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ROME 7–12 OCTOBER

ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION








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Modern Rome is a major international business destination. It is the seat of the Italian government and the economy is dominated by services, IT, aerospace, defence and telecommunications companies, research, tourism, construction and banking. The city hosts the head offices of the vast majority of major Italian companies, as well as the headquarters of three of the world's 100 largest companies, Enel, Eni and Telecom Italia.

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- Be part of the debate on the future of the law

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IN THIS ISSUE

Newsletter Editors

Jane Colston
Brown Rudnick, London
jcolston@brownrudnick.com

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

International Bar Association

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

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

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From the Co-Chairs

Ira Nishisato
Borden Ladner Gervais, Toronto
inishisato@blg.com

Tom Price
Gowling WLG (UK)
tom.price@gowlingwlg.com

It is a pleasure and an honour to serve as Co-Chairs of the IBA Litigation Committee. Our Committee is extremely fortunate to have so many active and dedicated members who join us each year for our conferences. The open and inclusive nature of our Committee is special and is a culture that has been developed over many years by our successive leaders. We intend to do everything we can to continue that tradition, and very much look forward to seeing many of you soon at the IBA Annual Litigation Forum in Chicago and even more of our members at the IBA Annual Conference in Rome later this year.

The Committee is privileged to be meeting in Chicago for our 2018 Forum. Building on the success of Zurich in 2017, we expect to have a record attendance for this conference, which will focus on 'Advocacy in the 21st Century'.

It has been some time since we focused on advocacy as a topic and, because advocacy underlies all that we do as litigators, it seems appropriate to return to it as we face continuing challenges, such as the 'vanishing trial' and cost pressures that can impact the opportunities that we have to appear in court.

Our long-time member Larry Schaner has been absolutely instrumental in working with Ira Nishisato to plan for Chicago, and we are very grateful to him for his energetic leadership. We are confident that you will enjoy the excellent speakers and topics – and the fine social venues – that we have planned.

Turning to the IBA Annual Conference in Rome, we hope you have made your travel arrangements for the event in October. The Eternal City is resplendent at any time of year and meeting there will be a high point for the Committee. With an increased number of sessions that the Committee is leading and supporting, there will be plenty of opportunities for involvement by our members, and we are grateful to all of the session chairs who are busy recruiting speakers and fleshing out the topics.

We are also very pleased to announce our first African regional conference that will take place in Accra, Ghana, on 15–16 November 2018. Under the leadership of Jacques Bouyssou, Nene Amegatcher and the host committee that they have assembled, the arrangements are well underway and we are confident that our first conference in Africa will be a great way to introduce our Committee to African lawyers. We encourage all members of the Committee to join us in Accra.

Planning has also begun for our 2019 Annual Litigation Forum that will take place in Berlin, Germany, on 8–10 May next year. We are putting together the host committee as we write, so if you or your firm would be interested in participating, please speak to Tom Price.

Finally, while we are fortunate to have many repeat participants attending our conferences, it is also important for us to welcome new members, including younger litigators. We invite each of you to consider bringing colleagues from your firms to join and become active in the Committee.

Thank you for all of your support for the Committee.

Jane Colston
Brown Rudnick, London
jcolston@brownrudnick.com

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

Editors' note

It's a challenge for busy litigators to keep up-to-speed with all the current developments in our practice area, but we think this edition is a good start.

Our call for articles at the start of the year was met with a bumper crop from Litigation Committee members worldwide – more than we could in fact include. Thank you to all those willing to share their know-that and know-how.

These latest articles display a myriad of new and cutting-edge legal issues and court-led reforms. One particular theme is how the courts, bar associations and law firms in several jurisdictions are seeking to increase diversity within the profession.

We're already gathering articles for the next edition, due out ahead of the IBA Annual Conference in Rome. So please keep the contributions coming.

Committee Officers

Co-Chairs
Ira Nishisato
Borden Ladner Gervais, Toronto
inishisato@blg.com

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

Senior Vice-Chairs
Angelo Anglani
Nctm Studio, Milan
angelo.anglani@nctm.it

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

Vice Chairs
Frederick Acomb
Miller Canfield, Detriot
acomb@millercanfield.com

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

Secretary
Carlo Portatadino
Tosetto Weigmann & Associati, Milan
carlo.portatadino@studiotosetto.it

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

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

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

Regional Representative Asia Pacific
Neerav Merchant
Majmudar & Partners, Mumbai
nmerchant@majmudarindia.com

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

Regional Representative Middle East
Jacques Bouyssou
Alerion, Paris
jbouyssou@alerionavocats.com

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

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

COMMITTEE OFFICERS

Newsletter Editors
Jane Colston Elliott
Brown Rudnick, London
jcolston@brownrudnick.com

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

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

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

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

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

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

Website Editor
Felix J Montero Muriel
Perez-Llorca, Madrid
fmontero@perezllorca.com

Diversity and Equality Officer
Daan F Lunsingh Scheurleer
NautaDutilh, Amsterdam
daan.lunsingh@nautadutilh.com

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

Sponsorship Officer
Sae Youn Kim
Yulchon, Seoul
kimsy@yulchon.com

Young Litigators Forum

Co-Chairs
Anna Grishchenkova
KIAP, Moscow
ag@kiaplaw.ru

Sandrine Giroud
LALIVE, Geneva
sgiroud@lalive.ch

LPD Administrator
Susan Burkert
susan.burkert@int-bar.org

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Litigation Committee's sessions

Monday 1430 – 1730

Mock trial: the briber's dilemma facing parallel criminal, arbitral and civil asset recovery proceedings

Presented by the Criminal Law Section, the Anti-Corruption Committee, the Arbitration Committee, the Business Crime Committee, the Corporate Counsel Forum, the Criminal Law Committee and the Litigation Committee

Bribery and corruption occur throughout business and increasingly lead to parallel criminal, arbitral and civil proceedings. The proof of corruption in those three types of proceedings is subject to different rules and practices. In particular, privilege, right against self-incrimination, admissibility of evidence and publicity apply differently. The Criminal Law Section's interactive and ever-popular mock trial will explore how evidentiary issues are managed in criminal, arbitral and civil asset recovery proceedings by having the same persons examined by an Italian criminal court, an International Centre for Settlement of Investments Disputes (ICSID) arbitral tribunal and the English High Court on the same set of facts.

AULA DELLA TORRE, CORTE SUPREMA DI CASSAZIONE

Monday 1615 – 1730

Privileged and confidential: cross-border differences in the protection of confidential information

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

Privileged and confidential – do these 'magic words' provide sufficient protection? Lawyers use them all the time, but they are not always used consistently or correctly. The protections available vary greatly among legal systems. In some jurisdictions, the failure to correctly mark a document or designate a conversation is fatal to the claim of privilege or confidentiality. In others, dawn raids by criminal or regulatory authorities can result in privileged documents, such as internal investigation reports, finding their way into an adversary's hands. Legal counsel may refuse to produce evidence or provide testimony, but if the client has waived privilege or confidentiality, even implicitly or inadvertently, the protection may be rendered meaningless. In arbitration, privilege is not always uniformly applied. This panel will explore the legal and practical differences worldwide to assist international lawyers in dealing with privileged and confidential information, and in better understanding the legal and practical boundaries of protection available to them.

Tuesday 0800 – 0915

Global women litigator breakfast

Presented by the Litigation Committee

Tuesday 1115 – 1230

Judges or arbitrators: comparisons between courts and arbitral tribunals, the view of advocates – do retired judges or seasoned advocates make good arbitrators and does arbitration need litigation on top?

Presented by the Forum for Barristers and Advocates, the Arbitration Committee and the Litigation Committee

This session will explore procedural distinctions between arbitral tribunals and traditional courts, and the extent to which there are variations between:

- common and civil law systems;
- arbitral institutions that provide for greater court scrutiny; and
- arbitration in general commercial cases as opposed to specialists London Maritime Arbitration Association (LMAA).

The session will discuss the relative merits of procedures governing dispute resolution before courts or private bodies. It will examine the extent to which arbitration (both substance and procedural rules) require an element of judicial scrutiny in light of the fact that most are private/confidential. The identity and experience of arbitrator-types will be discussed. The session may also examine whether the development of a single transnational arbitral institution is a good idea in principle.

Continued overleaf

Tuesday 1430 – 1545

Litigation proceedings involving repossession of aircraft: enforcement of rights under the Cape Town Convention and conflict of laws between common and civil law systems

Presented by the Aviation Law Committee and the Litigation Committee

This international panel will discuss important issues regarding the rights of variously situated parties in aircraft/aircraft engines and the alternatives for enforcing those rights. Among the topics to be explored are relevant provisions of the Cape Town Convention on International Interests in Mobile Equipment, including legal remedies for default in transactions under the Convention, and a comparative law analysis of the applicable enforcement procedures and substantive law in different countries.

Tuesday 1430 – 1545

Post-closing claims: when the deal goes wrong

Presented by the Litigation Committee and the Corporate and M&A Law Committee

This panel of cross-border litigators and deal lawyers will discuss which representations and warranties in M&A agreements most commonly result in claims for breach. They will examine the most common themes in purchase price adjustment disputes and earn-out disputes, evaluate the most common issues in claims for breach of the covenant not to complete, the covenant not to solicit employees or customers, and the covenant not to disclose confidential information, identify the most typical fact patterns in post-closing fraud claims, and identify winning strategies for pursuing, defending and settling the foregoing claims and disputes.

Tuesday 1615 – 1730

Data privacy and cybersecurity litigation

Presented by the Litigation Committee

Data privacy breaches, resulting criminal investigations and cybersecurity civil litigation, are on the rise and will be well into the foreseeable future. All breaches of data privacy – whether the product of human error or, more likely, the result of planned, sophisticated attacks, including hacking, phishing, malware and ransomware – are exponentially increasing the risk of litigation, governmental investigations and other legal consequences for which companies, even – or, perhaps, especially – the most cutting-edge companies, now require, seasoned and competent counsel to guide and litigate this invasion of computer-based privacy matters. As hackers and cybercriminals continue to find more creative ways to access data, breaches have included confidential business information, trade secrets and other sensitive and valuable data; personal information, including health-related information, social security numbers, passwords, financial information of consumers and customers, including credit card and bank account information; and a plethora of storable, unauthorised data that can be used directly against the company, and to indirectly generate claims and inquiries against it. Counsel has to be prepared to litigate the adequacy and effectiveness of, and to assess and develop, cybersecurity measures in this burgeoning area. The panel will assist counsel to stay current in both liability issues, and the legal framework surrounding data breaches. It will explore technical and procedural safeguards being tested, through an increase in protective laws, regulations and rapidly evolving legal standards designed through differing jurisdictional regimes, all designed to make companies improve protections against threats, minimise risks to third parties and prepare their clients to both prosecute and weather the protracted litigation cyberstorm that has broken in full force. The panel will discuss data breaches that lead to investigations by governmental agencies, regulatory fines and sanctions, shareholder suits, private litigation and class actions by consumers, patients, customers, suppliers and employees.

Wednesday 1115 – 1230

Changes in national laws that may undermine mining development agreements: remedies for investors

Presented by the Mining Law Committee, the African Regional Forum and the Litigation Committee

The imposition of new legislation that contradicts existing mining development agreements (eg, a new law that calls for a review and renegotiation of existing mining development agreements and/or does not allow for dispute settlement to be via foreign dispute settlement bodies (eg, International Chamber of Commerce (ICC) and United Nations Commission on International Trade Law (UNCITRAL)). Issues could arise between international law and local law.

Wednesday 1430 – 1545

The art of witness examination

Presented by the Litigation Committee

The role of the witness (both factual and expert) is often key in any dispute. But quite what that role is varies from jurisdiction to jurisdiction such that litigating away from your home court can hold traps for the unwary. This session will focus on what those traps might be. Previous sessions have looked at how different ethical rules deal with witness preparation. This session will focus on the evidence itself and the giving of it, what form the evidence takes (written statement or oral evidence), how that evidence is collected, how witnesses are questioned in court and how the judge intervenes. What styles of witness questioning work and what does not work? Are there any formal rules to consider, for example, taking evidence by video link may be unlawful in some countries. Does the process vary with expert witnesses? The session will help all those involved in cross-border litigation to have a better understanding of this crucial part of the dispute resolution process.

Thursday 1115 – 1230

Collective actions: international trends and currents

Presented by the Litigation Committee and the Consumer Litigation Committee

Returning back to Rome means, among other things for the Litigation Committee, a look back to our very successful spring meeting in 2007 when the Committee devoted the full 1.5-day programme to discussions about the latest developments in collective redress and class actions. Rome 2018 is the perfect time for us to revisit the issue. Our interactive panel of experts from across the globe, on both sides, claimant and defendant, will refresh our view on how the legal markets are developing, whether opt-in or opt-out models will prevail, how and where cross-border recognition can be successfully implemented, and what further measures should be considered to address the fear of those potentially exposed to class actions, all while providing guidance to proper access to justice. Litigators, corporate counsel, judges, academics, consumer association representatives and policy-makers can profit from attending this session, which will focus not only on discussing the current state of play, but also influencing future developments.

Thursday 1115 – 1230

Impact of international economic sanctions to the mining sector and how to manage risks

Presented by the Mining Law Committee, the Banking Law Committee, the Criminal Law Committee, the International Trade and Customs Law Committee and the Litigation Committee

Economic sanction regimes, particularly those promulgated from the United Nations, European Union and United States, can have a significant impact on the exploration and production activities of mining firms and related service providers. Depending on the particular sanctions programme, prohibitions may range to a comprehensive embargo on all trade with a country or government, including state-owned enterprises, to more targeted restrictions that penalise dealings with certain persons (ie, individuals, entities or vessels), which could be customers, suppliers, service providers, subcontractors, employees, operators or other business partners. Sanctions can affect offshore conduct, and penalties or other liabilities that may be imposed can contribute to negative financial conditions and reputational damage. This session will review existing sanction programmes of the principal sanctioning authorities (UN, EU and US) and explore how the risks created by those programmes can be most effectively managed.

All programme information is correct at time of print.

To find out more about the conference venue, sessions and social programme, and to register, visit **www.ibanet.org/Conferences/Rome2018.aspx**.

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

FEATURES FROM OUR GLOBAL MEMBERS

The 'decisive influence' test: the ECJ judgment on Uber

EUROPE

Guillermina Ester
Pérez-Llorca, Madrid
gester@perezllorca.com

Few companies have attracted as much worldwide attention as Uber. This is the case because Uber operates in a number of countries around the world and its business directly affects the taxi sector, which provides urban transport services and which is subject to heavy administrative regulation.

In most jurisdictions, taxi drivers have expressed their bitter opposition to Uber, claiming that it is providing transport services without the necessary administrative authorisations. In other cases, drivers who provided transport services through the Uber app have requested that the courts declare that their relationship with Uber was equivalent to an employment contract, in view of the fact that Uber controlled their remuneration and the conditions for providing the service.

Regardless of whether one is for or against Uber, it is undoubtedly true that Uber has used technology to revolutionise non-collective urban transport. This technology-driven change has also affected other areas of our daily life, such as the way we communicate, socialise or travel, which now mainly revolves around using the internet.

From a legal perspective, this technological change poses important questions. Specifically, it is important to determine whether companies which provide services through the internet should be subject to the administrative regulations which affect the activity of their offline competitors. From the specific perspective of European Union Law, the recent ruling of the European Court of Justice (ECJ or the 'Court') on the activity of Uber may shed some light on this issue.

The ECJ Judgment, dated 20 December 2017 (C-434/15 – *Asociación Profesional Élite Taxi v Uber Systems Spain SL*), established that the activity of UberPop in Spain constituted a 'service in the field of transport services' (the 'ECJ Uber Judgment' or the 'Judgment').

The ECJ Uber Judgment arose following a Spanish lawsuit filed by a professional association of taxi drivers for unfair competition. According to the claimant, the UberPop service (a service no longer provided by Uber) was performed by non-professional drivers in their own vehicles and without administrative authorisation. In the opinion of the claimant, Uber was providing urban transport services without authorisation, which allegedly was tantamount to unfair competition. However, according to the defendant, Uber simply matched demand with supply. As such, Uber alleged that it carried out an intermediation activity, which was an information society service and not a transport service.

The ECJ Uber Judgment deserves some attention because of the impact that this ruling may have on future cases relating to digital platform businesses. The Judgment formulates the 'decisive influence test' which the ECJ used to analyse the characteristics of the activity performed by Uber, in order to determine whether such activity should be classified as an information society service or a transport service.

Please note that, according to EU regulations, information society services should be provided freely from any EU member state, without being subject to prior administrative authorisation. Therefore, if Uber was classified as an information society service, it would be allowed to operate without being subject to the specific administrative regulations of the transport sector.

As a starting point, the ECJ stated that an intermediation service that enables a driver to locate and connect with a potential passenger using a smartphone application is not, in principle, a transport service and must be classified as an information society service, according to the wording of Article 2, letter (a) of Directive 2000/31/EC.

However, the ECJ further considered that Uber does not just provide an intermediation service for passengers and drivers but actually provides a 'composite service' where Uber

exercises a 'decisive influence' on the activity of the drivers, to the extent that Uber actually organises and supplies a non-collective urban transport service.

According to the Advocate General, a 'composite service' is partly provided by electronic means and partly offline (the underlying activity). In order to conclude whether a 'composite service' is an information society service or not, one has to determine (i) whether the service provided offline is financially independent of the service provided online or (ii) whether the two services form part of an inseparable whole because the provider exercises a decisive influence over the conditions under which the offline service is provided.

In the Uber case, the ECJ carried out the aforementioned analysis and concluded that UberPop consisted of two services, an online service and an offline service, where the offline service (non-collective urban transport) was financially dependent on the service provided online (connecting drivers with passengers through an online application) due to the decisive influence that Uber exerted on the way the offline service was provided. Such decisive influence was observed in view of facts such as the control that Uber exerted over drivers including their recruitment and performance, the way Uber set fares and the control that Uber exerted over the technical requirements that vehicles had to meet.

