International Litigation News

the global voice of the legal profession

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IN THIS ISSUE

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'Innovation in litigation – prepared for 2027' is the – certainly unusual – topic for our upcoming IBA Annual Litigation Forum (ALF) Conference on 3–5 May 2017 in the beautiful town of Zurich. We are excited to present a conference that, because of its conspicuous focus on super-technology rather than purely current legal topics, fully satisfies the expectation of our members for an international organisation that is the voice of the legal profession. Attendees at this year's ALF will, once again, have the benefit of being more well-informed and ahead of the brave new world of litigation than could be achieved by attending your average domestic conference.

Noteworthy achievements in 2016, early 2017

Before going into the details of this exciting, upcoming event, it is time to express our deep and lasting gratitude to Chris Tahbaz who, as the outgoing Senior Co-Chair, steered the Committee in such a masterfully deft way to even bigger successes, as he brilliantly assembled an ever-growing IBA universe of litigation experts. The current, striking record of sponsorship funds raised for Zurich has to be attributed to the great efforts put into our Committee by our past Chairs, and this is the right place to repeat our gratitude to their dedication and devotion. Foremost in our thanks is our outgoing Chair, Chris Tahbaz. With the help of his Co-Chairs, Cedric Chao, Chris Helmer and Michael Novicoff, Chris has provided us with truly distinguished speakers and lively, engaging panels on topics that perfectly matched the outstanding venue of San Francisco.

In addition, under Chris's guidance, Sandrine Giroud and Sara Chisholm-Batten – assisted by 20 country representatives covering Austria, China, France, Italy, the Netherlands, Norway, Russia, Spain, Switzerland, the United Kingdom and the United States – edited the Committee's *Report to the Hague Conference/Conférence de La Haye (HCCH) Special Commission on the Recognition and Enforcement of Foreign Judgments*. For more information, please check the Projects and Reports section available at the following link for our top-quality report, which was published in February 2017: **www.ibanet.org/LPD/Dispute_Resolution_Section/Litigation/Default.aspx**.

Chris's Co-Chair, Bettina Knoetzl, together with Tom Price and Tim Strong, furthered the IBA goal in fighting corruption by coordinating the Committee's contribution to the Judicial Integrity Initiative.

Finally, the IBA Annual Conference in Washington, DC in September 2016 was a tremendous success. Aside from the remarkable presentation of the Dispute Resolution Showcase, truly impressive topics – ranging from navigating corporate scandals to asset tracing and climate change disputes – fostered a high-level exchange of legal know-how and expertise. So did the 2nd IBA Litigation Committee Conference on Private International Law, Milan, Italy, which has – under the masterful guidance of Angelo Anglani and Carlo Portatadino – developed into a truly outstanding platform for exchange of new developments and trends in the field of private international law.

IBA Annual Litigation Forum Conference in Zurich, 3–5 May 2017

This year's IBA Annual Litigation Forum (ALF) Conference, with its focus on 'Innovation in litigation – prepared for 2027', promises to be among our most popular and eye-opening ALFs, offered in a sublime location for networking. The representatives of our local host committee and Conference Co-Chairs, spearheaded by Marc Russenberger, Sandrine Giroud and Urs Feller, have worked incredibly hard to take us to exceptional venues, such as the Zunfthaus zur Meisen, where alpine tradition is kept strong. For those who want to enjoy more of Switzerland and additional networking opportunities, the host committee is arranging for an outing to Appenzell on Saturday 6 May. We encourage you to make your travel arrangements soon to be a part of this year's hugely successful ALF.

From a professional point of view, the ALF promises to be an eye-opener, allowing a compelling look into the future of our litigation profession. The Conference kicks off with a preview of our next generation: a young litigators' seminar, with a session based on a hypothetical model, will offer a valuable training opportunity involving witness examination. Clement Dupoirier and Feodor Vyacheslavov have invited senior members of our Committee to teach the dos and don'ts of examining witnesses in different jurisdictions. This will be followed by the formal opening of the conference on Thursday morning, with a keynote speech by Gerry Riskin, who will not only teach young litigators but also give senior practitioners pointers about how to help their firms to accelerate and ease their ability to adapt.

Following this introduction to the topic, outstanding legal professionals, forensic experts and information technology gurus will provide their insights into the most recent developments in the legal profession, offering a unique exchange and transfer of know-how, with a focus on the practice of the litigator. This is a unique opportunity to share with litigation experts from across the globe a fluid compilation of know-how and trends, compressed into 1.5 days, starting on Wednesday with our welcome reception and ending on Friday at lunchtime with the start of the open officers' meeting.

Will artificial intelligence replace our employees – or has it already?

Using predictive coding to locate the 'smoking gun', presenting with three-dimensional animation, and predicting the outcome of court proceedings based on different arguments or presentation techniques, how deeply will our future practices suffer from inexorable technological progress in legal practice? Will in-house counsel check legal fee statements with the help of automated programs and, simultaneously, educate us on efficiency in drafting complex briefs?

More than 250 practitioners from all over the globe are expected to attend this conference, raising and answering questions that we are all unwittingly facing, no matter whether we like the progress of technology or hate it. Fifteen years ago, we could not imagine that a law firm partner would be typing messages into a small, handheld device instead of dictating the content of a letter to their secretary. Constant change is so pervasively driving the legal profession that litigation practice experts will shed light on the question: what will change in court proceedings? What can already be anticipated from most recent, ground-breaking technological developments? A look into the future of lawyering will be rounded up by a glimpse into Brexit and suggestions on how to adjust to it. We thank our panel chairs, Jane Colston, Sandrine Giroud, Marc Russenberger, Gion Christian Casanova, Cedric Chao, Keith Oliver and Frederick A Acomb, for their time and the hard work that they put into preparing what promises to be the absolute highlight of this year's Committee functions. For more information please check the programme at **www.ibanet.org/Conferences/conf780.aspx**.

IBA Annual Conference in Sydney, 8–13 October 2017

We also look forward to, and have started to prepare our sessions for, the IBA Annual Conference in Sydney. Despite the longer travel time for most of us, we are excited to meet in such a cutting-edge and attractive part of the world, and – in doing so – expand our global reach and network even further. If you wish to get more involved in the Litigation Committee's work, please do get in touch with us.

And finally

We have decided that 2017 is the perfect year to pay special attention to collective redress and to explore where the legal profession is developing in this respect. Thus, our next edition of International Litigation News will prominently feature country reports on this topic. Please get in touch with the editors to let us know if you are interested in contributing.

Editors' note

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In this edition, we have contributions from our members across the globe. We are particularly pleased to have received a number of contributions from jurisdictions that have sometimes been under-represented in the past, such as Asia.

The pace of procedural reform is picking up in a number of countries as the court systems modernise through digitisation and look to compete for international commercial disputes through the creation of specialist courts. A number of the articles in this edition pick up the theme of reform both in terms of court structure and the procedural rules that apply.

We are very grateful for all the time that our contributors have taken to provide material for this edition, and the forbearance they have shown when we have returned with questions and suggested amendments during the editorial process.

We hope that you receive this edition of the publication before the Litigation Committee mid-year conference in Zurich. For those travelling to Zurich, we look forward to seeing you there and renewing our request for articles for the next edition.

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IBA 2017 Sydney 8–13 OCTOBER

ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

Litigation Committee sessions

Monday 0930 – 1230

Dispute resolution showcase: culture clashes – systemic pitfalls in international dispute resolution

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

'I'm an alien, I'm a legal alien, I'm an Englishman in New York…' Sting's famous song captures the surface of what must be regarded as an iceberg. Separated by the same language, even citizens from the US and UK feel like and are strangers when solving their disputes in the foreign venue. As the cultural differences increase, the challenges for international dispute resolution lawyers grow. Religion, gender and geographic background are just a few examples of the massive differences that dispute resolution lawyers are facing when dealing with their clients and opponents, some might be conspicuous and some might be so implicit that only insiders may observe them. Those differences may impose – implicitly or visibly – tremendous hurdles and need to be taken into account when trying to resolve a matter effectively and successfully.

Dispute resolution lawyers, judges, arbitrators, mediators and enforcement mechanisms implicating multiple countries find complications from:

- national and international politics;
- real culture (including the role of women);
- national interests and security issues, particularly in cybersecurity;
- investment adventurism;
- judicial philosophy;
- selection of judges;
- mass, inconsistent psychology of peoples;
- involvement of 'rogue' regimes (Russia 'expelling' Apple, North Korea arresting 'spies');
- changes in one or more political underpinnings (eg, Brexit, Philippines' 'divorce' from the US, Russia's appetite for expansion, China's relationship with Hong Kong, and the Arab spring, fall and winter); and
- corruption inconsistently applied.

The panel assembled for this workshop represents senior, experienced practitioners, cutting-edge academics, and forward-thinking internationalists and protectionists. They promise to bring an array of views, cultures, biases, successes, failures and forecasts to the workshop, with the goal of sharpening our awareness of cultural clashes and to make practitioners around the world more adept at coping with the challenges arising out of handling cross-border disputes.

Monday 1430 – 1730

Blame the brain: the science of dispute resolution

Presented by the Mediation Committee, the Arbitration Committee and the Litigation Committee

'No area of understanding is more relevant and important to mediation competency than a basic understanding of how the human brain functions, perceives events, processes emotional notions, cognitive response and formulates decisions. The awareness of cognitive neuroscience and psychology are at the heart of our work in managing conflict and problem solving.' Robert Benjamin, 2009.

Experienced mediators rely on instinct, intuition and experience to assist disputants and counsel with high conflict personality and heightened emotions, over-confident case theories and assessments, deeply held beliefs, and barriers to rational deals. Regardless of the outcome, it is difficult for practitioners to identify the precise micro-actions taken individually or collectively by the mediator(s), disputants and/or counsel that turns a mediation, and pinpoint exactly what worked and why. This session aims to explore the science behind the instincts, intuitions and experience of experienced mediators, and considers the latest research on how and why disputants and counsel behave the way they do at mediations. We survey the landscape of neuroscience and psychology behind mediators' interventions that may turn an impasse into a successful outcome, and discuss how neuropsychology may help provide mediators and counsel with structures and tools to assist disputants.

Tuesday 0800 – 0930

Global women litigator breakfast

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

Tuesday 0930 – 1045

Sell your judgment/award! Third-party funding for litigation and arbitration proceedings, including funding of enforcement of judgments and arbitral awards

Presented by the Litigation Committee and the Arbitration Committee

Australia is the birthplace of modern litigation funding. In recent years, third-party funding has become a significant force in international litigation and arbitration. The funder, which has no prior interest in the dispute, funds the legal costs and expenses of a claimant, typically on the basis that the funder will be paid out of the proceeds of any recovery following a successful outcome. Funding offers benefits to claimants in terms of access to justice and spreading the risk of complex legal proceedings. Courts in many jurisdictions have determined that funding is permissible in appropriate cases, but the terms of the funding agreement may have to be disclosed and may require court approval. Challenges can be brought to the terms of the funding agreement by the opposing party. While funding provides considerable benefits to the claimant, it can also introduce legal and practical challenges for managing the relationship between the funder and counsel, as well as between counsel and the client.

This session will explore the latest issues and trends in third-party funding, and include commentary from counsel, funders and an arbitrator on how funding has affected the conduct of litigation and arbitration. Counsel will address the challenges of the three-way relationship between the client, funder and counsel. The funders will address how they scrutinise legal claims and risks, the flexibility of funding arrangements and how they can be tailored to the needs of the claimant, and the extent of involvement that funders expect to have in the management of the dispute. The arbitrator will address the extent to which funding affects arbitration and potential conflict issues that can arise where funders are involved in multiple cases involving the arbitrator or their firm.

Wednesday 0930 – 1045

Preventing climate chaos: the latest judicial, legal and policy developments in achieving justice and human rights in an era of climate disruption

Presented by the Presidential Task Force on Climate Change Justice and Human Rights, the Energy, Environment, Natural Resources and Infrastructure Law Section (SEERIL), the Human Rights Law Committee, the IBA's Human Rights Institute, the Indigenous Peoples Committee and the Litigation Committee

This session will examine how the role of law, legal systems, lawyers and the judiciary are playing increasingly critical roles in the urgent societal response to global climate change.

The December 2015 Paris Agreement has been called 'historic'. However, despite its ambition to keep the global average temperature increase to below 2°C, greenhouse gas emissions continue to rise. As the United National Environment Programme 'Emissions Gap Report 2016' makes clear, countries' current pledges and 'nationally determined contributions' under the Paris Agreement still leave a significant deficit to achieving the 2°C target.

In October 2014 the IBA's ground-breaking report 'Achieving Justice and Human Rights in an Era of Climate Disruption' found that legal systems and institutions were inadequate and ill-equipped to deal with the nature and scale of the problem. The report provided over 50 recommendations to address legal systems' deficiencies and progress climate justice. Three years on from the release of the 2014 IBA report, this session will provide the opportunity for an updated discussion of important insights from a variety of perspectives, practices and various IBA committees, including Litigation, Human Rights Law, Indigenous Peoples and the Judges Forum, to explore the latest legal, judicial and policy developments.

The session will address:

- the challenges for implementing the Paris Agreement and its impact on multinational entities;
- the significance of the Paris Agreement's references to human rights and climate justice;
- the potential for human rights law to play a key role in addressing climate change and the Paris obligations;
- the legal obligations that will arise out of countries efforts to achieve their 'nationally determined contributions' under Paris;
- the implications and the potential of recent innovative climate-related litigation on several continents; and
- how the courts are increasingly playing a role in addressing climate change, including the current and recent cases addressing parties' efforts to seek redress in the courts.

The session also will include presentation of the reports and recommendations of two IBA Presidential Task Force on Climate Change Justice and Human Rights Working Groups: the Model Statute for Climate Change Remedies and the Legal Aspects of Climate Adaptation working groups.

Wednesday 0930 – 1230 (continued)

Litigating disputes in the natural resources sector

Presented by the Litigation Committee

Whether in the mining or the oil and gas sector, disputes over natural resources arise in an incredibly diverse range of ways. Projects are large, complex and multiparty, and their impact is usually felt far beyond the contracting parties. This session will review the full range of typical disputes in a natural resources context. Starting with the inception of the project, disputes may arise around ownership of title to the asset, including native or Aboriginal title and overlapping exploration claims. Shareholder and joint venture disputes are common. For companies raising finance in the debt and equity capital markets, disputes with investors are a risk, as well as regulatory action. Once the project is in production, issues frequently arise out of joint operating and production-sharing agreements, often caused by force majeure or natural events. Disputes can arise over equipment supplies and trading. And projects can be expropriated by host governments or the legislative or regulatory regime in country may be modified to the significant detriment of the investor. All of this is to be seen in the context of low commodity prices. How does that play out? Finally, the session will look at claims that may be brought by third parties, such as First Nation claims to land that is affected by the project, or local communities that have been displaced or affected by environmental disasters. The session will also consider whether claims that the project has caused some form of climate change may be sustained.

Managing high-profile criminal clients and cases

Presented by the Criminal Law Committee, the Business Crime Committee, the Litigation Committee and the Media Law Committee

High-profile criminal prosecutions present numerous challenges for defence counsel. Not only must they prepare to represent their client in a court of law but they must be prepared to respond to the court of public opinion as well. This panel, composed of experienced practitioners in both criminal and media law, will examine effective tactics for protecting your clients' interests and rights in high-profile matters.

Wednesday 1430 – 1730

In search of a 'global corporate criminal liability act'

Presented by the Litigation Committee and the Anti-Corruption Committee

Would a transnational criminal law support enforcement of civil liability claims of injured parties and promote fair trade, with a view to fighting fraud, corruption and infringement of human rights?

Unrepresented litigants: the cost to clients and country

Presented by the Judges' Forum, the Access to Justice and Legal Aid Committee, the Family Law Committee and the Litigation Committee

The burden of self-representation extends well beyond the stress to the litigant going it alone. This type of litigation tests the capacity of the courts to cope and creates expensive, unnecessarily lengthy hearings for the represented opponent. How this phenomenon can be addressed and curbed will be explored.

Thursday 0930 – 1230

Duties, risks and liability: selling financial products, including insurance

Presented by the Insurance Committee and the Litigation Committee

This session will look at issues confronting issuers and intermediaries in the distribution of financial products, particularly insurance related products. The panel will explore the role of litigation in enforcing, creating and in some instances further complicating the creation and distribution of financial products.

To find out more about the conference venue, sessions and social programme, and to register, visit **www.ibanet.org/Conferences/Sydney2017.aspx**.

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

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Conference report – IBA Annual Conference,

Washington, DC, 18–23 September 2016

Modern litigation issues facing corporate counsel

Report on the joint session of the Litigation Committee and the Corporate Counsel Forum at the IBA Annual Conference in Washington, DC

Monday 19 September 2016

Session Co-Chairs
Yvette Borrius *Höcker Advocaten, Amsterdam*
Ira Nishisato *Borden Ladner Gervais, Toronto*

Speakers
Simone Davina *Siemens Nederland, The Hague*
Susan Dunn *Harbour Litigation Funding, London*
Ana Reyes *Williams & Connolly, Washington, DC*
Brendan Ross *Marriott International, Arlington, Virginia*
Wade Wright *JT International, Geneva*

The panel represented a balanced mix of three senior in-house lawyers, three outside counsels and a representative of a funder. As a result, the session provided an excellent opportunity to see modern litigation from different angles, and to exchange different views. Great work from the moderators and active participation of the audience made the session interactive and thought-provoking.

The goal of litigation

At the beginning, the discussions focused on seeing modern litigation as a business issue.

The in-house lawyers stressed that litigation is not a goal itself; the goal is to support the business and help it grow. Whenever a company has a major piece of litigation and the legal department needs its financial colleagues to be on board, the first thing the legal department needs to do is, within a sentence or two, explain a connection between the litigation and the company's goals and objectives. In this way, there can be a different way of measuring the viability of the project, rather than just through costs.

Another useful aspect of dealing with finance colleagues in connection with litigation is precision. A cost-benefit analysis of one particular project in isolation is not always accurate because a dispute can have more aggregates and a broader effect. In dealing with issues that affect the reputation of a company or brand, it is necessary to be aware of what is important for a particular organisation strategically, which can be different across different industries, and be able to recognise issues that raise an 'existential threat'.

The main goal of the funders, as with any business, is also to make money for investors. Sometimes, the funders face challenges in project management regarding litigation and arbitration in foreign jurisdictions. In such cases, the estimation of budgets in a jurisdiction unknown to a funder is mostly a matter of trust.

One of the trends that has been observed is that, in some companies, straightforward litigation cases are being handled internally. Some companies in countries where there is a split profession have tried to skip 'middle man' services and have directly instructed barristers. Users believe that this can help with greater precision and save legal fees.

Company's objectives

The panellists agreed that, while making decisions about litigation, it is necessary to take into account the long-term strategic objectives of the company, rather than short-term considerations. Sometimes it is better to preserve relationships with particular customers rather than fight with them until the end.

In some cases, litigation and legal precedents can bind a whole industry in an unhelpful way and, therefore, this is why a decision on whether to litigate a particular issue can be difficult. If the whole industry is affected, the issue might be discussed collectively in industry fora. However, at the end of the day, a specific in-house lawyer should take responsibility for the litigation, make the decisions and then keep their fingers crossed!

The outside counsel assured the audience that, across the jurisdictions, they do their best in order to act in a client's best interest, even if this may contradict their own firm's best interest. An example provided was that sometimes it is in a client's best interest to settle the case quickly, effectively and cheaply rather than to litigate to great lengths, and good lawyers always inform their client of that strategy. However, a balance needs to be preserved. An increasing international trend is, rather, to settle big cases. The problem is that these settlements can motivate lawyers and companies to bring copycat claims in other countries. In that sense, active litigation is still something important to think about, and litigating the case very aggressively can discourage these copycat lawsuits.

Budgeting

The in-house counsel reminded the audience that budgeting is a very important issue. One of the main concerns is that, because litigation is unpredictable, it is very difficult to budget for it. However, there are some ways it can be done. At the beginning of each year when in-house counsel prepare the budget, external counsel may know whether there are likely to be claims and can budget how they can progress through the year. Equally, if something appears during the year, unless this is an extraordinary type of case, it would usually be relatively low-cost to begin with, and so the impact on the annual budget should initially be low. It is important for external lawyers to understand the particular budgeting system in the company they are acting for, including key internal indicators by which the in-house legal team is assessed.

Another tip for outside lawyers was to get some financial lessons from their clients in order to better understand their business model, which is their competitive advantage, so as to be able to speak with in-house lawyers in one language.

Then discussion naturally flowed to an issue of controlling costs in litigation and different fee structures.

The point was made that some law firms say that they are innovative in relation to costs, but actually everything is not innovative. The panel highlighted that a relatively new system for litigation in some countries is to use a cap for hourly rates, but the system is not new itself. Some law firms use monthly retainers for large-scale litigation, and have an agreement regarding a reassessment of this monthly retainer on a regular basis.

Risks of litigation

One of the recent trends observed is that more and more companies ask their lawyers to share the risks of litigation with them. However, the use of success fees raises many questions. In some countries, such as Austria, success fees are prohibited. Clients can offer to pay their lawyers a bonus in the event of success, but this must be a voluntary act, not an obligation. Success fees were historically used to a greater degree in the United States. The panel commented that lawyers have started to use 'reverse success fees', which means that the lawyers representing respondents get a percentage of the amount of the rejected claim in the case of a successful defence. In some jurisdictions, lawyers offer the equivalent of a success fee by offering increased hourly rates in the event of success and discounted rates in the case of failure. However, there was common agreement that outside lawyers are very risk averse and avoid sharing risks whenever it is possible.

