (eg, legal fees) are subject to the general rules established by procedural codes.

Once the class is certified by the judge, he/she must order the publicity of such decision applying the criteria of the lower economic cost that enables greater diffusion (eg, through technological means suitable for this purpose). These costs should be

borne by the plaintiff. Consumers are entitled to opt out of the class, if they do not want to be bound by the court's decision in the class action lawsuit.

The bill sets forth that the voluntary abandonment of a collective claim requires the approval of the defendant, provided it is raised after the claim is notified. If the judge considers a defendant's opposition well founded, the withdrawal is ineffective and the proceedings should continue. All decisions in this sense are made with the prior intervention of the Public Prosecutor's Office,

who must express its opinion regarding the withdrawal and, if applicable, if they decide to continue processing the case.

The bill remains subject to amendment and is far from certain to pass, but, if enacted, would represent a significant development in Argentinian dispute resolution.

Notes

- 1 Ley de Procesos Colectivos, Proyecto Justicia 2020.
- 2 Corte Suprema de Justicia de la Nación, *Halabi, Ernesto c/ PEN ley 25.873 y decreto 1563/04 s/ amparo*, 24 February 2009, Fallos: 332:111.
- 3 Acordadas CSJN 32/14 and 12/16.

Community protests and clashes in Chile

Ruggero Cozzi

Baker McKenzie,
Santiago

ruggero.cozzi@
bakermckenzie.com

As communities start to organise and empower themselves, it is common to see community protests against the development of projects (eg, hydroelectric power plants, mining sites, ports, etc.). Protests may arise at construction or exploitation phase, challenging the viability of the project on social, environmental or cultural grounds, and attracting the attention of the press and local authorities around the project in question.

There is no question that communities have the right to protest. International and regional human rights instruments protect that right as an integral part of freedom of speech and freedom of assembly. Difficulty arises when protests go too far, exceeding the legitimate exercise of rights, and falling into de facto and illegal conduct, such as the blockage of roads or occupation of private property. In Chile, the word *toma* has evolved to describe such phenomenon as a community taking de facto control over roads, industries, buildings – or indeed control over anything – as a means of political protest. A *toma* may cause delays in construction, or paralyse business for weeks or months, pushing companies to negotiate or even give up their projects.

There is no general standard for determining when a protest becomes illegal; legality of protests should be assessed on a case-by-case basis. The issue has been litigated

many times before Chilean courts, with differing results.

One line of judgment declares that *tomas* and similar protests are socio-political matters, and therefore, surpass the jurisdiction of the courts. Legislative and governmental branches of the State are constitutionally empowered to deal with socio-political matters; they are not a concern of the judicial branch. Following this line of reasoning, tribunals can only rule on legal controversies and not political conflict.

In 2010, for example, the Court of Appeals of Valparaíso ruled against a hotel company whose hotel building was occupied by a *toma* of people from the Rapa Nui community in Easter Island. The Court based its dismissal on the political nature of the conflict that made 'other authorities responsible for prosecuting in some way the problem raised'.¹ In 2011 the Court of Appeals of Antofagasta rejected a constitutional challenge against a *toma* of a school. In that case, the Court held that it was a 'controversy of a political and not a legal nature', so the case should be addressed before the political authorities and not before the tribunals.² This line of judgment was followed by the Court of Appeal of Valdivia, which considered 'that we are in the presence of a conflict of a political nature, so this is the field in which it should be duly resolved'.³

In other instances, Chilean courts have taken an opposing stance and declared that

de facto occupations – and particularly, *tomas* – are contrary to the rule of law, because they are a way for protestors to take the law into their own hands.

In 2014, in a leading case, the Court of Appeals of Santiago held that the fact that a *toma* is framed within a conflict of a political nature does not mean it is justified. The Court added that under a rule of law ‘freedom of speech is assured, but as every right, it has its limits (...) measures of force cannot be imposed’, and political claims ‘must be channeled through other means that the institutional order allows’. The Court added that protesters can express their opinions in many forms, such as ‘meetings, public statements, formal petitions to the authority’, among others, ‘but should never resort to force, which cannot take place in a democratic society’.⁴ The Supreme Court confirmed, and added, that *tomas* are by definition ‘an act of force that does not constitute a legitimate means for expressing an opinion and does not form part of the content of freedom of expression. It is an illegal behaviour that does not respect the rights of others (...) the plausibility of the reasons invoked to explain or justify the *toma* (...) cannot render legal the factual means used for that purpose. The legality of social protest, which, like most public expressions of citizenship, may be relevant for generating debates in public opinion, should not be confused with the use of mechanisms characterised by the use of force’.⁵