Thus, the Court concluded that the intermediation activity carried out through the online application was inextricably linked to the offline activity consisting of a non-collective urban transport service (or taxi service). Therefore, Uber was the provider of an intermediation service and, simultaneously, offered and organised the general operation of urban transport services for the benefit of people who wished to make an urban journey. This led the ECJ to conclude that Uber could not solely be considered an electronic platform but that, in fact, it also performed a 'classic transport service'. This classification as an urban transport service means that Uber's activity could be subject to administrative authorisation depending on the specific regulations of the different EU member states.

In terms of the future consequences of these conclusions, the Court's reasoning may generate uncertainty regarding the impact this case will have, if any, on other digital platform businesses.

There is an ECJ precedent in a very similar case where an information society service clashed with national legislation. In Case C-108/09, *Ker-Optika*, the ECJ, by judgment of 2 December 2010, ruled that the sale of contact lenses over the internet qualified as an information society service and, therefore, the Hungarian regulation which established that the marketing of contact lenses could only be carried out in establishments specialising in medical instruments was contrary to Directive 2000/31/CE.

The ECJ's reasoning and conclusions in the *Ker-Optika* case differ greatly from those in the ECJ Uber Judgment. It would have been useful for the ECJ to have justified the need to reach a different conclusion in the Uber case than in the *Ker-Optika* case. We believe the ECJ has missed a great opportunity to explain these different decisions on the application of Directive 2000/31/CE. One could argue that the difference could be partially attributed to the fact that Uber is a sensitive business that requires special attention.

In light of the foregoing, it is reasonable to consider what the ECJ Uber Judgment will mean for companies that operate online apps which are similar to Uber in other sectors. Following the reasoning in the Uber case, some may argue that these companies exert a 'decisive influence' over the offline service and, thus, do not qualify as e-commerce services and could be subject to the specific administrative regulations of the different EU member states.

In any case, and until further notice from the ECJ, in terms of Directive 2000/31/CE, we may have to apply the 'decisive influence' test. Thus, we may be required to analyse the extent to which the activity of the platform is inextricably linked to the underlying service (be it accommodation, catering or urban transport) and the degree of control and influence the platform exercises over the underlying or offline service.

The proposed overhaul to Part 31 of the Civil Procedure Rules (CPR) in English court litigation: the end of standard disclosure as we know it?

Imogen Winfield
Brown Rudnick, London
iwinfield@brownrudnick.com

While the disclosure regime can be an attractive tool in English court litigation, it often comes at a significant price; one which inevitably increases as growing volumes of data are generated, extracted and reviewed. The framework has become somewhat antiquated as electronic disclosure has overtaken paper disclosure and Technology Assisted Review (TAR) has emerged. The more significant issue though is the reliance that parties, their legal representatives and judges have continued to place on standard disclosure as the default approach, demonstrating a widespread reluctance to deviate from that which has become the norm. This year should see the introduction of a two-year pilot scheme across the majority of cases in the Business and Property Courts in England and Wales, in an effort to tackle these issues and promote a more efficient and cost-effective disclosure process.

Basic and extended disclosure

The ultimate objective is to limit disclosure to what is reasonable and proportionate in the circumstances of any given claim, in order to determine each issue. In its current form, the pilot provides for two potential rounds of disclosure (basic disclosure with service of the pleadings and extended disclosure following the first case management conference (CMC)), though in certain cases one or both of these will not be appropriate.

Basic disclosure will require a party to produce key known documents which are: (i) relied upon to advance arguments made in a statement of case; and (ii) necessary for the other parties to understand that party's case, save for documents previously provided or known to be in the other parties' possession. To the extent that such documents number more than 500 pages (which may occur quite frequently in high-value disputes), basic disclosure will not apply, presumably because the burden would start to outweigh the benefit. Whilst there is clearly logic in this 'cards on the table' approach to litigation, the pilot envisages that parties may dispense with (or simply defer) basic disclosure by agreement, which at first glance would seem a fairly straightforward means of evading this step where it would otherwise apply, though it requires the parties to document their respective reasons for contracting out and the court may overturn their agreement.

To the extent that further disclosure is required to resolve one or more key issues (presumably in all but the most straightforward cases or where basic disclosure was deficient or did not take place), the parties will then need to consider extended disclosure. In place of the current form of standard disclosure and the alternative options that tend to be ignored, five different models of extended disclosure will be available:

- model A: no order for disclosure;
- model B: limited disclosure (of key documents not already provided via Basic Disclosure);
- model C: request-led search-based disclosure (of particular documents or narrow categories of documents);
- model D: narrow search-based disclosure (of documents likely to support or undermine any party's case); and
- model E: wide search-based disclosure (of documents likely to support or undermine any party's case, or which may lead to a train of inquiry which may then result in the identification of other documents for disclosure).

A model will be selected per issue, with discussion and ideally agreement between

the parties, though the court will determine what is a reasonable and proportionate model for each issue, taking into account all the circumstances of the case. Rather than adopting a single model for the entire disclosure exercise, each party may use some or all models in respect of multiple issues: for example, one issue may require no disclosure (model A), while another might require request-led search-based disclosure (model C). Standard disclosure is most closely resembled by model D, though it is clear that there will be no 'go to' option. Model E will facilitate an even broader category of disclosure, albeit one reserved for exceptional cases.

In theory it is possible that there might be no disclosure on a given issue, as any prior agreement to abandon basic disclosure will not influence the court's decision as to whether to order extended disclosure, whereas failure to comply or engage with basic disclosure might. Nonetheless, regardless of the model(s) ordered, there would be an ongoing duty on each party to produce any documents which adversely affect their own case, at the time of extended disclosure (models B to E) or within 30 days of the first CMC (model A). Where models A or B are ordered and no search is to be conducted, this would be limited to known adverse documents. Therefore, one party's suspicion that another may be in possession of adverse documents should not influence their position as to which model might be appropriate for any given issue.

Early co-operation and a more interventionist court

The proposed rules will require the parties to give proper consideration to the subject of disclosure at the very outset of a claim. Aside from providing basic disclosure where applicable, at the time a party serves its statement of case it must also indicate whether it is likely to request extended disclosure (models B to E) in respect of any issue. The parties will then need to discuss and seek to agree a draft list of issues for disclosure in advance of the first CMC, including the nature of any requests that might be made under model C. The approach is more structured than the current regime, which simply provides that parties must discuss and seek to agree a disclosure proposal at least seven days before the first CMC (CPR 31.5(5)).

Following discussions, the parties will be required to jointly complete (and again seek to agree) a disclosure review document (DRD) ahead of the CMC, documenting proposals as to the scope of any extended disclosure sought and how such exercise might be conducted, detailing the location of potentially disclosable documents and considering whether TAR should be used. The parties will be expected to consider these issues with a view to reducing the burden and costs of the disclosure exercise. The DRD will replace the optional electronic disclosure questionnaire and presumably the shorter disclosure report, though it may continue to be updated by the parties throughout the proceedings, consistent with the continuing duty of disclosure.

However, the draft rules make clear that the parties cannot simply agree matters between themselves without input from the court, which will take a more proactive role and have the final say. Where the parties have agreed to dispense with basic disclosure, the court will determine whether the benefit of basic disclosure outweighs the burden. Similarly, where the parties request extended disclosure, the court must be persuaded to order it, having regard to numerous factors. This is quite a contrast to the current position where the court may approve the parties' disclosure proposals without a hearing and give directions in the terms proposed (CPR 31.5(6)).

Judges will also play an important role in circumstances where the parties have been unable to resolve their differences with regard to disclosure and the court's guidance is sought at a short disclosure guidance hearing, though the draft rules suggest that these will be rare. Nonetheless, judges and solicitors alike will need to understand the capabilities and limitations of the various review tools and technology in order to get the best out of the framework, not least because when giving guidance the courts will wish to hear from the person with direct responsibility for the conduct of disclosure. Furthermore, where the court makes an order for extended disclosure, it may also require use of specified software, data sampling and de-duplication methods, among other measures to determine how the disclosure process will be conducted, highlighting the need for parties to give this sufficient consideration beforehand.

Conduct and costs in relation to disclosure

A key component of the pilot scheme will be the introduction of express duties with regard to disclosure. Whilst the current regime imposes a duty on the parties to conduct a reasonable search and to disclose relevant documents, the new rules will add a duty to take certain reasonable steps to preserve potentially relevant documents in its control (currently legal representatives are simply required to notify their clients of the need to preserve disclosable documents under PD 31B.7) and a duty to refrain from disclosing non-relevant documents to another party. These duties will be key in establishing a more focused approach to disclosure, particularly the latter which should deter parties from the tactical production of large volumes of irrelevant documents. Where a party fails to discharge their duties, fails to cooperate with the other parties or fails to comply with any procedural requirement in respect of disclosure, they may be penalised with an adverse order for costs, among other sanctions such as an order to carry out further searches or disclose further documents.

The parties' legal representatives will be subject to similar duties under the pilot, as well as duties to liaise and cooperate with the other parties' legal representatives to promote the reliable, efficient and cost-effective conduct of disclosure, and to undertake a review of their client's privileged documents to ensure that they are properly withheld with a clear rationale. While these are steps that legal representatives should already be taking, the introduction of such duties should help to alleviate any doubts over the veracity of another party's disclosure exercise.

The proposed rules will require the parties to give greater consideration to the disclosure methodology in advance of the CMC but will excuse the parties from committing themselves at that stage to an estimate in respect of the disclosure phase in cases subject to the costs budgeting regime. This makes sense in circumstances where the court will have the deciding vote on the scope of disclosure to be applied, following which the parties will be in a better position to assess the likely costs, to be confirmed after the CMC. Throughout the disclosure exercise, the parties will be required to maintain a record of the methodology used to search for and review documents, including the use of any analytics or TAR. While the proposed regime would inevitably involve a greater frontloading of costs on disclosure strategy in the stages leading up to the CMC, the result should be a more targeted and transparent search and review process, which in turn would deliver significant cost savings in the long run.

Not a threat but an opportunity

Whilst the draft framework is presented as a complete overhaul of the existing regime, the majority of the proposed rules simply build on what is already in place. For example, the requirement on parties to preserve documents is more prescriptive but does not differ vastly from what should already be done. In theory, each of models A to E is available under the existing rules (CPR 31.5(7)), though without a separate duty to disclose known adverse documents and perhaps not on an issue-specific basis. Whilst there will be no 'one size fits all' model for extended disclosure, the draft rules standardise some of the more tedious aspects of the disclosure process, by removing the requirement to request inspection of documents and stipulating that electronic data be produced in native format with metadata preserved. This should focus the parties' collaboration on the issues that really matter, including whether TAR would assist in any disclosure exercise.

If the pilot succeeds in limiting the costs of disclosure to what is reasonable and proportionate, it should reduce the overall cost of litigating in England and Wales. However, there is more to the proposed rule change than cost savings: the requirement on parties in all cases to produce adverse documents without the corresponding burden of standard disclosure will be particularly attractive. Ultimately, the proposals aim to change the way we think about disclosure and achieve a shift away from a default approach to bespoke disclosure orders. Following a recent consultation period, the next step towards the new regime will be for the Disclosure Working Group to develop the pilot scheme for implementation later this year.

Jane Colston
Brown Rudnick, London
jcolston@brownrudnick.com

Ian Smith
33 Chancery Lane Chambers, London
is@33cllaw.com

'Bang for your buck' – FAQs, myths and truths regarding Norwich Pharmacal orders

All litigators should have a good grasp of Norwich Pharmacal orders (NPO) granted by the courts of England and Wales to compel pre-action disclosure. For fraud litigators a detailed understanding is essential.

There are several common myths about NPOs – perhaps not surprisingly because they are constantly being developed and their boundaries constantly being pushed, given the flexible nature of this civil remedy.

In practice, a NPO is quick to obtain and is an effective way of compelling disclosure. It is not a remedy of last resort and, indeed, in the right circumstances it is one of choice, as you can get plenty of 'bang for your buck'. It should, however, be handled with care as it can, if misused, inflict damage to an applicant's case and reputation.

Often the NPO is made secretly so as not to forewarn defendants. The price to be paid for this advantage is that the applicant must be candid with the court about all the relevant facts and circumstances of the application.

Question 1: Is NPO disclosure limited, for example, to the identity of the wrongdoer?

Answer: No.

A NPO will provide information/documents to help applicants identify who to sue but will also:

- identify if a wrongdoing has in fact taken place;
- show the wrongdoer has committed the wrong;
- help decide whether to bring a claim or to take other steps to protect the applicant (eg, dismiss an employee or amend internal procedures);
- help a case to be pleaded; or
- trace money and other misappropriated assets.

Question 2: Does an applicant need to show it intends to bring proceedings or the information is necessary to allow it to do so?

Answer: No.

The applicant can seek the information to allow it to take steps to determine what to do which may include commencing proceedings.

In *Orb ARL and others v Fiddler and another (2016) EWHC 361*, Popplewell J emphasised the importance of an applicant for a NPO identifying the purposes for which the information disclosed would be used. This was necessary so that the court could determine whether the information was to be used for a legitimate purpose (eg, in this case, Popplewell J found the NPO application had been improperly used in the hope of acquiring evidence that would discredit the respondent and enable the applicants to attain an advantage in the main proceedings).

Question 3: What about the nature of the wrongdoing? Is a NPO is possible if the wrongdoing is a crime?

Answer: Yes.

This is a wide relief and it is possible to get disclosure regarding a crime. A NPO is also possible for other kinds of wrongdoing including:

- breach of contract; or
- 3rd parties becoming mixed up in a judgment debtor evading enforcement of a judgment.

There is no need to allege dishonesty.

Question 4: Can a NPO be sought to aid foreign proceedings?

Answer: Yes.

If a respondent is subject to the English court's jurisdiction, a NPO can be granted to aid foreign civil proceedings. However, a NPO cannot be granted in aid of foreign criminal proceedings.

Question 5: How do you get an order against a 3rd party if it is outside the jurisdiction?

Answer: With difficulty.

The applicant faces a potential problem where the respondent, and the information or documents that the applicant seeks, are outside the jurisdiction using a NPO. The English court has, on occasion, exercised its discretion to grant permission to serve a NPO outside of the jurisdiction. However, the law in this area remains unclear.

Teare J in *AB Bank Ltd v Abu Dhabi Commercial Bank PJSC (2016) EWHC 2082 (Comm)* set aside a NPO that had been granted against a UAE bank, finding that none of the 'jurisdictional gateways' permitted the application to be served out of the jurisdiction. This judgment, therefore, suggests that the Court will not exercise its jurisdiction to grant NPOs against respondents overseas.

However, NPOs may be obtained against subsidiary companies registered in the UK. This would have application to internet service providers, such as:

- Google UK Limited;
- Yahoo UK Limited; and
- Microsoft Limited.

In *CMOC v Persons Unknown (2017) EWHC 3602 (Comm)* the court has been willing to order disclosure against persons based abroad.

Question 6: What does an applicant have to show to get a NPO?

Answer: Three threshold conditions must be satisfied.

The three conditions to be satisfied for the court to exercise its power to grant Norwich Pharmacal relief are summarised by Flaux J in *Ramilos Trading Ltd v Buyanovsky (2016) EWHC 3175 (Comm):*

1. 'a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer;
2. there must be the need for an order to enable action to be brought against the ultimate wrongdoer; and
3. the person against whom the order is sought must: (a) be mixed up in so as to have facilitated the wrongdoing; and (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued.'

Even where the three threshold conditions are satisfied, the court still has to exercise its discretion as to whether to grant the order sought, weighing relevant factors which the Supreme Court, in *RFU v Consolidated Information Services Ltd (Viagogo) (2012) UKSC 55*, said include:

1. the strength of the possible cause of action;
2. the strong public interest in allowing an applicant to vindicate his legal rights;
3. whether the making of the order will deter similar wrongdoing in the future;
4. whether the information could be obtained from another source;
5. whether the respondent knew or ought to have known that he was facilitating arguable wrongdoing;
6. whether innocent persons will suffer any harm as a result;
7. the degree of confidentiality of the information sought;
8. privacy rights under Article 8;
9. the rights and freedoms under the EU data protection regime; and
10. the public interest in maintaining the confidentiality of journalistic sources.

Question 7: Is a NPO is a remedy of last resort and exceptional?

Answer: No.

The amount of NPOs obtained shows that it is not an exceptional remedy and you do not have to show the court that you have exhausted all other routes first – just that the respondent is a practical source for the information sought.

Question 8: In a fraud case, would you apply for a NPO at the same time as seeking freezers and disclosure orders?

Answer: Yes.

Those whom you cannot sue (eg, because you do not have the evidence) but who have facilitated the wrongdoing you can NPO to get information and documents. Typically, that includes banks, financial advisors and accountants but could also include potential wrongdoers.

Question 9: What is the price for this disclosure to the applicant?

Answer: It is well known that the price for this disclosure is that the applicant has to pay the reasonable costs of the respondent complying with the order. It is sometimes hard to advise an applicant what their cost exposure will be.

If you NPO an individual who seeks legal advice, the costs exposure could come to tens of thousands of pounds, especially if the NPO questions to be answered in an affidavit are complex. Costs are one reason why you

should be specific about the information and documents you seek. In our joint experience, when banks are targeted they do not *usually* charge – or if they do, it is a few hundred or thousand pounds as they are well used to dealing with such applications. However, we also know of cases where a bank's costs have been tens of thousands, proving it is hard to give an exact budget to the applicant.

Question 10: Should you always apply without notice?

Answer: No.

On the whole, we prefer to give notice to banks or internet service providers (ISPs), not least because the courts usually expect that they be given an opportunity to object. In our experience, the banks and other institutional respondents tend not to appear at a hearing. Their usual response is to 'neither consent nor oppose' an application.

Question 11: How should this notice be given?

Answer: First, ensure the bank or ISP agrees not to tip off the target. Then, you can reveal the target information.

Otherwise, only give them the form of the order that you are seeking, the justification for the order and seek their comments on that format. If the bank or ISP company agrees to keep the application confidential then you can give them fuller information and make the application on notice. If it does not, then that is a valid reason for making an application without notice.