Fixed fees

A hot discussion arose when the subject turned to fixed fees and the question was posed whether they helped to control costs more efficiently.

The outside lawyers argued that it is very difficult to know how long a particular piece of litigation will take. Even if the lawyer has a lot of data about past litigation, and even if the next litigation is between the same parties; the course of the litigation is never the same. Additionally, the lawyer always acts based on assumptions, and there is always something that clients know and the lawyer does not, which impacts the future costs.

Other participants counter-argued that 'what one can measure, one can manage and what one can manage, one can make better'. It was suggested that, if a lawyer looks into the set of costs data, the lawyer can consider a task level as opposed to a matter level. Lawyers can analyse similar past cases in detail to check how much has been billed and how much has been paid at each task level. Such an analysis can help to assess the likely fees more precisely for future matters.

Interestingly, the in-house lawyers reported that fixed fees or capped fees are not a solution in all situations because it is not unusual for outside lawyers to come back to in-house lawyers requesting an increase in fees. One of the possible reasons is that, at the beginning of the project, the lawyers may underestimate the fees, fearing that if they provide an actual quote, the company will not hire them. As one of the in-house lawyers said, in relation to costs 'the biggest risk is assuming that outside lawyers know what they are doing; they may not, even with all their experience because this is a new world for them as well'.

One of the panellists offered to use open discussions of the budget. Outside lawyers have their costs, overheads and desirable profit margin; it was suggested that law firms should reveal them and discuss them with their clients.

Other in-house lawyers agreed that they want a fixed fee and to save money, but they do not want that to be at the expense of outside counsel losing out because this dynamic is unhealthy. However, the most frustrating thing for in-house counsel is to find an unanticipated increase in costs three or six months after they occurred. The most valuable thing for in-house lawyers is precision because this is what their finance colleagues cherish most of all. Thus, in a situation of an unanticipated increase in costs, the natural thing is to complain to the outside lawyer because this is exactly what internal finance colleagues do with in-house lawyers.

Closing tips

Three closing tips for the audience and outside counsel were as follows.

First, at the beginning of the project, outside lawyers should ask a reasonable but sufficient number of questions. They need to understand what in-house lawyers want to achieve, what it is worth to the business, how the in-house lawyer will feel about this case taking three years and, particularly, what does the lawyer feel about the amount of money it will cost to litigate. By asking questions, outside lawyers might provoke a further thought process for the in-house counsel and give way to clearer instructions or changes in instructions.

Secondly, outside lawyers should monitor the case on a monthly, or even weekly basis, and keep the in-house lawyer informed about the costs.

Thirdly, if an unanticipated increase in costs has occurred or may occur, outside lawyers should contact the in-house lawyers immediately rather than sit on this information.

The in-house lawyers added that having outside counsel who are on top of their files, know what the client is spending and are quick to communicate good or bad news give in-house counsel a lot of confidence. With such outside lawyers, when something goes wrong, it is much easier to overlook that than when you have a counsel who is not engaged.

FEATURES

Transnational litigation and international arbitration: when an application for leave to serve out requires prima facie determination of an arbitration agreement

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It is not unusual for a commercial dispute between international parties to play out in more than one jurisdiction. In fact, there is abundant jurisprudence in the fields of international commercial arbitration and transnational litigation that sets out principles that apply in exactly these circumstances. Where there are parallel proceedings in different foreign jurisdictions, the local courts (and sometimes arbitral tribunals) are often approached for anti-suit or anti-arbitration injunctions, or for a stay of civil litigation (in aid of arbitration). In the Australian courts, as in the courts of many countries around the world, it is a prerequisite to a stay that the applicant establish prima facie an enforceable arbitration agreement.

Jasmin Solar Pty Ltd v Trina Solar Australia Pty Ltd[1]

A recent decision in the Full Federal Court of Australia, traversing both litigation and international arbitration, arose when the plaintiff to civil proceedings in Australia sought leave from the Federal Court to serve those proceedings out of the jurisdiction. The primary judge of the Full Federal Court granted leave to Jasmin Solar Pty Ltd ('Jasmin') to serve on Trina Solar (US) Inc ('Trina'); the judge was satisfied that the elements of the relevant provision of the Federal Court Rules 2011 (Cth) (the 'Rules') had been made out. Specifically, the judge found that Jasmin 'had established a prima facie case in respect of the causes of action framed by the statement of claim and that "jurisdiction" was engaged'.[2] There was no challenge to the judge's findings in this regard.

Trina, however, appealed the decision to the Full Federal Court. Trina submitted that the primary judge ought to have looked beyond the mandatory requirements of the Rules, and had erred in refusing to exercise residual discretion to dismiss the application because an order granting leave to serve in the US would be of no use where the civil proceedings in Australia would be stayed on application by Trina under section 7(2) of the International Arbitration Act 1974 (Cth) (IAA). Trina submitted in support of the appeal that Trina and Jasmin were parties to an arbitration agreement for the purposes of the IAA, that section 7 of the IAA was engaged and that on application by Trina, the court must stay the litigation pursuant to that section.

The primary judge gave three reasons for the decision not to exercise a residual discretion. First, the primary judge found that there was a question as to whether there was an arbitration agreement for the purposes of section 7 of the IAA and whether Jasmin was party to it. Secondly, the primary judge held that the question of whether Jasmin was a party to the arbitration agreement should be determined according to the law of the forum, and not the proper law of the contract. Thirdly, on applying the law of the forum (Queensland law), the primary judge was not satisfied that a stay would be granted, as Trina contended.

By way of background to the appeal, the Full Federal Court observed that arbitration proceedings had been commenced by Jasmin in early 2015, and the arbitrator had determined in the course of those arbitration proceedings that Jasmin was a party to the arbitration agreement and bound by its terms. There was evidence before the court of the final award made in the arbitration in January 2016. The award was adverse to Jasmin and 'records the rejection of Jasmin's contention that first, it was not a party to the [arbitration agreement] and second, it could not be compelled to arbitrate'.[3]

While the Full Federal Court judgment includes a detailed discussion as to the availability and exercise of the residual discretion, it is the court's analysis on choice of law rules, both in determining the existence of an agreement and in the context of the IAA, which is of particular interest for transnational litigation practice. Trina submitted that the question of the validity of and parties to the arbitration agreement ought be determined according to New York law.

Choice of law issue

The starting point for Greenwood J, on the choice of law issue, was the statement in *Voth v Manildra Flour Mills Pty Ltd*[4] (at [23]): 'When the question concerns whether to grant leave to serve out, leave should not be granted unless the Court is satisfied that the "case is of the relevant category" (that is, the relevant integers for leave are made good) and the Court is satisfied ("positively persuaded") that the proceedings "would not be subsequently stayed as an abuse of process on forum non conveniens grounds or for some other reason".'[5] Thus, the question of the exercise of the residual discretion on an application for leave to serve out requires the primary judge to consider whether the proceedings would, or would not, be subsequently stayed.

The judge then examined jurisprudence, principally in Australia and the UK, where the courts had been called upon to determine the *existence, construction and validity* of a pleaded contract, including where an application to stay proceedings was founded on the parties' contractual arrangements. The judge observed the two questions which the court must consider: first, whether the parties had themselves chosen the applicable proper law of the pleaded contract and, secondly, where the court itself was required to do so. Having undertaken the analysis, the judge was persuaded by the obiter of Brennan J and Gaudron J in the High Court of Australia in *Oceanic Sun Line Special Shipping Company Inc v Fay*[6] ('*Oceanic*') and by the English cases, observing: 'I accept that these [English] authorities suggest that when the question arises of whether an agreement was made by the parties, the English courts are likely to apply the putative law of the contract to determine that question', but concluding that '[h]aving regard to Oceanic and the discussion in these reasons, it seems to me that the *lex fori* ought to be applied when determining [whether an agreement was reached]'.

Beach J and Dowsett J agreed with Greenwood J, with Beach J observing that the 'appropriate choice of law [to determine whether there is consensus *ad idem* between the parties] is the law of the forum' (at [128]), noting, among other things, that 'it is counter-intuitive to suggest that the choice of law to assess consensus *ad idem* should be that set out in an agreement that an entity says it is not a party to because there was no consensus *ad idem*' (at [130]). Beach J also relied on his finding in obiter of the High Court in *Oceanic*.

Arbitration agreement

Having concluded that the question of whether there was in fact an arbitration agreement ought be determined by Queensland law, each of Greenwood J and Beach J, with both of whom Dowsett J largely agreed, turned to the operation of sections 7 and 8 of the IAA. It is important to note, as did Beach J, that the primary judge was not required to finally determine whether a stay would be granted under the IAA, and the primary judge did in fact not do so.

Section 7(2) of the IAA provides that the court 'shall on application of a party to an arbitration agreement stay the proceedings or so much of the proceedings as involves the determination of the matter, as the case may be, and refer the parties to arbitration in respect of that matter'. Section 8(5) of the IAA, which concerns the enforcement of a foreign arbitral award, provides, inter alia, that the court may refuse enforcement where 'the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it, or where no law is so expressed to be applicable, under the law of the country where the award was made or where a party to the arbitration agreement […] was, under the law applicable to him or her, under some incapacity at the time when the agreement was made'.

The provisions of the IAA suggest, therefore, that, for the purposes of the IAA, the court looks not to the *lexi fori* to determine the validity of the arbitration agreement that underpins a foreign arbitral award, but to the proper law of the agreement itself, or, where there is no proper law expressed in the agreement, to the law of the place where the award was made. The question for the court in those circumstances is therefore, as Greenwood J observed, 'whether there is an arbitration agreement, so defined, between the parties said to be parties to it', whether or not there is a contract according to the law of the forum. In answering this question, the judge had regard to the seminal cases of *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*[7] and *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia*,[8] the New York Convention and the UN Commission on International Trade Law (UNCITRAL) Model Law, and leading academic studies. The judge concluded that:

> '[a]lthough the [IAA] does not select, for the purposes of recognition of an arbitration agreement […], the same choice of law rule selected at s 8(5)(b), the question of whether a party to a proceeding contemplated by s 7(2) is a "party to an arbitration agreement" for the purposes of the [IAA], ought be governed by the same choice of law rules that govern the very same question when it arises in the context of whether the court will refuse to enforce a foreign award on the proven ground of invalidity due to the relevant party never having been a "party to the arbitration agreement"'.

Beach J took a different approach. While accepting that the aim of the New York Convention is to encourage uniformity of international standards, the judge observed that '[t]he fact that s 8(5)(b) provides for a choice of law different to the law of the forum in relation to whether an "arbitration agreement" exists to which a party is bound, does not entail that the same choice of law needs to be made for s 7(2)'. A factor in the judge's reasoning was that policy considerations that apply to the recognition and enforcement of foreign arbitral awards do not exist in relation to the enforcement of arbitration agreements. Dowsett J agreed, noting that 'I see no support for the proposition (if it be advanced) that the references to proper law in s 8 should be imported into s 7 [of the IAA]'.

While the judgment contains different analyses in relation to the choice of law issue, the court unanimously dismissed the appeal.

Notes

1 [2017] FCAFC 6.
2 At [5].
3 At [17].
4 (1990) 171 CLR 358.
5 Voth at 564.
6 (1988) 165 CLR 197.
7 (2006) 157 FCR 45.
8 (2013) 251 CLR 533.

The rise of class actions and litigation funding in Australia

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This year marks the 25th anniversary of class action litigation in Australia. Since class actions were first introduced by Commonwealth legislation in 1992, more than 467 class actions have been filed, but importantly, the growth has been exponential with over a third of these cases filed in the last six years. As we discuss below, the development of class actions in Australia has been driven by Australia's 'plaintiff-friendly' jurisdiction for such claims, its highly regulated industries creating multiple potential causes of actions for plaintiffs, and the rapid development in Australia of a sophisticated market for commercial third-party litigation financiers.

On a per capita basis, Australia is arguably the second most active class action market in the world, behind the United States. With many of the neighbouring jurisdictions in Asia Pacific considering or recently introducing class action regimes or permitting third-party litigation funding, the Australian model and experience is, increasingly, a benchmark.

This article examines the factors driving growth in class actions in Australia and likely future developments.

'Plaintiff-friendly' class action regime

The federal class action regime was introduced in 1992 in Part IVA of the Federal Court of Australia Act 1976 (Cth) (Part IVA). Australia is often described as a 'plaintiff-friendly' regime because of the low threshold for commencing proceedings and the absence of any certification procedure. The requirements for commencing a class action are as follows:

- Seven or more persons have claims against the same person: This requirement is satisfied if it is reasonable in all the circumstances to infer the existence of seven or more persons. It is not necessary to identify such persons by name, and their consent is not required.
- The claims arise out of the same, similar or related circumstances: This requirement of 'connectedness' has been interpreted liberally and allows for a degree of variance between the claims of the lead plaintiff and group members, even in cases alleging misrepresentations made at different times to different group members.
- The claims give rise to a substantial common issue of law or fact: This requirement is satisfied if the lead plaintiff establishes that there is a single common issue of law or fact shared by all group members. The word 'substantial' has not been read to import a quality or magnitude into the common issue, for example, the common issue need not be significant.

Pleading requirements are also generally easy to satisfy and class action have little specific additional pleading requirements over conventional proceedings.

Unlike the US, the Australian class action regime is tolerant of cases in which individual issues are pervasive, particularly issues of individual causation and reliance. Further, in cases involving multiple defendants, generally, only the lead plaintiff is required to have a claim against each defendant – that is, it is not necessary for each group member to have a claim against each defendant. Procedurally, sub-groups are permitted, and often encouraged, to deal with segments of similarly situated group members.

Access to justice policy considerations appear to account for the low thresholds set in Australia for the commencement of class actions. This contrasts sharply with the certification rules embodied in Rule 23 of the Federal Rules of Civil Procedure in the US, which require, for example, a showing of a predominance of a common issue.

Alongside Part IVA, three of Australia's six states have introduced identical state-based class action procedures. Most recently, in November 2016, Queensland passed legislation establishing a class action structure in its jurisdiction, thereby joining Victoria and New South Wales, where similar regimes have existed since 2000 and 2010, respectively.

Robust regulatory framework across key industries

Class actions facilitate the enforcement of rights, but do not themselves create new rights. A key factor in the prevalence of class actions is the broad range of rights that are capable of being enforced through the class action vehicle.

Australia arguably has the common law world's strictest consumer protection and product liability laws. It also has a demanding continuous disclosure obligation for publicly listed entities, and comprehensive prohibitions on misleading and deceptive conduct. This particular combination of legal obligations and prohibitions creates multiple causes of action that are amenable to prosecution in the class action form and cover a wide range of subject matter. Corporate malfeasance is, by its very nature, broad-based harm that affects a large number of people who are similarly situated.

More than 30 per cent of all Part IVA proceedings have been brought on behalf of shareholders and investors. Such claims have increased in frequency and prominence in recent years. In part, this can be attributed to the growth in litigation funding. Shareholder claims create an attractive investment vehicle for funders, as relatively large groups of institutional and retail shareholders could be aggregated for the purpose of advancing proceedings with a large potential quantum. Funders' efforts have been largely directed towards supporting shareholder and investor claims, accounting for 76 per cent of all funded Part IVA proceedings.

Product liability class actions featured prominently in the early years of Part IVA, but have gradually diminished in frequency. In recent years, a number of mass tort claims have been filed that draw on traditional product liability principles, including in relation to bushfire and flood disasters.

Consumer protection claims have increased in recent years. Claims typically concern uniform business processes and the use of standard form contracts that are challenged as misleading and deceptive, or in breach of relevant industry-specific regulations.

Strong support from third-party litigation funders

The growth of class actions in Australia is synonymous with the rise of third-party litigation funding.

Third-party litigation funding gained traction in 2006 when it was endorsed by the highest court in Australia in *Campbell's Cash & Carry Pty Ltf v Fostif Pty Ltd* ('*Fostif*').[1] Empirical data demonstrates that the number of class actions filed in the three years following *Fostif* almost tripled from the three-year period immediately prior to the decision. The involvement of litigation funders in class actions is now commonplace in Australia, and has increased markedly over the last five years. Between 2010–2016, almost 50 per cent of class actions in the Federal Court were supported by a funder.

According to one academic, the profitability of class action claims from the funders' perspective is 'unambiguous', as over 92 per cent of funded class action claims brought in the Federal Court have settled.[2] This 'success' arises from the economics of risk and return associated with class action litigation in Australia. In return for providing immunity to lead plaintiffs and group members against the adverse costs orders and legal expenses, funders extract 25–40 per cent of any proceeds obtained in the litigation. This arrangement allows funders to routinely achieve more than 300 per cent return on their investment, after costs. Further, funding in Australia is subject to minimal regulation and continues to receive legislative and judicial support, largely on the asserted basis that it facilitates access to justice.

The increasing role and influence of funders on the types of class actions filed is reinforced by recent empirical data showing that, since 2010, there has been a notable increase in the number of shareholder/investor and consumer protection class actions, and a notable decrease in the number of product liability and mass tort class actions. These trends may be explained by the fact that product liability and mass tort claims on average take up to twice as long to resolve compared with shareholder and consumer protection claims, and are therefore less economically attractive to funders given the longer time required to realise a return on capital.

In the last few years, various foreign funders with access to deeper capital markets have emerged in the Australian market. It is likely that this trend will continue, in view of recent legal developments discussed below.

'No win, no fee' practices by plaintiff law firms

Not all class actions are supported by third-party litigation funders. Periodically, large class actions are prosecuted by plaintiff firms on a speculative or 'no win, no fee' basis.

Lawyer-funded class actions have become less common in recent years, essentially because contingency or damages-based fees are prohibited in Australia. While lawyers are allowed to enter into conditional fee arrangements and limited 'uplift' arrangements, the financial incentives are far lower than those associated with true contingency fees, and so the economic incentive for lawyers to fund large class actions given the significant cost risk associated with Australia's 'loser pays' rule is significantly diminished. Nevertheless, Australian plaintiff firms occasionally fund large class actions, especially those that can 'piggyback' on similar cases previously brought in the US or cases that are prosecuted as part of a plaintiff firm's social justice initiative on a pro bono basis. Only a small number of Australian firms have sufficient capital and resources to support class action proceedings on this basis.

Endorsement of common fund doctrine

In late 2016, the Full Federal Court accepted that, in some cases, group members in a funded class action should be compelled to remit a commission to the litigation funder, calculated as a percentage of money recovered on their behalf as a result of the proceeding, irrespective of whether the group member has entered into a funding agreement with the funder (a 'common fund' order): *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group* ('*Money Max*').[3]

Such an order mirrors the substance of the common fund doctrine in the US, which is based on the equitable principle of unjust enrichment. If a person through its litigation efforts creates a 'fund' for the benefit of group members, that person has an equitable entitlement to a proportion of that fund as fair compensation for the work undertaken to create it.

While the full impact of the decision is yet to be determined, *Money Max* is the most significant class action case in Australia since *Fostif*. It represents a shift in the litigation funding dynamic, and may allow for more class actions to be commenced within a shorter timeframe. This is because a common fund order reduces the long-standing obstacle for funders of generating a critical mass of group members prepared to enter into funding agreements (commonly called a 'book build'). This is particularly appealing in cases where group members are numerous but difficult to identify, such as users of fast-moving consumer goods. It may also result in larger class actions, as funders can now extract a commercial return across the entire 'open' class, rather than being limited to recovery from the small subset of group members who sign up with the funder.

Although the Australian funding market has experienced steady growth for a decade, the decision in *Money Max* is likely to result in significant growth in domestic and foreign funders commencing Australian class action claims throughout the next decade.

Other developments affecting growth

Growth in the litigation funding market means a greater number of funders pursuing opportunities in Australia and increasingly searching for market share. This results in new types of cases being prosecuted and an increase in the entrepreneurial appetite of class action promoters to bring class actions into new subject-matter areas.

With the fillip to third-party funding delivered by *Money Max*, calls for a lift on the prohibition on contingency fees is likely to be revived. The Productivity Commission has already recommended the introduction of contingency fees in Australia, although that recommendation has not led to any legislative initiative at this stage. If permitted, it would deepen the class action market, with more lawyers incentivised to self-fund and pursue collective redress in the hope of larger returns, especially if cost risk can be spread across a portfolio of class actions, as funders currently do.

Conclusion

The developments in class action and litigation funding in Australia will continue to be monitored with interest. Neighbouring jurisdictions in Asia Pacific have cautiously permitted collective action in limited circumstances. Recently, draft legislation allowing third-party funding of international arbitrations has been under consideration in Hong Kong and Singapore. Meanwhile, Australia continues to develop into a sophisticated and growing class action market, and the most sophisticated third-party litigation funding market in the world.

Notes

1 (2006) 229 CLR 386.

2 Vince Morabito, 'An Empirical Study of Australia's Class Action regimes: Fourth Report, Facts and Figures on Twenty-Four Years of Class Actions in Australia', August 2016 (unless otherwise indicated, all statistics are referrable to this source).

3 [2016] FCAFC 148.

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India's unique approach to the doctrine of separation of powers*

A live topic among the legal community in India is whether the separation of powers enshrined in the Constitution of India is at risk of being significantly diluted. This debate often arises in connection with subjects, such as judicial overreach and the interplay between parliamentary prerogative and judicial independence. This is all in the context of a landmark judgment of the Supreme Court of India in late 2015 striking down the 99th amendment to the Constitution of India in the case of *Supreme Court Advocates-on-Record Association and another v Union of India*[1] (the 'NJAC case').