In 2016, neighbours of a construction project in the city of Puerto Montt resorted to a *toma* of the streets, blocking the way with cars to impede the passing of construction trucks and workers. The Court of Appeals of Puerto Montt ruled that the *toma* violated the economic freedoms of the contractor, declaring that the blockage was a ‘de facto measure of taking the law into their own hands’, which is forbidden by law, and ordered the police to remove all obstacles and clearance access to the construction site.⁶

Moreover, the Chilean courts have declared that this kind of protest may violate freedom of movement of the workers. In a case concerning CODELCO, an important state-owned mining company, some subcontracted workers blocked the access to the mining site, impeding access to other personnel of the company and so interfering with their ability to attend for and perform their work. The Court of Appeals of Copiapó ruled against the protest.⁷

More recently, members of an indigenous community protested against a neighbouring mining company. The community blocked access to the mining camp, claiming that the access road was within the limits of their indigenous lands. The Court of Appeal of Copiapó ruled in favour of the company, declaring that whatever the nature of the road, public or private, under Chilean law ‘it is forbidden to take the law [into their] own hands’ and that nobody can compel others by force. The Court reasoned that, ‘the court was obliged to restore the rule of law’ inasmuch that the road blockage impeded the company from developing its mining operations and business, and ordered the indigenous community to stop blocking the road.⁸

In conclusion, companies facing community protests may resort to litigation in order to obtain redress. Some judges may avoid ruling in the face of political protests. There are, however, good examples of successful outcomes when resorting to litigation for the restoration of the rule of law.

Notes

- 1 Court of Appeal of Valparaíso, Rol 343-2010, 11 November 2010.
- 2 Court of Appeal of Antofagasta, Rol 578-2011 29 September 2011.
- 3 Court of Appeal of Valdivia, Rol 412-2011, 18 October 2011.
- 4 Court of Appeal of Santiago, Rol 39.022-2014, 18 August 2014.
- 5 Supreme Court, Rol 23.540-2014, 11 November 2014.
- 6 Court of Appeal of Puerto Montt, Rol 976-2015, 2 March 2016.
- 7 Court of Appeal of Copiapó, Rol 123-2007, 12 July 2007.
- 8 Court of Appeal of Copiapó, Rol 294-2018, 22 March 2019.

Continental law and Latin America perspectives on punitive damages

The history of punitive damages can be traced back to the early 1760s. Notwithstanding its lengthy history, the law on punitive damages cannot yet be regarded as a defined doctrine, even in common law jurisdictions, due to long-standing controversy surrounding the concept.

In Latin America the issue of punitive damages is especially unsettled. This is mainly because it is a relatively young institution, and considered incompatible with the structure and principles of continental law. However, in recent years, punitive damages have seen significant developments in the legal practice of some South American countries.

This article reviews the current situation and the latest trends in punitive damages in Spain, Argentina, Mexico, Venezuela, Brazil, Uruguay and Colombia.

Spain

Punitive damages are a type of remedy meant to deter defendants from acting in the same reckless manner that led to the injury, that is, a punishment for harmful acts. These types of damages are awarded – mostly in common law jurisdictions – when the courts decide that compensatory damages are not enough to fully compensate the plaintiff for the damages suffered.

Spanish tort law does not regulate punitive damages. Article 1.902 of the Spanish Civil Code ('SCC')¹ only provides for compensatory damages. The purpose is to restore the victim to the state they were in before the injury occurred (feasibility). Under the umbrella of compensatory damages, the following can be distinguished between: (1) tangible losses (eg, loss of income, economic loss, etc.); and (2) intangible losses (eg, pain and suffering, emotional distress, etc.).

The rationale to exclude punitive damages is that, in Spain, authority to punish an individual is a social policy issue expressly reserved to administrative law bodies and criminal justice. However, even though punitive damages are not regulated, article 1.152 of the SCC allows for the so-called "*cláusula penal*" ('penalty clause'),

which gives the parties to an agreement the right to set a specific amount of money for the case of contractual breach, acting as a punitive clause. The judge has the discretion to moderate such penalty clause in the event that the main contractual obligation has been partially performed, or, in case of defective performance.