If a NPO is directed at a potential suspect or individual, be very careful about how that person is described and of the fact that they may alert the target. It is usually no good trying to tie them into a voluntary gagging agreement before the order. In this case, the application should likely be made without notice and a long gagging order against them sought so they are restrained from tipping off the target.

Question 12: Is there a duty of full and frank disclosure even when making an on notice NPO application?

Answer: We assume that there is a duty to be candid even when giving notice of a NPO application based on the fact that respondents tend to be passive even if notified.

The case of *Orb ARL and others v Fiddler and another* is an example where a NPO was discharged on the basis of a failure to be candid.

Question 13: What about costs?

Answer: The applicant usually pays the costs of the respondent dealing with the application, as well as compliance with a NPO. The respondent is entitled to the costs of the application and in providing the disclosure (this includes advice on the rights to vary, etc).

Question 14: What is it like acting for a respondent to a NPO?

Answer: When acting for individual or corporate respondents who have been actively involved in impugned transactions we suggest you advise with extreme care.

We have seen:

- the courts willing to restrain a NPO respondent from leaving the jurisdiction until they have provided full disclosure;
- the court requiring continuing disclosure even when the NPO respondent has become a defendant; and
- where claimants have asserted serious deficiencies in the disclosure, the NPO respondent has been subject to a cross-examination order ahead of trial. The court has held such orders can be obtained even if the claimants have not pursued other less intrusive ways of obtaining the missing information.

With the court's permission, the resulting testimony can found a contempt claim. We have seen respondents pursued for contempt for failing to comply (at all or adequately) with a NPO.

When so much is at stake, if you are acting for a respondent to a NPO you need to draft any response with care. It is important to resist being bullied into providing a deposition, which under time pressure and with limited information can cause future problems. Therefore, ensure that the disclosure given is accurate and responsive to the questions only.

Ensure that your drafting reflects the likely reality, that is that the disclosure has been done under time pressure and likely with limited information. The court acknowledges that people cannot be expected to remember all details after a lapse of time.

It is important to stress to your client to read their statement and be accurate. Many business people take signing a witness statement too lightly. Inaccuracies are gifts to the claimant. There is too much at stake to 'just get it done' – you need to get it right.

An exorbitant jurisdiction? Recent developments relating to jurisdiction in the English courts

Daniel Saoul
4 New Square, London
d.saoul@4newsquare.com

Joshua Folkard
4 New Square, London
j.folkard@4newsquare.com

Introduction

As litigation becomes ever more international, the choice of forum can become a heated issue. The English courts are often considered a favourable venue by claimants, who perceive the impartiality and standard of the judges, the extent of disclosure/discovery obligations and the availability of reputable legal advisors to be valuable assets.

As a result, a substantial proportion of the litigation proceeding before the English High Court – and in particular the Commercial Court – features parties from overseas and concerns events that took place outside of England and Wales.

But what are the limits of the English court's reach, in particular where one is dealing with defendants outside of the European Union (and, therefore, falling outside of the Brussels Regulation, Recast)? What is required in order for a party to be entitled to serve a claim on a party outside the jurisdiction? And where do jurisdiction clauses fit in?

We consider three recent cases in which these crucial jurisdictional questions were considered.

Brownlie v Four Seasons – a review of the requirements

In *Brownlie v Four Seasons (2017) UKSC 80,* the UK Supreme Court dealt with a number of the requirements to serve a claim out of the jurisdiction of England and Wales. The Supreme Court was divided on many of these issues, splitting 3:2.

By virtue of a very unusual procedural development (as a result of which the Supreme Court concluded that the defendant to the action was the wrong party to the claim) the Court's comments were merely *obiter*, as emphasised most strongly by Lord Wilson (at (57)), but the guidance given is nevertheless important. Three issues of particular note were discussed:

The meaning of a 'good arguable case'

One of the requirements a claimant must meet in order to serve a claim on a party outside of England is to show a 'good arguable case' that each cause of action pleaded falls within one of the jurisdictional 'gateways' contained in the English Civil Procedure Rules (at Practice Direction 6B). These 'gateways' include, for example, that the defendant is a 'necessary or proper' party to a claim being pursued against another defendant based in England, that the claim relates to a contract concluded in England, or governed by English law, or containing an exclusive jurisdiction clause in favour of the English courts, or that the claim relates to a tort where damage has been sustained in England or where the act causing the damage has been committed in England.

The requirement for a 'good arguable case' in this regard had previously been interpreted by the Court of Appeal as requiring a claimant to show that it had a 'much better argument' than the defendant that each of its claims fell into one of the gateways: *Canada Trust v Stolzenberg (No 2) (CA) (1998) 1 WLR 547, at 555G* (the 'Canada Trust gloss').

However, the Supreme Court (unanimously, on this point) was of the view that requiring a claimant to show that it had 'much' the better of the argument, in relation to the jurisdictional gateway, was too high a hurdle (Lady Hale, at (33) and Lord Sumption, at (7)). The majority emphasised that 'glosses should be avoided', and accordingly reaffirmed the unvarnished 'good arguable case' test.

It is notable that this brings the concept of good arguable case in a jurisdictional context back into line with – or at least closer to – the concept of a good arguable case in a freezing order context. As fraud practitioners will know, in order to get a freezing order in England, you must establish a good arguable case on the merits. That there is now greater

consistency in what this means is a welcome development.

Consequential loss and the 'tort gateway'

Under the English Civil Procedure Rules, Practice Direction 6B, paragraph 3.1(9) provides a 'gateway' to serve out of the jurisdiction where: '[a] claim is made in tort where (a) damage was sustained, or will be sustained, within the jurisdiction; or (b) damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction'.

The majority of the Supreme Court in *Brownlie* opined that mere consequential loss suffered in England *was* sufficient for the 'tort gateway' (especially at (55), (56) and (68)), in the face of a strong dissent from Lords Sumption and Hughes (see in particular (23)). The Supreme Court, therefore, effectively overruled the Court of Appeal's decision in *Brownlie* that only direct damage suffered in England would suffice to serve a defendant out of the jurisdiction.

This widens considerably the scope of this gateway, in turn expanding the English court's reach.

The approach to forum conveniens and service out

In the previous Supreme Court decision of *Abela v Baadarani (2013) 1 WLR 2043*, Lord Sumption, apparently heralding a more flexible approach to the English court asserting jurisdiction in cross-border cases, had stated *obiter* (at (53)) that: '[i] t should no longer be necessary to resort to the kind of muscular presumptions against service out which are implicit in adjectives like "exorbitant". The decision is generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum'.

However, his Lordship was at pains to state in *Brownlie* that those *obiter* comments should not be interpreted as giving *carte blanche* to claimants seeking to serve out of the jurisdiction. Lord Sumption's stated that the correct approach to the 'gateways' was 'a neutral one of construction or discretion' and that in *Abela* he had 'not proposed to substitute an alternative, and equally objectionable, presumption in favour of the widest possible interpretation of the gateways simply because jurisdiction thus conferred by law could be declined as a matter of discretion' (at (31)).

Parties seeking to serve out will, therefore, need to consider carefully whether they do indeed satisfy (or at least have a good arguable case that they satisfy) one of the gateways before proceeding with their claim.

***Bazhanov v Fosman*: an end to *Cherney v Deripaska*?**

In *Cherney v Deripaska* (2010) *2 All ER (Comm) 456*, the Court of Appeal upheld Christopher Clarke J's decision that, although Russia was definitely not the natural forum for that dispute, England was nonetheless the *forum conveniens* because Mr Cherney was – in practice – unable to return to Russia for a trial. He would accordingly have his claim stifled if the English courts did not accept jurisdiction (at (67)).

In *Bazhanov v Fosman (2017) EWHC 3404*, an attempt was made to apply the *Cherney v Deripaska* reasoning to a dispute relating to the ownership of a sunflower production business in Voronezh Oblast, Russia. The High Court held that none of the 'gateways' relied upon by the Claimants were satisfied and its comments on *forum conveniens* were accordingly *obiter* (at (92)).

The High Court held, however, that although 'the Claimants' arguments… were very largely based on similar arguments which had been advanced successfully in *Cherney v Deripaska*', the 'Cherney factors' were either 'not present' or 'not present to anything like the extent that they were in the Cherney case' (at (98)).

Daniel Toledano QC (sitting as a Deputy High Court Judge) emphasised that *Cherney v Deripaska* was a 'rare case' in which a claimant had established that it would not receive substantial justice in a foreign country and that such cases 'are the exception' (at (97)).

The court went further, however, and held that even if it had been accepted that there would have been the 'grave risk of an unfair trial' if Mr Bazhanov was forced to return to Russia, 'the solution to this concern would be for Mr Bazhanov to bring his claim in the *Arbitrazh* courts whilst at all times remaining in England' (at (103)).

This was not an argument which had been taken up by the courts in *Cherney v Deripaska*, and potentially has wide ramifications for claimants seeking to serve out on defendants from Commonwealth of Independent States countries on the basis that there is a real risk that substantial justice will not be done in the natural forum for the dispute. The scope for

such arguments may be substantially reduced.

It remains to be seen whether this decision will be the subject of appeal.

Apex Global Management v Global Torch: exclusive jurisdiction clauses and forged contracts

Finally, the Court of Appeal decision in *Apex Global Management v Global Torch (2017) EWCA Civ 315* is worthy of mention.

The case involved an extremely unusual jurisdiction challenge, brought in reliance on an exclusive jurisdiction clause in favour of the courts of Saudi Arabia but raised only after the English court had given judgment upon the underlying contractual claim.

The parties were suing each other pursuant to a share purchase agreement (amongst other claims). However, there was a dispute as to which version of the agreement was genuine and which was a forgery. The competing versions contained materially different terms: Global Torch's version entitled it to payment of $6.7m from Apex and also contained an exclusive jurisdiction clause in favour of the Saudi courts. Apex's version did not contain either of these clauses.

Ultimately, Global Torch succeeded in its argument that the version it relied upon was authentic and obtained judgment for its debt from the English court. However, following the judgment, Apex then raised, for the first time, the argument that because Global Torch's version of the contract contained an exclusive jurisdiction clause in favour of the Saudi courts, the English court, having decided that this was the true version of the contract, could not in fact adjudicate on the debt claim. Apex asserted that it could not have raised this argument earlier, given that the exclusive jurisdiction clause was not in play until the English court had decided which version of the contract was legitimate – if Apex's version had been preferred, no issues regarding exclusive jurisdiction would have arisen.

The High Court rejected these arguments and its decision was upheld by the Court of Appeal. In its judgment, the Court of Appeal revisited the circumstances in which it is possible to apply to stay proceedings on the basis of a jurisdiction clause, confirming that such applications should be made promptly (per *Texan Management v Pacific Electric Wire & Cable Co (2009) UKPC 46)* and that late applications would have to meet the 'relief from sanctions' test (*Denton v TH White (2014) EWCA Civ 906)*; in other words first the significance or seriousness of the failure to make a prompt application should be considered, then the court had to consider why the failure occurred and whether there was a good reason for it and finally the court has to consider what is just in all the circumstances of the case.

The Court of Appeal considered that notwithstanding that Apex was disputing the authenticity of Global Torch's version of the agreement, Apex could and should have raised its alternative case based on the jurisdiction clause much earlier: 'challenges to jurisdiction must be made as early as possible' (at (21)). In this regard, the Court of Appeal rejected Apex's contention that the previous case of *Fiona Trust & Holding Corporation v Privalov (2007) UKHL 40* supported its position: as Lady Justice Gloster explained, 'Fiona Trust identifies which allegations will attack an exclusive jurisdiction agreement (and these include allegations that the contract in which that agreement is contained is a forgery) – but it simply does not bear on the question of *when* that attack must be raised."

In addition, the Court of Appeal concluded that by participating in the proceedings in England to the extent it already had, Apex had submitted to the jurisdiction and waived any right to rely upon the jurisdiction clause.

This confirms that if parties are considering relying on exclusive jurisdiction clauses, they should do so at the earliest opportunity and should exercise caution before otherwise engaging in the proceedings.

Conclusion

The English courts will no doubt remain a popular forum for claimants bringing cross-border claims. The three cases examined above reflect the heavily contested issues that can arise in relation to jurisdiction and the varied responses that such arguments can generate. No doubt these debates will continue and the law in this area will continue to be refined. How the English court continues to respond and the extent to which it is prepared to assert 'exorbitant' jurisdiction – particularly post-Brexit – is something all commercial practitioners should keep under close review.

Paul Lowenstein QC
20 Essex Street Chambers, London
pdl@20essexst.com

Matthew McGhee
20 Essex Street Chambers, London
mmcghee@20essexst.com

Breaking new ground in fraud recovery claims in London – international pursuit of cyber fraudsters

The Commercial Court (the 'Court') in London has recently signalled that it is prepared to take bold steps in respect of its jurisdiction, the Court's procedure and the remedies available to claimants in cases where a claimant has been the victim of a fraud and seeks the Court's assistance in identifying the fraudsters and recovering the loss. These latest innovations closely follow on from the launch of the Business & Property Courts of England & Wales as a single umbrella for the specialist jurisdictions of the High Court, including the Commercial Court.

These recent innovations have been made in the course of proceedings concerning a fraud perpetrated on a global commodities trader. This article considers various aspects of these proceedings, exploring the steps taken by the Court in what could become a template for future international fraud investigations and claims.

The proceedings are ongoing but the facts, at present, appear to be that an English company, acting as the London branch of the global commodities trader, was the target of a sophisticated cyber-attack. Unknown perpetrators caused several million dollars of the claimant's funds to be transferred from its bank accounts in London to and through multiple bank accounts held with many national and international banks and spread throughout a large number of jurisdictions.

Since discovering the fraud, the claimant has, by a series of applications, sought and obtained a suite of interim orders – principally both to trace and secure the stolen money and to identify the unknown 'ghost' perpetrators. A trial against the perpetrators who have been identified to date is scheduled to take place in July 2018 but the judgments in the interim applications are now becoming publicly available: *CMOC v Persons Unknown (2017) EWHC 3599 (Comm)* and *CMOC Sales & Marketing Limited v Persons(s) Unknown & Ors (2017) EWHC 3602 (Comm)*.

There are three particularly innovative features of the orders granted by the Commercial Court:

Worldwide freezing order against Person(s) Unknown

A worldwide freezing order (WFO) was initially granted against a closely defined class of 'Person(s) Unknown' as the only respondent. This was required as, in the immediate aftermath of the fraud, the claimant knew how much money had been taken and the bank account numbers to which it had been transmitted but the identity of the perpetrators and the true identity of the account holders were unknown. The Judge was satisfied that he could permit service of the claim form on and make a WFO against 'Person(s) Unknown' because a class of persons could be defined with sufficient precision by reference to the claim as defined on the face of and attached as schedules to the claim form.

There is no report of the Court having previously fused its jurisdiction to make injunctions against persons unknown (ordinarily encountered in online libel, theft of property,[1] trespass and possession cases) with the jurisdiction to make freezing orders. As the Judge recognised, there is good reason – both in principle and in practice – for permitting such a fusion as it acts as 'a springboard for the grant of ancillary relief in respect of third parties', and thus facilitates the identification of the perpetrators so that the fraud claim can 'get off the ground': *(2017) EWHC 3599 (Comm) at [4]* (HHJ Waksman QC).

This in fact happened in the present proceedings. Following the initial grant of the WFO, information was received in response to certain disclosure orders (see the following section) and thus by the time of the return date of the WFO there were a

further eight named natural and corporate defendants: (*2017) EWHC 3602 (Comm*). All of those defendants, together with the Person(s) Unknown, were subject to the continued WFO and are defendants in the underlying claim. Subsequently, further suspected perpetrators have been identified and, at time of writing, there are 27 named natural and corporate defendants in addition to the Person(s) Unknown.

Internationally enforceable disclosure orders against foreign 'no cause of action defendants'

Ancillary to the WFO against the fraudsters, the Commercial Court has confirmed a number of disclosure orders against 'no cause of action defendants' (NCADs). The NCADs are so named because they are named on the claim form but no substantive relief is sought against them in the claim.

Each NCAD has been joined to make them amenable to the Court's jurisdiction to make disclosure orders against them. Joinder in this way is required to avoid the uncertainty as to whether the principle in *Norwich Pharmacal* has extra-territorial effect (cf *AB Bank, Offshore Banking Unit (ABU) v Abu Dhabi Commercial Bank PJSC (2017) 1 WLR 810*). NCADs have instead been joined under the *Bankers Trust v Shapira ((1980)1 WLR 1274*) principle and/or *CPR 25.1(1)(g): (2017) EWHC 3599 (Comm) at [10]* (HHJ Waksman QC). The Court was satisfied that the *Bankers Trust* principle did have extraterritorial effect in a case such as this where there was good evidence of international criminal activity.

The NCADs are all corporate persons who are believed to have information which will identify the perpetrators and/or provide evidence of the fraud and/or allow the stolen assets to be traced. There are currently 49 NCADs: 35 international banks to or through which the proceeds of the fraud are believed to have been diverted; four corporate parties who are believed to have participated in the incorporation and operation of one of the corporate defendants, which in turn is suspected of being a shell company used to disguise the ultimate recipients of the fraudulent payments; and a number of others, including professional firms and a storage facility operator.

The information which has been obtained as a result of the disclosure orders has enabled the claimant to trace the flow of funds stolen from its accounts and has formed the basis for the joinder of each and every one of the named defendants to date, as well as providing an evidential basis for adding to the burgeoning number of NCADs themselves.

In almost every case, the NCADs are domiciled abroad and subject to banking secrecy and client confidentiality laws in their home jurisdictions. Specific safeguards have been built into the disclosure orders to enable them to be enforced in the NCADs' local jurisdictions while ensuring that foreign regulatory and other legal requirements are not disturbed. This has permitted the claimant to focus on analysing the disclosure received, rather than becoming embroiled in satellite litigation with NCADs who consider that the Claimant or the High Court are requiring them to act contrary to their local law obligations.