By a four to one majority the Supreme Court held that the Constitution (Ninety Ninth Amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014 were unconstitutional. The Court struck down the amendment introducing the National Judicial Appointments Commission, deciding that the matter of selection and appointment of judges to the higher judiciary was to remain with the judiciary. The Court considered whether the constitutional amendment could operate as a successful alternative to the present system, and the decision effectively preserves the status quo ante, which means that judges continue to appoint judges. This decision is mentioned to underscore the tremendous plenipotentiary powers of the Supreme Court of India exercised under various articles of the constitution to nullify even a duly legislated constitutional amendment, so as to override laws, rules, procedures, notifications and so on of the Government of India or of any state government. This has never been a matter for churlish conservatism. In other words, the Supreme Court, and indeed the High Courts, generally consider it to be their constitutional duty to jealously guard and actively protect the bill of rights – called fundamental rights. They also ensure that any exercise of power by the state is checked, even by striking down new laws if necessary, while declaring some rights and constitutional safeguards as inalienable and hence part of the well-recognised 'basic structure' of the Constitution of India.

This article is more about the impact of the Supreme Court, and in some cases, High Court, cases that affect business rights, concessions, tenders, state allotments and rules that impinge on citizen's rights, such as the right to freedom of trade and profession. Under Article 13 of the Constitution of India, it is possible for a court, not necessarily the Supreme Court, to declare a rule, law or constitutional amendment void for being violative of the bill of rights. But after the judgment in *Kesavananda Bharati v State of Kerala* in 1973,[2] the Supreme Court has actually gone several steps further by developing this special doctrine, called the 'basic structure' doctrine, by which any amendment to the bill of rights or the overall constitutional scheme can be challenged. If the relevant court thinks fit, it is possible for it to declare the law, rule, notification and so on, void for being inconsistent with the provisions of Part III of the Constitution of India or inconsistent with the basic structure doctrine, which, in the above-mentioned example, would naturally cover judicial independence. Because this article started with the NJAC case, it is important to draw attention to the following paragraph that formed part of the rationale for the majority judgment delivered by Justice Khehar, the current Chief Justice of India. The judge observed the following:

> 'The judiciary has to be manned by people of unimpeachable integrity who can discharge their responsibility without fear or favour. There is no question of accepting an alternative procedure which does not ensure primacy of the judiciary in the matter of selection and appointment of Judges to the higher judiciary (as also in the matter of transfer of Chief Justices and Judges of High Courts to other High Courts). In the above-stated position, it is not possible to conclude that the combination contemplated for constitution of NJAC is such that would not be susceptible to an easy breach of the "independence of the judiciary".'

These lines form the bedrock of the decision comprising 419 paragraphs for one of the judges. The court clearly took the view that Parliament's 'interference' with judicial independence was unacceptable, and hence the entire constitutional process was set back to 1993, a position that had been strongly criticised as undemocratic, even unconstitutional, and one that Parliament and most legislators obviously disagree with.[3]

Turning back to the question of the separation of powers and how it operates in India, some remarks from the judges and historical quotations should be examined to consider whether there is indeed a 'functional overlap', as was said to exist between the state exercising its powers over the judiciary and the judiciary exercising its powers over the state. Is that overlap, in fact, a one-way street? This viewpoint can be only appreciated after looking at extracts from judgments that reflect a healthy legal system, but one that is not necessarily predictable given the wide amplitude of powers conferred on judges to decide not only what is in the best interest of the adversarial parties concerned, but also to weigh and evaluate public interest, often in cases that have been filed by interested parties. This must give us pause for thought.

Is there a doctrine of the separation of powers under the Constitution of India?

The 'doctrine' remains largely implicit, even though one of the constitutional directive principles of state policy provides that '50. Separation of judiciary from executive. The State shall take steps to separate the judiciary from the executive in the public services of the State'. This does not of itself establish a separation that is unshakeable. In fact, the separation of powers under the Constitution of India seems to have been assumed or implied, but never clearly enunciated, and this has given rise to a comment from a former judge of the Supreme Court of India to the effect that '[l]ike the Westminster model, there is no real "separation" as such between the executive and legislative authorities under our Constitution. But it has gone further in providing for a *functional overlap* between the legislative, executive, and judicial wings of government, so that there is in fact no strict separation of powers with each of these organs empowered to carry out functions which would generally be considered within the purview of the other'[4] [emphasis added].

This quotation would appear to suggest the existence of a healthy system that allows occasional incursions into the domain of the other authority, but I would venture to suggest that, in practice, the overlap is not balanced. An occasional overlap would suggest scope for the executive to occasionally stray into judicial air space and vice versa. On the contrary, there is a short list of legislative/executive incursions jealously guarded by the judiciary to sustain the theory that judicial encroachment or incursion must be accepted, not just tolerated, but, in fact, the opposite situation is rarely countenanced. If there is a real incursion into the judicial domain whereby the state attempts to dilute judicial powers and reduce the Supreme Court's power of superintendence through constitutional amendment or enactment, then it is almost certain that litigation will follow and, if necessary, appropriate directions will be passed, and again, if necessary (a wide word indeed), such legislation may not survive judicial scrutiny. Such challenges can be filed in the High Court or even directly to the Supreme Court, but most such cases end up being decided by the superior court.

There remains some lack of clarity on the strength of arguments based on the separation of powers theory. The Supreme Court in 1951 held that:

> '[i]t does not admit of any serious dispute that the doctrine of separation of powers has, strictly speaking, no place in the system of government that India has at the present day under her own Constitution or which she had during the British rule. Unlike the American and Australian Constitutions, the Indian Constitution does not expressly vest the different sets of powers in the different organs of the State. Under article 53(1), the executive power is indeed vested in the President, but there is no similar vesting provision regarding the legislative and the judicial powers'.[5]

And then, more recently, in a criminal case involving sentencing, while attempting to uphold the powers of the state, the Supreme Court held that:

> '[t]he concept of Separation of Powers is *inherent in the polity of the Constitution.* This doctrine creates a system of checks and balances by reason of which, powers are so distributed that *none of the three organs set up can become so pre-dominant, so as to disable the others from exercising and discharging the powers and functions entrusted to them.* The separation of powers between the legislature, the executive and the judiciary constitutes one of the *basic features* of the Constitution. *There is distinct and rigid separation of powers under the Indian Constitution.* The scrupulously discharged duties of all guardians of the Constitution include among them, the duty not to transgress the limitations of their own constitutionally circumscribed powers by trespassing into what falls properly within the domain of other constitutional organs'[6] [emphasis added].

Perhaps the best balance can be taken from the words of the late and legendary Honourable Justice HR Khanna, who seemed to recognise that the demarcation, though blurred, is more to prevent the legislature from encroaching on the judicial sphere than the other way round. In his view:

> '[a] declaration that an order made by a court of law is void is normally part of the judicial function and is not a legislative function. *Although there is in the Constitution of India no rigid separation of powers, by and large the spheres of judicial function and legislative function have been demarcated and it is not permissible for the legislature to encroach upon the judicial sphere.* It has accordingly been held that a legislature while it is entitled to change

with retrospective effect the law which formed the basis of the judicial decision, it is not permissible to the legislature to declare the judgment of the court to be void or not binding'[7] [emphasis added].

Justice Chandrachud in *AK Roy v Union of India*[8] made a distinction between the separation of powers as understood in the US and Australia, and as understood in India and expressed the following view in this regard:

'The American Constitution provides for a rigid separation of governmental powers into three basic divisions, the executive, legislative and judicial. It is an essential principle of that Constitution that powers entrusted to one department should not be exercised by any other department. The Australian Constitution follows the same pattern of distribution of powers. Unlike these Constitutions, *the Indian Constitution does not expressly vest the three kinds of power in three different organs of the State*' [emphasis added].

In the more recent past, and particularly by reference to the recent NJAC decision of the Supreme Court, the court was out to preserve its independence from executive control and also effectively from the political or electoral process. The underlying theme is a separation of powers and preserving what I call the lost bastion of elitism in India. Honourable Justice JS Khehar, subsequently Chief Justice of India, held as follows:

'When the issue is of such significance, as the constitutional position of Judges of the higher judiciary, it would be fatal to depend upon the moral strength of individuals. The judiciary has to be manned by people of unimpeachable integrity, who can discharge their responsibility without fear or favour. There is no question of accepting an alternative procedure, which does not ensure primacy of the judiciary in the matter of selection and appointment of Judges to the higher judiciary (as also, in the matter of transfer of Chief Justices and Judges of High Courts, to other High Courts). In the above stated position, it is not possible to conclude, that the combination contemplated for constitution of the NJAC, is such, that would not be susceptible to an easy breach of the "independence of the judiciary".'[9]

And in the same case, Honourable Justice Lokur held as follows:

'It is quite clear that *there is a distribution of power* through a system of checks and balances *rather than a classical separation of power between the Legislature, the Executive and the Judiciary*. These three organs of the State are not in a silo and therefore there is an *occasional overlap* – but every overlap does not necessarily lead to a violation of the separation of powers theory' [emphasis added].

It would appear from the foregoing that the decision of the Supreme Court in this case was based largely on maintaining the separation of powers, but it might be misleading to assume that this separation does not allow the courts to tread into the executive domain whenever necessary. To take another example, one can refer to the Delhi High Court orders in relation to what was called the '2G Scam' in the case titled *Centre for Public Interest Litigation v Union of India*.[10] It was held as follows:

'In the past, writ jurisdiction has been used to monitor the progress of ongoing investigations or to transfer ongoing investigations from one investigating agency to another. *Such directions have been given when a specific violation of fundamental rights is shown, which could be the consequence of apathy or partiality on part of investigating agencies among other reasons*. In some cases, judicial intervention by way of writ jurisdiction is warranted on account of obstructions to the investigation process such as material threats to witnesses, the destruction of evidence or undue pressure from powerful…

In all these circumstances, the *writ court can only play a corrective role* to ensure that the integrity of the investigation is not compromised. However, it is not viable for a writ court to order the initiation of an investigation. That function clearly lies in the domain of the executive and it is up to the investigating agencies themselves to decide whether the material produced before them provides a sufficient basis to launch an investigation' [emphasis added].

Unlike many other countries, Indian law allows for the Supreme Court, particularly, and the High Courts, in a more general manner, to interfere with the functioning of the executive going somewhat beyond the classical definition of judicial review. The courts do not simply interfere when the constitutional authority or executive has in fact acted so unreasonably that no reasonable person could have come to such a decision, but instead they easily interfere where the record reflects manifest injustice or patent illegality. As a constitutional court, the Supreme Court does not limit itself to deciding only those cases that affect constitutional rights, and so the High Courts follow suit. Civil courts might be somewhat more restrained in issuing directions that impact a cross section of society, but it is not uncommon for a criminal court, or even a civil court, to reflect on the doctrine of fairness or introduce ideas such as good faith in commercial transactions through the adjudicatory process. While this might have a salutary effect on the cause of justice, it is difficult to sustain through the appellate process. The apparently softer and more equitable approach of judges in India affects certainty and predictability, even contract enforcement. Understanding this trend might be the subject of a PhD dissertation, given the wealth of jurisprudence available. But, succinctly put, the system grapples with injustice deriving from oppression, abuse of a dominant bargaining position, poverty of one of the parties, corruption and other sources of injustice that make it difficult to elevate common-law notions of certainty, and predictability above basic principles of fairness. Taking that into account, the separation of powers doctrine remains available when needed, but it is sparingly used to tell our judges that they should not interfere.

Notes

* With research input and ideas from Divya Harchandani, Associate, ILA Pasrich & Company.

1 (2016) 5 SCC 1.

2 AIR [1973] SC 1461.

3 *Supreme Court Advocates-on-Record Association and another v UOI* (Second Judge Case) ((1993) 4 SCC 441].

4 Ruma Pal, The Oxford Handbook of the Indian Constitution, Ch 15.

5 In the case of In Re Delhi Laws Act 1912 (AIR [1951] SC 332).

6 *Janapada Sabha, Chhindwara v Central Provinces Syndicate Ltd.* See *His Holiness Kesavananda Bharati Sripadagalvaru v State of Kerala* (AIR [1973] SC 1461); *Smt. Indira Nehru Gandhi v Shri Raj Narain and Anr* (AIR [1975] SC 2299); *State of West Bengal v The Committee for Protection of Democratic Rights, West Bengal and Ors* (AIR [2010] SC 1476); and *State of UP v Sanjay Kumar* ((2012) 8 SCC 537).

7 *Indira Nehru Gandhi v Raj Narain* (AIR [1975] SC 1590). See *Shri Prithvi Cotton Mills Ltd v Broach Borough Municipality; Janapada Sabha, Chhindwara v Central Provinces Syndicate Ltd; Municipal Corporation of the City of Ahmedabad v New Shorock Spg & Wvg Co Ltd;* and *State of Tamil Nadu v M. Rayappa Gounder.*

8 AIR [1982] SC 710.

9 See n 1 above.

10 AIR (2011) 98 SC 1267.

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Enforcement proceedings in Ukraine in light of judicial reform

This article covers several key aspects of the improved court enforcement proceedings system in Ukraine. In particular, it is focused on the private execution of court and quasi-judicial bodies and is intended to impart essential know-how on judicial reform that was initiated in May 2015[1] and finalised in early January 2017.[2]

An obvious reason for the reforms was the critical ineffectiveness of state enforcement in Ukraine, which is incompatible with the pro-European development of a national legal system. A complete and fundamental reform of judicial enforcement was primarily aimed at:

- introducing a combined enforcement system that consisted of private and state enforcement officers – this initiative aimed to create a competitive environment, as well as to motivate enforcement officers and reduce the pressure on the state sector;
- determining reasonable terms for enforcement stages and relevant actions;
- providing publicity and proper access to case materials;
- creating proper conditions for effective enforcement, in particular, via technical and financial support, and so on;
- mitigating corruption risk within proceedings; and
- increasing the liability of enforcement officers and state control thereof.

The above-mentioned initiatives resulted in a law package that consisted of the Laws of Ukraine 'On Enforcement Proceedings' (the 'Law on Enforcement') and 'On Authorities and Officers which Enforce Court Judgments and Non-Court Decisions'. Both came into force on 5 October 2016, followed by subsequent legislative and by-law amendments.

The reform: things you need to know

Private enforcement officers

The reforms gave birth to the title of private enforcement officer. Legislative amendments regarding private enforcement officers came into force on 5 January 2017; however, recruits to the new profession will only appear from May 2017 at the very earliest because there are a number of formalities that must be attended to before gaining access to the profession. This includes, in particular, a one-month study course; a period of one-month prior to admission to the examination and the examination itself, which is followed by office verification from the Ministry of Justice of Ukraine; and finally, registration as a private enforcement officer within the Unified Register of Private Enforcement Officers.

Ukrainian private enforcement officers have similar but not equal powers and obligations to state enforcement officers. The key differences are the following.

Authority

Private enforcement officers are not entitled to enforce certain decisions. In particular, they have no authority to handle proceedings against the state, municipal and state authorities and officials, and companies with a state stakeholding exceeding 25 per cent, as well as decisions regarding state and local property, and so on. Restrictions are also established for decisions finding for the state, as well as just satisfaction awards of the European Court of Human Rights and decisions of Ukrainian administrative courts.

Maximum stake

Furthermore, the legislator has restricted private officers from the enforcement of decisions where the amount at stake exceeds UAH6m (approximately US$220,000) until 1 January 2018 and respectively UAH20m (approximately US$740,000) during their first year of service.

Eviction

Special attention has to be paid to the enforcement of eviction decisions because they are beyond private enforcement officers' powers, irrespective of the amount at stake. However, the law does not forbid private enforcement officers enforcing an initial court decision as a part of the recovery of debt if an eviction is based on enforcement over mortgaged immovables. A state enforcement officer, however, must be involved in the eviction process itself.

Territorial jurisdiction

Another key difference between the state and private enforcement officers is that of territorial jurisdiction. Both may initiate proceedings according to their territorial jurisdiction, where a debt or the debtor's location corresponds with a registered district of the private enforcement officer or territorial jurisdiction of the state enforcement officer. However, the private officer is further entitled to conduct enforcement actions outside his or her registered office. For instance, the private enforcement officer may initiate proceedings in Kiev, but during the enforcement may also detect property in the city of Lviv. In such a case, the private enforcement officer may proceed with the enforcement in Lviv. This correlates with the state enforcement officer who has to cooperate with other officers, as well as enforcement bodies, in such cases.

Salary and costs

Another important difference is that the private officer has a greater incentive to enforce than the state officer. The private officer's income is not limited by law and is instead regulated by the demand of their clients, whereas the state officer is paid a fixed salary and, at best, may be granted a bonus. The costs of the private enforcement officer (office, insurance, transport, etc) are not covered by any institution and are much higher than those of state officers.

Challenging officers

The final difference concerns challenging enforcement officers' actions and decisions. In the case of private officers, they may be challenged in court, whereas in the case of state officers, an applicant may additionally appeal to a chief of the respective enforcement body or the enforcement body at a higher level.

Automation of proceedings

The reform significantly improves the automation of enforcement proceedings. The Unified State Register of Enforcement Proceedings (USREP) was replaced by a new platform, the Automated System of Enforcement Proceedings (ASEP).[3]

It should be noted that USREP was closed to the public, and only parties to proceedings had restricted access to information regarding ongoing proceedings. As an example, the parties involved could only review basic information about current stages of the proceedings and key decisions made by an enforcement officer. In contrast to USREP, ASEP provides a more functional toolkit. In a nutshell, it supports record-keeping of all materials relevant to the proceedings, including replies to enforcement officers' requests, claims and motions lodged by parties, and any replies from the enforcement officers. Creditors, as well as debtors, are allowed to monitor the whole process of enforcement online and, should they deem it necessary, react swiftly without visiting the officer in person.

It is also worth noting that for the very first time since Ukrainian independence, ASEP opens up information about debtors to the public. The respective service is called the Unified Register of Debtors (URD)[4] and contains information about a debtor, enforcement body, enforcement officer and category of collection (eg, fines and alimony). This tool allows parties to obtain additional information about business partners while conducting due diligence investigations, as well as mitigating transactional risks in the future.

Terms of enforcement proceedings

As stated previously, the reform was aimed particularly at optimising the timing of proceedings. The legislator excluded a six-month general term for enforcement proceedings. Instead, it determined a number of specific terms within which certain actions, inter alia, seizure of funds and property, transfer of payment requests to banks and removal of arrests, may be taken in enforcement proceedings. In addition, the legislator abrogated popular grounds for the frivolous suspension of proceedings. Such measures will speed up proceedings in general and thereby mitigate existing and potential risks of the abuse of power.

The reform in action: new opportunities

The enforcement procedure in Ukraine has several stages. We have reviewed each stage and outline them below.

First, it is for a creditor (a claimant) to make an advance payment in the amount of two per cent of the total recovery amount (however, the payment shall not exceed ten times the minimum wage – around $1,160). The advance payment is to be made before proceedings are initiated and has to be returned from the sums collected.

In contrast to the old procedure, as soon as enforcement is started, a debtor is obliged to pay the state fee of ten per cent from the debt sum.

The enforcement generally consists of the detection of a debtor's assets, seizure of those assets and compulsory sale. An enforcement officer detects assets by lodging requests with state registries holders, as well as through direct visits to the domicile or factual locations of the debtor.

Almost revolutionary compared with old procedures, the law also provides access to open registers. Nonetheless, it still leaves a Ukrainian enforcement officer with no direct access to the debtor's bank accounts. Hence, the seizure of the debtor's assets will be complicated by the requirement to request the list of the debtor's accounts from the appropriate tax bodies. On receipt of such a list, the officer may order banks to perform factual seizure. This gives a debtor time to withdraw funds and thereby slow down enforcement, especially if bank accounts are the debtor's only assets. Unfortunately, this less efficient aspect of enforcement has been missed by the reform.

As regards the seizure of other assets (eg, real estate; registered movable property, such as a vehicle; stocks; and corporate rights), the matter remains principally under the control and discretion of the enforcement officer.

Detected, inventoried and distrained property is subject to valuation. By the parties' consent, assets may be valued either individually by an enforcement officer according to current market prices or by an independent certified valuator.

The most problematic stage of enforcement is still that of fire sales, which was reconsidered by the reform. Some crucial developments are as follows:

- Compulsory sale became completely automated. All types of assets, including immovable, such as land plots, are to be sold via public online auction services.
- Any participation of an enforcement officer in the process of a compulsory sale is restricted to the preparation of the documents for the auction. The remainder is to be performed by an authorised body.

During the transitional period set out in the reform, the one and only body entitled to conduct compulsory sales is the state enterprise 'SETAM',[5] which is an institution that acts within the Ministry of Justice of Ukraine.

The law prescribes only three auction stages for the fire sale of assets. For the second and third auction stage, the asset's price is to be reduced (ie, the final price for the third auction shall be equal to 70 per cent for immovable assets and 50 per cent of the initial price for movable property). Unsold assets are proposed to be transferred to the creditor's possession at the price they achieve after the third auction. A rejection of the proposal by the creditor will result in the termination of enforcement proceedings should there be a lack of other assets to be fire sold.

The final stage of proceedings is the distribution of recovered sums. During this stage, advance payments made by the creditor have to be returned. If there are a number of creditors involved in the same proceedings regarding one debtor, those with secured claims have priority over other creditors for obtaining relief from the sale of collateral.

Despite this reform, there are many issues that remain unaddressed that arise from the old legislation, which leaves creditors with similar challenges. In particular, the fire sale of unregistered real estate – also real estate with no technical documentation and premises with the interest of minors or debtors without other housing – remains a very complicated process. There will also be challenges in respect of cases of corporate rights collection. In addition, it is still nearly impossible to enforce over the debtor's account receivables, including compulsory debt remittance or assignment.