Lastly, Spanish courts have generally admitted enforcement of foreign judgements that grant punitive damages. In this regard, the Spanish Supreme Court Order dated 13 November 2001² established a three-pronged test under which a foreign judgement would be duly enforced – in accordance with public order requirements – if the punitive damages awarded are: (1) proportional; (2) objectively justified; and, (3) the case is not factually linked to Spain. In any case, this issue does not seem to be settled as, in some instances, the Spanish Supreme Court has partially enforced those judgments by excluding the award on punitive damages.³

Notes

- 1 'Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil'.
- 2 See Supreme Court Order dated 13 November 2001 [JUR 2002, 608].
- 3 See Supreme Court Order dated 18 September 2001 [JUR 2001, 264071].

Félix Montero

Pérez-Llorca, Madrid
fmontero@perezllorca.com

Mercedes Romero

Pérez-Llorca, Madrid
mromero@perezllorca.com

Rodrigo García

Marval, O'Farrell & Mairal, Buenos Aires
 rfg@marval.com

Argentina

Until the amendment of the Consumer Protection Act in April 2008, there was no specific law regulating punitive damages in Argentina. Since it has punishment and deterrence purposes, the enactment of Section 52 Bis reformed the Argentine tort liability framework, which, until that moment, had been structured purely around compensatory damages.

According to Section 52 Bis, at the request of the client, punitive damages can be awarded in favour of the plaintiff and against the supplier who did not comply with a legal or contractual obligation.

To quantify punitive damages, Section 52 Bis set out the following guidelines: (1) reprehensibility of the supplier's conduct; (2) other circumstances of each case; (3) compensatory damages should not be taken into account; and (4) damages must not exceed the limit of ARS 5m (about US\$108,700).

Since its enactment, numerous scholars have voiced severe criticism about the indeterminacy and broad scope of Section 52 Bis, which does not require the breach to be serious, deliberate or neglectful.

However, case law (which has increased significantly during the last three years) has stated that breach should not be deemed as the only requirement for awarding punitive damages, but considered together with either: (1) supplier's negligence or gross negligence; (2) the gain or profit that they may have obtained; or (3) serious disregard for the consumer's rights.

An amendment to the Consumer Protection Act has recently been drafted, which modifies Section 52 Bis by recognising legal standing to request punitive damages in favour of the Public Prosecutor's Office and properly registered consumer associations (the latter already being admitted under case law). Moreover, the limit of punitive damages is increased (up to about US\$1,358,700) and a mechanism for monetary update is established. Finally, judges will be entitled to award punitive damages *ex officio* and determine to whom they should be awarded in each particular case.

Juan José Iturbe López

Malpica, Iturbe, Buj & Paredes, Mexico City
 jitrube@mibp.com.mx

Mexico

Mexican law on damages has been characterised, to a certain extent, as being strict and rigorous. The current Federal Civil Code recognises only the possibility of recovering material damages caused directly and necessarily by unlawful conduct and non-material damages. However, levels of punitive damages, a topic widely studied and recognised in other legal systems such as that of the United States, are not expressly regulated in Mexican civil codes even today. The incorporation of punitive damages into Mexican law is instead based on rulings adopted by the First Chamber of the Mexican Supreme Court of Justice in the direct *amparos* (injunctions) 30/2013 and 31/2013, better known as the Mayan Palace Case; the first declaration under Mexican law that punitive damages were

a possibility, which subsequently became enshrined in article 1916 of the Federal Civil Code.

Since the Mayan Palace Case, it has been established that punitive damages are part of the human right to just compensation. However, it has also been established that it is an essential requirement of the courts to prove the casual link between the damage and/or injury suffered and the unlawful conduct. In addition, there is still distrust and lack of clarity on the part of judges when ruling on punitive damages, partly, we believe, due to the absence of a clear legislative and jurisprudential framework providing accurate sentencing guidelines. Judges lack specific criterion to rule on punitive damages and so prefer to absolve.

Since Mexico has both high litigation rates and breaches of legal obligations, it seems not only convenient but absolutely necessary to find resolution to these issues in the legal forum.

Venezuela

In Venezuela, punitive damages are neither regulated nor recognised as a concept in law. Venezuelan civil legislation recognises two kind of damages: (1) material damages; and (2) moral damages.