Alternative service

Finally, the Court has made ground-breaking orders for service of documents by alternative methods. These have included by serving: (a) two of the alleged fraudsters, for whom it was difficult to find reliable contact details, by private Facebook message; (b) several of the defendants at the addresses of certain other defendants or NCADs; and (c) by a combination of email notification and online data room document delivery.

Service by provision of a link to an online data room is particularly unusual but especially helpful. There have been a number of hearings in these proceedings and, both before and after each one, a substantial service regime has been required to serve the various applications, evidence and orders on each defendant and NCAD. This has been an international exercise which would generally require repeated service through conventional means (eg, couriering ever-larger volumes of files around the world); such measures involve exorbitant expense and delay the asset-tracing and recovery exercise. Data room link service has enabled service to be effected by sending an email notification or couriering a single page letter containing a link to a secure online data room to certain addresses, even as the material being effectively served in this way becomes ever more copious.

A further benefit of the data room is that it has been compartmentalised to give effect to certain confidentiality rings in these proceedings. The data room has made compliance with the confidentiality requirements easier while at the same time

reducing the scope for inadvertent breach of the same.

Procedure

Court users will be accustomed to making urgent applications and having more straightforward matters dealt with on the papers without a hearing. Both of these procedures have been put to frequent use in this matter and the Court has been prepared to entertain applications for more substantial matters (eg, the return dates for freezing orders) to be dealt with as paper applications where appropriate (eg, where a respondent has followed a pattern of failing to engage following service of an ex parte WFO).

Given the international scale of the fraud, foreign enforcement of the WFO and the disclosure offshores (DOs) has been a particular concern.

So far as the interim orders of the Court are concerned, the claimant was initially restricted by the standard undertaking that provides that the applicant will not seek to enforce the WFO abroad without the permission of the Court. On a number of occasions, the claimant marshalled evidence to support applications for permission pursuant to the *Dadourian* guidelines (*Dadourian Group International Inc v Simms (No 1) (2006) 1 WLR 2499)* to enforce the WFO in specified foreign jurisdictions. Those applications were granted. After a time, the claimant sought and obtained a general release from the standard undertaking – in effect, the claimant was granted permission to enforce the WFO in any jurisdiction worldwide on its undertaking not to seek to obtain superior relief or security in any other jurisdiction and to make a report to Court every two weeks.

In similar fashion to the WFO, the claimant sought permission to enforce in any jurisdiction worldwide the disclosure orders made against the NCADs. The claimant reserved its position as to whether such permission was required but applied for it out of an abundance of caution. Subject to the same undertakings offered by the claimant in seeking the equivalent permission for the WFO, this application in respect of the disclosure orders was granted.

As to the enforcement of any eventual judgment against the perpetrators, this was recently considered at the case management conference (CMC) in these proceedings. The Court approved a set of directions to trial which drew on parts of each of the Pilot Schemes for Shorter Trials and Flexible Trials (cf *CPR Practice Direction 51N*). The object of the directions is to bring about a full trial of the claim in such a way as to maximise the prospect of enforcing any judgement abroad, while at the same time not requiring the claimant to spend unnecessary time and money performing procedural steps which are unnecessary given the defendants' non-engagement in the proceedings.

As with interim relief, so too with procedural directions, the Commercial Court has shown its willingness to work with the claimant to ensure that UK fraud litigation can be conducted effectively and efficiently.

Note

1 *Bloomsbury Publishing Group and JK Rowling v News Group Newspapers Ltd* (2003) 1 WLR 1633.

Davina Given
RPC, London
davina.given@rpc.co.uk

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

Laura Evans
RPC, London
laura.evans@rpc.co.uk

Guarding professional secrets

Most jurisdictions have some form of protection for preserving the confidentiality of communications involving lawyers, whether known as (legal professional) privilege, professional secrecy or something else. How far that protection extends and how easily it may be broken varies enormously. In England, the protection, once gained, remains strong but recent cases have tended to restrict the extent of it, particularly by comparison to other common law jurisdictions.[1] The issue becomes most acute in a pre-litigation (or investigative) phase.

Which privilege rules apply or why should non-English lawyers care?

Where proceedings are brought in an English court, English law privilege principles will apply, regardless of the locations of the lawyers, clients or documents or the law of

the advice given. The English courts will not treat a document as privileged simply because it is considered so in another jurisdiction. Lawyers, whose home jurisdictions may have more generous privilege rules, need to be keenly aware of this when advising on multinational disputes to avoid inadvertently creating damaging documents that may then become available to the other side and/or regulators.

As a demonstration of the impact this can have, in *Re RBS Rights Issue Litigation*,[2] interviews of a bank's employees were undertaken separately by US lawyers and English lawyers (as agents for the US lawyers) in investigations in response to US Securities and Exchange Commission subpoenas and to allegations by a US employee. It was accepted that the interview records would be privileged under US principles. However, the English court held that English rules applied and that the interview records were not privileged under English rules – and so were not protected from disclosure to the claimant/plaintiff shareholders.

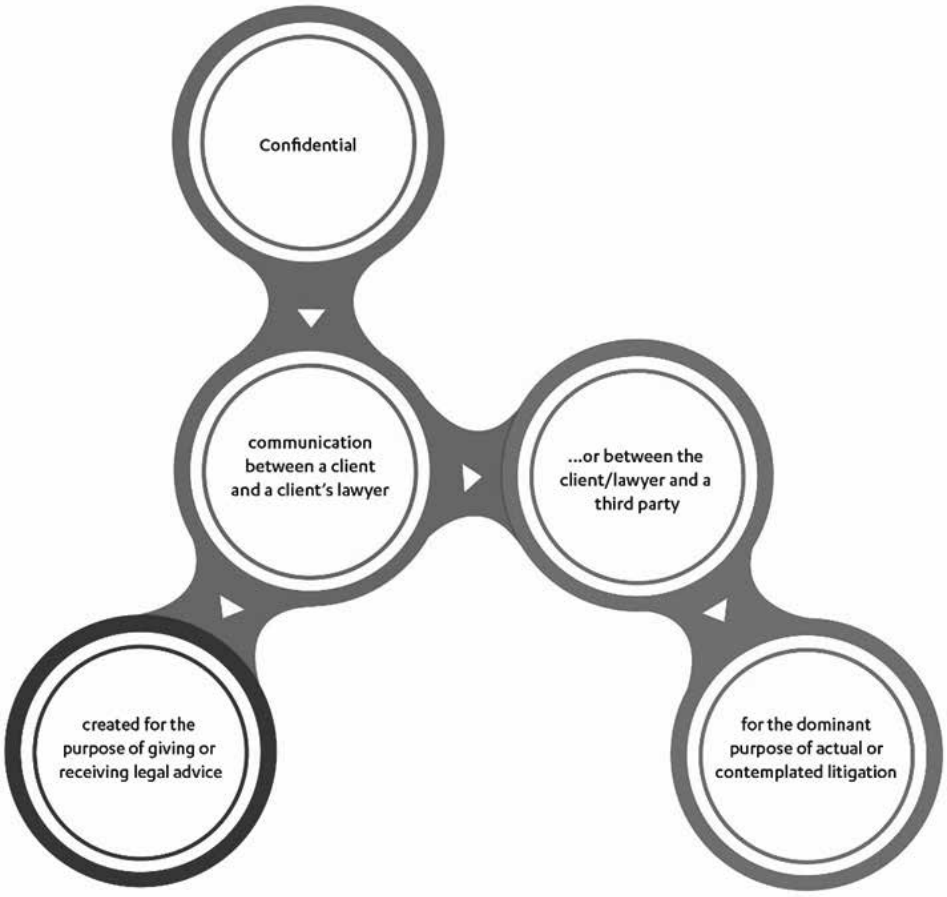
The one exception is if a request is made by a foreign court for documents or witness evidence in England. In those circumstances, privilege under either English or the foreign law (or both) may be claimed,[3] preventing attempts to arbitrage between different levels of protection in other jurisdictions.

A thumbnail sketch of English privilege rules

Under English rules, the most common type of privilege attaches to:

- confidential communications between a lawyer and his or her client for the purpose of giving or receiving legal advice ('legal advice privilege'); and
- confidential communications between a lawyer and his or her client or between a client or his or her lawyer and a third party, for the dominant purpose of litigation which are in prospect ('litigation privilege').

Each element of the test must be met for privilege to apply – which may not always lead to the result a foreign lawyer (or sometimes even an English lawyer) might expect.



Legal professional privilege under English law

Confidential

A communication must be confidential (ie, not in the public domain). A document will not usually be confidential if it has been shared with a third party, even if the document fulfilled the privilege criteria before being shared.

There is, however, a limited exception to this general principle, following a New Zealand case.[4] A privileged document can be shared with a third party (such as an auditor), without waiving privilege as against the rest of the world, if the privileged document is provided for a limited purpose and on a confidential basis. This is called a limited waiver of privilege.

Although a limited waiver may be implied in some circumstances (for example, when a privileged document is provided to a parent company's board), in order to be sure, the party sharing the privileged document should ideally ask the recipient to acknowledge that (i) it is receiving a privileged communication for a limited purpose; (ii) the communication is to be held in confidence and should not be disclosed; (iii) there is no waiver of privilege; and (iv) the document will be returned/destroyed on request. This is very different to the position under, for example, US law, where the concept of a limited waiver is not (consistently) recognised.

Communication

Documents created by a client must be communicated to the lawyer (or, in the case of litigation privilege, a third party) to attract privilege. Working papers or preparatory material prepared by a client but not communicated will not be privileged.

Documents created by the lawyer and not communicated may attract privilege as part of his or her working papers. However, this exception will not extend to documents that would not have been privileged even if they had been communicated, such as the lawyer's records of non-privileged communications.

Lawyer

'Lawyer' includes members of the legal profession, including in-house counsel and foreign lawyers (regardless of whether the foreign lawyer is advising on English law or another type of law), as well as those acting under their supervision (such as trainees, paralegals and secretaries). It is different, therefore, to many civil law jurisdictions such as France and Germany where in-house counsel typically do not attract privilege. It is also different to the position under US law, where 'lawyer' includes non-lawyers who are facilitating the rendering of legal advice.

The situation can become more complicated where in-house counsel has a dual legal and commercial role. Communications may then contain both legal advice and commercial strategy and need careful scrutiny as to whether they meet the test for privilege. From an English perspective, it is preferable for in-house lawyers to keep their legal advice separate from their business advice.

Client

Who constitutes a 'client' when the client is a corporate entity is perhaps the most hotly contested element and the English courts have taken a restrictive approach. At present, the client is considered to be only those employees who are charged with instructing the lawyers and who are authorised to seek and receive legal advice.[5] 'Client' will not, for example, include employees (or former employees) who provide information for the purpose of being given to a lawyer. As they are third parties, privilege can extend to them only if litigation is in prospect.

This narrow definition has been widely criticised and contrasts with the approach taken in other jurisdictions. For example, in Hong Kong the client is simply the company.[6] Similarly, the approach taken in the US is broader; an employee is considered to be part of the client group as long as certain conditions are met (the communication has been authorised by superiors in the company, the employee was aware the communication was related to legal advice, it concerns information that could not be obtained from more senior employees and it relates to the employee's duties). While one might hope that the English approach will change in the future, that awaits a decision of the Supreme Court.

Legal advice

By contrast with the narrow definition of 'client', legal advice is broadly construed and extends to what might prudently and sensibly

be done in the relevant legal context. Factual documents can sometimes be regarded as privileged if they are part of the 'continuum' of communications between a lawyer and client: in one recent case, minutes, taken by lawyers of the meetings of a steering committee managing numerous regulatory investigations, and tables prepared by lawyers showing the status of the investigations were held to be privileged as an integral part of the legal advice.[7]

Litigation

The narrow definition of 'client' puts a premium on finding litigation in prospect, so as to take advantage of the wider remit of litigation privilege. Unfortunately, recent cases have tended to restrict what amounts to litigation. It has long been accepted that the litigation in question must be adversarial not inquisitorial, ruling out public inquiries and ordinary internal investigations.[8] In the last year, the court has also ruled that litigation is not in contemplation during a regulatory or criminal investigation until the client has sufficient knowledge to know that a prosecution is likely.[9] This decision too has been much criticised and it is hoped that it will be reversed on appeal (to be heard in July 2018).

What's the problem?

The problems created by the narrow definition of 'client', combined with the narrowing definition of 'litigation', are most acute for institutional clients at the very early stages of potential civil litigation and during regulatory and criminal investigations. At that point, they can only find out the relevant facts by talking to their employees. Since their employees are unlikely to be considered part of the 'client', legal advice privilege does not apply. However, if the facts are not yet known, litigation/prosecution may not be considered sufficiently likely to engage litigation privilege. Discussions with employees (and any records of those discussions) are, therefore, unlikely to be privileged, just when an institution most needs to know the facts and is least able to risk the creation of damaging documents that might fall into the hands of a litigant or regulator. This is very different to some other jurisdictions – for example, in the US notes taken by a lawyer of an employee's interview during the course of an internal investigation are considered to be privileged as long as certain conditions have been fulfilled (an adequate '*Upjohn*' warning and consent of the interviewee obtained). Lawyers advising in the international context need to be wary of inadvertently damaging their clients' positions by falling foul of other jurisdictions' privilege rules.

Notes

1 Privilege/professional secrecy rules in civil law jurisdictions tend to be narrower than common law jurisdictions in any event.
2 *(2016) EWHC 3161 (Ch).*
3 Section 3, *Evidence (Proceedings in Other Jurisdictions) Act 1975*; Article 14 *Council Regulation (EC) No 1206/2001.*
4 *B v Auckland District Law Society (2003) UKPC 38.* The principle of a limited waiver of privilege was most recently affirmed in England in *Belhaj v Director of Public Prosecutions and others [2018] EWHC 513 (Admin).*
5 *Three Rivers District Council and others v Governor & Co of the Bank of England (2003) EWCA Civ 474.*
6 *CITIC Pacific Limited v Secretary for Justice & Commissioner of Police (2015) CACV 7/2012 (CA).*
7 *Property Alliance Group Limited v The Royal Bank of Scotland plc (2015) EWHC 3187 (Ch).*
8 *Re L (A Minor)* (1997) AC 16. Query whether the specific facts of that case (relating to the welfare of a child) influenced the decision and so subsequent analysis.
9 *Serious Fraud Office v Eurasian Natural Resources Corporation Ltd (2017) EWHC 1017 (QB). R v Jukes (2018) EWCA Crim 176. Bilta (UK) v Royal Bank of Scotland (2017) EWHC 3535* found on the facts that action by Her Majesty's Revenue & Customs was in contemplation before action commenced.

Przemysław Wierzbicki
KKLW Kurzyński Łyszyk Wierzbicki, Warsaw
pwierzbicki@kklw.pl

Poland is in the process of terminating its BITs with EU Member States

It looks as though Poland will terminate Bilateral Investment Treaties (BITs) concluded with EU Member States and the last judgment of the European Court of Justice in the case *Slovak Republic v Achmea* will speed up that process. However, in the majority of cases, investors will still, for a few years, be able to use the dispute settlement mechanism provided for in BITs.

Current state of affairs

Poland is currently a party to 60 BITs. These treaties constituted an important element at the initial stage of development of the Polish economy, when it was necessary to persuade foreign investors to invest in Poland. In recent years, Poland was more and more often effectively sued by foreign investors (such as, among others, the notorious case of *Eureko v Poland* for the uncompleted privatisation of the largest insurance company in Poland – PZU SA, or *PL Holdings v Poland* against the background of the expropriation of investment in FM Bank, or *Baltona v Poland*). Therefore, it is no surprise that some arguments appeared in the press and media referring to BITs as some sort of relics from the early stage of the Polish transformation and evident manifestation of excessive privileges of foreign corporations.

Suffice to say, in 2016, Poland was a party to arbitration proceedings under BITs for the total amount of PLN 4.1bn (almost €1bn), with a continuously increasing number and value of lawsuits). Taking into consideration serious legislative changes in many sectors (such as wind energy, retail sales, banking regulations, intended changes of the media market), which at the same time aggravated the situation of investors, one should expect further grounds for disputes.

What changes can be expected?

At present, also in connection with the doubts raised by the European Commission, the Polish Government is getting ready to terminate treaties with the EU countries (probably 23 treaties in total), bearing in mind that the treaty with Italy has already been terminated and, on 15 September 2017, the Polish Parliament adopted a law to terminate the BIT with Portugal (this treaty will be effectively terminated in August 2019).

The Polish Government attempts to terminate BITs, first of all, by mutual agreement with respective EU countries (unofficial sources disclose that the countries which consented to such a solution include Czech Republic, Denmark, Estonia, Latvia and Romania). In case of a failure to reach agreement, the Polish Government is determined to terminate BITs by way of unilateral statements. Inevitably, at the very least, this will be a time-consuming process due to the necessity of adopting relevant laws allowing the President to make a statement on the termination of any given BIT.

Due to the above, in February and March 2018, draft laws granting consent to the termination of 16 BIT treaties with EU countries (including treaties with Belgium, Cyprus, France, Germany, Luxembourg, the Netherlands and the UK) were submitted to the Polish Parliament. Cyprus (where around 5,000 companies related to Poland are registered) is a particularly interesting case, insofar that it did not generally reject a possibility to terminate the BIT but the details of the agreement were not agreed upon.

For now, we do not know what the plans of the Polish Government concerning BITs with non-EU countries are – in particular, no information indicating that the Polish Government intends to terminate such treaty with the US is available.

Possible consequences for investors

In the short term, the situation of investors will not change – in the majority of cases, BITs concluded by Poland currently usually provide for a one-year notice period. Moreover, even the effective termination of the treaty will not change the legal status of

investments made prior to the effective date of termination. The provisions of a relevant BIT will continue to apply to investments made before that date and for a specified period of time thereafter (usually, a period of ten or 15 years from the effective termination date). Nevertheless, investments made after the effective termination of a given BIT will no longer be protected and, in particular, they will not be covered by the arbitration mechanism contemplated in BITs.

Of course, investors from EU countries will be able to seek protection for their investments on the grounds of the Polish domestic legal order or on the grounds of EU law.