Conclusion

Undoubtedly these reforms revolutionise Ukrainian enforcement proceedings and challenge the status quo. The main achievement of this reform is the introduction of private enforcement officers, who are expected to be better incentivised in this sector than their state predecessors. The reform is expected to bring both domestic and international investors' protection up to a high standard, and make existing remedies more effective.

Although some of the more problematic areas of the old regime still apply, there remains much opportunity for future reform, particularly following the testing of newly adopted measures and using foreign enforcement experience. Such recent improvements give much hope for the rejuvenation of the Ukrainian enforcement system, and are promising in the context of other Ukrainian judiciary reforms. All in all, a court decision that cannot be enforced mocks justice itself – and there should be little or no occasions for a debtor to engage in such mockery.

Notes

1 http://zakon2.rada.gov.ua/laws/show/276/2015, accessed 27 March 2017.

2 We mean that the legal background has been prepared already, while the introduction of private enforcement officers on the market is in process (ie, education and verification).

3 http://asvpweb.nais.gov.ua/#/search-debtors, accessed 27 March 2017.

4 http://erb.nais.gov.ua/#/search-debtors, accessed 27 March 2017.

5 https://setam.net.ua, accessed 27 March 2017.

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Recent developments in the Turkish judiciary and legislation

Turkey's judicial system underwent significant structural reforms in the second half of 2016 to improve the effectiveness of its procedural laws. The effective date of the long-planned reform to the appeals system overlapped with the failed coup attempt of July 2016, which had a dramatic impact on the day-by-day functioning of the courts for some time. The legislative changes, coupled with the dismissal of judges and public prosecutors, aims to improve the Turkish court system in order to render higher quality judgments, expedite the pace or conclusion of trials, and make it more efficient, reliable and predictable.

Two-tiered appeals system

The Turkish civil, criminal and administrative court system has long been based on local courts trying cases and rendering judgments, which could be appealed before the Court of Appeal (for civil and criminal cases) and Council of State (for administrative cases). If the appeal courts reversed the decision, the file would be remanded to the local court. The new decision by the local court would then again be subject to appeal, until the final confirmation of the judgment.

The Turkish government plans to introduce district appellate courts to review first instance court decisions in civil and criminal cases, and district administrative courts for administrative and tax cases, which would then be referred to the highest appeal court on matters of law. Legislative changes to underpin the system had been originally planned in 2004 for district appellate courts[1] and 2014 for district administrative courts.[2] The High Council of Judges and Prosecutors decided to establish district appellate and administrative courts on various occasions, but the decision that their effective date was to be 20 July 2016 was announced in the Official Gazette dated 7 November 2015.[3]

The Court of Appeal and Council of State would not only review the correct application of the law, but also consider whether the facts of the case had been addressed sufficiently. As the appeal courts were originally established as courts to review matters of law, however, they did not retry the case and made their decision based on the file contents, possibly holding one hearing. Their confirmation or reversal decisions were only subject to a reconsideration process, which was conducted by the same division of the appeal court. In the government's reasoning of the legislative changes, it mentioned that the former system, although aimed at increasing the judiciary's efficiency, had had the opposite result and overburdened the appeal courts. This also prevented the appeal courts from fully functioning as courts setting precedents on matters of law. Due to these problems, the reasoning behind the new laws is that the two-tiered system is interpreted by numerous countries as a basis of access to justice.[4]

In the new system, the reconsideration procedure against the Court of Appeal or Council of State decisions no longer exists. Judgments by local courts can now be brought before district appellate or district administrative courts, which may decide to set aside the local court decision, try the case again and possibly render a new judgment. Decisions by the district courts can then be taken to the Court of Appeal or Council of State, which are now expected to address only matters of law. If the district court's judgment is reversed, the file will be similarly remanded to the district court, whose decision can then again be taken to the appeal courts. To avoid cases going back and forth between the two courts, which led to cumbersome judicial processes, especially in major cases, an amendment to the law has also been made. If the district court aligned itself with the appeal court's reversal decision, then the district court's judgment can only be appealed in terms of whether it is actually in line with the reversal decision.[5]

Legal practitioners are starting to be faced with district court judgments and it remains to be seen whether this will improve the quality of judgments and result in a faster process. Cases that have been subject to appeal under the previous system will continue to be subject to the former system of appeals.[6]

Court fees in the enforcement of arbitral awards

Turkey is a party to the 1958 New York Convention, and for over a decade, Turkish courts have enforced many foreign arbitral awards. Nonetheless, the applicable court fees have always been the subject of dispute, and the issue remains unsettled to this day.

The lawsuit filing fees in Turkey are determined pro rata in claims for receivables or compensation for damages, whereas declaratory lawsuits or filings that do not relate to a certain sum are subject to minimal standard fees. In the case of the enforcement of foreign arbitral awards, there has long been a discussion regarding whether pro rata fees or standard fees should be charged.

According to Article 3 of the Law on Fees No 492 (the 'Law on Fees'), which regulates court fees, the applicable court fee in the enforcement of foreign arbitral awards is based on the nature of the award. Divisions of the Court of Appeal take opposite approaches in the interpretation of Article 3: the 15th and 19th Civil Law division refer to Article 3 and take the view that as the enforcement of a foreign arbitral award entitles the party requesting enforcement to collect money in Turkey, a pro rata fee, which is determined on the basis of the monetary amount awarded in the arbitral award, should be charged. On the other hand, the 11th Civil Law Division disagrees and requires that standard fees be charged on the basis that the enforcement of an arbitral award is a declaratory relief. As a further complication, the National Judiciary Informatics System (UYAP), the electronic filing system used by Turkish courts, automatically calculates standard fees for filing a lawsuit concerning the enforcement of a foreign arbitral award.

The Law on Fees lists the fees applicable to each court process in tariffs, which may be updated from time to time by the Council of Ministers. Law No 6518 had a sentence added to the tariff on pro rata charges, effective from 19 February 2014,[7] that such fees would be further reduced to half their rate in the case of arbitral proceedings. From the wording of the article, the arbitral proceedings phrase could also be literally translated as arbitration *lawsuits*. In the case of Law No 6728 dated 15 July 2016, which was published in the Official Gazette and entered into force on 9 August 2016, and which introduced amendments on certain different laws, including the Law on Fees for the purpose of improving the investment environment in Turkey, the newly introduced sentence was amended to state 'that no fees shall be applicable to arbitral proceedings (or arbitration lawsuits)'. In the reasoning of the law, it is stated that 'the application of pro rata fees in arbitral proceedings is abolished'. While this new amendment to the Law on Fees was well received by Turkish academia and has been interpreted to mean that standard fees shall be applied to a lawsuit filed for the enforcement of a foreign arbitral award, the Court of Appeal's interpretation of the amendment, its coexistence with Article 3 and the stance on whether it would order enforcement without charging any fees, remains to be seen.

Failed coup aftermath

Turkey faced a coup attempt on 15 July 2016. Pursuant to Article 120 of the Turkish Constitution, the Council of Ministers declared a state of emergency on 20 July 2016,[8] which was approved by the Turkish Parliament on 21 July 2016.[9] The state of emergency, which authorises the Council of Ministers to issue decrees having the force of law, was extended multiple times, the latest until 19 April 2017.[10] The statutory decrees not only relate to security measures, but address other issues, including a prohibition on Turkish companies filing for postponement of bankruptcy during the state of emergency, dissolution of a number of relatively small companies and clarification on the status of some major companies that were put under enforced administration due to criminal charges.

In addition, as a result of the coup attempt and state of emergency, large numbers of judges and prosecutors were dismissed by the High Council of Judges and Prosecutors, the latest round on 13 February 2017, when 227 judicial officers were dismissed.[11] Therefore, many new judges and public prosecutors have taken office after such dismissals, and many judges and public prosecutors who were already on duty have been appointed to different courts, positions and offices to refill vacancies. In the meantime, many experienced judges have been appointed to the district appellate or district administrative courts following the above-mentioned judicial reforms. Additional appointments have been made to fill the seats of the judges who have taken office in the district courts.

Therefore, the newly appointed judges and public prosecutors have had to familiarise themselves with ongoing dossiers, which has caused a delay in the proceedings. However, our experience is that the turbulence is phasing out, the newly appointed officers are becoming more familiar with their pending cases and the related delays are diminishing every day.

Notes

1 Laws No 5235 and 5236 published in the Official Gazette dated 7 October 2004 No 25606.
2 Law No 6545 published in the Official Gazette dated 28 June 2014 No 29044. District administrative courts existed before the judicial reform, but their authority was limited to the examination of certain types of administrative or tax court decisions.
3 Official Gazette No 29525.
4 www2.tbmm.gov.tr/d22/1/1-0521.pdf, accessed 24 February 2017 and www2.tbmm.gov.tr/d26/1/1-0726.pdf, accessed 24 February 2017.
5 Art 50 Administrative Procedure Law No 2577 and Art 373 Civil Procedure Law No 6100.
6 Provisional Art 3 Civil Procedure Law No 6100 and Provisional Art 8 Administrative Procedure Law No 2577.
7 Official Gazette dated 19 February 2014 No 28918.
8 Official Gazette dated 21 July 2016 No 29777.
9 Official Gazette dated 22 July 2016 No 29778.
10 Official Gazette dated 5 January 2017 No 29939.
11 Official Gazette dated 21 February 2017 No 29986.

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European Account Preservation Orders available across the EU

The European Parliament recently enacted European Union Regulation 655/2014 (the 'Regulation') to allow a creditor to apply for a European Account Preservation Order (EAPO). On 18 January 2017, it became possible to apply for an EAPO pursuant to the Regulation. Such an order allows a creditor to freeze a debtor's bank account(s) held across the EU by relying on a single order made in the court of a participating EU Member State. The aim of the Regulation is to provide creditors with a time-efficient and cost-effective remedy for the enforcement of relief across the EU. While there are benefits arising from swift enforcement pursuant to a single court order, the Regulation is complex and there are several areas of uncertainty in relation to the practical application of EAPOs.

Scope of the Regulation

From January 2017, the Regulation will be directly applicable (ie, without the transposition via national law) in all Member States except the United Kingdom and Denmark, which opted out of the Regulation. Consequently, UK or Denmark courts will not award EAPO relief, and funds in bank accounts held in the UK or Denmark cannot be preserved under an EAPO. However, the EAPO procedure is still relevant to UK or Danish banks. First, the branches or subsidiaries of UK or Danish banks located elsewhere in the EU may still be subject to an EAPO, depending on the specific circumstances, and secondly, customer account(s) of UK or Danish nationals, or entities situated outside the UK or Denmark but within the EU, may also be subject to an EAPO. Finally, a potential issue with which UK courts may have to grapple is whether to enforce an EAPO awarded in another Member State court. An application for enforcement could be made under the recast Brussels Regulations or any alternative regime introduced after the implementation of Brexit.

Given that the UK expressly opted out of the Regulation, UK courts may be reluctant to allow derivative enforcement of an EAPO. Indeed, the UK government was concerned by responses to the public consultation on the Regulation, as well as submissions by relevant stakeholders, who viewed the measure to be too 'pro-creditor', with insufficient safeguards for debtors. It may be that UK courts will allow enforcement, but subject to the standard terms found in freezing orders, as set out in the Commercial Court Guide, so as to ensure that debtors are offered the expected procedural protection.

Threshold for applying for an EAPO

An EAPO will be available to a creditor with monetary claims in 'civil and commercial matters' both pre-judgment (prior to or during proceedings) or post-judgment (Article 2 of the Regulation). The term 'civil and commercial matters' is a description often found in EU regulations and the Regulation provides a non-exhaustive illustrative list of the types of claims to which EAPOs will be available, including 'claims relating to tort, delict or quasi-delict and civil claims for damages or restitution which are based on an act giving rise to criminal proceedings'. The Regulation also states that an EAPO will not be available in cases involving specified excluded matters. These matters include cases in relation to matrimonial property, social security and/or arbitration. A further restriction is that an EAPO will only be available in 'cross-border cases'. This means that the account(s) that a creditor intends to freeze must not be in either the country of the court to which the application for an EAPO is made or the Member State in which the creditor is domiciled.

An EAPO cannot apply to financial instruments, such as shares, bonds and derivatives, held with, issued by or entered into with banks. An EAPO is only applicable to bank accounts containing monies credited to an account in the name of or on behalf of the debtor in any currency.

An application is made without notice to the debtor for obvious reasons and will generally be decided on paper (ie, without a hearing). The relevant court of a Member State with jurisdiction over 'the substance of the matter' will have the power to issue an EAPO, which can then be enforced across the EU. Prescribed forms for an EAPO application are available from the European e-Justice Portal.

To obtain an EAPO post-judgment as part of the enforcement proceedings, the creditor must demonstrate the need for an 'urgent protective measure' without which enforcement will be impeded or would be substantially more difficult.

The same requirement applies to obtaining an EAPO prior to a final judgment, but the creditor must also satisfy the additional requirement of providing sufficient evidence that 'the claim is likely to succeed'. It is expected that national courts hearing EAPO applications will consider similar factors (and legal authorities) as they do when hearing applications for domestic injunctions of this type. Considerations such as the risk of dissipation of assets and the conduct of the respondent or judgment debtor are likely to be relevant. However, there is limited guidance on the interpretation of such provisions from the EU Court of Justice, so there is scope for inconsistency between Member States. There is also the risk of patchwork implementation under various national laws in relation to the particular application of the Regulation within national courts.

Once an EAPO is awarded and served on a respondent, such as a bank holding a debtor's account(s), it has the effect of freezing the relevant account(s) pending a further order of the court. The debtor can apply to revoke or modify the terms of an EAPO by relying on various grounds, including showing that the requirements for the EAPO relief are not, in fact, satisfied. The prescribed forms for discharging an EAPO are also available from the e-Justice Portal.

Although there is no express obligation on the creditor to give full and frank disclosure, an application for an EAPO must include 'a declaration that the information provided by the creditor in the application is true and complete to the best of his knowledge and the creditor is aware that any deliberately false or incomplete statements may lead to legal consequences under the law of the Member State in which the application is lodged or to liability under Article 13' (Article 8(o) of the Regulation). Article 13 provides, in short, that a creditor is liable for damage caused to the debtor by an EAPO due to the fault of the creditor (Article 13 of the Regulation). The recoverable loss would presumably include a loss arising from the failure of the creditor to give adequate disclosure. There are no provisions indicating that the debtor can offer alternative security to release an EAPO, but the debtor can apply to revoke or modify an EAPO where it can be shown that the claim that is enforced under the EAPO has been paid in full or in part (Article 33 of the Regulation). In addition, the Regulation provides that the EAPO will no longer take effect where 'a measure to enforce a judgment, court settlement or authentic instrument obtained by the creditor relating to the claim which the Preservation Order [ie, the EAPO] was aimed at securing has taken effect with respect to the funds preserved by the Preservation Order' (Article 20(c) of the

Regulation). This effectively means the EAPO is discharged once payment has been made or when adequate alternative protection or security has been obtained.

Protections for parties subject to an EAPO

As a safeguard against the abuse of the EAPO procedure, a creditor applying for an EAPO is required to pay into court a sum of security sufficient to prevent abuse and to ensure the availability of compensation to the debtor if it transpires that the EAPO was wrongly awarded. Further, a creditor will be liable for any damage caused to the debtor due to fault on the creditor's part (eg, if they deliberately misled the court).

However, there is no express reference in the Regulation to the provision of security to protect third parties, such as banks, that may also be affected by an EAPO. In fact, the Regulation expressly states that it does not deal with the question of the possible liability of a creditor towards banks or third parties. As such, should a bank suffer a loss as a result of an EAPO, such as for breaching contractual obligations with the debtor or to third parties by enforcing the EAPO, it would therefore have to consider relief under domestic laws for any redress against the creditor.

Compliance with an EAPO

To comply with the Regulation, third parties subject to the Regulation, particularly banks holding an account subject to an EAPO, will need to ensure that they have processes in place to comply. In practice, this is likely to mean a development of existing processes for dealing with domestic civil and criminal restraint orders in their local jurisdiction, including reassessing standard terms and conditions governing bank accounts.

When a bank receives an EAPO, the bank must 'without delay' either ensure that the amount specified in the EAPO is not transferred or withdrawn from the account(s) indicated in the order, or transfer that same amount to a separate ring-fenced account. When requested by the debtor, the bank must disclose to the debtor the details of the EAPO, and may also choose to disclose an EAPO to a debtor without such a request. By the end of the third working day following the implementation of an EAPO, the bank must issue a declaration to the relevant nominated authority in its jurisdiction for onward transmission to the court that granted the EAPO, setting out whether, and if so, which funds are subject to the EAPO and the date on which the EAPO was implemented.

A bank subject to an EAPO is entitled to charge fees for implementing an EAPO or providing account information in connection with an EAPO (see further details below). However, the charging of fees is only permissible where the bank is entitled to charge for implementing equivalent orders or providing account information under the comparable domestic law.

There may also be civil or criminal penalties under national laws for failing to implement an EAPO sufficiently expeditiously. These requirements will vary across Member States and may expose third parties and banks to the risk of additional costs or liability.

Providing account information

The provision of the bank account information (eg, an International Bank Account Number – IBAN, Business Identifier Code – BIC or another bank account number and/or the name and address of the bank) to be frozen is a condition precedent to the granting of an EAPO (Article 8(2)(d)). Without such information, an EAPO cannot be easily enforced.

To facilitate the provision of such information, a creditor may request that the relevant court make a request to an 'information authority' (the 'Information Authority') in the jurisdiction where the debtor's bank account(s) are believed to be situated to obtain the necessary account information. In the application form, the creditor may request an EAPO that such information is obtained by the court of issuance from the relevant Information Authority. The creditor must substantiate why it is believed that the debtor holds account(s) with a bank in a specific Member State, and provide all relevant information available to the creditor about the debtor and the account(s) to be preserved. In general, such requests will only be permitted where an enforceable judgment is obtained. Nonetheless, in exceptional circumstances where the amount to be preserved is substantial and there is an 'urgent need for the account information', the request may be allowed before the judgment has been made enforceable. The Information Authority will transmit the account information to the requesting court and not the creditor. The relevant information to be provided appears to be limited to the account information and will not require the bank to disclose the level of funds held in the account.

Where the court considers that the application for further information is well substantiated and all the conditions for issuing the EAPO are met except for the information requirement, and where applicable, security is provided (Article 12), the court shall then transmit the request to the Information Authority for enforcement.

Participating Member States must nominate which authority will serve as the Information Authority and be responsible for obtaining the relevant information on a debtor's bank accounts. For example, the proposed Swedish legislation designates the Swedish Enforcement Authority to act as the Information Authority.

There is uncertainty in relation to how the Information Authority of each participating Member State will ensure the provision of account information. Given that a creditor appears to be able to seek provision of account information without adducing evidence that the debtor actually has a relevant account held by the bank, there are also concerns that courts may award an EAPO or require the provision of information in a way that requires third parties and/or banks to conduct wide-ranging searches to find accounts and/or account details.

Conclusion

The Regulation provides a powerful enforcement tool that will allow a creditor to obtain relief swiftly across the EU. In this respect, an EAPO is a welcome addition to the enforcement options available to creditors. However, as outlined above, there are areas of concern that may take some time to be resolved.

Protection of trade secrets in German civil proceedings: an EU directive as saviour?

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Know-how and other business information ('trade secrets') are important and sensitive assets of any undertaking. Undisclosed information typically loses its value when disclosed to others, even more so if these third parties are competitors of the information holder. Hence, companies are very keen to protect their trade secrets. Under certain circumstances, however, disclosing confidential information may be inevitable.

This can be the case in court proceedings, for example, or provide the basis for a claim or properly defend against claims asserted by the other party. Until now, German civil procedure law has not had any (or very few) regulations regarding the protection of trade secrets. European Union Directive (EU) 2016/943 (the 'Directive') addresses the issue of unlawful acquisition, use and disclosure of trade secrets.

When taking legal action, there are four situations imaginable in which the necessity to disclose secret information may arise. The first situation may occur when a party chooses to pursue a claim before court. To provide reasonable grounds for a claim, it may be essential to disclose certain information. This means that, under these circumstances, a claim can only be asserted successfully if valuable trade secrets are disclosed to the court and defendant in return. Secondly, it may be crucial to reveal trade secrets to the court and opposing party to defend oneself against claims asserted by the claimant. If information needed for an efficient defence is kept confidential, the claimant's claim might be successful. Thirdly, the matter in dispute itself may be undisclosed information. This is usually the case in disputes regarding intellectual property. Finally, it is imaginable that a third party holds the trade secret being endangered, even though that party is not part of the proceedings, for example, a party's business partner. If such information were to be disclosed to competitors, the business partner might suffer severe losses, and business relations will be damaged irrevocably.

In all these cases, the trade secret's holder is confronted with the decision of whether to devalue important information or be successful in court. Either way, the party that is forced to disclose a trade secret will suffer a loss. Thus, when addressing the issue of protecting undisclosed trade secrets in German civil procedure, two aspects need to be considered: on the one hand, the need to protect certain information to prevent its devaluation through disclosure; however, on the other hand, the principles of civil procedure must not be disregarded.

Status quo in German civil proceedings

To date, the German Code of Civil Procedure has contained only very limited and mostly insufficient possibilities to protect trade secrets in court. The court and opposing party are entitled to be notified of all the facts relevant for the decision. Notwithstanding the possibility that the court orders all involved parties not to disclose any trade secrets associated with the litigation, the information may still be used by the opposing party for its own purposes, such as business strategies. In order to avoid this, the German courts and German legal literature have developed several approaches. These approaches aim to avoid the necessity of disclosing the trade secret to the opposing party altogether.