The following criteria prevails: in civil legislation and rulings thereon, the reparability of damages will only cover damages actually caused, without the possibility of extending it by imposing

compensation for damages separate to those actually proven, on the understanding that the damages effectively recognised must be those that have caused a certain and effective loss in the legal sphere of the plaintiff, with the possibility of imposing compensation for material or moral damages.

The criteria outlined above was established by the Constitutional Court in ruling No. 1542 of 17 October 17 2008. Under the effect of this rule, only damages that have been effectively caused and effectively proven before the court in which the case is heard may be recognised.

Carlos Domínguez

Lega, Caracas
cdominguez@lega.law

Brazil

The Brazilian legal system does not contain any provision on punitive damages, a legal concept yet further impaired by the ban on unjust enrichment, a principle expressly incorporated in the Civil Code of 2002.¹ This is because, in civil liability cases, (property and moral) damages must be based on a principle of redress. Thus, article 944 of the Civil Code sets out that damages are measured by the extent of the damage;² and the proposal put forward in Bill No. 6,960 of 12 June 2002, to include as paragraph 2 in said article: ‘The redress for moral damage should be a compensation to the victim and proper discouragement to the offender’ was rejected.

Despite that, the concept of punitive damages at times (but without legal basis) influences decisions that take into consideration the educational background and punitive effect on the offender in measuring the damage, more specifically the moral damage. This stand was well defined in a precedent settled by the Brazilian Superior Court of Justice: ‘The criterion that has been adopted by this Brazilian Superior Court on determining the award for moral damage considers the personal and

economic conditions of the parties, and it must be determined in a moderate and reasonable manner, taking into account the reality of life and particularities of each case, so that it entails no unjust enrichment of the victim, while serving to discourage the offender against repeating the wrongdoing.’³

Nevertheless, even when punitive damages have been applied conditionally, the award determined by the courts was negligible, on account of the ban on unjust enrichment, which effectively disqualifies the real purpose of this precept; that is, to discourage the offender against repeating his conduct.⁴

Therefore, one concludes that, in Brazil, the application of punitive damages is incipient, as it has no legal grounds and is far from being settled in legal writings and court precedents on this matter.

Théra van Swaay De Marchi

Pinheiro Neto,
São Paulo
tdemarchi@pn.com.br

Felipe Evaristo dos Santos Galea

Barbosa Mussnich
Aragão, São Paulo
fes@bmalaw.com.br

Notes

- 1 Article 884: Whoever is unjustly enriched at the expense of another must restitute the unduly earned benefits, duly adjusted for inflation.
- 2 Article 944: Damages are measured by the extent of the damage.
- 3 Internal Interlocutory Appeal (Agravo Regimental - AgRg) in Interlocutory Appeal No. 850.273-BA (2006/02(62377-1).
- 4 Luciana de Godoy Penteado Gattaz, *Punitive damages no Direito Brasileiro*, RT 964/2016.

Diego Gamarra Antes

Posadas, Posadas &
Vecino, Montevideo
dgamarra@ppv.com.uy

Uruguay

Punitive damages are not recognised under Uruguayan law, which is a civil law system. There is agreement on this, as they are neither recognised by statutory law nor are they applied by the courts.

Our liability regime (both breach of contract and torts) is based exclusively on the indemnification of direct damages – that is, patrimonial and moral damages, including loss of profit, as long as they are direct – notwithstanding the possible application of contractual penalties if agreed by the relevant parties.

Deterrence is achieved exclusively by the use of administrative and penal sanctions, which need to be set in an instrument of statutory law. Therefore, judges are not

authorised to apply or award punitive or exemplary damages. They are empowered, however, to impose *astreintes* (sanctions regarding compliance with judicial orders) and in cases of procedural breaches, which are not punitive damages.

There are certain defined cases in which so-called ‘legal civil penalties’ apply as specifically regulated under statutory law; for example: section 71 of Act 14.219 regarding evictions; section 51 of Act 9.739 regarding infringements to copyrights; sections 1634, 842 and 2002 of the Civil Code respectively regarding revocation of donations; the extinction of rights as heirs caused by indignity, and concealment of goods during marriage, etc.

Nevertheless, despite the aforementioned specific cases, punitive damages as a general category are not recognised under Uruguayan law.