Introduction of the new civil, administrative and commercial codes of procedure as a crucial element of the judicial reform in Ukraine

Maksymov Maksym
Vasil Kisil & Partners, Kiev
maksymov@vkp.ua

Andriy Stelmashchuk
Vasil Kisil & Partners, Kiev
stelmashchuk@vkp.ua

The reform of the legal system has been one of the top priorities for the Government of Ukraine since early 2014. Apart from significant changes in the area of law enforcement and criminal justice, the judicial system of Ukraine is currently being strongly redesigned. The most notable innovations include a newly-created Supreme Court, as well as the (yet to be formed) High Anti-Corruption Court and High Intellectual Property Court; a modified system of courts; an introduction of a private enforcement institute in addition to state enforcement of judgments; an establishment of 'attorneys' monopoly' on representation in courts; and a constitutional complaint mechanism. On 15 December 2017, the new versions of the codes of civil, administrative and commercial procedure came into force, bringing considerable changes to the process of state adjudication of disputes. Most of the crucial components of a modified court process in Ukraine are discussed in this article.

The Unified Judicial Information and Telecommunication System

Until recently, all procedural documents, including statements, motions, appeals and any evidence, could be submitted to court on paper only. As a result, communication between the parties to the case and with the court itself was cumbersome, slow and ineffective. In response, the Government of Ukraine plans to launch the Unified Judicial Information and Telecommunication System, which should transfer all paperwork-based communication online. Every attorney will be required to obtain a unique email address to log in to the system.

The system will perform, inter alia, the following functions:

- registration of procedural documents;
- determination of a judge to consider the dispute;
- technical recording of court hearings;
- participation in a court hearing via video conference; and
- communication between the parties and the court, between different courts and between the parties themselves.

The Ukrainian authorities expect to implement the system in 2019.

Reimbursement of litigation costs

The Ukrainian legislation which established a maximum amount of compensation for legal assistance costs (far below the market) is now cancelled. This means, potentially,

that a losing party will have to reimburse its full cost of litigation to a winning party. The amount to be reimbursed, however, should be commensurate with the following factors:

- complexity of the case and the work completed by the attorney;
- time spent by the attorney working on the case;
- scope of the services of the attorney; and
- the value of claim and/or importance of the case to the party, including the impact of the court judgment on the reputation of the party or the public interest of the case.

With immediate effect, both claimants and defendants are obliged to submit a preliminary estimate of court expenses as an appendix to the first procedural document filed to the court (ie, statement of claim, objections to statement of claim, explanations). The amount of the expenses to be paid by a party is established by the court, based on evidence provided by the parties (agreements, invoices, etc). Such evidence should be presented to the court before the end of court debates or within five days after rendering of judgment, if a party made a corresponding statement during court debates.

Also, in commercial and civil cases, the court is now empowered to require the parties to allocate funds in the amount of the preliminary estimate of court expenses to a deposit account of such court.

Simplified proceedings

A new fast-track procedure named 'simplified proceedings' is introduced for civil, commercial and administrative procedures. Simplified procedure applies to cases with:

- the value of claim not exceeding 100 living wages (approximately $7,250);
- insignificant complexity, determined by a court as minor cases, excluding cases that may only be subject to general proceedings and cases with the value of claim exceeding 500 living wages (approximately $36,250).

Also, there are some types of disputes that cannot be adjudicated within the simplified proceedings, such as family and inheritance cases, bankruptcy proceedings, privatisation and corporate cases.

Apart from reduced timeframes, other specifics of such proceedings are the absence of a preparatory hearing and consideration of the case by a judge on the basis of the documents provided by the parties without notification of the parties.

Quasi-mediation procedure

The new versions of the codes of civil, administrative and commercial procedure also include a chapter that provides for a new voluntary procedure named 'Settlement of dispute with judge's participation', that present several similarities with mediation. Such settlement procedure is carried out by a judge in the form of joint and/or separate conferences. Information received by any of the parties as well as the judge during such a settlement of the dispute, remains confidential, while minutes of meetings are not taken nor recorded by technical means.

Although a judge is precluded from providing the parties with legal advice and recommendations, in evaluating the evidence, he/she may point to the relevant case-law in similar disputes and suggest possible settlement options.

As an incentive for the use of such a settlement procedure, 50 per cent of the court fee may be returned if a dispute is settled successfully. The parties are given a 30-day period to achieve settlement, while the procedure shall be terminated upon one of the party's initiative or due to delaying settlement of the dispute.

Abuse of procedural rights

A new legislation also includes provisions on the abuse of procedural rights by the participants to the court process. Depending on the particular circumstances of the case, the court may determine that the following actions, among others, may constitute an abuse of procedural rights:

- appeal of a court decision that is not subject to appeal, is not valid or expired; submission of a motion to resolve a matter already decided by the court in the absence of other grounds or new circumstances; submission of a knowingly unjustified request for a judge's withdrawal or commission of other similar actions aimed at unjustifiably delaying or obstructing the consideration of a case or enforcement of a court decision;
- submission of several claims to the same defendant (defendants) on the same subject and on the same grounds or submissions of similar claims with a similar subject and for similar reasons, or committing other acts aimed at manipulating the automated distribution of cases between judges;

- submission of a knowingly unreasonable claim, a claim in the absence of the subject matter of the dispute or in a dispute that is obviously artificial; and
- unreasonable or artificial association of claims in order to change the jurisdiction of the case, or knowingly unreasonable involvement of the person as a defendant (co-respondent) for the same purpose.

In case the above or similar actions are carried out by the parties or their representatives, the court may apply the measures of procedural coercion, which include a warning, removal from the courtroom, temporary seizure of evidence for court's analysis or fine.

Other significant changes that transform the dispute resolution process in Ukraine are the extension of the list of evidence, increase of the procedural deadlines and the court filing fees, new requirements to the content of the procedural documents, changes to jurisdiction (regarding enforcement of the international and Ukrainian commercial institutions) and amendments to interim measures procedure.

Today, just four months after the new codes of civil, administrative and commercial procedure came into force, both judges and lawyers are still adjusting to the changes. Nevertheless, the majority of the Ukrainian legal community agrees that the new codes constitute an essential part of the judicial reform in Ukraine and, therefore, supports the amendments aimed at improving the court process, which required significant reformation.

Digitalisation of courts in Finland and its cross-border effects

Kristiina Liljedahl
Borenius Attorneys, Helsinki
kristiina.liljedahl@borenius.com

Saara Lapiolahti
Borenius Attorneys, Helsinki
saara.lapiolahti@borenius.com

Finland is known for its technology-oriented mind set. However, it is fair to say that the courts and the judicial system have not always been in the forefront of technological and digital development. Immediacy is a striving principle in Finnish court proceedings and, therefore, the physical presence of the parties in the courtroom is a main rule. Exceptions have been scarce and allowed only on certain conditions set out in the legislation. Under the current legislation, physical presence cannot be replaced by presence via electronic means.

Now, with the recent proposed amendments to the Finnish Code of Judicial Procedure concerning civil proceedings and corresponding legislation concerning criminal proceedings,[1] the Finnish judicial system is finally catching up. The possibility of using audio-visual technology in Finnish courts has been available for years and submitting writs and evidence in electronic form is a routine task for attorneys practising in Finland. The judicial system is now aiming at a fully electronic trial, as a result of which amendments facilitating these developments have been made in recent years (eg, in relation to digital correspondence between the parties and the courts, digital filing and archiving). However, until now the legislation concerning judicial proceedings has not allowed as efficient use of technology as the resources would allow. Now, digitalisation in Finnish courts takes another step forward.

Currently participation in court proceedings via electronic means in civil proceedings is limited to giving testimonies by the parties, witnesses and experts but only under exceptional circumstances relating mainly to health issues and other events preventing physical presence in the court proceedings. Giving testimonies via video-conferencing is possible only if the court deems it appropriate. The proposed amendments will significantly broaden the possibilities to use audio-visual technology in Finnish court proceedings. The amendments shall apply to both civil and criminal proceedings; however, the focus is on civil

proceedings. The proposed amendments will enter into force in the beginning of 2019.

According to the proposal, a party to civil proceedings will be allowed to participate in hearings through video-conferencing throughout the proceedings and not only for giving testimony. The availability of video-conferencing will also extend to the parties' legal representation. This means that, with the client's consent, an attorney to a party will be able to litigate for his or her client without the need to travel to the venue. The proposal does not suggest any restrictions on the legal representative's non-physical presence and the parties are also free to join the hearings through video-conferencing. In contrast to current legislation, there is no need to meet any preconditions set out in the Finnish Code of Judicial Procedure. However, video-conferencing requires the agreement of the parties to the proceedings and of the court. This leaves some room for the court's deliberation. For cross-border cases and participation of several attorneys from different countries, this will most certainly ease the necessity to travel or at least limit such need to main hearings. Preparatory meetings and preliminary hearings could be attended electronically and potentially even from different countries, as the case may be.

Interestingly, the proposal does not concern hearing of witnesses and experts. Therefore, a witness or an expert witness will still have to meet the prerequisites set forth in the Finnish Code of Judicial Procedure in order to be able to give a testimony via video-conferencing. Despite the current provisions of the Finnish Code of Judicial Procedure allowing hearing of witnesses and experts via video-conferencing on certain conditions, this opportunity is not widely used in civil proceedings in particular. Physical presence of the witness or expert is still considered a significant factor in assessing the witness's reliability. Allowing hearing of witnesses via electronic means without specific conditions would have been a significant addition to the digitalisation of Finnish courts, especially in respect of cross-border civil litigation, which often includes hearing of several expert witnesses who often are foreign. The need of physical presence of such experts will often add to the cost and duration of the proceedings.

The proposal does mean a clear step away from the main rule of physical presence in court proceedings and it will allow a more flexible approach to the parties and their legal representation's participation in the proceedings. Through video-conferencing, parties will be able to save both time and money if they do not have to travel to the proceedings venue.

The proposal will also bring opportunities for cross-border litigation and to foreign parties litigating in Finland by allowing the parties' representatives to take part in the proceedings via video-conferencing. It is probable that encouraging the use of video-conferencing in relation to the parties and their legal representation, courts could also have a more positive attitude towards hearing witnesses and expert witnesses particularly via videoconferencing. How these amendments will be taken into practice depends on the attorneys' and the judges' ability and willingness actually to use those means the legislation enables.

Note

1 Government Proposal 200/2017.

Electronic auctions: Greece enters the digital age

Yiannis G Bazinas
Bazinas, Athens
ybazinas@bazinas.com

Enforcement in times of crisis

It is generally accepted that any efficient credit system requires a predictable, transparent and affordable enforcement procedure for creditor claims, secured and unsecured, outside of insolvency.[1] In the case of Greece, the reform of the legal framework for enforcement has been considered an essential step in tackling the problem of Non-Performing Loans (NPLs), which presents one of the biggest challenges for the Greek economy.[2] In fact, since the beginning of the debt crisis in 2009, the Greek banking system has suffered heavily under the ever growing burden of NPLs. Greece currently features the highest NPL ratio in Europe, with NPLs corresponding to roughly 45 per cent of the country's GDP and amounting to €100bn.[3] in total value. Nevertheless, even though NPL resolution has been identified as a number one priority, there has been only minimal progress so far; it is characteristic that between June 2016 and June 2017, the NPL rate decreased by a mere 0.6 per cent (compared to 24.6 per cent for Italy and 11 per cent for Cyprus and Portugal) recording the lowest rate of decrease in the EU.[4]

Under these conditions, the adequacy of the legal framework for enforcement has been put to a strenuous test. In general, any creditor, whether secured or unsecured, can initiate enforcement proceedings by seizing the debtor's (encumbered or unencumbered) assets and being satisfied by the liquidation proceeds resulting from the public auction of those assets, which is conducted by the competent public official (notary public).[5] Nevertheless, foreclosure proceedings have long suffered from a number of legal and practical deficiencies. For instance, the law required a series of notifications, many of which had to be published in the daily press and thus ran the danger of going unnoticed by interested parties. Various third parties (most notably secured creditors) also needed to be individually notified, which made the procedure overly cumbersome and expensive. In addition to that, the system of sealed first-price bids and the statutory stipulation that, physical auctions could only be held once a week (on Wednesdays) failed to maximise returns. More importantly however, the need for physical presence encouraged abusive practices and more recently auctions were routinely called off due to the presence of activists, who were opposed to satisfaction of the banks' claims at the expense of ordinary homeowners.

The soundness of the legal framework for enforcement has also been negatively affected by a number of initiatives that have sought to impose statutory moratoriums on enforcement, often presented as signs of political goodwill. For instance, between July 2010 and the end of 2013, debtors were afforded horizontal protection against foreclosures by banks for claims not exceeding €200k, which effectively blurred the line between unable and unwilling defaulters. In addition to that, between January and December 2014, foreclosures against primary residences of debtors were prohibited, albeit not horizontally but upon satisfaction of certain requirements. The above measures (and their repeated time extension), while having some socio-economic justification, not only placed significant pressure on the Greek banking system, by essentially precluding banks from obtaining any meaningful return on their distressed assets,[6] but also contributed to moral hazard and encouraged debtors to default on their obligations, a phenomenon commonly described as strategic default. These features can explain the relatively low rate of auctions during recent years.[7]

The new framework for electronic auctions

As a response to the above problems, Greece recently decided to amend the legal and regulatory framework for enforcement proceedings, through the introduction of electronic auctions (e-auctions).[8] E-auctions are envisaged as a means to expedite the resolution of NPLs, by providing a speedy and cost-efficient procedure for banks to realise their collateral (most importantly real estate). While first introduced as an elective option of

the enforcing creditor, as of 21 February 2018 e-auctions are the only method by which all asset classes (meaning tangible assets) will be liquidated, including movables, immovables, ships and aircraft.

The new procedure is now conducted exclusively on a newly introduced digital platform, called the 'Electronic Auction System' (EAS). The procedure takes place under the auspices of a certified notary public, who is designated by the enforcing creditor and has the leading role in running and concluding the e-auction. As regards the pre-auction stage, the public notary is responsible for publishing all relevant information, including, among others, the announcement of the auction, the description of the assets to be auctioned, the date and exact time on which the auction will take place as well as the starting price on **www.eauction.gr**, the web-portal of the EAS. As regards access to the electronic system, general information about the auction and the relevant assets (including a brief description and the starting price) is accessible to everyone. However, in order to submit a bid, one must also complete a certification process and register personal data, which gives enhanced access to the system. The debtor can observe the course of the electronic procedure and is afforded limited access using a special passcode he/she receives.

The most important innovation, however, is the new system for the submission of bids. More specifically, bidders can, freely and constantly, without any limitation, submit consecutive open tenders during the bidding process, which are registered in the system, until the expiration of the time limit of the auction. Thus, the system of sealed first-price closed bids, which very often resulted in no winning bid, is replaced by consecutive open bids. The highest bidder is announced electronically to the participants by the appointed notary, who also drafts an electronic report concerning the award of the assets to the successful bidder. This report also serves as proof of the outcome of the procedure and as the legal title for the transfer of assets to the winning bidder.

Advantages and possible problems of the new procedure

The introduction of e-auctions brings the Greek legal framework into the digital age and is characterised by a number of significant advantages. In general, the new procedure is faster and less costly, as it requires fewer notifications and all relevant information is now subject to greater online publicity and thus more easily accessible to the public. This is expected to lead to an increased interest from possible bidders and contribute to value maximisation. In addition, as e-auctions require no physical presence of any of the parties involved, this allows bidders to retain their anonymity and avoid confrontations. Furthermore, the system of consecutive open bids allows no abusive participation by fictitious bidders[9] and, consequently, creates a more competitive environment, thereby favouring the debtor's interests. Finally, e-auctions will be susceptible to significantly less nullities, as the now simpler, fewer and automated steps of the procedure leave little margin for procedural violations, which were common in the past and often resulted in the judicial nullification and re-run of the process. In general, the new system is envisaged to result in a more secured and solid enforcement procedure, the results of which will be far less possible to be reversed after the fact.[10]

The new system, due to the nature of the procedure as strictly electronic, may give rise to some concerns, as regards the technical adequacy of the EAS and the impact of potential system errors to the successful conclusion of the process. Nevertheless, in case of a system shut down during the course of the procedure, the law expressly allows for a rescheduling of the auction following a petition by the enforcing creditor. Moreover, issues may arise as regards the consistency of the e-auction process with the remaining provisions of the Code of Civil Procedure, most notably the provisions for the jurisdiction of the courts as well as the deadlines for filing the application for annulment by the debtor. For instance, jurisdiction in enforcement disputes is generally determined by reference to the place of enforcement. However, the fact that the electronic part of the procedure retains no apparent connection with any single place, combined with the enforcing creditor's option to appoint a notary public from literally everywhere on the Greek territory to conduct the e-auction, complicates the situation, as regards the identification of the competent court. Last but not least, there is the issue of the lack of any similar electronic means of asset liquidation in collective proceedings, most noticeably the Greek Insolvency Code. This 'regulatory anomaly' may lead to competition

between collective and individual procedures and to possible instances of 'procedure shopping' by creditors.[11]

A look into the future

Since the reform is still in its infancy, the full impact of the new procedure has yet to be determined. The first eight e-auctions took place on 29 November 2017, when the new procedure was still optional, but there were limited registrations until the end of 2017. Since the introduction of mandatory e-auctions, however, the pace has picked up and almost 900 auctions were scheduled to be conducted just in March 2018 (primarily involving real estate). Furthermore, over 2,500 auctions, which have been registered on **www.eauction.gr**, are expected to take place until October 2018. These numbers still fall short of the targets agreed between Greece and its international lenders, who are aiming at 100,000 to 150,000 auctions until the end of 2021, an objective that is considered maximalist by many. However, the first signs allow for modestly optimistic predictions, as the increased number of scheduled e-auctions in the first months of 2018 is higher than originally projected,[12] a view shared by the representatives of the four Greek systemic banks, who consider e-auctions as a useful weapon against strategic defaulters.