The so-called Düsseldorf method (*Düsseldorfer Verfahren*), which has been established by case law, is mainly applied in industrial property protection (IPP) disputes. The trade secret in question will only be disclosed to an objective expert witness. This expert witness then submits a report to the court and the opposing party's attorney. Before that, however, the opposing party's attorney is bound to secrecy towards their client by the court. All other involved parties, especially the opposing party, only receive a blacked-out copy.

Even more extensive is the so-called 'black box' solution. The trade secrets are only disclosed to one expert witness, who then provides a direct answer regarding the matter in dispute. The court follows the expert witness's answer unrevised.

Furthermore, there is the approach of using an in-camera proceeding, as known by the German Code of Administrative Court Procedure. No involved party is granted access to the undisclosed information, except the court itself.

The right to be heard, the principles of oral argument, immediateness and production of evidence, and the obligation to make declarations as to facts and circumstances fully and completely, are the main principles of German civil procedure that have to be considered. All above-mentioned methods restrict these principles, to a certain degree, in favour of protecting trade secrets. Thus, it is particularly important to ensure both the effective protection of trade secrets and respect for the parties' right to a fair trial.

Directive (EU) 2016/943

There are significant differences in EU Member State legislation regarding the protection of trade secrets. The scope and protection available differs greatly throughout the EU. In many Member States, the legal protection of trade secrets in court is insufficient. The Directive seeks to provide protective measures to compensate for the insufficient and fragmented legal protection of trade secrets across the EU. It is supposed to grant a minimum standard of protection.

Scope of application

The Directive is only applicable to information that meets certain criteria. For information to be regarded as a trade secret, it needs to be secret. Pursuant to the Directive, information will only be considered secret provided it is not generally known among or readily accessible to persons within the industry. In addition, the information's commercial value needs to originate from its secrecy, and the owner of the information has to have taken reasonable steps for the information to be kept secret. If one of these requirements is not met, the information will not be considered a trade secret. In that case, the Directive will not be applicable.

These requirements differ from German case law. In Germany, the person in control of the trade secret must have the intention to keep the knowledge secret, and has to communicate this intention. The Directive does not require such an intention.

Regarding the protection of trade secrets during civil proceedings, the Directive only applies to disputes that relate to the unlawful acquisition, use or disclosure of trade secrets. This means that a trade secret will only be protected by the Directive's stipulations if it is the matter in dispute itself. Thus, the Directive only applies to IPP cases. Aside from this, the Directive is not applicable to other situations. Thus, only one of the four cases mentioned at the beginning of the article is within the Directive's scope of application.

Safeguards

The Directive contains measures to protect trade secrets in the course of legal proceedings. The Directive's main means of preventing the disclosure of secret information is the prohibition of use or disclosure of the trade secret. A competent court may order such a prohibition. In the event that an infringement already occurred, the court may order the immediate cessation instead. The court will issue an order at the request of the trade secret holder. Once ordered, a prohibition will remain in place, even after the proceedings have ended.

Besides that, the access to documents and hearings can be restricted to a limited number of people. Persons not included in the limited number shall only have access to blacked-out versions of documents and protocols. However, a natural person of each party and the individual's legal counsel must be granted access to all information relevant for the court's decision at all times.

From a German point of view, this provision constitutes the Directive's greatest weakness. As mentioned previously, the opposing party – who might be a competitor – can use the gained information to its advantage. A court order that prohibits the information's disclosure and use is not sufficient to prevent this. It is this dilemma that significantly undermines the Directive's intention to protect trade secrets. The prospect of losing the confidentiality of a trade secret may prevent many trade-secret holders from taking legal action. In Germany, the Directive leads to a decrease of the protection provided for trade secrets.

Conclusion

The Directive only applies to proceedings that relate to the infringement of trade secrets. Other matters in disputes in which trade secrets may have to be revealed to provide reasonable grounds to a claim or provide an efficient defence against claims made are not covered by the Directive. Therefore, the only case considered by the Directive is the situation in which German courts have been successfully applying the Düsseldorf method for years. Other situations that were and still are in need of a sufficient solution remain unregulated.

In fact, the Directive makes it all worse. From a German point of view, the necessity of a natural person having access to all information is a step in the wrong direction. The Düsseldorf method, as well as the other approaches, will become inapplicable. These methods can only work if the information is kept away from all involved persons, including the opposing party, at all times. However, the Directive restricts the exclusion of a party. A court order – as provided for by the Directive – as the sole safeguard is insufficient to protect trade secrets, even more so when the opposing party is a direct competitor of the trade secret holder.

As mentioned previously, when focusing on the protection of trade secrets, two sides need to be considered. It needs to be ensured that the trade secret in question is protected, while a fair trial is still retained. Balancing these opposing interests is a nearly impossible task, which the Directive attempted to complete. The result, however, is nothing more than a mere minimum standard. The scope of applications is too narrow and the available safeguards are not sufficient to ensure the information's secrecy. It remains to be seen how the German legislator implements the Directive into the German Code of Civil Procedure. First, it seems necessary to implement further measures of protection to guarantee that information is kept secret. In particular, safeguards need to be implemented with a stronger emphasis on the trade secret holder's interests. If the legislator chooses to stick to the Directive's scope, it is quite likely that the protection of trade secrets in German courts will decrease. EU Member States have to transpose the Directive into their national law by 9 June 2018.

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Digital revolution of court cases in Denmark

Denmark is, in many ways, a front-runner when it comes to digital communication and registrations.

The government and municipalities communicate on all issues with citizens through a portal, in principle, without any paper communication.[1]

All registrations on the title of land can be completed online[2] and companies can be incorporated and registered online as well.[3] It comes as a surprise to many foreign investors that they can have a fully incorporated and operating company within 24 hours.

This tendency towards digitalisation has now also come to the Danish courts.

Traditionally, the practise of law was often thought of as a conservative discipline, dominated by rigid customs and traditions. Apart from the introduction of the photocopier and email, the litigation process has not undergone much digitalisation throughout the 20th and 21st centuries. Today, there is still a need for bundles of documents, sometimes tens of thousands of pages, to be printed in preparation for court proceedings. Disregarding the environmental impact, the handling of paper-based material is inefficient and time-consuming from the point of view of lawyers, judges and other parties involved.

However, Denmark has already, at this point in time, made developments regarding digital communication with courts. There is no longer a requirement to submit physical procedural documents by ordinary mail, and there is no need to sign submitted documents.

The communication with courts is normally done via email, and we already have a 24/7 time slot for delivering procedural documents if forwarded by email. The opening hours of courts are no longer of importance with respect to when a document can be received by the courts. If you have a deadline on, for instance, 24 May, a document received by the court through email is delivered on time if received on the server prior to midnight on that day. This legal position was established by two decisions from the Eastern and Western divisions of the High Court.[4]

The digitalisation of the Danish court system is now taking a step further.

The digital portal

With effect from 1 January 2016, Denmark implemented a legal framework for a mandatory digital case management system.[5]

The system has been implemented in one district court and one of Denmark's two high court divisions, the Western division, with effect from 4 October 2016.

At the moment, it is not clear when the system will be implemented in additional courts, but there is a rollout plan, and full implementation in all courts is expected in 2018.

The pilot has already yielded mostly positive reactions from judges, lawyers and administrative personnel. The portal is being praised for its intuitive and accessible interface, providing its users with, sometimes, much needed comprehensibility.

The new digital case system requires that all communication with the courts, including the uploading of pleadings, requests for appeal and reopening of cases, has to be done via the system.

Any communication to the court, including email correspondence not sent using the system, will be deemed as not received by the court.

The portal will not only function as cloud storage for procedural documents, but also facilitate actual communication between parties and courts. Parties will receive notification about upcoming deadlines, payable court fees, court decisions and so on, encouraging clarity and punctuality. The portal will also allow for the online payment of court fees, and even include a library of standardised text for correspondence between parties.

The new digital case system applies to all civil cases and requests for obtaining evidence.[6] Among others, criminal cases and enforcement proceedings are excluded.

The material uploaded via the system is

considered to be received by the court when it is available to the court in the system, as is already the case with email correspondence under the current system.

An especially challenging feature for many lawyers working with the new system could be that the client has full access to the digital case, which means that the client will, for instance, receive the judgment at the same time as the lawyer. The client will also be able to see all, more or less well-founded, applications for postponement of deadlines.

The fact that all documents are only available online will probably also have an effect on how the actual hearing is conducted because the main rule according to the new rules is that document bundles should be produced electronically only.

However, the court can request paper bundles in addition to the electronic version.[7] One could imagine that this exemption could be invoked by more seasoned judges, at least for some period of time.

Some cases with a substantial number of documents have already been conducted exclusively by way of electronically-stored documents, with no paper bundles, and all Danish courts have installed the necessary equipment to be able to handle a hearing without physical documents.

Another aspect of the digitalisation could be an increased use of examination of witnesses by video link, and the necessary equipment is also available in all courts.

However, the legal framework is an impediment to the increased use of video links because the main rule in the Danish Administration of Justice Act is still that a witness must appear in person before the court.[8]

Video examination is used primarily where the witness would have to travel a long distance, and where the witness could not be considered crucial for the outcome of the case.[9]

If the witness is located abroad, it is an additional requirement that the examination can take place in a court or other public authority abroad under secure circumstances.[10]

Online judgment database

In addition to the digital case system, an online judgment database will also be implemented.[11]

This project has been in the pipeline for a number of years, and a working group issued a report in 2015.[12]

It should be noted, in this respect, that precedent is a very important feature in Danish (commercial) cases because, unlike what is commonly believed, Denmark has no civil code. In fact, Denmark is a hybrid between common and civil law, and cannot be placed exclusively in the civil law camp. It is conceived as a democratic project enhancing transparency and giving all equal access to justice, and the purpose of the online database is to make all Danish court judgments in civil cases available to the public.

The database should, in principle, give access to judgments in civil cases issued after 1 January 2016, but will not contain any judgments issued prior to this date.

However, the judgment database interacts with the digital case system, so that judgments will be extracted from the digital case system and placed in the database. Because of the postponement of the implementation of the digital case system, it is unclear to what extent judgments dating back to 1 January 2016 will be fully available in the database.

The database will not include procedural decisions and so on, but only final judgments.

It is not possible to apply for exemption (eg, due to sensitive business secrets being involved), which means that all judgments will be available in the database. This has the effect that there is more publicity related to court cases than is the case today. It could lead to increased use of arbitration in commercial matters.

Before being uploaded to the database, personal and sensitive information will be removed from the judgments to the extent required by applicable law.

The downside of the database is that it could lead to an unnecessary focus on legal precedent, forgetting that most cases are won on facts, where the lawyer's main task is to present these in a way to create a 'logical platform' for the client's case.

Conclusion

Denmark is already one of the most digitalised countries in the world, and digitalisation has now come to the Danish courts with the new portal administrating cases and communication between courts and parties.

This will forever change how court cases are conducted in Denmark, and it is expected to enhance efficiency and transparency in litigation.

Notes

1 *NemID conditions for online banking and public digital signatures*, www.nemid.nu/dk-en/about_nemid/citizen/conditions/NemID-conditions_UK_v5.pdf, accessed 27 March 2016.

2 *LBKG 2014-09-30 nr. 1075 Tinglysningsloven*, www.retsinformation.dk/forms/r0710.aspx?id=142900, accessed 27 March 2016.

3 *LBKG 2015-09-14 nr. 1089 Selskabsloven*, www.retsinformation.dk/forms/r0710.aspx?id=174205#id8bb64438-a0d7-47df-a09e-c670028b0edf, accessed 27 March 2016.

4 The Danish Law Report Weekly 2016 p 3825 Western Division, and The Danish Law Report Weekly 2017 p 438 Eastern Division, respectively.

5 *LOV 29-12-2015 nr 1867, Lov om ændring af retsplejeloven, lov om Domstolsstyrelsen og lov om retsafgifter*, www.retsinformation.dk/forms/r0710.aspx?id=176776, accessed 27 March 2016.

6 S 16 ss 148a of the Danish Administration of Justice Act.

7 S 357, ss 5 of the Danish Administration of Justice Act.

8 S 174, ss 1 of the Danish Administration of Justice Act.

9 See, for instance, an example in The Danish Law Report Weekly 2013 p 2930 High Court Eastern Division.

10 S192, ss 6 of the Danish Administration of Justice Act.

11 Danish Parliament, *Forslag til Lov om ændring af retsplejeloven, lov om Domstolsstyrelsen og lov om retsafgifter*, S9a www.ft.dk/RIpdf/samling/20151/lovforslag/L22/20151_L22_som_vedtaget.pdf, accessed 27 March 2016.

12 Terms of reference for the working group about the online judgment database, *Rapport Arbejdsgruppen om domsdatabase*, published April 2015, www.domstol.dk/om/publikationer/Publikationer/Rapport%20Arbejdsgruppen%20om%20Domsdatabasen%20april%202015%20Endelig%20version.pdf, accessed 27 March 2016.

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Financial disputes: a new alternative dispute resolution tool in Italy

Through Resolution No 19602 of 4 May 2016, Commissione Nazionale per le Società e la Borsa (CONSOB)[1] established the arbitrator for financial disputes (Arbitro per le Controversie Finanziarie – ACF) and the related regulation (the 'Regulation'). This new alternative dispute resolution (ADR) body, which commenced its activities on 9 January 2017, aims to solve disputes among intermediaries and retail investors, where investors are the only parties who may file complaints.

The establishment of the ACF constitutes one of the steps through which Italy is implementing Directive 2013/11/CE on ADR of the European internal market. In this respect, the European legislator is also aiming at increasing the effectiveness of ADR tools in the area of investment services.

The European Parliament and the Council recently remarked on the necessity for Member States to ensure the setting-up of efficient and effective ADR systems for consumer complaints through Article 75 of Directive 2014/65/EU on markets in financial instruments (MiFID II).[2] Indeed, the ACF appears to be a true reflection of the extrajudicial mechanism for consumer complaints required by Article 75, and thus in line with the European framework.

Accordingly, the main goals of the ACF are: (1) to provide investors with more specialised and effective protection as opposed to that provided by the previous instruments of the Conciliation and Arbitration Chamber; and (2) subsequently, and in the long term, to decrease the Italian courts' workload regarding proceedings in relation to such matters.

Scope of ACF activity

The intermediaries on which CONSOB exercises its supervisory powers are compelled to join the ACF institution, and have to inform investors about the possibility of bringing an action before the ACF to resolve disputes.

Indeed, the ACF's scope of activity is limited to disputes between retail investors and intermediaries where there have been violations in the obligations of the diligence, fairness and transparency that are owed to investors.[3] In this regard, given the technical (banking and financial) expertise of the ACF decision-making body, the ACF is competent to assess the quantum of financial damages that are direct consequences of the intermediaries' violations.

Within the above-mentioned framework, the ACF's scope of work includes consumer cross-border and high-value disputes, whose cap is fixed at €500,000.

Admissibility of the action and judgment

As a condition for the admissibility of the action, CONSOB requires that the investor initially submits a written complaint to the intermediary. Should the intermediary not reply within 60 days, or if it denies the investor's request, the investor can bring an action before the ACF, either personally or through a lawyer or trade association.

The ACF's decision-making body is a panel composed of a chairperson and four members, selected by CONSOB from professionals with proven experience, following certain criteria set out in the Regulation.

The ACF's panel determines disputes on the basis of the relevant principles of law. It issues decisions that contain declaratory judgments, such as an order to cease a particular conduct or to deliver a document; it also issues orders for payment.

In both cases, the judgment is not binding and investors retain the right to seize the court. Thus, the effectiveness of ACF's decisions depends on their impact on the intermediaries' reputations. Indeed, if the ACF ascertains that an intermediary has not acted upon its decision, this failure to perform is made public through the publication of a notice on the ACF website and in two national newspapers.

As for its nature, the ACF cannot be considered a jurisdictional authority because its decisions are not enforceable. On the other hand, it is also true that the ACF is not a conciliation body because it does not suggest settlements, but decides disputes. The ACF can therefore be considered to be an ADR body that anticipates the possible outcome of a jurisdictional trial, giving the investors the opportunity to evaluate in advance the likely effectiveness of seizing a court of the dispute.

Costs and timing

The proceedings are free of charge for the applicants and the relevant expenses are covered by an ad hoc fund created by CONSOB. However, in the event of a favourable decision for the investor, the intermediary is obliged to pay the ACF an amount that varies according to the amount due to the investor based on the ACF's decision.

The ACF started its activity on 9 January 2017; hence, there is not sufficient data available to evaluate the likely length of the relevant proceedings. However, the ACF is expected to be able to rule within six months from the submission of the application.

The activity of the ACF is expected to have deflationary effects on ordinary judicial proceedings and, in the medium term, decrease the number and length of civil suits.

Notes

1 The Italian securities and exchange commission.
2 The Directive will enter into force on 3 January 2018.
3 The obligations of diligence, fairness and transparency of intermediaries are regulated in the second part (regulation of intermediaries) of the Italian consolidated finance act (Testo Unico della Finanza (TUF), D lgs No 58 of 1998).

The Netherlands as efficient jurisdiction for cartel damages claim litigation

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Recent developments may necessitate different choices

Under European Union law, the courts of any one of its Member States can have jurisdiction regarding cartel damages litigation, depending on the country of origin of the defendant or the place where the harmful event took place. In 2015, 23 follow-on damages claim cases were heard by United Kingdom courts, 11 by Dutch courts, and ten by German courts.[1] Recently, the Brexit referendum has made the choice of UK jurisdiction less obvious. In this article, we discuss the reasons why the Netherlands is popular and offers a serious alternative for cartel damages litigation.

Dutch courts are well-equipped to handle international cases

There are various reasons why Dutch courts have a remarkable reputation.

The quality of Dutch courts is undisputed

As the practice of cartel damages claim litigation already shows, Dutch courts are considered to be among the best in their field. Dutch courts are known to be as experienced as they are efficient. It is not without reason that the Netherlands ranks fifth on the Rule of Law Index of the World Justice Project, and even ranks first worldwide in the field of civil justice.[2]

Dutch law also allows for settlements to be universally binding upon the class of those who have suffered damage throughout the EU. Considering that defendants run the real risk they will be sued again, but by different parties in different EU Member States – all of whom may have jurisdiction – the possibility of arranging a pan-European settlement contributes to the likelihood of reaching an attractive settlement.

The language skills of the legal profession and its judges are excellent

Proceedings in Dutch courts are conducted in Dutch. Judges usually allow exhibits to be filed in English without requiring their translation into Dutch. Extremely skilled interpreters are widely available in the Netherlands, to be deployed in hearings. And in the near future, the Netherlands Commercial Court, which will enable parties to litigate in English, will open its doors.[3]

Litigations costs are relatively low in the Netherlands – effectively no 'loser pay' rule

The Dutch legal system is distinguished by its efficiency and expertise, which substantially reduces litigation costs.

When proceedings are initiated, both claimant and defendant are due to pay court fees, which are fixed and modest.[4] There is no 'loser pays' rule, at least not exceeding the minimal nominal fees as stipulated in various decrees. For example, nominal cost orders in favour of individual defendants per plaintiff are commonly less than €20,000, even in high-stake cases, and hardly ever in excess of €50,000. Only plaintiffs that are domiciled outside the EU and United States can, under specific conditions, be asked to provide security with regard to the costs of the proceedings.

How do Dutch courts rule in cartel damages cases?

No arrest/suspension when a decision to impose a fine is revocable

Dutch judges show little willingness to be slowed down easily when it comes to the advancement of proceedings. In the *Equilib/KLM* case,[5] for instance, the Court of Appeal of Amsterdam refuted the defence that the decision of the European Commission to impose a fine was not yet irrevocable, which was why legal proceedings would need to be suspended or adjourned. The Dutch court is also quite willing to assume that the procedure should not rely completely on the validity of the cartel ruling, and will therefore not have any problems ascertaining its jurisdiction.[6]

No arrest/suspension awaiting a Supreme Court ruling

Even when, in similar (cartel damage) cases, no decision has yet been reached by a higher court, the Dutch court has ruled that this does not imply the adjournment of the cartel damages case being tried until said decision would have been reached.[7] In compliance with European judiciary directives, the Dutch court refutes the line of defence that argues that a case needs to be suspended or adjourned until higher courts have reached a decision in a similar (cartel damage) case.[8]

Dutch judges claim jurisdiction relatively easily: the anchor defendant creates the jurisdiction

In line with EU legislation, Dutch judges can and will claim jurisdiction if:

1. the cartel infringement/restrictive trade practice originated (partly) in the Netherlands;
2. the restrictive trade policy was (partly) enforced in the Netherlands or damages as a result of the cartel infringement were (partly) suffered in the Netherlands; or
3. at least one of the (alleged) offenders is established in the Netherlands.[9]

A Netherlands-based defendant can serve as an *anchor defendant* when individual claims are essentially connected.[10] This means that all existing claims against the recipients of a decision to impose a fine can be handled by one single court. By allowing this, the

Dutch court addresses the risks of possible fragmentation and divergent rulings, which would be contrary to the EU Execution (EEX) Regulation.[11]

The Dutch court has ruled that cases in which judicial and factual circumstances are similar can and should be handled by one individual court.[12] The Dutch court assumes that this is the case relatively quickly.[13] Furthermore, it does not usually show itself to be eager to acknowledge the existence of separate (national) cartels.[14] In other words, the Dutch court is not likely to shy away from ascertaining its jurisdiction, provided the individual claims are more or less closely related. Legal objections in this regard are easily refuted by Dutch judges.