Christian Perez Rueda

Lloreda Camacho & Co,
Bogotá
cperez@
lloedacamacho.com

Colombia

Currently, the Colombian tort and liability law does not allow for the award of punitive damages, even in cases where it is proven that the defendant acted with the willful intention to harm the plaintiff. Moreover, the Colombian Supreme Court has recently stated that punitive damages are exclusive to common law and are considered to be ‘exotic’ in the Colombian civil-law based system.¹

According to the majority view, tort law in Colombia is conceived under a comprehensive reparation system, being its only purpose to make the victim whole and not to become a source of enrichment. Therefore, punitive damages are construed as something beyond reparation.

In general terms, Colombian tort law is taken from Article 2341 of the Civil Code, a law enacted in 1887. In the beginning, Colombian Courts would only award the victims with compensation for monetary damages (ie, actual damages and loss of profit).

Over time, based on the principle of comprehensive reparation, Colombian courts began to award additional compensation for non-monetary damages (eg, moral

damages, lifelong relationship damages, and, more recently, damages to health and to constitutionally protected rights and goods), establishing certain parameters to determine the amount of the compensation.

However, on some occasions, the awarding of compensation for non-monetary damages has been criticised by some authors and justices from the high courts, explaining that, in their view, it is a way to conceal and justify the award of what actually is punitive damages, given that the value of non-monetary damages cannot be calculated moneywise.

Notwithstanding these criticisms, there is a chance that punitive damages might be allowed in Colombia: The Constitutional Court has stated, in a handful of its judgments,² that it is within the powers of Congress to determine what the boundaries of comprehensive reparation are. Thus, it would be constitutionally admissible for the legislator to enact a law allowing punitive damages, as long as they are regulated within reasonable limits to avoid the abuse of judicial discretion.

Notes

1 Decision No. AC4410-2018 of 10 October 2018.

2 Eg, judgments C-916/02, C-1008/10, and C-344/17.

When eating from the poisonous tree is not fatal

Yohai Shelef

Eitan Mehulal Sadot,
Herzliya

yohai@ems-legal.com

In January 2019, the President of the Israel Bar, advocate Effie Naveh, was questioned by the police under caution on suspicion of acting for the appointment and advancement of judges in consideration for sexual bribery. Further thereto he resigned from his position as President of the Israel Bar. The information that led to the investigation was obtained by hacking Naveh's mobile phone. Hadas Shtaif, a journalist with Galei Tzahal (Army Radio), managed to obtain Naveh's mobile phone and passed it on to a technician for him to hack into it. On 20 January, Naveh filed a complaint with the police against Shtaif for taking the phone without his permission and breaking into it. Naveh also filed a civil complaint against Army Radio and Shtaif, claiming damages of seven million shekels (approximately US\$2m) and the return of all copies of the material in the phone.

These events raised a controversy in Israel with regard to the issue of whether it is desirable to make use of evidence obtained unlawfully for the purpose of law enforcement and the conviction of offenders.

In the United States, the answer to the question is in the negative. The US Supreme Court has developed the 'fruits of the poisonous tree' theory, according to which evidence that has been obtained unlawfully is inadmissible. According to the doctrine, the court must exclude not only the evidence obtained as a direct result of infringing the accused's constitutional right, but also any other evidence found directly or indirectly through the information uncovered by the original evidence – even when the reliability of the evidence is not in doubt. The US exclusionary rules are based on the disqualification of evidence that has been obtained contrary to the Fourth Amendment to the US Constitution, which concerns the principles of search and seizure; the Fifth Amendment, which embodies the right against self-incrimination and the right to fair process; and also the Sixth Amendment, that guarantees the right to representation by an attorney, if the accused wants.

In its case law, the US Supreme Court has accepted the approach whereby the said exclusionary rules are essentially intended as an educational deterrent in order to deter the police and other government agencies from using means of investigation that are in violation of the suspect/accused's constitutional rights.

The rigidity of the American exclusionary rules, which have not allowed room for judicial discretion, has had far-reaching results by eroding the purpose of law enforcement, which is the fight against crime and the discovery of truth. As a result of those social consequences, the rules have been criticised in the US and abroad. Further to that criticism, the Federal Supreme Court has recognised exceptions to the exclusionary rules, which have slightly eased the sweeping exclusion prescribed by them.