More importantly, however, the new electronic procedure opens up new and exciting prospects for the further digitalisation of the judicial system in Greece. For instance, the potential use of modern innovations, such as Distributed Ledger Technology (DLT), can enable the conclusion of transactions on the e-auction platform in a faster, more transparent and incorruptible way. Furthermore, in the case of immoveable property, the full development and digitalisation of a uniform land registry around DLT may enable the automatic transfer of title once the auction procedure is finalised, through the application of smart contracts, thereby eliminating the time lapse between conclusion of the auction and settlement of the transaction on public records. While it is still early to make predictions as regards the efficiency of the system and the potential room for further improvements, it would be fair to say that the Greek legal order has finally entered the digital age.

Notes

1 This principle is reflected in the *World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes* and especially principles A6, A7 and A8.

2 This has also been advocated by the IMF, *A Strategy for Resolving Europe's Problem Loans* (International Monetary Fund Staff Discussion Note, September 2015, SDN/15/19, p 28). For a review of some recent reform initiatives in the field of insolvency law in Greece see Sakkas YG, Bazinas YG, *Back to square one, International Financial Law Review (IFLR)* (December 2016/January 2017, p 61).

3 Data from the Bank of Greece.

4 European Commission Progress Report on the reduction of non-performing loans (NPLs), January 2018, available online at https://ec.europa.eu/info/publications/180118-non-performing-loans-progress-report_en.

5 Art 904-1056 Code of Civil Procedure.

6 In reality, the costs of such measures have been borne by the taxpayers that have been forced to 'bail out' the banking system in two recapitalisation cycles (in 2010 and 2013), only to see their holdings completely diminished as a result of the third wave of recapitalisations in 2015. See Sakkas Y and Bazinas Y, *Creditor Participation in the Recapitalisation of the Greek Banking System (in two parts)* (The Banking Law Journal, March–April 2016).

7 According to media source, auctions of real estate have dropped from 52,000 per year in 2009 to merely 4,800 per year in 2016, while the total value of foreclosed real estate has decreased from €4.2bn to €1bn. This figure also includes auctions enforced by the Tax Authority, which was not subject to the statutory moratorium, suggesting that auctions by banks are significantly fewer.

8 E-auctions were introduced by virtue of Law 4512/2018 (State Gazette A, 5/17.1.2018). In fact, the Supplemental Memorandum of Understanding between Greece and the European Commission provides that the authorities will implement a three-year strategic plan for the improvement of the functioning of the judicial system, including the implementation of electronic auctions, full text available at https://ec.europa.eu/info/files/supplemental-memorandum-understanding-greece-5-july-2017_en.

9 In fact, the system of e-auctions provides important safeguards against delays by offering the enforcing creditor the option to seek and appoint a notary, situated outside the region, where the attachment of the assets to be auctioned took place, if the one who has local jurisdiction is prevented from fulfilling his duties. This choice was absent in the former regulation and this legal vacuum often gave the opportunity for collusions between notaries and debtors against the enforcer creditor's interests.

10 This is combined with the new shortened timelines for the filing of the annulment application of Article 933 of the Greek Civil Procedure Code, which constitutes the debtor's main defensive weapon against enforcement proceedings.

11 Debtors (ie, traders) cannot engage in procedure shopping, as they are obliged by law to file an application for insolvency within 30 days as of the date of the cessation of payments. Art 5 s2 Greek Insolvency Code, Law 3588/2007, State Gazette (SG) A 153/10.7.2007, a full English translation of the Greek Insolvency Code is available at www.bazinas.com.

12 The European Central Bank has advocated for the completion of 600 to 700 e-auctions during the first months of 2018, a number which was estimated to be staggered over the year to reach 10,000 e-auctions in the last three months of 2018. This averages to about 1,400 e-auctions per month and a sum of 16,800 e-auctions for 2018 alone.

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

The Joint Divisions of the Italian Supreme Court confirm the compatibility of punitive damages with public order in Italy: a focus on judgment number 16601 of 5 July 2017

It has been confirmed – the Italian Supreme Court, acting in the Joint Divisions format, has followed the suggestion of the First Civil Division (see ruling No 9978 of 16 May 2016)[1] to allow recognition in Italy of foreign judgments that include 'punitive damages'.[2] The Supreme Court ruling reflects and confirms a new approach being taken in Italy, both in the Courts and by the legislator, aimed at recognising that compensation can include elements that have essentially punitive purpose.

The judgment of the Joint Divisions of the Supreme Court basically retraces the arguments made in ruling No 9987 of 16 May 2016 and confirms its conclusions.[3]

The Joint Divisions trace the new approach back to a 2015 case on the liability of directors. In judgment No 9100/2015 the same Joint Divisions recognised that the punitive function of damages is no longer 'incompatible with the principles of our system'. This new approach was in recognition of a number of legislative changes 'aimed at recognising a (*sensu latu*) sanctioning trait in damages' but, in the 2015 ruling, the Supreme Court came to the conclusion that the punitive nature of compensation would have to be clearly set out in a statutory provision taking constitutional and EU law into consideration.[4]

The Joint Divisions link the earlier approach of not allowing punitive damages to the need to stop extending classes of damage to cases not covered by statute. However, now the Joint Divisions consider that this need can still be met without, at the same time, denying the possibility of enforcement of foreign judgments awarding punitive damages. They conclude that the past approach could not be used 'to deny the developments in the field of civil responsibility in the last decade'.

It is clear that the primary function of civil liability is compensation and repair of damage. In certain identified cases, it can also serve, besides a preventive and deterrent function, a sanctioning and punishing function (so-called 'multi-functional nature of civil liability').

The ruling of the Joint Divisions lists a series of laws which show that the legislator already recognises, in practice and in reality, the punitive nature of damages.[5] In addition the ruling makes reference to the Supreme Court's own judgment in No 7613/2015 which had emphasised the commonalities between *astreintes* and punitive damages. Furthermore, the Joint Divisions recognise the sanctioning nature of certain further provisions such as Article 28 of Legislative Decree 81 of 2015 (in the context of labour contracts), which provides for lump-sum compensation to be paid when a fixed-term contract is converted into a contract of indefinite duration on account of the unlawful insertion of a fixed-term clause.[6]

Finally, the Joint Divisions make reference to judgment No 152/2016 of the Italian Constitutional Court which ruled that Article 96 of the Italian Code of Civil Procedure was not merely a compensation mechanism but also had a punitive function.[7]

After confirming the need for 'legislative intervention' to 'provide for when damages can be increased (for punitive purposes)', the judgment examines the evolution of jurisprudence on the concept of international public order, commencing with the examination already contained in the ruling of the referring Court.[8]

The Joint Divisions underline that there has been a move from a concept of purely-domestic public order to a concept of the public order of the European Union.[9] However, this new concept cannot be used to allow the introduction of foreign provisions or judgments capable of 'undermining the inner consistency of the legal system'. Hence, 'any foreign judgment being applied in an area not regulated by domestic law, albeit not banned under EU law, should be assessed in the light of the Constitution and the laws that (…) embody our constitutional system'.

Consequently, any verification for the purposes of recognition of foreign judgments should be limited to verifying whether there is conflict between a given foreign institution and the set of rules and values relevant to the assessment at issue. According to the Supreme Court, some obvious conclusions follow from all this.

The idea of punitive damages does not seem 'per se incompatible with the Italian legal system' and, therefore, with Italian public policy. However, its admissibility should be assessed on a case by case basis, by carefully looking at the impact of the recognition, so as to ensure its consistency with public policy.

To that end, the Court should first assess compliance with the principle of *typicality*, by verifying that a punishment arises from a recognisable source of law, at least in the jurisdiction of the original judgment. Furthermore, that law must clearly set out the boundaries of the fact situations that can give rise to damages and any limits thereto, based on the principle of *predictability*.

Finally, as part of the process of recognition of a foreign judgment, the Italian courts should verify the proportionality between ordinary damages and punitive damages, as well as between punitive damages and the wrongful conduct, in order to be able to clearly identify the sanctioning and punishing function (in compliance with the principle of *proportionality*).[10]

The clear evolution of the approach taken in Italy, as set out in the judgment of the Supreme Court examined here, is evidence of the fact that Italian courts are increasingly paying attention to legal developments in other countries and, while still reaffirming their role as guardians of the integrity of the Italian legal system and public order, are keen to ensure that there should be no formal obstacles to the effectiveness of the protection afforded in other jurisdictions.

Clearly, improving the circulation of foreign judgments will foster trade, thereby benefiting the overall Italian economy.

This article is for information purposes only and is not intended as a professional opinion.

Notes

1 See '*Compatibility of punitive damages with Italian public order? Maybe. Last word to the Joint Divisions of the Supreme Court*' (International Litigation Newsletter, September 2016, p53 *et seq* (English version)) and *http://www.lexology.com/library/detail.aspx?g=815dfc39-2982-46a7-945b-2e7b826c93cb*.

2 A decision of the Joint Divisions of the Italian Supreme Court - – which has inter alia the function to provide a uniform interpretation of the law – represents a forceful precedent, which lower courts and subsequent judgments are likely to abide by.

3 For completeness, it is worth noting that the Joint Divisions start with analysing the opposite view, enshrined in judgment No 1183 of 2007 of the Supreme Court, according to which the only object of compensation is to remove the consequences of damage caused, with no afflictive and punitive concept of damage categories, typically alien to the Italian legal system. The 2007 judgment was at first 'immediately disputed by the most well-established legal literature' – as recalled by the Court itself – but subsequently in fact confirmed by judgment No 1781/2012. That 2012 ruling, in denying the admissibility or enforcement of punitive damages in Italy, referred to the prohibition to make financial transfers from one person to another, in the absence of legal reason, as a principle inherent in the Italian legal system.

4 The 2015 ruling found that certain inferences of the principle of legality did not allow recognition. These principles are enshrined in Article 25, paragraph 2, of the Italian Constitution ('No one may be punished except on the basis of a law already in force before the offence was committed') and in Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed'). To clarify the grounds for such view, the Joint Divisions also mentioned Article 23 of the Italian Constitution, according to which no services of a personal or patrimonial nature shall be imposed except on the basis of law.

5 The judgment under examination incorporates the text of Supreme Court's judgment No 7613/2015, which, first and foremost, lists a number of provisions whereby the decision finding breach fixes the amount payable for each subsequent infringement or breach, or for each day of delay in implementing its operative part. Here below is the list:

- concerning patents and trademarks, Article 86 of Royal Decree No 1939 of 29 June 1127 and Article 66 of Royal Decree No 929 of 21 June 1942, repealed by Legislative Decree No 30 of 10 February 2005, which introduced for that purpose the measures under Article 124, paragraph 2, and Article 131, paragraph 2;
- Article 140, paragraph 7 of Legislative Decree No 206 of 6 September 2005 ('Consumer Code'), where consideration is given to the 'seriousness of the occurrence';

- someone is of the opinion that this list should also include Article 709 *ter*, paragraphs 2 and 3, of the Italian Code of Civil Procedure, introduced by Law No 54 of 8 February 2006 on non-performance of child custody obligations;
- Article 614 *bis* of the Italian Code of Civil Procedure, introduced by Article 49 Law No 69 of 18 June 2009, which provides for the judge's power to set the amount payable for each further breach or delay in implementing a decision, 'based on the value of the controversy, the nature of the services, the quantified or predictable damage and any other useful circumstance'; and
- Article 114 of Legislative Decree No 104 of 2 July 2010, drafted along the lines of the above provision, which confers a similar power upon administrative judges in proceedings for implementation of administrative judgments.

There are also cases in which it is the law itself that imposes a punishment on the wrongdoer:

- the provisions of Articles 388 and 650 of the Italian Criminal Code;
- Article 18, paragraph 14, of the Italian Workers' Statute, according to which, against finding of particularly serious unfair dismissal, failure to reinstate is discouraged by an additional sanction;
- Article 31, paragraph 2, of Law No 392 of 27 July 1978, according to which the landlord is under an obligation to pay a certain sum of money in the event of its withdrawing for reasons subsequently found false;
- Article 709 *ter*, paragraph 4, of the Italian Code of Civil Procedure, which gives the judge a power to impose an additional fine for non-performance of child custody obligations; and
- Article 4 of Decree Law No 259 of 22 September 2006, converted into Law No 281 of 20 November 2006, on illegal publication of wiretapping records, which provides for monetary compensation calculated per each printed copy and based on the area where dissemination through radio, television or electronic media takes place (even if the judge has to take into account any payment made, if an action for damages is brought).

6 Reference is also made to:

- Article 28 of Legislative Decree No 150/2011 on controversies concerning discrimination, which gives the judge a power to award damages against the defendant, based on the fact that an act or conduct amounts to retaliation against a previous case or an unfair reaction to a previous action undertaken to obtain compliance with the principle of equal treatment; and
- Article 18, paragraph 2, of the Italian Workers' Statute, which provides that compensation can in no event be less than five monthly instalments of the global basic salary.

The judgment of the Joint Divisions specifies that 'The list of "punishments", for example, in the matter of joint ownership (Article 70 of the Provisions Implementing the Italian Civil Code), subcontracting (Article 3, paragraph 3, of Law No 192/1998) and late payment in commercial transactions (Articles 2 and 5 of Legislative Decree No 231/2002), is still long. This is not the place for analysing each single case to resolve the conflict between those who deny the existence of any link between the above punishments and third-party liability and those, such as the Joint Divisions, who see in them an expression of the multi-functional nature of the complex institution under examination'.

7 Judgement of Constitutional Court No 152 of 23 June 2016: 'Therefore, the new 2009 provision (...) does not seem unreasonable but (...) merely reflects one of the choices lawmakers can make, given their unrestricted discretion, under the Constitution, in identifying the beneficiary of a measure punishing abuse of process and serving as a deterrent against the repetition of such behaviour'.

8 Ruling No 9978 defined international public order as 'that set of principles underpinning a national legal system at certain point in time, based however on the need to protect those fundamental human rights which are common to different legal systems and can first be inferred from the systems of protection set up on a level higher than ordinary statutes'.

9 According to the Joint Divisions, the notion of public order on which the admissibility of a foreign judgment should be assessed has changed from 'that set of fundamental principles characterising the ethical and social structure of the national community at a certain point in time, and that set of imperative principles which are inherent to key legal institutions' (Supreme Civil Court judgment No 1680/1984) to a kind of 'distillation' of 'the protections created at a higher level than ordinary statutes, which is why reference should be made to the Constitution and, after the Treaty of Lisbon, to the guarantees provided to the fundamental rights by the Charter of Nice, which under Article 6 TEU has the same legal value as the Treaties establishing the European Union' (Supreme Civil Court judgment No 1302/2013).

10 With this in mind, the Joint Divisions acknowledge the rapid evolution of punitive damages in the North American legal system, where 'grossly excessive' damage awards are now prevented.

When the Italian jurisdiction is imperative (notwithstanding the parties' agreement)

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

Caterina Mancini
Pavia e Ansaldo Studio Legale, Rome
caterina.mancini@pavia-ansaldo.it

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

Law no 218 of 1995 (Italian Statute of private international law)

Law no 218 of 1995[1] constitutes the most recent Italian reform of private international law: it sets out the scope of Italian jurisdiction for both natural and legal persons.

This law must be read in conjunction with the European regulations enacted on the matter. Indeed, the division of jurisdiction among Member States (MS) had already been regulated at the European level, by the Convention of 1968[2] and, subsequently, by the European Regulation no 44/2010[3] (recently replaced by EU Regulation no 1215/2012).[4]

The Convention of 1968, as well as the European Regulations nos 44/2001 and 1215/2012, establish rules on the jurisdiction, recognition and enforcement of judgments in civil and commercial matters within the European Union.

Application of the EU regulation

Article 3 of EU Regulation no 44/2001 provides that 'persons domiciled in a Member State may be sued in the courts of another Member State'. The choice of the MS's jurisdiction may depend on either the type of obligation which is the subject matter of the dispute (article 5) or other features of the proceedings (article 6).

In particular, in proceedings where more than two parties are involved, article 6, no 1 of EU Regulation no 44/2001 provides that one or more defendants may be sued in the court of the place where any of the other remaining defendants is domiciled, provided that the claims are so closely connected that it is expedient to hear them together.

As mentioned, EU Regulation 44/2001 has been recently replaced by EU regulation no 1215/2012, which reproduces (at article 8, no 1) the content of the afore-mentioned article 6, no 1.

Decision no 26145 of 2017 of the Italian Supreme Court

The Italian Supreme Court recently addressed the issue of the applicability of article 6, no 1 of the EU regulation 44/2001 and stated that this rule not only identifies the jurisdiction where to file proceedings but it also designates the competent court within said jurisdiction. Any possible claim of lack of competence of the local court is regulated by the *lex fori*, as long as this lack of competence does not also lead to the exclusion of the jurisdiction.

The relevance of this rule is enhanced by the fact that it also applies to persons domiciled in non-EU countries. Article 2 of law no 218 of 1995 provides for the application of the Convention of 1968 (and of any modification in force, including regulation no 44/2001) to cases where the defendant is not domiciled in the territory of a contracting state, with respect to matters falling within the scope of application of the Convention.

As a consequence, when there are both extra-EU and Italian defendants, there is the possibility that the Italian jurisdiction is considered existent even where there is a majority of non-Italian/EU parties.

Consequences in corporate law disputes

This situation impacts on cases where the dispute is somehow related to international contracts providing for arbitration or exclusive jurisdiction clauses, such as shareholders' agreements and equity and asset purchase agreements. Indeed, even if such agreements provide that all the disputes related to them should be referred to arbitration or to the courts of a given jurisdiction, in some cases these provisions may be circumvented.

This may occur, for example, where, following the execution of said agreements, a dispute arises on the 'abuse of right' exercised by one of the shareholders of an

Italian subsidiary. In such a case, provided that at least one of the defendants is domiciled in Italy, the shareholder alleging to have suffered a damage because of the 'abuse of right' can file its claim for compensation before the competent Italian court, regardless of any contrary provision set forth in the executed agreements.

The described situation becomes particularly relevant whenever an Italian subsidiary is owned or controlled by a non-EU entity through a chain of subsidiaries. In such a case, the ultimate owner, as well as the subsidiaries, can be sued before an Italian court, along with the Italian company because the latter is considered a necessary joinder of the proceedings.