The Dutch court has ruled that when there has been direct membership of a cartel by a Dutch entity, it could reasonably be anticipated that possible cartel damages claims would be put before a Dutch court. The fact that the cartel damages case is also connected to other jurisdictions does not affect this conclusion.[15] Furthermore, the Dutch court emphasises that cartel-related rulings are not only intended to affect its individual members, but possibly also parent companies.[16]

The Dutch court will also not easily decide that adding another party to a pending case or joining cases together constitutes an abuse of procedural law, nor is it likely to conclude that this hinders defendants in their defence.[17] If the possibility of an abuse of procedural law is raised by the defendant, the Dutch court emphasises the importance of the principle of efficiency, to which it will usually give precedence.[18]

Choice of court agreement does not affect the jurisdiction

The Dutch court has also ruled that a choice of court agreement does not affect its competence in cartel damages cases. The Dutch court has stipulated that a choice of court agreement only applies to claims of a contractual nature, which means that it does not apply to disputes concerning antitrust infringements because these are, in principle, not considered to be contractual claims.[19] The only possible exception to this would be when a plausible argument could be made that the agreement(s) to which the choice of court agreement applies is relevant to the judgment in the cartel damages case.[20] This will only occur in exceptional cases.

Dutch civil procedural law allows special claim vehicles

Dutch civil procedural law allows special claim vehicles to act as a plaintiff in proceedings. Dutch law provides the following options to enable a special purpose vehicle (SPV) to engage in proceedings:

The injured parties can assign their claims to the SPV, which subsequently litigates these claims. The injured parties and the SPV can also enter into a contract of mandate which will entitle the SPV to litigate the concerned claim. The SPV can subsequently litigate these claims either in its own name, or in the name of the injured parties.

The SPV can bring a so-called 'collective action' on the basis of Article 3:305(a) of the Dutch Civil Code (DCC). This enables the SPV to demand declaratory relief with regard to liability and causal relationship for the benefit of groups of injured parties as far as their claims are sufficiently similar. Such declaratory relief does not bind the injured parties if they opt out.

Unlike option 1, Article 3:305a DCC does not enable the SPV to claim the payment of damages. However, collective actions can provide the momentum necessary to force the injuring party to accept a collective settlement.[21] An SPV can commence a collective action without the cooperation of the injured parties, but is subject to other limitations.

Options 1 and 2 can be combined. Collective actions, option 2, can only be brought by a Dutch foundation or association. Statutory law restricts the foundation or association in distributing profits (Articles 2:26 (3), 2:285 (2) and 3:305a (1) DCC). Furthermore, in order to have *locus standi* the foundation or association is required to adopt sufficient safeguards for injured parties' interests (Article 3:305a (2) DCC). This requirement was introduced recently in order to counteract the use of collective actions by entrepreneurs that put their own commercial objectives before the interest of the injured parties they claim to represent. The minimum standards with regard to these safeguards are not yet determined by legislation or case law. As a means of self-regulation, a corporate governance code for collective action foundations and associations was introduced. This code, inter alia, entails that the board of the foundation or association should be independent of the law firm it employs and that the foundation or association should be run on a non-profit basis.

The above-mentioned corporate governance code does not apply to an SPV that brings claims as described above under Option 1. Furthermore, Dutch law allows such claims to be brought by vehicles other than Dutch foundations and associations, provided the plaintiff's law of incorporation empowers it to bring legal actions (Article 10:119 (a) DCC).

Option 2 is of limited use in cases where the intention is to represent claimants who opt out of the effects of the judgment obtained by another foundation or association. For reasons of uniformity of law, it is highly likely that the Dutch courts would provide the same declaratory relief as provided by a court of the same rank; although, it is possible, in theory, that another foundation or association could achieve a better result.

Other benefits of Dutch civil procedural law

The Netherlands is an attractive venue for settling international mass claims

The Netherlands is an attractive venue for settling international mass claims, irrespective of whether it regards cartel damages claims or other damages claims, and irrespective of whether any litigation has actually taken place in the Netherlands. This mechanism is set out in the Dutch Act on the Collective Settlement of Mass Claims. In short, it requires a collective settlement agreement between one or more potentially liable parties and one or more foundations or associations that, pursuant to their articles of association, promote the interests of the class members. Subsequently, the parties to the collective settlement agreement can jointly request the Amsterdam Appeal Court to declare this settlement agreement binding on all class members on an opt-out basis.

The international scope of this mechanism was first confirmed in the *Shell Reserves* case.[22] The vast majority of the class members did not reside in the Netherlands, but across the globe. Additionally, not all potentially liable parties had their domicile in the Netherlands. The *Converium* case[23] was of an even more international nature. None of the potentially liable parties resided in the Netherlands. Moreover, there was only a very limited number of Dutch class members.

In the *Converium* case, the argument that the amount of settlement relief was unreasonable because the fees for the US plaintiffs' lead counsel, which were to be deducted from the settlement amount, were too high, was dismissed.

Proof of damage

When it comes to proving the scope of the damage, the Dutch court can be very forthcoming towards damaged parties in cartel cases. For example, in a case that involved a worldwide cartel, it has ruled that, when trying to ascertain proof of damage, claimants cannot reasonably be expected to know what should have been a reasonable price for the products in question.[24]

The principle of effectiveness implies that defendants are under the obligation to provide an insight into their price calculations because insufficient available information makes it extremely complicated for claimants in cartel damages cases to calculate the price increases or surcharges about which the complaint is made. This implies that defendants in cartel damages cases may be obliged to provide an insight into their price calculations, and substantiate their production costs and surcharges. When defendants fail to provide this information, the Dutch court considers itself free to make an estimate of the surcharge arising as a result of the cartel. This significantly reduces the burden of proof for claimants in Dutch cartel damages cases.

Gathering evidence

Although the Dutch legal system does not have the concept of US-style discovery or UK-style disclosure, there are some procedural tools that are sometimes effective. Admittedly, they are less invasive compared with those in Anglo-Saxon jurisdictions, but this is not always a bad thing, particulary when it comes to plaintiffs that are vulnerable to passing-on defences. In addition, the more restrictive rules greatly contribute to keeping litigation time and costs under control.

Dutch law contains a special arrangement that pertains to the inspection and provision of records. Based on the stipulations of Article 843a DCC Procedure, a party may, under certain conditions, seek the provision of items of evidence from its opponent. This party must have a *legitimate interest* in the provision of a *certain record*. In order to preclude the possibility that the item of evidence might disappear during this procedure, it is also possible to impose a prejudgment attachment on information in the possession of the opponent by means of a so-called seizure of evidence. In this way, it is possible to ensure that the items of proof will be available when the right to inspection has eventually been granted. This arrangement offers all too welcome compensation for the informational disadvantage of claimants in cartel damages cases.

Notes

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2 http://data.worldjusticeproject.org/#table, accessed 27 March 2017.
3 www.netherlands-commercial-court.com, accessed 27 March 2017.
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6 District Court of The Hague 1 May 2013, ECLI:NL:RBDHA:2013:CA1870 (CDC/Shell cs), para 4.26.
7 District Court of Gelderland 15 April 2015, ECLI:RBGEL:2015:2621, para 3.6.
8 European Court of Justice (ECJ) 14 December 2000, C-344/98 (Masterfoods); ECJ 1 December 2011, C-145/10 (Painer).
9 ECJ 21 May 2015, C-352/13 (CDC/Perioxide).
10 Art 6 (1) Brussels I Recast.
11 Court of Appeal Amsterdam 24 September 2013, ECLI:NL:GHAMS:2013:3013 (EquilibKLM); District Court of The Hague 17 December 2014, ECLI:NL:RBDHA:2014:15722; District Court of Amsterdam 7 January 2015, ECLI:NL:RBAMS:2015:94 (*Equilib/KLM*); District Court of Limburg 25 February 2015, ECLI:NL:RBLIM:2015:1791 (*Deutsche Bahn/Nedri Spanstaal ea*).
12 District Court of Amsterdam 7 January 2015, ECLI:NL:RBAMS:2015:94 (*Equilib/KLM*); District Court of Amsterdam 4 June 2014, ECLI:NL:RBAMS:2014:3190 (CDC/Akzo cs), para 2.12.
13 District Court of Amsterdam 4 June 2014, ECLI:NL:RBAMS:2014:3190 (*CDC/Akzo cs*), paras 2.12–2.13.
14 District Court of Amsterdam 7 January 2015, ECLI:NL:RBAMS:2015:94 (*Equilib/KLM*), para 3.4.
15 District Court of Limburg 25 February 2015, ECLI:NL:RBLIM:2015:1791 (*Deutsche Bahn/Nedri Spanstaal* ea), para 3.5; District Court of of Amsterdam 4 June 2014, ECLI:NL:RBAMS:2014:3190 (CDC/Akzo cs), para 2.16.
16 District Court of The Hague 1 May 2013, ECLI:NL:RBDHA:2013:CA1870 (*CDC/Shell cs*), para 4.17.
17 District Court of Amsterdam 7 January 2015, ECLI:NL:RBAMS:2015:94 (*Equilib/KLM*), paras 3.6–3.8; District Court of Limburg 25 February 2015, ECLI:NL:RBLIM:2015:1791 (*Deutsche Bahn/Nedri Spanstaal* ea), para 3.5; District Court of The Hague 1 May 2013, ECLI:NL:RBDHA:2013:CA1870 (CDC/Shell cs), para 4.27.
18 District Court of The Hague 1 May 2013, ECLI:NL:RBDHA:2013:CA1870 (*CDC/Shell cs*), para 4.27.
19 District Court of The Hague 1 May 2013, ECLI:NL:RBDHA:2013:CA1870 (*CDC/Shell cs*).
20 District Court of Amsterdam 4 June 2014, ECLI:NL:RBAMS:2014:3190 (*CDC/Akzo cs*), para 2.23.
21 The settling of international mass claims in the Netherlands will be discussed below.
22 Court of Appeal Amsterdam 29 May 2009, ECLI:NL:GHAMS:2009:BI5744 (Shell Reserves).
23 Court of Appeal Amsterdam 17 January 2012, ECLI:NL:GHAMS:2012:BV1026 (Converium).
24 District Court of Gelderland 24 September 2014, ECLI:NL:RBGEL:2014:6118.

Going Dutch: the Netherlands as an attractive litigation forum for international disputes in English

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In January 2016, the Dutch Council for the Judiciary announced plans to create a Netherlands Commercial Court (NCC) sitting in Amsterdam after launching a review in September 2014 aimed at determining the necessity for a specialised commercial court. The April 2016 edition of International Litigation News highlighted this matter in two articles in its 'Focus on the Netherlands' section.

In December 2016, the Dutch government published the draft bill for the formation of the NCC and the Netherlands Commercial Court of Appeal (NCCA)[1] as well as its explanatory memorandum. Now that these documents have seen the light of day, more details are known. This article serves to outline some of the most relevant aspects of litigation before the NCC, once the NCC gets started.

Background and aim

The background of the NCC is that businesses are increasingly operating on a global scale. Given the fact that the language of international business is predominantly English, and international contracts are mainly drafted in English as well, the NCC seeks to meet the rise in a need for dispute resolution in English in a traditionally non-English speaking jurisdiction such as the Netherlands. The hearings will take place in Amsterdam.

The main aim of the NCC is to offer parties that have an international dispute a forum in the Netherlands where they can litigate their dispute in English and subsequently obtain an enforceable judgment in English. The NCC would thus take away any language barriers that may exist and therefore introduce an incentive to parties to choose the Netherlands as a forum for the resolution of their international disputes as a credible alternative to international arbitration.

According to the explanatory memorandum, the five characteristics of the NCC procedure are as follows:

1. Parties may only litigate before the NCC if they have explicitly agreed to do so. The draft bill contains safeguards to prevent consumers and small businesses from involuntarily becoming involved in NCC litigation (ie, without their express consent).
2. Parties may only submit to the NCC matters of civil and commercial law that are at the sole determination of the parties.
3. The working language of the NCC is, in principle, English.
4. The NCC will be entirely financed by the court fees of the litigating parties. The court fees will be substantially higher when compared to regular Dutch district courts.
5. The NCC and NCCA will have one set of procedural rules (the 'NCC Rules') by which parties may further shape their proceedings to the extent that this is enabled by the Dutch Code of Civil Procedure (DCCP).

Jurisdiction of the NCC

The NCC will only deal with international disputes. According to the explanatory memorandum that forms part of the draft bill, one may speak of an international dispute, if, for example, one of the parties involved in the dispute has its domicile or place of business outside the Netherlands, when the agreement has to be carried out outside the Netherlands or when foreign law is applicable to the agreement between the parties. If and to the extent that a purely domestic dispute is submitted to the NCC, the NCC will not hear the case and will refer the matter to the competent district court.

A few examples of international disputes mentioned in the explanatory memorandum that may be submitted to the NCC are international contractual disputes, tort claims, disputes relating to property law and corporate issues. In addition to the above-mentioned examples, parties may also consider bringing international construction and infrastructure disputes to the NCC given that Fédération Internationale Des Ingénieurs-Conseils (FIDIC)-based international projects usually have English as their working language. The NCC could be welcomed by parties that, in these cases, would like to have an alternative to international arbitration.

The NCC will, however, not be dealing with disputes that pertain to specialised courts in the Netherlands, such as the Enterprise Court, the Patent Division of the Hague District Court and the Maritime Chamber of the Rotterdam District Court. The NCC would, in any case, not have jurisdiction over subdistrict court cases (*kantonzaken*), which, in the Netherlands, are cases with a claim of up to €25,000, and cases concerning labour law, consumer credit and lease disputes.

It is not the intention of the draft bill to change any rules of jurisdiction based on the Dutch Code of Civil procedure, the Hague Convention on Choice of Court Agreements or the Brussels I bis Regulation. It is a matter for the Amsterdam District Court, which will host the NCC, to determine its jurisdiction ex officio insofar as a case is brought before the court. The question of whether the Amsterdam District Court has jurisdiction therefore falls outside the scope of the draft bill.

The jurisdiction of the NCC will be voluntary, and parties have to specifically agree its competence through an ex ante choice of forum clause or through an ex post mutual agreement. Reference to the NCC in the general terms and conditions of one of the parties will not be considered an express choice of forum. Because the jurisdiction of the NCC is in fact to be obtained by agreeing to the Amsterdam District Court as the choice of forum, parties are advised to expressly insert 'Amsterdam District Court NCC' in their (choice of forum clause in their) agreement. If, by the rules of private international law, the Amsterdam court would in any case have jurisdiction, a formal choice of forum by the parties will not be necessary and the specific choice to litigate at the NCC in English will suffice.

The NCC will, furthermore, only have jurisdiction over matters of civil law that are at the sole determination of the parties, ruling out, for example, matters of wills and succession, insolvency issues and family law matters. The provisional examination of a witness, provisional expert opinions and a court inspection of the premises are possible, provided that they are related to matters of civil law that parties are free to determine.

Moreover, the draft bill will also make it possible to conduct summary proceedings in the Netherlands in English insofar as parties have agreed to submit their disputes to the NCC. When provisional relief becomes necessary, one of the NCC judges would act as an interim relief judge prior to or during the NCC procedure. An appeal against the judgment in the summary proceedings would be held at the NCCA.

If the arbitral seat of an international arbitration is Amsterdam and parties have specifically favoured the NCC, for example, by including a clause to that extent, the NCCA may also deal with a claim for setting aside an arbitral award because, pursuant to the DCCP, the claim for setting aside an arbitral award shall be presented to the Court of Appeal in whose judicial district the place of arbitration is located.

Expertise

To ensure that the NCC as well as the NCCA have the required expertise in order to thoroughly understand and adjudicate complex international disputes, the explanatory memorandum envisages the formation of a dedicated group of experienced Dutch judges that have a proper command of the English language and English legal terms to become part of the NCC and NCCA, and to be able to serve as interim relief judges.

Working language

The working language of the NCC is English, unless parties agree to litigate in Dutch. Summary proceedings will also, in principle, be conducted in English.

The NCC judgment shall be in English, unless parties have agreed to conduct the proceedings in Dutch. However, a decision on a procedural issue of the jurisdiction of the NCC put forward by one of the parties shall only be in Dutch.

If a judgment in English by the NCC – as a result of requirements prescribed by Dutch law – has to be entered in the appropriate public registers, the relevant parts of the judgment will also be drafted in Dutch by the NCC, thus facilitating registry, as mentioned.

When it comes to the enforcement of the judgment, the draft bill specifies that if there are parts of the judgment – on which execution may be issued in the Netherlands – that are not in Dutch, the party that wants to serve the judgment has to attach a Dutch translation of these parts of the judgment by a sworn Dutch translator. These seem to be practical requirements that can be met relatively easily.

Position of third parties

The position of third parties is also mentioned in the explanatory memorandum. Pursuant to the DCCP, a third party may become involved in litigation between two or more other parties, for example, through third-party actions. Third parties will, however, not have agreed to the jurisdiction of the NCC as chosen by the parties that have submitted their dispute to the NCC.

According to the explanatory memorandum, the third party that could potentially get involved in the NCC proceedings will have to indicate whether or not it accepts the jurisdiction of the NCC. If the third party does not accept the jurisdiction of the NCC, the third-party action will have to be filed at the regular courts. A third party may, therefore, not be obliged to litigate in English – and against higher court fees – at the NCC and NCCA.

Litigation costs

The draft bill will also amend the Court Fees (Civil Cases) Act. The amendments to this act will substantially raise the court fees for proceedings at the NCC, which, compared with the fees of regular Dutch Courts, are much higher, which makes the NCC completely self-supportive and exclusively financed by the parties making use of its services.

The NCC fees, as mentioned in the draft bill, are €15,000 for proceedings on the merits and €20,000 on appeal at the NCCA. In summary proceedings, these fees are €7,500 (NCC) and €10,000 (NCCA).

Relation to the Dutch Supreme Court

The introduction of the NCC does not alter the right of appeal or appeal in cassation. Litigation before the Dutch Supreme Court does not, however, fall within the scope of the draft bill, but this does not mean that parties that were involved in litigation before the NCC and NCCA are barred from taking their dispute to the Supreme Court. The DCCP still offers this possibility, but parties should not expect the Supreme Court to render its decision in English. Given the role of the Supreme Court within the Dutch judicial system of monitoring the uniformity of law, its decision will only be given in Dutch. The proceedings at the Supreme Court will therefore also have to be in Dutch.

Notwithstanding the above, the Supreme Court may – and will – inspect all documents pertaining to cases that were litigated before the NCC and NCCA. The Supreme Court may therefore, when deemed necessary or desirable, ask the parties to submit Dutch translations of their court documents, pleadings and other documents.

Conclusion

The draft bill will amend the DCCP in order to enable parties to conduct their legal proceedings in the Netherlands in English and to obtain an enforceable judgment in English.

As for the timeframe that should be taken into account, the Dutch Council for the Judiciary expects the Amsterdam District Court and Amsterdam Court of Appeal to have all facilities in place to enable the operating of the NCC by April 2017. It is, however, expected that the bill will enter into force on 1 January 2018. The Dutch government expects the NCC to deal with approximately 100 cases each year and the NCCA with 25 cases each year.

Given the assumption that a large number of international contracts are drafted in English and the fact that the Netherlands has a top five ranking when it comes to the rule of law,[2] the Netherlands may – with the NCC – very well offer parties a solid, reliable and, perhaps, financially more attractive alternative to international arbitration.

Notes

1 When referring to the NCC in this article, the NCCA is also meant.

2 World Justice Project Rule of Law index 2016 http://worldjusticeproject.org/rule-law-around-world, accessed 27 March 2017.

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Decision regarding corporate separateness: no liability for an indeterminate amount, for an indeterminate time, to an indeterminate class

The English High Court has recently held that that Royal Dutch Shell (RDS), a holding company that is the ultimate parent of the Shell Group, does not owe a duty of care to residents of the Niger Delta in respect of alleged environmental damage said to have been caused by the operations of one of RDS's Nigerian subsidiaries.

This decision will have particular significance for large multinational operators, as the case deals with the issue of corporate separateness in large international corporate groups, and particularly in the context of environment, social and governance (ESG) issues. The case provides a greater understanding of the requirements and circumstances that need to be present for a parent company to potentially attract civil responsibility for the acts and omissions of a subsidiary.

As we continue to see increased awareness and public scrutiny over group structures, corporate integrity and reporting on ESG issues, this means that companies and investors alike should pay close attention to the outcome of this judgment and its potential implications.

Background to the case

The case concerned two proceedings, both of which arose from certain oil operations in Nigeria. The defendants to both proceedings were RDS and Shell Petroleum Development Company of Nigeria Ltd (SPDC – a Nigerian company and subsidiary within the Shell group of companies that is responsible for Shell's onshore operations in Nigeria).[1] The first set of proceedings concerned the Ogale community in Nigeria and comprised approximately 40,000 people, and the second set of proceedings concerned the Bile community, with approximately 2,335 claimants.

While the exact nature of the claims is complex, a broad overview is that they concerned oil pollution in Nigeria; in particular, oil pollution of the waters and land of the relevant communities. In combination, the claim was for a sum in excess of US$1bn for special damages and US$100m in general damages for clean-up and remediation.

The claims were brought in the English courts because the solicitors for the claimants were effectively relying on RDS as an anchor defendant to also bring SPDC into the proceedings. As such, the court was looking at whether there was an arguable duty of care on the part of RDS towards the claimants under English law; it was accepted by both parties that if there was no arguable duty of care under English law, then there would also not be an arguable duty under Nigerian law. The claimants needed such a duty of care to exist on the part of RDS because, otherwise, there would be no anchor defendant and the claim against SPDC would be considered outside the jurisdiction.