Other common law countries, such as Canada, England, Australia and South Africa, have adopted a more moderate exclusionary doctrine, which is based on a somewhat less rigid model. The English legislature has adopted a relative exclusionary doctrine that allows the court discretion as regards the exclusion of evidence obtained unlawfully. The main criterion in this connection is whether, in the particular circumstances, admitting the evidence in court will significantly prejudice the fairness of process. According to English case law, the primary purpose of excluding evidence is not to educate the police or deter the use of illegitimate means of enquiry, but to protect the fairness of process and the integrity of the judicial system.

According to the English legal position, the English exclusionary doctrine is not conditional upon the evidence being obtained in infringement of a protected constitutional right, and it suffices to prove that in all the circumstances, including those in which the evidence was obtained, its admission in court will affect the fairness of the proceedings. The English case law has emphasised that evidence might also be excluded because of the use of unfair means

of investigation and it is not necessary to establish that obtaining the evidence was formally unconstitutional.

The European Convention on Human Rights does not provide an answer to the question of whether evidence obtained unlawfully is admissible; the matter is regulated by the domestic law of the individual countries. Nevertheless, the European Court has held that the infringement of a right protected by the Convention when obtaining the evidence does not necessitate the exclusion of its admissibility. According to it, it is necessary to examine in the individual circumstances of each particular case whether admitting the evidence will render the trial as a whole unfair.

In Israel, rules have been adopted that are similar to those applying in England and the European Union as regards the possibility of excluding evidence obtained unlawfully. Again in Israel, the power to exclude evidence is subject to judicial discretion, the court having to balance the infringement of fair process. The weight of the infringement derives from the offence in which the evidence was obtained, compared with the gravity of the offence involved in the indictment and the social implications of legitimising the evidence. The court must also balance the interests of: discovering the factual truth, the fight against crime and the protection of the public peace, on the one hand; and the protection of the accused's rights and the fairness and integrity of the criminal process, on the other hand.

In the writer's opinion, these are abstract rules and almost any result is possible if they are applied. Nevertheless, the Israeli courts mainly tend to legitimise evidence that has been unlawfully obtained. They take the view that the public interest generally outweighs the interests of the accused and the individual wrong that is *prima facie* caused to him by the infringement of his rights.

In the Naveh affair, the question arose as to whether the Israeli state prosecutor acted properly by permitting the use of the evidence that had been taken from Naveh's mobile phone by hacking into it contrary to the law and then making unrestrained use of the content stored in it, seriously infringing the privacy of Naveh and his associates.

So what will the scales indicate to the judge when, on the one hand, he balances the interest of prosecuting white-collar crimes,

to the extent that the evidence unlawfully obtained substantiates those offences; and on the other hand, the interest of protecting the privacy of Naveh, his associates and the public in general, who might be harmed by similar intrusions in future? Which value is more worthy of respect?

Should society lend encouragement to hacking into and trawling databases? And, if so, for what purpose? Defeating violent crime? Or, perhaps, also for eradicating tax offences?

Where will the court draw the line and say that the criminal act committed in order to obtain the evidence does not justify its legitimisation? Should the answer to such questions be left to the courts, whose opinions are likely to differ depending on the subjective philosophy of individual judges or should the publicly elected legislature answer the question?

Trying the evidence obtained by the commission of a criminal offence (as in the case of Naveh) concerns society as a whole, both in Israel and abroad, wherever the rules relating to the use of unlawfully obtained evidence are fluid and subject to the discretion of those sitting in judgement. In those legal systems, the result is uncertain.

Which social aspects will the court delineate? Those of an intrusive Orwellian society that encourages prying and invasiveness; or more balanced aspects, like those of a society that permits lines to be crossed in order to obtain evidence only in cases where it is necessary to fight against serious crime and when that need is obvious and perhaps immediate, in order to prevent a serious crime that is about to be committed?

Taking a long-term view and having regard to the risks inherent in encouraging a violent culture that legitimises the illegitimate in borderline cases, the scales tilt in favour of significantly restricting the ability to make use of unlawfully obtained evidence, limiting it solely to investigations in the case of serious crimes, cases that are generally not heard by a judge sitting alone.

The legislative position that currently exists in Israel and elsewhere in Europe, where the boundaries between the permitted and prohibited use of unlawfully obtained evidence are blurred, unfortunately creates the possibility of a slippery slope down to overriding fundamental norms of human dignity and the basic right of privacy.

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