Notes

1 Law no 218 of 31 May 1995: 'Reform of the Italian system of private international law'.
2 'Convention on jurisdiction and the enforcement of judgements in civil and commercial matters' signed in Brussels on 27 September 1968.
3 Council Regulation (EC) no 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
4 Regulation (EU) no 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
5 On matters falling within the scope of application of the Convention.

Pelin Baysal
Gun + Partners, Istanbul
pelin.baysal@gun.av.tr

Ilgaz Onder
Gun + Partners, Istanbul
ilgaz.onder@gun.av.tr

Asena Aytuğ Keser
Gun + Partners, Istanbul
asena.keser@gun.av.tr

Choosing the proper court for provisional attachments in relation to international arbitration seated in Turkey

Turkish international arbitration law (IAL) governing disputes with a foreign element, where the seat of arbitration is Turkey,[1] contains a provision (article 6) which paves the way for the parties' application before Turkish courts for provisional attachments. The IAL widens the scope of Turkish courts' jurisdiction to render provisional attachments by stating that this particular provision is applicable not only for arbitrations seated in Turkey but also for those seated abroad.

Access to provisional attachments to be granted by the local courts is crucial for the parties seeking indemnification in arbitration because of the ambiguity as to when exactly an arbitral award subject to the IAL becomes enforceable. The IAL, providing that the cancellation action (set aside) automatically suspends the enforcement of the arbitral award, implies that arbitral awards are enforceable as soon as they come into existence. The same law, on the other hand, stipulates that a party can enforce an arbitral award provided that it obtains a certificate which can only be granted by the state court after the cancellation action is dismissed or the 30-day period to file a cancellation action has expired. As seen, enforcement of an arbitral award is left pending in mid-air until Turkish court's certification after an array of post-arbitral proceedings. Considering that scholars[2] are unanimously of the opinion that an arbitral award cannot be enforced by use of state authority without the enforceability certificate, provisional attachments remain the only tool in this interim period for those seeking fulfilment of the arbitral award.

Although the IAL, similarly to the UNCITRAL Model Law, principally aims at lessening the involvement of state courts, it still remains as an undeniable fact that the court's support and supervision may be a lifeline, at least for one of the parties, even after the arbitral award has been rendered. Yet, the effort exerted in the course of the arbitral proceedings does not come to an end for the party which applies for provisional attachment from the state court. The hardship starts before anything else

when choosing the proper court for such assistance. The Grand National Assembly, as the state's legislative branch, tried to address this issue on many occasions and enacted a number of laws in order to ascertain the court having jurisdiction over international arbitration related matters. As a new law had already been in the pipeline at the time of writing, it is clear that the lawmaker's endeavour has not yielded the desired result. On 6 March 2018, the Law on *Amendments on Execution and Bankruptcy Code and Some Other Codes for the Purpose of Improving the Investment Environment* ('Omnibus Law') was approved, which, among others, regulates the courts' jurisdiction over arbitration-related matters. The Omnibus Law was published in the Official Gazette and became effective as of 15 March 2018. To understand what the Omnibus Law has introduced in this matter, a brief overview of the past developments is necessary.

The IAL (2001) points to civil courts as the courts having jurisdiction over all arbitration-related matters including but not limited to provisional attachments (article 3). This was far from promoting clarity given that the term 'civil courts' had a broad meaning[3] which also comprised commercial courts until the amendment dated 26 June 2012 of the Turkish Commercial Code. With the amendment, civil courts and commercial courts were separated as two distinct branches of first instance jurisdiction.

Although this distinction had driven the jurisprudence[4] to point to civil courts instead of commercial courts as the courts having jurisdiction over arbitration related matters at that time, this did not last for long as a new amendment was introduced in 2014. According to this amendment, made in law number 5235, *Concerning Establishment, Duty and Authority of Courts of First Instance and Regional Appellate Courts* (the 'Law no 5235'), commercial courts had jurisdiction on:

- cancellation (set aside) actions;
- actions to challenge the validity of arbitration agreements;
- appointment or dismissal of arbitrators; and
- enforcement and recognition of foreign arbitral awards.

The amendment goes further in a very interesting way, providing that provisional injunctions and attachments that are filed before or after the lawsuits enumerated above shall also fall within the jurisdiction of commercial courts composed of a panel of three judges, provided that the provisional injunction/attachment requested is relevant to these lawsuits.

As the law's intention behind the term 'relevance' is not defined, the endeavours to ascertain jurisdiction over arbitration-related matters seem to have increased the ambiguity further. The preamble[5] of the relevant provision merely states that the enumerated lawsuits are considered extremely significant in terms of content and legal consequences and, therefore, required to be examined by a panel of judges under the roof of commercial courts. The argument to the contrary (*argumentum a contrario*), especially in the presence of the IAL designating civil courts as the courts having general jurisdiction, concluded that provisional injunction/attachment requests that are not related with the above listed lawsuits shall be examined by civil courts instead of commercial courts.

According to this distinction, provisional injunctions/attachments requested from state courts before and/or during the arbitration proceedings shall be examined by civil courts (given that there is not one of the enumerated lawsuits which can be deemed 'relevant'), whereas a request of a similar nature shall be examined by commercial courts if, for instance, this request is filed after the arbitral award was rendered and if the counterparty has initiated a cancellation action. The issue, however, was even more complex and unanswered in case of a provisional injunction/attachment request filed in the 30-day period[6] following the arbitral award (ie, the period when it is not known whether the losing party will file a cancellation action).

In the absence of any guiding jurisprudence, there were credible scholars trying to solve this everlasting ambiguity. Professor Dr Ziya Akinci , for instance, having adopting a pragmatic approach, opined that civil courts referred to by the IAL should still be deemed to include commercial courts and, therefore, all arbitration-related matters including provisional attachments should always be brought to commercial courts.[7] Professor Dr Sema Taspinar Ayvaz reached the same conclusion with a criticism as to the double entendre narration of legislation, stating that the real intention of the lawmaker was to categorise all arbitration-related matters as 'commercial transactions/lawsuits' and to appoint commercial courts for all arbitration-related matters without any distinction.[8] Accordingly, the lawsuits enumerated by Law no 5235 and relevant

provisional injunctions/attachments shall be dealt with by commercial courts composed of a panel of judges, whereas the rest of the arbitration-related matters shall be dealt by commercial courts composed of a sole judge.

As suggested by Ayvaz,[9] this ambiguity could have been solved by abrogating the relevant provision of the IAL designating civil courts as the courts having jurisdiction in general. However, the lawmaker adopted a different solution by enacting the Omnibus Law, which, among others, regulates the courts' jurisdiction over arbitration-related matters.

The Omnibus Law, effective as of 15 March 2018, amends Law no 5235 by removing cancellation actions from the enumerated lawsuits and designates Regional Appellate Courts[10] as the courts having jurisdiction over cancellation actions. As a result, provisional injunctions/attachments relevant to cancellation actions can no longer be examined by commercial courts composed of a panel of judges. This ultimately gives rise to the question whether provisional injunctions/attachments from now on fall within the scope of commercial courts composed of a sole judge, as per certain scholarly opinions, or within the scope of civil courts referred to by the IAL. The Omnibus Law – finally – provides an answer for this question, too. Accordingly, the civil courts referred to by the IAL shall be understood to include commercial courts. The Omnibus Law concordantly stipulates that all arbitration-related matters (except for cancellation actions) shall be examined by commercial courts given that the underlying dispute subject to arbitration is a 'commercial transaction/lawsuit'.

Notes

1 The IAL also applies where the parties so agree or the arbitral tribunal determines that the arbitral proceedings should be conducted according to IAL.

2 Ergin Nomer/Nuray Ekşi/Günseli Öztekin Gelgel, *Milletlerarasi Tahkim Hukuku (International Arbitration Law)* (Istanbul: Beta Publishing, Vol 1, 2013), 49, 50. Ziya Akinci, *Milletlerarasi Tahkim Kanunu (Arbitration Law)* (Istanbul: Vedat Publishing, 2016), 260–261.; Hakan Pekcanıtez, *Milletlerarasi Tahkim Kanunu'na Göre Verilen Hakem Kararlarının Icrasi (Enforcement of Arbitral Awards Under International Arbitration Law),* (Tribute to Prof Dr Hamdi Yasaman, 2017), 585.

3 Court of Appeals, 15. Civil Chamber, 2010/4040 E, 2010/4663, 21.09.2010.

4 Court of Appeals, 19. Civil Chamber, 2014/111 E, 2014/2806 K, 12.02.2014.

5 The Law no 5235 and its preamble are available in Turkish at the official web page of Ministry of Justice: http://www.kgm.adalet.gov.tr/Tasariasamalari/Kanunlasan/2014Yili/6545%20s%C4%B1ra%20say%C4%B1s%C4%B1.pdf.

6 This period shall be prolonged if one of the parties' requests for correction of calculation, spelling or other errors in the award from the arbitral tribunal.

7 Akinci; 92, 93.

8 Sema Taşpınar Ayvaz; *Asliye Ticaret Mahkemelerinde Yapılan Değişikliler* Çerçevesinde *Tahkimde Görevli Mahkeme* (*Competent Court in Arbitration As Per The Developments Concerning Commercial Courts*), Dokuz Eylül University Law Faculty Journal, Volume 16, Special Edition. Tribute to Prof D. Hakan Pekcanıtez, 479, 480.

9 Ayvaz; p 480.

10 Regional Appellate Court is the court of second instance in three-tier system of adjudication that was established by the Law no 5235 and came into operation as of 20 July 2016. As the Omnibus Law comes into force, cancellation actions are to be examined by Regional Appellate Courts, as a court of first instance and are subject to appellate review by the Supreme Court as the court of last resort.

Collective action mechanisms – developments in the EU, the Netherlands and the US

Philip ter Burg
Buren, The Hague
p.terburg@burenlegal.com

Damiën Berkhout
Buren, Amsterdam
d.berkhout@burenlegal.com

Introduction

Collective action redress mechanisms present a conundrum to governments.[1] Proponents argue that there are advantages to such mechanisms, such as increased efficiency of the legal process and lower costs of litigation. Furthermore, they correctly highlight that a mechanism can allow claimants with small claims to recover their damage, where they would not have individually pursued a claim given the imbalance between the claim and the legal cost of an individual procedure. Opponents, however, argue that class members often receive little or no benefit from class actions, while generating large fees for the attorneys. It is also claimed that collective actions may preclude individuals from litigating their claims separately.

Both sides have a point. When introducing mechanisms, law-makers must find a balance between the wish to provide access to justice and the need to prevent abusive litigation practices. Finding this balance is complicated by the fact that increasingly disputes are cross-border. Thus, the law-makers must not only consider the effects of the mechanism within their own jurisdiction but also what effects it will have on the country's position vis-à-vis other countries. In this note, we will provide a high-level overview on how the balance appears to be developing in the EU and the US, after which we will discuss how the Netherlands is currently struggling to change its collective action system without causing undesired cross-border effects.

The US

In the US, viewed from this side of the Atlantic, there appears to be a move towards limiting the scope of collective action mechanisms. The US Class Action Fairness Act of 2005 already put limits to 'coupon settlements' – under which plaintiffs receive a small benefit, such as a small cheque or a coupon for future services or products from the defendant – and to the attorneys' fee award to class counsel to discourage 'lawyer-driven' litigation. The trend of apparent scepticism about the benefits of class actions also resulted in the US House of Representatives passing the Fairness in Class Action Litigation Act on 9 March 2017. This legislation intends to prohibit federal courts from certifying class actions seeking monetary relief for personal injury or economic loss, unless each proposed class member suffered the same type and scope of injury as the named class representatives. The party seeking to maintain a class action must demonstrate a reliable and administratively feasible mechanism for the court to determine whether putative class members fall within the class definition and for the distribution of any monetary relief directly to a substantial majority of class members. Also, attorney's fees are limited to a reasonable percentage of any payments received by class members.

The EU

Collective action redress problems have also been a matter of concern within the EU. Somewhat contrary to the trend in the US to make collective action less attractive, several EU Member States have been implementing new collective action mechanisms in recent years. The EU Commission has been instrumental in this development. After first viewing collective redress mostly through the prism of consumer protection and competition policy, the Commission took a broader approach with the adoption of a recommendation in 2013 (the 'Recommendation').[2] The Recommendation contains principles which, according to the Commission, should be applicable in relation to violations of rights granted under EU law across all policy fields and in relation to collective redress mechanisms.

The Recommendation was intended to create a benchmark for a European model of collective redress but this has not been achieved. In its report of 25 January 2018, the Commission concluded that the Recommendation fostered debate, but

that there is a 'rather limited follow-up to the Recommendation'.[3] Indeed, the Commission's analysis shows that there remain large differences between the Member States, as well as between the 'benchmark' and the Member States. Importantly, there are still nine Member States that do not provide for collective claim compensation in 'mass harm situations' at all (as defined by the Recommendation). Furthermore, it remains very difficult for affected parties to effectively pursue a claim in various Member States that do have a system in place.

The Netherlands as a forum for collective action

The Netherlands is one of the EU Member States that has taken and is still taking action to develop collective action mechanisms. It can be safely stated that the Netherlands already is an attractive location to litigate. This is due to various reasons.

First of all, the Netherlands is the seat of many multinational corporations and a main port of entrance to continental Europe. Simply due to domicile or residence by the defendant, collective action plaintiff parties can often create jurisdiction for the Dutch courts (eg, see Regulation (EU) No 1215/2012, Article 4). Secondly, the Dutch judiciary is generally considered professional, predictable and fast, making it an attractive venue for both plaintiff and defendant. Thirdly, litigation in the Netherlands is relatively inexpensive, due in part to low rates of compensation for the costs of litigation the losing party must pay in procedures. Fourthly, the Dutch legislator deliberately promotes the Netherlands as a forum for resolving international disputes. A recent example of this is a legislative proposal to create a special chamber at the Amsterdam district court and court of appeals at which parties will have the possibility to litigate – and get a court decision – in the English language.[4] The Dutch government quite explicitly wants to introduce this option to litigate in English to compete with other jurisdictions and to strengthen the position of the Netherlands as an international trade centre.[5]

Formal collective redress mechanisms in the Netherlands

There are currently two formal collective action redress mechanisms in the Netherlands. Firstly, in 1994 the possibility of a representative collective action (Article 3:305a Dutch Civil Code (DCC)) was introduced. This action involves a representative entity, an association or foundation that can initiate legal proceedings on behalf of a group of persons with similar interests against a certain liable party or parties. This action can be the first step towards a settlement but there is an important limitation for the representative collective action: whereas the action can serve to establish the defendant's liability, monetary damages need to be claimed individually by each plaintiff.

Secondly, in 2005 the Dutch Act on the Collective Settlement of Mass Damages (WCAM) was enacted. The WCAM allows parties to a collective settlement to file a request with the Amsterdam court of appeals to declare a collective settlement generally binding. A collective settlement under the WCAM is a settlement of mass damages, negotiated between on the one hand foundations and/or associations that defend the common interest of a group of claimants and on the other hand the party held liable to compensate the group for the damages. A key characteristic of the WCAM is that it provides for an opt-out system. The WCAM obtained some notoriety and indeed cemented the Netherlands as one of the key collective action forums after the Amsterdam court of appeal appeared willing to deem itself competent and declare a settlement generally binding, even though the subject of dispute had only limited connection to the Dutch jurisdiction. For example, the Amsterdam court of appeal was willing to do this in the so called *Converium* case, involving a Swiss based reinsurance company, with listings on a Swiss index and American depository receipts at the NYSE, only 200 of the 12,000 non-US parties were domiciled in or residents of the Netherlands.[6]

Potential changes

The Dutch legislator is currently considering material changes to the aforementioned system. This is not inspired by the Recommendation but rather by a motion adopted by parliament.[7] After several failed pre-draft attempts, draft legislation was introduced to the Dutch parliament on 16 November 2016. The key elements of the draft include: (i) the removal of the prohibition for representative entities to claim monetary damages in collective actions;

(ii) the introduction of stricter admissibility requirements for representative entities (eg, governance, funding and representation requirements); (iii) the appointment of an exclusive representative for all claimants (in case of various representative parties); (iv) an opt out at the beginning of the procedure for members of the class; (v) a binding decision on all parties that did not opt-out; and (vi) a 'scope rule' that serves to ensure that the collective action is sufficiently closely connected with the Dutch jurisdiction.

The legislative proposal has (yet again) been subject to significant criticism, which has led to important amendments to the draft on 12 January 2018. Of particular interest from a cross-border perspective is that the Dutch government further enhanced the 'scope rule'. Rather than an opt-out, the legislature is now pushing an opt-in system with respect to class members who are domiciled or reside outside of the Netherlands. With this, the Dutch government is moving more in line with recent Belgian and UK collective action legislation. The amendment thus serves to prevent Dutch collective action redress mechanisms from being used in cases which have a limited connection with the Dutch legal sphere. The concern is that in the absence of a proper scope rule, companies could be exposed to collective action of plaintiffs worldwide, even where little connection with the Netherlands exists. This could diminish the attractiveness of the Netherlands as a domicile for international business.

The relative value of the formal collective action mechanisms

The importance of the described possible amendments to the existing collective action mechanisms should not be overstated. Dutch law offers effective opportunities to file collective or bundled claims without making use of the redress mechanisms mentioned above. One commonly used method is to assign claims to a special purpose litigation vehicle. In two recent judgments in the air cargo cartel follow-on cases, the Amsterdam district court held that the assignment by individually injured parties of claims to a claim vehicle is in principle valid under Dutch law.[8] This option may not always be attractive, because although the claims may be filed as bundled, each individual assigned claim must be considered under the law applicable to that particular claim and each individual claim remains subject to the defences the defendant may raise in relation to the assignor of the claim. Therefore, the assignment of claims to a claim vehicle may mainly be attractive if a relatively small group of injured parties is involved or if the same law applies to most of the assigned claims.