The decision

The court concluded that the claims based on an alleged duty of care between RDS and those living in the vicinity of certain operations of its Nigerian subsidiary were 'bound to fail'. The following key principles emerged from the judgment.

The starting point is the three-part test in *Caparo v Dickman* (proximity, foreseeability and reasonableness) and the decision of the House of Lords that the law of negligence should develop incrementally and by analogy with established categories of relationship in which a duty of care has been recognised.

Membership of the same corporate group does not of itself result in a parent having responsibility for the acts of its subsidiaries. However, there may be some factual situations where a parent company owes a duty of care in relation to the acts or omissions of a subsidiary.

More particularly, a parent company may owe a duty of care if: (1) it carries on the same business as its subsidiary; (2) has superior knowledge or expertise compared to that of its subsidiary; (3) has intimate knowledge of the subsidiary's system of work; and (4) knows that the subsidiary relies on it to avoid a particular type of damage. Where a subsidiary is run as a division of a parent company or there is high degree of interference and control by the parent in and over the operational decision-making of its subsidiaries, the potential for parent company exposure is more real. The mere existence of group-wide policies, whether mandatory or not, does not demonstrate a high level of control or reliance. These criteria emerged from the judge's decision of *Chandler v Cape*, in which the court held that a parent did owe a duty of care to the employees of a subsidiary company, and *Thompson v Renwick Group*, in which the court found that the parent company did not owe a duty of care to an employee of a subsidiary company.

A parent company is to be distinguished from a holding company, which by definition has no operating activities and is also therefore highly unlikely to have the superior expertise which might – depending on the facts – lead to a finding of responsibility. This is so, even if the holding company appoints directors to the board of its subsidiaries. Case law has been clear to distinguish between parent companies and pure holding companies.

Public disclosures made by multinational groups about the group's commitment to safe and sustainable business practices in the context of meeting listing obligations are of themselves in most, if not all, cases insufficient to support the imposition of a duty of care on the parent of the group.

A finding of parent company liability in the context of a multinational group would likely give rise to 'liability for an indeterminate amount, for an indeterminate time, to an indeterminate class'. For that reason, it appears unclear whether third parties will ever succeed in establishing the requisite degree of proximity between themselves and the parent of a large multinational group.

ESG implications

In reaching its decision, the court effectively provided some interesting practical points to note in relation to ESG issues, and, in particular, ESG reporting.

The claimants case focused heavily on public disclosures made by RDS in the context of its listing obligations and on group-wide policies, some mandatory, concerning environmental and safety issues, among others.

However, the court held that it is highly unlikely that compliance with public disclosures made by parent companies in respect of the group's ESG position will of itself ever be sufficient to establish a duty of care on the part of a parent. Certainly, there is no legal authority to support the imposition of a duty of care on that basis.

It was highlighted that, in fact, such public statements are often a function of the listing regulations, for example, the London Stock Exchange, and are made by companies in order to fulfil their relevant listing obligations (eg, see the new ESG reporting obligations imposed by the London Stock Exchange).

Even if passages in public documents that state the policies of a group of companies could be construed as being sufficient to establish a presumption of responsibility on the part of the parent, carefully drafted disclaimer language can effectively negate that presumption.

It would be counterproductive to the availability of information for investors regarding the activities and aspirations of listed companies if the contents of generic statements, for example, the implementation of a global policy on sustainability, is held against different companies of the group when they are permitted to organise their corporate affairs through separate legal vehicles that are protected by the corporate veil.

Conclusion

The question of whether a duty of care may be, in principle, imposed on the parent for the acts/omissions of its subsidiary depend on the facts of the particular case. Nevertheless, the decision does reinforce the importance of observing corporate separateness, not only on paper but also in practice. As we move into an era of non-financial reporting and ever-greater transparency around ESG issues, it is also a timely reminder of the importance of the precise language used in such disclosures.

Note

1 Latham and Watkins partner Sophie Lamb was co-advocate for RDS and SPDC.

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Enforcing judgments: pensions are not always sacrosanct

Recent findings from an international team of scientists funded by the United Kingdom Medical Research Council and the United States Environmental Protection Agency, reported in the UK press on 22 February 2017, indicate that life expectancy will soon exceed 90 years, upending previous assumptions about human longevity that existed at the beginning of the 20th century.

Predictions of increasing lifespans raise serious questions about the health and social care that will be needed by large numbers of the population living through their 80s and into their 90s, as well as the sustainability of current pension plans. A central purpose of pensions is to allow people to continue to live and consume once they have stopped paid work. Given the tax advantages, pensions often harbour substantial amounts.

Are unexercised pension rights safe harbours against judgment debts? Recent case law in England and Wales indicates maybe not.

Broadly speaking, a bankrupt in England and Wales is afforded protection from creditors to the extent that payments to creditors will only come out of 'surplus income', that is, monies left over after the payment of the bankrupt's living expenses. Approved pension schemes are excluded from a bankrupt's estate by virtue of section 11 of the Welfare Reform and Pensions Act 1999. This can lead to situations where, in order to shield their pensions from judgment creditors, judgment debtors declare themselves bankrupt while at the same time choosing *not* to exercise any pension rights they may be entitled to for the duration of the bankruptcy.

It is important to note that if a bankrupt exercises their pension rights and is receiving pension income, any *payments* received by the bankrupt during the bankruptcy from a pension scheme will be counted as part of their bankrupt estate and available to creditors after the permitted living expenses are paid.

In a litigation context, and for the reasons explained below, it is key that potential claimants strategically assess what pension pot there may be, and when a claim should be made against it. They should do this early on in the litigation process. The recent decision of the Court of Appeal in *Re Henry (A Bankrupt)*[1] provides instructive guidance to judgment creditors in enforcing judgment debts against a debtor's pension.

Gloster LJ delivered the leading judgment in *Re Henry (A Bankrupt)*, confirming that pension rights of a defendant were afforded contrasting treatment depending on whether bankruptcy had been triggered, namely that 'prior to bankruptcy pensions are not protected [against enforcement proceedings], after bankruptcy they are'.[2]

In addition to clarifying and approving the distinction between the treatment of pensions pre and post-bankruptcy as set out in *Blight v Brewster*,[3] the decision of the Court of Appeal also approved the decision at first instance in *Re Henry*, thereby overturning a previous conflicting decision at first instance in the *Raithatha* case[4] (discussed further below).

Re Henry: facts and the decision

Henry was made bankrupt on his own petition, at which point he was 58 years old. At the date of the judgment of the Court of Appeal, he was 61 years old.

His assets included four pension policies: a self-invested personal pension (SIPP) policy and three personal pension policies. While Henry had not elected to exercise any of his rights under these pension policies, it was not disputed that he was eligible to do so. The trustee in the bankruptcy applied to the court for an income payments order under section 310 of the Insolvency Act: that Henry, in effect, draw down and pay towards his estate the percentage of the pensions available to be drawn down as a tax-free lump sum, and also any further periodic income derived from the pensions.

In seeking such an order to include Henry's pension rights – as opposed to pension income – as part of his estate, the trustee sought to rely on two previous first instance cases:

- *Raithatha v Williamson (A Bankrupt)*,[5] in which the court held that a bankrupt's undrawn pension was to be treated as income in bankruptcy on the grounds that the bankrupt was entitled to the pension income even if they had to make an election to become so entitled; and
- *Blight v Brewster*,[6] in which the court granted the judgment creditor an order requiring the judgment debtor, who was not a bankrupt, to elect to draw down a lump sum from his pension; and granted the judgment creditor a third-party debt order ordering the pension trustees to pay the amount in question towards the satisfaction of the judgment debt.

In *Re Henry (A Bankrupt)*, the Court of Appeal rejected the decision of the judge in the *Raithatha* case as incorrect, and approved the decision in *Blight v Brewster* – in particular, the comments from Gabriel Moss QC, sitting as a deputy judge of the Chancery Division, in his judgment that '[w]hilst Parliament has seen fit in the area of bankruptcy to create special statutory protections for pensions, *no such intervention has taken place in the area of the enforcement of judgments*… A judgment debtor in my view cannot have the benefits of bankruptcy without its burdens' [emphasis added].

What does it mean for judgment creditors?

In summary, if you are a judgment creditor looking to enforce against a judgment debtor who is eligible to draw down or otherwise access their pension, but has not elected to do so or is deliberately refraining from doing so in light of the judgment against them, forcing such a debtor into bankruptcy could now – in light of the Court of Appeal decision in *Re Henry* – backfire in spectacular fashion, as pension rights will be afforded protection within bankruptcy proceedings. That is, they will not be available to the judgment creditor but will be regarded as an asset on which the bankrupt needs to live.

On the other hand, if the debtor petitions their own bankruptcy with a view to triggering bankruptcy protection for the pension, it is open to judgment creditors to challenge such a petition and seek an annulment of the bankruptcy order, and at the same time, a third-party debt order to access the pension funds. This requires judgment creditors to be agile.

For a judgment debtor, they may have to choose between a rock and a hard place. On the one hand, bankruptcy with its reputational, and sometimes professional and financial downsides, or on the other hand, the protection afforded to pension rights as a result of being in bankruptcy.

The key lesson in all of this is that potential judgment creditors, be they claimants in proceedings or defendants with a counterclaim, should make an early assessment of whether a pension pot is a realistic asset in the circumstances, which is an assessment that will be based on, inter alia, the defendant's age.

If it is a relevant consideration, the disclosure of the pension documents should be sought vigorously during proceedings. If freezing orders are appropriate, the full disclosure of pensions should be targeted and the freezing order served on the pension providers. Thus, the judgment creditor minimises the loss of time at the point of judgment, where a clued-up debtor may well be making a run to try to seek sanctuary for their substantial pension in bankruptcy protection.

Notes

1 [2017] 1 WLR 391.
2 *Ibid*, at para 39.
3 [2012] 1 WLR 2841.
4 [2012] 1 WLR 3559.
5 *Ibid.*
6 See n 3 above.

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Ireland: a US$2.9bn claim dismissed on the grounds of public policy

Madoff-related litigation is among the most significant commercial litigation of recent years in the Irish courts and globally. This litigation has resulted in important rulings and practice developments in the areas of third-party funding, electronic discovery, the scope of discovery obligations, privilege, case management and, most recently, maintenance and champerty.

In recent times, the 17th century rules on maintenance and champerty have been the subject of consideration in Ireland in respect of the legality of third-party funding. These laws were also considered in the context of the *locus standi* of a hedge fund to bring litigation in Ireland following it acquiring a bare right to sue service providers to a fund on foot of an assignment from the fund.

Maintenance and champerty are prohibited by the Maintenance and Embracery Act (Ireland) 1634, which was retained in Ireland by the Statute Law Revision Act 2007. The 1634 act created the criminal offences and torts of maintenance and champerty, which, in summary, are a prohibition on parties acquiring or sharing any part of the damages awarded in an unconnected party's claims or litigation.

Historically, the offences arose to combat abuses in medieval England. Unscrupulous nobles and royal officials would lend their names to bolster the credibility of doubtful claims in return for a share of the property recovered. The offences, therefore, were enacted to inhibit any possible temptation to meddle in someone else's legal claim. In modern times, the offences are still considered to be contrary to public policy on the basis that it is wrong for persons to 'traffic' in litigation, and the law should be reluctant to assist in the development of a market in legal claims.

The rules on maintenance and champerty

were deployed successfully in Ireland in 2015 to dismiss on an interlocutory basis a US$2.9bn claim on the grounds of public policy. In January 2017, the Court of Appeal heard the appeal from the 2015 High Court judgment in the case of SPV OSUS Ltd (SPV). The Court of Appeal upheld the High Court judgment and held that the claim was void as savouring of champerty on two independent grounds because it was an assignment of a bare right to litigate and constituted trafficking in litigation.

Background

The claim arose in circumstances where Optimal Strategic US Equity Ltd (SUS), a Bahamian investment fund, was entitled to make a claim in the United States bankruptcy of Bernard Madoff under Securities Investor Protection Act legislation.[1] These claims can legitimately be traded in the market in the US. In order to allow the investors in the fund to sell their share in the bankruptcy claim, SUS set up the special purpose vehicle SPV and assigned the bankruptcy claim to it. The majority of the original investors swapped their shares in the fund for shares in SPV and thereafter traded the shares in SPV in three auctions. The value of the shares in SPV fluctuated in accordance with the value of the bankruptcy claim. Through this process the original investors' shares were acquired and the ownership of SPV was ultimately transferred to distressed debt hedge funds.

SPV subsequently claimed that the assignment of the bankruptcy claim also included any claims that SUS may have had against the service providers to SUS. However, the assignment did not assign the underlying contracts between SUS and the service providers from which those rights were derived, and it was only a bare cause of action that arguably was transferred to SPV. SUS dispute that the assignment included the right to sue the service providers, and the scope of the assignment is the subject of litigation in New York. The New York court recently found in SPV's favour on the summary motions to dismiss, upholding that the assignment included the bare right to litigate against the service providers.

SPV issued proceedings in Ireland against the custodian to the fund and claimed an entitlement to the net asset value of the investments of SUS as of 30 November 2008, which had a value of approximately US$2.9bn.

The custodian issued an application challenging the standing of SPV to bring proceedings against it on the basis that the assignment was contrary to public policy in Ireland and should not be enforced for reasons of maintenance and champerty. The High Court ruled in the custodian's favour, dismissing the claim.

High Court judgment

The judgment of the High Court is exceptionally clear in its terms. The court held that the assignment of third-party litigation rights was neither incidental nor ancillary to the assigned rights in the bankruptcy. In addition, it was held that the purchasers of the shares in SPV lacked a genuine commercial interest in taking an assignment of third-party litigation rights. The court held that the transaction involved the sale of litigation as a matter of fact. The purchasers of SPV shares bought them with a view to receiving distributions from the litigation or to selling the shares on for a sum greater than they paid for them. The purchasers were not engaged in any other business other than the realisation of claims to the greatest extent possible, and this amounted to professional trading in litigation, which is condemned as trafficking in litigation and prohibited by Irish public policy. The court saw no purpose in staying the proceedings and dismissed them as being frivolous and vexatious.

Court of Appeal

SPV maintained, in both the High Court and Court of Appeal, that the assignment of the claims was not the assignment of a bare right to litigate because it was ancillary and incidental to the assignment of the US bankruptcy claim. SPV argued that it had a genuine commercial interest in the enforcement of these claims and a constitutional right of access to the courts. It also claimed that it was necessary for the respondent to prove that the assignment complained of would cause prejudice to the administration of justice and that the respondent had failed to put forward any case that demonstrated that there would be any risk to the administration of justice in this case.

The Court of Appeal gave judgement on 2 March 2017, upholding the decision and reasoning of the High Court.

SPV can, if it obtains leave from the Supreme Court, appeal the decision to the Supreme Court on the basis that the case concerns an issue of great public importance or that is necessary in the interests of justice.

The judgments are available online from the courts' websites.[2]

Notes

1 Securities Investor Protection Act of 1970.

2 High Court judgment: www.courts.ie/Judgments.nsf/0/42231B3E722F38B980257ED8003FB407, accessed 27 March 2017. Supreme Court judgment: www.courts.ie/Judgments.nsf/0/481D2BC600D1C43B802580DB0059FFE3, accessed 27 March 2017.

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First instance proceedings in Greece after the amendment of the Code of Civil Procedure

It has been more than a year since the implementation of Law 4335/2015, which amended the Greek Code of Civil Procedure. After the decision of the Euro Summit of 12 July 2015,[1] the Greek authorities committed to introduce measures in order to rebuild trust with the European Union Member States. These measures included the reform of the Code of Civil Procedure, with a view to accelerating the judicial process and reducing the cost of access to justice. The decision of the Euro Summit was incorporated into Greek law via Law 4334/16 July 2015. To comply within the prescribed time limit, the Greek government introduced before Parliament the only draft, which had previously been approved by the institutions in November 2014.[2] Parliament adopted the draft with a narrow majority, and the amending Law 4335/2015 entered into force on 1 January 2016 (Article 9 of Law 4335/2015). However, the actual implementation of the law started in September 2016, delayed by a seven-month lawyers' strike in Greece regarding a protest against the new regulations introduced by the legislation, which have never been thoroughly discussed.

The purpose of this short paper is to present the most important aspects of the amended Code of Civil Procedure as applicable to first instance proceedings, based on the experience of a six-month application of the law, the emphasis being on the provisions likely to affect EU residents who participate in litigation held in Greece.

Ordinary proceedings

The Greek Code of Civil Procedure distinguishes ordinary proceedings in the wake of a legal action from special proceedings reserved only for specific types of litigation (employment law cases, family law disputes, etc). Ordinary proceedings are applicable in the majority of cases, including almost all forms of commercial litigation. Law 4335/2015 introduced a revolutionary system aimed at concluding the first instance procedure within 160 days from the day of the filing of the legal action. The means to achieve this goal were: (1) the obligatory lodgement of pleadings within 100 days from the filing of the action; (2) the complete replacement of witness deposition with written affidavits; and (3) the abolishment of the right to defer a trial.

In detail, according to Articles 215 and 237–238 of the Code of Civil Procedure, after the filing of the legal action, the plaintiff must serve a copy of it to the defendant within 30 days, otherwise the action is considered unsustainable. As mentioned above, the defendant must lodge its pleadings, accompanied by all supporting evidence, no later than 100 days from the date the action was filed (not the date when the copy was served). The same obligation applies to the plaintiff. Upon the lapse of the deadline, the litigants have 15 days to deposit a written reply and the case is considered closed. The litigants may not introduce additional claims or objections in this written reply as these will be deemed inadmissible. Within the next 15 days, the head of the court is responsible for setting a date for the hearing, which should not be more than 30 days away. However, in practice, hearings are set three to five months later due to the court's case load. The appearance of the litigants before the court at the date of the hearing is optional. They are considered to be present provided they have lodged their pleadings within the prescribed period of 100 days. If the court has any doubt about the substantiality of the action, it may issue a judicial order calling upon a witness to testify. All of the time limits are extended by 30 days in the event that the defendant does not reside in Greece.

Order for payment

The order for payment is a judicial means of recovery of pecuniary claims on the basis of written proof of its existence and amount. This procedure is regulated by Articles 623–634 of the Code of Civil Procedure. The claimant can file a statement before the court enclosing the documents that support the claim. The procedure is unilateral. This means that the debtor is not informed at this point about the effort of the claimant to obtain an order for payment. The responsible judge can uphold the claim and issue an order for payment or reject it. From the moment it is issued, the order for payment can be enforced against the debtor, provided it is served on the debtor by a bailiff within two months. Additional interim remedies are also provided by law – conservative seizure and charge on property – even before the serving of the order on the debtor. The debtor has the right to file an objection within 15 working days from the date on which the order for payment was served on the debtor. This objection does not suspend the enforcement. However, the law provides for a specific procedure by which the debtor may obtain a stay of the enforceability of the order for payment. Moreover, Article 632 of the Code of Civil Procedure holds an exception to the immediate enforceability of the order for payment in cases where the debtor is residing abroad. The provision allows for 30 working days, during which the order for payment cannot be executed against the debtor. If an objection has not been lodged, the claimant then has to serve the order for payment on the debtor for a second time, which initiates an additional 15-working-day period for the filing of an objection. At this point, a statement for a stay of enforceability is inadmissible. If the debtor fails to object, the order for payment has the effect of a final judgment.

Reservations about the compliance of the provisions with EU Law

Academic circles[3] have already expressed their scepticism over the compliance of the reformed procedure before the Courts of First Instance with the relevant EU regulations concerning the right to a fair trial. This principle is enshrined in the European Convention on Human Rights (ECHR) and the EU Charter of Fundamental Rights, and should govern the procedure before the courts of all EU Member States.[4]

It may be said that the reform of the Greek Code of Civil Procedure violates the right to a fair trial insofar as its rules on the serving of judicial documents are concerned. The applicable Regulation (EC) 1393/2007 for the service of documents provides for a specific system that ensures the delivery of documents, either through national transmitting agencies (Article 2) or through direct service in accordance with the laws of the Member State addressed (Article 15). With regard to the date of service, Article 9 section 1 of the regulation provides that the date of service is regulated in accordance with the law of the Member State addressed. However, Article 9 section 2 states that if, according to the law of the Member State, a document has to be served within a particular period, the date to be taken into account with respect to the applicant shall be that determined by the law of that Member State. Taking into account that the reformed ordinary proceedings in Greece are based on a time-limit scheme, it is doubtful whether the defendant who resides in another Member State will have adequate time to prepare its pleadings and collect the necessary means of proof.

Another possible violation of the right to a fair trial might be diagnosed in the context of the recognition and enforcement of a Greek judgment in another Member State.[5] According to Articles 45 and 46 of Regulation (EU) 1215/2012 on the recognition and enforcement of a judgment, it shall be refused where the judgment was given in default of appearance if the defendant was not served with the document that instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the defendant to arrange for a defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible to do so. The reformed ordinary proceedings in Greece could indeed constitute a deprivation of the right of defence as it appears that the defendant not only has a narrow time limit to prepare, but, moreover, the time allotted to the defendant for preparation is less than that allotted to the plaintiff.

Last but not least, the amended procedure to obtain an order for payment makes it possible for the claimant to lodge a statement even against a debtor who is not resident in Greece. However, in this way, the Greek legislator minimises the importance and legal effect of Regulation (EC) 1896/2006 for the creation of a European order for payment procedure. Meanwhile, the enforceability of such an order for payment in another Member State is questionable by reference to the aforementioned Articles 45–46 of Regulation (EU) 1215/2015.

Notes

1 See www.consilium.europa.eu/press-releases-pdf/2015/7/40802200528_en.pdf, accessed 27 March 2017.

2 Explanatory statement of Law 4335/2015 at www.hellenicparliament.gr/en, accessed 27 March 2017.

3 Among others, Nikas, Textbook on Civil Procedure Law (in Greek), 2016, s 66, No 2.

4 Legally binding according to Art 6 s1 the Treaty on European Union (TEU).

5 Hengst, C-474/93 and Klomps, 166/80.

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Discovery proportionality takes hold in the United States

Federal court discovery in the United States has been driven by relevancy. To be discoverable, the material sought is required to be ‘relevant to any party’s claim or defense’. Federal courts have had discretion in applying that rule, for example, to avoid undue burden or expense, but the availability of that discretion frequently did not reduce the scope of discovery.

The amendment

In December 2015, US federal discovery rules were amended. While relevancy is still an important pillar, the amendment added that the requested discovery be ‘proportional to the needs of the case’. To determine whether discovery is proportional, the rule sets forth six factors to be considered: (1) the importance of the issues at stake in the action; (2) the amount in controversy; (3) the parties’ relative access to relevant information; (4) the parties’ resources; (5) the importance of the discovery in resolving the issues; and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit.

The rationale for this amendment was explained by Chief Justice Roberts in his 2015 Federal Judiciary Report: ‘[t]he amendments may not look like a big deal at first glance, but they are’. He continued:

> ‘The amended rule states, as a fundamental principle, that lawyers must size and shape their discovery requests to the requisites of a case. Specifically, the pretrial process must provide parties with efficient access to what is needed to prove a claim or defense, but eliminate unnecessary or wasteful discovery. The key here is careful and realistic assessment of actual need. That assessment may, as a practical matter, require the active involvement of a neutral arbiter – the federal judge – to guide decisions respecting the scope of discovery.’

Recent case law

Recent court decisions demonstrate the proportionality rule in practice. In *Crabtree v Angie’s List, Inc*,[1] the court denied a motion to compel discovery that the court found was not proportional. Sales personnel alleged they had been denied overtime pay. In addition to seeking data showing employee computer login times and mobile phone records reflecting phone calls made, the defendant sought a forensic examination of the Global Positioning System (GPS) location data from plaintiffs’ electronic devices to determine whether and when they had left their workstations during the working day.

While arguably relevant to demonstrate the amount of time the employees actually spent at their workstations, the court nevertheless rejected the request for GPS data because it was not proportional to the needs of the case. The court grounded its reasoning in the sixth factor of the new rule, that the burden of that discovery outweighed its likely benefit, finding that ‘any benefit the data might provide is outweighed by Plaintiffs' significant privacy and confidentiality interests'.

Similarly, in *Noble Roman's, Inc v Hattenhauer Distributing Company*,[2] the court granted a motion for a protective order, finding the defendant's discovery requests were not proportional to the needs of that case. There, after conducting a series of audits, the plaintiff corporation brought suit against its franchisee for unpaid royalties. The defendant franchisee filed counterclaims alleging, among other things, that the plaintiff intentionally used flawed audit methodology as an illegitimate means of propping up its poor financial condition, and did so in response to 'Wall Street' pressure. The defendant served discovery subpoenas on the plaintiff's major shareholder, seeking all information about every aspect of the plaintiff's business operations, finances, marketing plans and management structure.

In rejecting that discovery, the court explained that, while the defendant 'beats the drum of "relevancy"… [t]hat's not good enough'. The court observed that the defendant failed to address any of the six proportionality factors when attempting to support its requests. As a result, the requests were deemed 'too far afield from the contested issues in [the] case'.

Some courts have noted that, in practice, the federal courts traditionally applied a proportionality test as a matter of discretion under prior rules by which courts could consider the undue burden that would result from the requested discovery. Specifically, a New York district court has noted that, before the proportionality amendment was added, courts had the 'discretion to limit discovery requests that are disproportionate to the needs of the case'.[3] The court went on to explain, however, that the amendment codified this discretionary practice, and serves to encourage 'judges to exercise their preexisting control over discovery more exactingly'. A Texas federal court has also explained that, even before the 2015 amendment, it was the court's duty to 'limit proposed discovery that it determine[d] [was] not proportional to the needs of the case… even in the absence of a motion'.[4]

Conclusion

Whatever discretion the courts had to limit discovery in the past, the proportionality requirement is now mandatory. Relevancy alone will no longer be enough. Moreover, the new rule sets forth six factors that a court must weigh in determining proportionality. Parties on both sides of litigation, therefore, must be mindful of the six enumerated proportionality factors when analysing the propriety of a discovery request.

Notes

1 No 116-CV-00877, 2017 WL 413242, at *3 (SD Ind 31 January 2017).
2 314 FRD 304, 311 (SD Ind 2016).
3 *Robertson v People Magazine*, No 14 CIV 6759, 2015 WL 9077111, at *2 (SDNY 16 December 2015).
4 *Allen-Pieroni v Sw Corr, LLC*, No 3:13-CV-4089, 2016 WL 1750325, at *4 (ND Tex 2 May 2016).

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Corporate separateness versus group enterprise theories in enforcement of foreign judgement in Canada: the case of *Yaiguaje v Chevron Corporation*

On 20 January 2017, the Ontario Superior Court of Justice released its decision in *Yaiguaje v Chevron Corporation*, 2017 ONSC 135 (*'Yaiguaje'*), respecting applications by Chevron Corporation ('Chevron'), Chevron Canada Limited ('Chevron Canada') and the plaintiffs for summary judgment relating to the enforcement of the plaintiffs' Ecuadorian judgment against Chevron Canada. The plaintiffs also brought applications to strike the defences pleaded by Chevron in its statement of defence and to add another Chevron entity as a party; however, this article focuses on the summary judgment decision.

While Yaiguaje confirms the law in Canada on corporate separateness of a group of related companies, it has significant procedural and substantive lessons for litigators suing or representing multinational corporate groups. It brings to the fore the impact of judgment collection on every substantive and procedural decision in the life of an action.

Background

The applications arose from an Ecuadorian judgment obtained by the plaintiffs against Chevron in February 2011. The claim originated in the Oriente region of Ecuador, an oil-rich area that suffered environmental pollution from the exploitation and extraction activities by oil companies, including Texaco Inc ('Texaco'), from 1964 to 1992. The plaintiffs commenced proceedings against Texaco in 1993 in New York. That proceeding was eventually dismissed on the grounds of international comity and forum non conveniens. The decision was upheld on appeal, in part, because Texaco agreed to submit to the jurisdiction of the Ecuadorian courts.

The plaintiffs then commenced proceedings against Chevron in Ecuador in 2003. By then, Texaco had merged with Chevron. The plaintiffs obtained judgment against Chevron in the amount of approximately US$18bn. The judgment was upheld by an Ecuadorian intermediate appellate court in 2012. The National Court of Justice of Ecuador partially varied the judgment in November 2013 by reducing it to US$9.5bn. Chevron, having no assets in Ecuador to be attached, obtained an injunction barring enforcement of the judgment in the United States on the ground that the Ecuadorian judgment was obtained by fraud and deceit.

In 2012, the plaintiffs commenced an action in Ontario, Canada for the recognition and enforcement of the Ecuadorian judgment against Chevron, Chevron Canada and Chevron Canada Finance Limited (CCFL) (the 'Ontario Action') pursuant to Ontario's Execution Act, Revised Statutes of Ontario, 1990 ('RSO 1990'), chapter E24 and the Securities Transfer Act, 2006, Statutes of Ontario (SO) 2006, Chapter 8. The action against CCFL was discontinued.

The parties

The 47 plaintiffs represent approximately 30,000 indigenous Ecuadorian villagers affected by the environmental pollution. Chevron is a public Delaware corporation with its head office in California. Chevron does not itself engage in the exploring, producing, refining or marketing of petroleum products. While its principal business is the holding of shares in subsidiary corporations and managing those investments, Chevron does not own the shares of Chevron Canada. With the exception of its interest in two related Bermudian companies, all of Chevron's assets are owned and located in the US. However, Chevron files consolidated financial statements of its subsidiaries because it is required by the US Securities and Exchange Commission to do so. When required, it also guarantees the debts of its subsidiaries.

Chevron Canada is a seventh level, indirect subsidiary of Chevron. It was originally incorporated in 1966 and was amalgamated under the Canada Business Corporations Act (CBCA). Its head office is in Calgary, Alberta. Chevron Canada's major business activities involve petroleum and natural gas exploration in Canada. It has never carried business in Ecuador and played no role in the events leading up to the Ecuadorian judgment. Chevron Canada's shares are wholly owned by Chevron Canada Capital Company (CCCC), which was not a defendant in the original action or the subsequent proceedings.

Issues

The issues determined in the summary judgment applications were: (1) whether the shares and assets of Chevron Canada are exigible and available for execution and seizure, pursuant to the Execution Act, to satisfy the Ecuadorian judgment against Chevron; and (2) if they are not, whether Chevron Canada's corporate veil should be pierced so that its shares and assets would be available to satisfy the Ecuadorian judgment against its indirect parent, Chevron.

Decision and reasons

The Ontario Superior Court of Justice granted Chevron Canada and Chevron's applications for summary judgment, and dismissed the plaintiffs' claim against Chevron Canada. The court also dismissed the plaintiffs' motion for summary judgment against Chevron.

On the first issue, the court did not accept the plaintiffs' submission that Chevron Canada's shares and assets are exigible, pursuant to the Execution Act, to satisfy the Ecuadorian judgment against Chevron. The court reasoned that Chevron Canada's incorporating statute, the CBCA, gives it all the rights, powers and privileges of a natural person. Therefore, Chevron Canada is neither an asset of Chevron nor of any other person, including its own parent CCCC, but a separate legal person. As Chevron Canada is not the judgment debtor under the Ecuadorian judgment, the Execution Act does not apply to it with respect to that judgment.

The court found that the Execution Act, which is a procedural statute, does not create any rights in property or substantive rights that override the long-established principle of corporate separateness; neither does it establish a cause of action against Chevron Canada. The act merely provides for the seizure and sale of property in which a judgment debtor already has a right or interest. Therefore, the Execution Act does not give Chevron any right or interest, equitable or otherwise, in the shares or assets of Chevron Canada. Further, while Chevron Canada is a going concern, its shares confer no right to its underlying assets. The court distinguished cases where the shares were in the name of the judgment debtor and accorded legally recognised residual interests in the shares that could be sold. The court found that Chevron has no legally recognised interest in Chevron Canada's assets, unless the corporate veil between the two companies is pierced.

On the second issue, the court concluded that the plaintiffs had not established that Chevron Canada's corporate veil should be pierced. The court reasoned that, while the 'group enterprise' or 'single business entity' theory exists in Canadian law, it applies only as a carefully limited exception to the well-established principle set out in *Salomon v Salomon & Co.*[1] Therefore, Canadian courts would disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct. The court found that the first element, 'complete control', requires more than ownership. It must be shown that there is complete domination and that the subsidiary company does not, in fact, function independently, or that the subsidiary is a 'puppet' of the parent. The second element relates to conduct akin to fraud that would otherwise unjustly deprive claimants of their rights.

The group enterprise exception has been further clarified by Canadian courts to the effect that even where complete domination is present, in the absence of wrongdoing akin to fraud in the establishment or use of the corporation, the corporate veil would not be pierced.

The court found that Chevron and Chevron Canada are separate legal entities with separate rights and obligations in accordance with the principle of corporate separateness. Chevron does not exercise complete dominance or control over the affairs of Chevron Canada. The court found that centralised strategic planning, allocation of large amounts of capital and common reporting requirements found in the Chevron family of companies, by themselves, did not undermine the separate legal status of Chevron Canada down the corporate chain, which operated a tangible business managed by separate directors, officers and senior managers.

In addition, the provision of guarantees by Chevron in relation to Chevron Canada underscored the separate corporate existence of each, as the lenders in those cases proceeded on the basis that the parent and indirect subsidiary were separate legal entities. The court found that Chevron's filing of a consolidated set of financial statements simply reflected the legal reporting requirements of its home jurisdiction, in particular, the Sarbanes–Oxley Act and the Securities and Exchange Act, and not indicia of the complete domination and control of the subsidiary by the parent.

The court also found the distribution of profits from subsidiary to parent by dividends to be a standard fact of inter-corporate life, and no evidence to suggest complete domination in the sense used by the alter ego cases.

Further, the court found that the plaintiffs did not allege, and therefore could not establish, that the corporate structure of which Chevron Canada is a part was designed or used as an instrument of fraud or wrongdoing. Chevron's corporate structure has been in place since 1966 and is not a recent creation designed to blunt the effect of the Ecuadorian judgment. The court found that, under the theory of enterprise group liability, the various defendant corporations usually had worked in common, together and in concert as a single business entity in dealing with the plaintiffs. In this case, Chevron Canada had no involvement in the activities in Ecuador that led to the Ecuadorian judgment.

The court concluded, pursuant to the principle of corporate separateness, that the assets of the corporation are owned exclusively by the corporation, not the shareholders of the corporation. Therefore, Chevron does not have any legal or equitable interest in the assets of Chevron Canada as an indirect shareholder seven-times removed. The court rejected the plaintiff's proposition that the corporate veil would be pierced when it is just and equitable to do so. The court held that there is no independent 'just and equitable' exception to the principle of corporate separateness in Canada.

Implications

Yaiguaje touches on many aspects of the law. While the plaintiffs have applied for leave to appeal to the Ontario Court of Appeal, the implications of *Yaiguaje* for Canadian corporate law is clear. It confirms the fundamental principle of corporate separateness as it relates to corporate groups operating internationally, such as Chevron, with approximately 1,500 indirect subsidiaries operating in approximately 60 countries. It also confirms that there is no 'just and equitable' exception to this principle in Canada.

Given the relatively low Canadian threshold for enforcement of foreign judgments, the decision offers some reassurance and guidance to corporate lawyers crafting complex corporate structures. It also confirms consistency and predictability for the Canadian business and investment climate in general.

Yaiguaje also has significant procedural and substantive lessons for litigators representing or suing a multinational group of companies. While there was not enough background in this summary judgment decision to determine some questions relating to the original action, it appears that Texaco Petroleum Company, a fourth-level subsidiary of Texaco, was the Chevron entity that operated in Ecuador. It was not clear whether there was any attempt to preserve the assets of Texaco in Ecuador and why Chevron was the only defendant in the action throughout the years of litigation at the three levels of Ecuadorian courts. Some commentators have imported the concept of 'tracing' corporate assets in their analysis of *Yaiguaje,* which in turn queries whether the original causes of action engaged the equitable remedy of tracing. In sum, lessons for litigators include the following:

Judgment is not the end of an action; enforcement and collection should be hardwired into the litigation plan from the start of every litigation project.

Enforcement should influence early decisions on substantive and procedural issues, such as proper and necessary parties, causes of action, pleadings and appropriate defences, preliminary/interlocutory or interim strategies and remedies; and the appropriate forum, preservation of assets, scope of discoveries and all facets of the action.

Note

1 [1897] AC 22 (HL (Eng)).

Clarity under Brazilian law regarding exclusive jurisdiction clauses contained in international agreements

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The new Brazilian Code of Civil Procedure entered into force on 18 March 2016 and brought relevant modifications to civil procedural law, replacing the former Code of 1973, which had been amended several times. One of main changes was welcomed by practitioners and the business community alike, as the new code gave parties to an international agreement the assurance that their choice of exclusive foreign jurisdiction clause will be valid, effective and mandatory before Brazilian Courts. According to the new rule, set out in Article 25 of the code, if an exclusive jurisdiction clause is raised by the defendant in its defence, Brazilian judges will recognise their lack of jurisdiction to adjudicate disputes arising from the international agreement containing said clause, and declare the termination of the lawsuit without prejudice.

In order to be accepted, the exclusive foreign jurisdiction clause has to be inserted in a written international agreement, and the dispute be related to said agreement. In the event that one of the parties to the agreement files a lawsuit before Brazilian courts, the defendant must invoke said clause and argue the lack of jurisdiction of said courts, under penalty of waiver, and the judge in charge of the case will then dismiss the case without prejudice.

It was considered time for Brazilian law to guarantee and safeguard the contractual freedom of parties to international agreements. Under the former regime, even though there was nothing preventing the parties from agreeing on an exclusive foreign jurisdiction clause for the resolution of disputes arising from an international agreement, a party could, in practice, in most cases, ignore the existence of said provision and initiate a lawsuit in Brazil. State courts in Brazil would actually retain jurisdiction, not only in those cases in which the former Code of Civil Procedure established exclusive Brazilian jurisdiction (ie, in cases involving real estate located in Brazil and probate proceedings involving assets in Brazil), but also in cases considered by the former code as cases of concurrent jurisdiction (ie, when the defendant had its domicile in Brazil, the obligations should be fulfilled in Brazil, the act or fact triggering the dispute took place in Brazil and the dispute involved public interest). In practice, therefore, in the majority of cases arising from a contract signed with a Brazilian party under the former regime, a party could disregard the choice of jurisdiction clause and force the foreign party to defend itself before Brazilian courts. Under said regime, two lawsuits could exist in parallel: one in Brazil and the other before the agreed upon jurisdiction indicated in the agreement.

Because international *lis pendens* is not recognised in Brazil, the first decision that would become *res iudicata* would be the one enforceable in Brazil. Moreover, for the foreign decision to be valid in Brazil, it had to be submitted for recognition before the Superior Court of Justice. In other words, the decision that became final first would prevail over the second.

This situation was far from ideal and disregarded the freedom of the parties when negotiating a contract. The choice of jurisdiction is widely considered as a very important aspect of an international agreement, and having that uncertainty was very problematic, leading many parties to choose arbitration instead, where the freedom of the parties has been widely recognised by the law and courts in Brazil. That could even be considered an inconsistency in the law, namely, it allowed parties to waive their constitutional right of being heard by a judge in Brazil by choosing a private alternative dispute resolution, but did not allow these parties to choose a foreign jurisdiction to adjudicate their dispute.

The change was therefore very well received by practitioners and companies doing business in Brazil, as this change brings a lot more predictability as to a very important aspect of international agreements.

One important point not yet fully settled under Brazilian law, however, is the concept of an international agreement, which can pose some doubts as to the application of Article 25 to certain kinds of agreements.

It is also important to note that Article 25 itself brings some exceptions to the general rule of validity of foreign jurisdiction clauses. Indeed, Brazilian courts will still retain jurisdiction in cases of exclusive Brazilian jurisdiction (matters involving real properties located in Brazil, succession matters, divorce, judicial separation or dissolution of stable union proceedings involving real estate properties located in Brazil). There is also an exception when the exclusive foreign jurisdiction clause is abusive or unfair, for example, in cases in which the purpose of the clause is to make it impossible or very difficult for one of the parties to file a suit before the chosen forum.

There has been no relevant precedent yet on the application of Article 25 of the new Code of Civil Procedure by the Superior Court of Justice – the highest court in Brazil for non-constitutional matters – but the existence of said article is already a drastic and positive change and development in Brazil.

The contractual freedom of parties is a key principle underlying international agreements, and this change is an important step towards legal certainty and the modernisation of the Brazilian legal system regarding international agreements.

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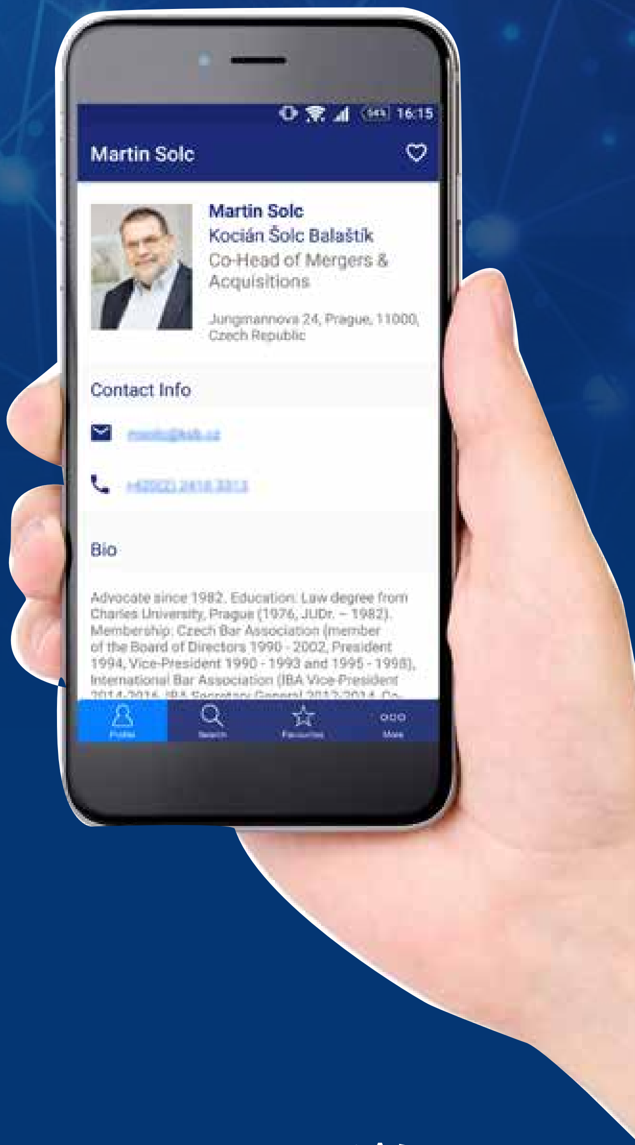

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