Finally, more relevant for the future development of collective action in the Netherlands – and indeed in the EU – will be how the relevant EU Member States are going to deal with third-party funding. In our practice, we are increasingly confronted with situations where a third-party funds collective or individual claims, either as a loan or in exchange for a share in the proceeds. We expect this practice to increase in the next few years, not gradually but exponentially. In the Netherlands, third party-funding is in essence not regulated as of yet, although it may not be excluded that in practice the third-party funder may find that the way in which it funds a litigation can affect whether the claim is admissible or whether a settlement is enforceable.

Notes

1 With collective redress mechanisms, we refer to the so-called class action, a lawsuit where one of the parties is a group of people who are represented collectively by a member of that group, as well as other group actions.
2 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violation of rights granted under Union law, OJ L 201, 25.7.2013.
3 Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee, COM (2018) 40 final, 25 January 2018.
4 We note that Dutch courts already may allow parties to provide exhibits in the English language and often allow parties to fully or partially conduct hearings in English. Moreover, the Rotterdam district court has a pilot which allows for certain cases – maritime, transportation and international trade cases – to be conducted in the English language. The decisions by courts are still versed in the Dutch language however. The draft legislation will allow the courts to provide binding decisions in the English language.
5 *Parliamentary documents II*, 2016/17 34761, no 3, pp 2–3. At the time of writing of this note, the House of Representatives adopted the draft, sending it to Dutch Senate (on 8 March 2018). We expect the legislation to be adopted.
6 Amsterdam court of appeals, 17 January 2012, ECLI:NL:GHAMS:2010:BO3908.
7 *Parliamentary documents II*, 2011/12, 33000 XIII, no 14.
8 Amsterdam district court, 2 August 2017, ECLI:NL:RBAMS:2017:5512 and Amsterdam district court, 13 September 2017, ECLI:NL:RBAMS:2017:6607. In the interest of proper disclosure, the writers note that they are involved as legal counsel to one of the parties in the air cargo cartel cases.

ASIA PACIFIC

Robert Johnston
Johnson Winter & Slattery, Sydney
robert.johnston@jws.com.au

Frances Dreyer
Johnson Winter & Slattery, Sydney
frances.dreyer@jws.com.au

Australian shareholder class actions

The Australian legal scene has witnessed a burgeoning class action 'industry' in recent years, especially with the growing presence of third party litigation funders who have increased prominence in Australia as lawyers are still prohibited from charging contingency fees in Australia, that is, a fee based on a percentage of damages recovered. This article looks at some of the critical developments in the cases in this area in recent times and gives a flavour of things to come in the Australian class action landscape.

Introduction

Shareholder class actions for alleged breaches of a listed company's continuous disclosure obligations and for various statutory prohibitions on the making of misleading statements are an established part of the Australian legal landscape. More than 50 such shareholder class actions have been commenced since 1999. The presence of these claims has had a powerful impact on corporate disclosure culture in Australia and has encouraged an increased focus on disclosure obligations at board level.

The prevalence of shareholder class actions over the past two decades has been driven, in part, by increased volatility in equity markets, together with tremendous growth in the third-party litigation funding market and so available capital. This has included entry into the market by a large number of established foreign funders. At the same time, there has been a growing acceptance of the utility of shareholder claims by institutional investors and an increased participation rate by these large shareholders.

However, there are three main areas of developing jurisprudence which are creating some uncertainty in the market. These are: the approach Courts will take to the issue of causation, and so proof of damages; the apparent willingness of the Courts to 're-write' funding agreements; and how the Courts will deal with competing class actions especially where there is no 'certification' process in Australian class actions.

Market uncertainties

While it is anticipated that shareholder class actions will continue to account for a significant number of class action filings in Australia in the future, there is presently a lack of clarity on two key areas that have the ability to impact on the commercial justification for pursuing these claims (particularly for third party funders). They are:

- whether the indirect 'market-based' theory of causation is sufficient to satisfy the causation requirement for damages in shareholder class actions; and
- the apparent willingness of the Courts to 're-write' funding agreements, including by changing the commission rate to be received by third party funders.

Uncertain status of 'market based' causation

In shareholder class actions, it is commonly argued that, as a consequence of the alleged contravention of a listed company's continuous disclosure obligations or misrepresentations, claimants either acquired shares when they would not have done so absent the contravening conduct, or they acquired shares at a higher price than they would have paid absent the contravening conduct, that is, if the market had been 'fully informed'.

Causation is an essential element in such claims – that is, what would the trading position have been – either in terms of the decision to purchase or in terms of the amount paid – had the contravening conduct not occurred. An important issue in these claims is what a claimant must do to establish that the contravening conduct *caused* their loss which is, relevantly, either the total value lost via the shares (in a 'no-transaction' case) or the value of the inflation caused to the share price by the misconduct.

There is no Australian appellate authority on whether it is necessary for claimants or class members to individually prove that they relied on the mis-information in deciding to buy their shares and in determining the price they agreed to pay (reliance based

causation) or, instead, whether it is sufficient to demonstrate that the contravening conduct caused the overall market on which the shares traded to be distorted, which in turn caused loss to investors who acquired the shares at the distorted market price (market based causation). Under market-based causation, a claimant would not need to prove that he or she was aware of or relied upon the mis-information but would need to prove that the mis-information in fact caused the market as a whole to incorrectly set the market price for the shares which were then purchased by the claimant. Appellate resolution of this issue is of significance as it will provide greater certainty as to whether the causation element of such claims can be established without individual claimants being required to give evidence as to what they took account of when acquiring shares, what financial information they actually read and understood and what they would have done absent the contravening conduct (which evidence significantly adds to the time, cost and complexity of such claims). Moreover, a requirement of reliance in class definitions operates to significantly limit class sizes and, in many cases, cuts out retail investors who do not review or comprehend published financial information.

Despite the tide of judicial consideration appearing to favour the adequacy of market-based causation, until the issue comes before the High Court, it will remain an open question and will therefore continue to impact on the risk assessment of both plaintiffs and defendants (and funders) in settlement negotiations. We expect the issue will only reach the High Court once a suitable case vehicle emerges and where both sides are willing to 'risk' taking the case all the way. Until then, the pressure to settle and so avoid the unknown will be the driving commercial imperative.

Judicial intervention on the terms of funding agreements

Recent decisions made in the context of 'common fund' and settlement approval applications have demonstrated the Court's willingness to review and, if necessary, amend the terms of funding agreements, including by assessing the reasonableness of the funding commission rate to be received by third party funders.

There is a clear tendency by some judges to open up the terms of funding agreements to court review. For example, in *Earglow Pty Ltd v Newcrest Mining Limited (2016) FCA 1433*, Justice Murphy, in the context of considering an application for Court approval of a settlement, said:

> 'I conclude that, if in a settlement approval application the Court considers the proposed settlement is fair and reasonable except that the funding commission is excessive or exorbitant, the Court has power to approve the settlement and reduce the funding commission to be deducted pursuant to the terms of the settlement… I do not accept that the Court's powers are limited to a binary choice between approving or rejecting the proposed settlement. In such circumstances it may be "just", "appropriate", or "appropriate or necessary to ensure that justice is done in the proceeding" that the Court make orders approving the settlement but reducing the funding commission to be deducted under the settlement.'[1]

The settlement approval in *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3) (2017) FCA 330* provided the Federal Court with the opportunity to exercise the power and determine an appropriate return to be received by a litigation funder in the context of approving a settlement. In approving the settlement, the Court accepted the reasonableness of a funding commission rate of 30 per cent of the net settlement sum after deducting the applicants' legal costs. This resulted in the funder receiving approximately 22 per cent of the gross settlement sum of AUD$40 million.

In determining the appropriateness of the funding commission rate, Justice Beach applied a range of factors including:

- the acceptance rate of the funding terms by group members compared to sophisticated investors;
- a comparison of the funding commission rate as against other rates in both Australian and foreign markets;
- how the rate under the common fund order compared to the rate recoverable under the funding agreement;
- the litigation risks of providing funding in the proceeding and the stage of the proceedings at which those risks were assumed;
- the legal costs expended by the funder;
- the proportionality of the commission to be received by the litigation funder as against the amount to be received by the group members; and

- whether group members had ample and fair opportunity to opt-out of the proceeding, or to notify their objections to the common fund application and proposed funding arrangements.

Given the breadth of factors taken into account by the Court, the decision serves to highlight the complexity involved in determining an 'appropriate' funding rate and implies that the rate approved will vary on a case-by-case basis. Funders will be required to convince the Court that the proposed commission represents a fair and reasonable return given the risks assumed by the funder and is appropriate.

It remains uncertain as to how the market will respond to these developments. We would expect however that massive windfall commissions to funders are likely to be moderated by the courts and that cases which see the majority (or close to all) of the recovery split between legal fees and funding fees may prompt court intervention. We also anticipate that other fees charged by funders, such as 'project' fees (which tend to be fees calculated as a proportion of legal costs rather than recovery and are typically charged in addition to funding commissions) may also attract judicial attention in some cases.

Competing classes

The increase in funders and lawyers in the class action market segment has also tended to increase the incident of 'competing' class actions (being multiple class actions arising from the same set of circumstances). Australia does not have a 'certification' process like the United States and the management of competing claims is a developing body of law. Recent applications with respect to the management of competing claims are becoming common and have seen discussion around the courts considering the terms of the respective funding agreements and indeed to 'compare the deal' being offered by different funders. Like common fund order applications, such applications bring the terms of funding agreements into the spotlight and open the door for a judicial review of the funding terms. It is likely that this too will result in downward fee pressure (and legal fees quoted for the action), as the 'better' deal may result in that funded claim being given preference over another.

Looking forward

There are, therefore, multiple market features emerging which are exerting downward price pressures on the cost of funding:

- significant new funders entering the market and an increase in available capital;
- the willingness of the court to revise commission rates; and
- an increased incident of competing claims.

It will be interesting to observe the interplay between these market features and to see the extent with which the funding offering shifts in response to increased judicial review and competition. The uncertainty around market-based causation, as a market 'dampener', would appear to be outweighed by these other features and we would expect them to bring a divergence of funding commission structures and more competitive rates. It is indeed a fast-changing landscape in Australian shareholder class actions at present.

Note

1 *Earglow Pty Ltd v Newcrest Mining Limited* (2016) FCA 1433, (157).

Foreign companies beware: the long arm of Australia's consumer law

Patrick Considine
MinterEllison,
Melbourne
patrick.considine@
minterellison.com

Valve Corporation v ACCC (2017) FCAFC 224

A recent appeal decision delivered by Australia's Federal Court (the 'Court') found that a US company with no offices, real estate or employees in Australia, and consumer contracts that were governed by the law of Washington, were nonetheless bound by Australia's expansive consumer law provisions and subject to penalties for breaching them.

The decision confirms that companies doing business in Australia are subject to Australia's consumer guarantees and consumer protection legislation, even where the company is based outside Australia and supplies goods or services pursuant to contracts that are not governed by Australian law.

Foreign companies will therefore be in breach of the Australian Consumer Law,[1] and liable to court imposed penalties, for including exclusion of liability clauses, in their contracts with Australian consumers, which suggest that refunds for goods or services will not be provided in any circumstances or that their goods or services are not otherwise protected by guarantees or warranties.

Background: The Australian consumer protection regime

Valve is a company based in Washington state and is one of the world's largest online game retailers.

Valve's subscriber agreements, including with its Australian customers, contained a term stating that the company 'does not offer refunds for purchases made through Steam' (Valve's digital distribution platform), and that Australian customers were not entitled to refunds for games purchased from Steam.

Australia's consumer watchdog and regulator, the Australian Competition and Consumer Commission (ACCC), alleged that these representations were inconsistent with the statutory guarantees set out in the Australian Consumer Law.

The guarantees are designed to give consumers a right of redress in the event that the goods or services they have purchased prove to be faulty or defective. They guarantee minimum quality standards to consumers in contracts for the supply of goods and services and include, for example, guarantees that goods will be of acceptable quality and fit for any disclosed purpose and that services will be rendered with due care and skill within a reasonable time. They cannot be excluded, restricted or modified by contract. Importantly, a number of the guarantees entitle consumers to refunds in certain circumstances.

Additionally, the Australian Consumer Law contains a wide reaching, general prohibition on corporations (including foreign corporations) engaging in conduct in trade or commerce that is misleading or deceptive. There is also a more specific prohibition on the making of false or misleading representations concerning the existence of any warranty or guarantee in connection with the supply of goods or services.[2]

A breach of these prohibitions can result in significant pecuniary penalties being ordered by Australian Courts against contravening corporations.

The international reach of Australia's consumer guarantees

The proceedings brought by the ACCC against Valve were based on the claim that the company had made representations to its Australian consumers regarding the existence of warranties or guarantees as to the quality of goods or services it provides and that it would not provide refunds in any circumstances.

The ACCC claimed that these representations were false or misleading because, pursuant to Australia's consumer protection regime, a corporation is required to provide such warranties or guarantees, and refunds in certain circumstances, due to the operation of the mandatory, non-excludable consumer guarantees in the Australian Consumer Law.

Significantly for Valve and other foreign companies, section 67 of the Australian Consumer Law states that the consumer guarantees will apply to a supply of goods or services under contract, irrespective of any term in that contract that states that the applicable law is the law of a country other than Australia. Valve had pointed to a choice of law clause in its contracts, nominating the law of Washington as the contract's governing law, to argue that it was not bound by Australian law, including Australia's consumer guarantees. The Court disagreed, however, finding that due to section 67, the mandatory consumer guarantees set out in the Australian Consumer Law applied to Valve's supply of goods to its Australian customers, despite the fact that the law of Washington was the law of the contract.[3]

Misrepresentations regarding the existence of guarantees are a breach of Australia's laws

Given that Valve was, in fact, bound to comply with the consumer guarantees, the Court was required to determine whether Valve had breached the Australian Consumer Law's prohibition on engaging in misleading or deceptive conduct. In particular, the Court was required to determine whether Valve breached the prohibition on making misleading representations concerning the existence, exclusion or effect of a guarantee in connection with the supply of goods or services, given that it had represented to its Australian customers that they were not entitled to refunds from Valve in any circumstances and that they were thereby excluded from enforcing the statutory guarantee of acceptable quality.

Valve argued that its misrepresentations regarding its liability to pay refunds to Australian customers had not been made in Australia and, therefore, it had not contravened the prohibitions. The representations had been made, Valve argued, in Washington, because that was where the subscriber agreements, which contained the misrepresentations, were uploaded.

Even if Valve was able to demonstrate that its conduct did not occur in Australia, it could still be liable for breaching the Australian Consumer Law if it could be shown that it is a company that carries on business in Australia. This is because the Australian Consumer Law specifically applies its prohibitions to companies which 'carry on business' in Australia, regardless of where it is incorporated or domiciled and irrespective of whether the conduct in question occurred in Australia. Therefore, in addition to arguing that its conduct occurred outside Australia, Valve was required to demonstrate that it did not carry on business in Australia, in order to avoid liability for misleading its Australian customers about the existence and availability of the consumer guarantees. Valve argued that it had not engaged in conduct in Australia and was not carrying on business in Australia.

The Court's ruling

The Full Court of the Federal Court held, on appeal, that Valve had made its misrepresentations in Australia because that is the place where the customer accesses and reads the representations on his or her computer. This was enough in itself to engage the provisions of the Australian Consumer Law, irrespective of where the company was domiciled or carried on business.

Nonetheless, the Court also confirmed that Valve was carrying on business in Australia because it makes its content or services available for download or purchase from Australian servers, has millions of Australian subscriber accounts (2.2 million) from which it generates large amounts of Australian revenue, has business relationships in Australia and incurs tens of thousands of dollars of monthly expenses in Australia.

The Court made this finding despite the fact that Valve:

- is a US corporation based in Washington state;
- is not registered in Australia as a foreign corporation, and has no registered office, real estate or other place of business in Australia;
- has no subsidiaries or employees in Australia;
- provides a worldwide subscription service, with access to content uploaded to Valve's website from servers hosted and located in Washington State; and
- processed subscriptions, and payment, in Washington State and in US dollars.

The Federal Court therefore held that Valve had engaged in conduct in Australia for the purposes of the Australian Consumer Law as it had made representations to Australian consumers. Even if it had not engaged in conduct in Australia, the Court found, the prohibitions against misleading conduct and

representations in the Australian Consumer Law were engaged because Valve was an incorporated body that was carrying on business in Australia.

Consequences for breach

The primary judge had imposed a $3m pecuniary penalty on Valve for its breaches of the Australian Consumer Law. The Full Court of the Federal Court confirmed, on appeal, that this penalty was appropriate. In doing so, the Court cited the company's 'very poor culture of compliance in relation to Australian operations'. This was because the company had adopted a position that it was not bound by Australian law, even though it had not obtained legal advice about its position in Australia. The company had acknowledged it 'certainly could have afforded that advice' but didn't obtain it because it 'had not occurred to us'.

The Full Court was also critical of Valve for doing 'relatively little' to train its employees about Australian legal requirements, even after the initial decision was handed down by the primary judge.

The Full Court also confirmed that the primary judge's non-pecuniary penalties, being an injunction, publication of a consumer rights notice and implementation of a compliance programme were all appropriate, even though Valve had removed the offending terms from its contracts by the time the matter was before the Court.

Take away points

Multinational companies doing business in Australia cannot assume that a choice of law clause in its contracts with Australian consumers or a physical presence entirely outside the jurisdiction will exclude liability under Australia's consumer laws. This is because its contracts for the supply of goods or services will be subject to Australia's consumer guarantees despite being incorporated and based outside Australia and despite carrying on business here pursuant to contracts that are governed by the law of a country, state, territory or jurisdiction outside Australia. The guarantees cannot be excluded.

Examples of some of the exclusions that we have come across in practice, which would breach the prohibitions in the Australian Consumer Law, include:

- 'No express or implied warranties concerning the use, performance or merchantability of this product'; and
- '[Company] makes no warranty, express or implied, as to results to be attained by [consumer] from the use of this service, and there are no express or implied warranties of fitness for a particular purpose or use.'

Not only is the company bound to comply with the consumer guarantees set out in the Australian Consumer Law if it does business in Australia but any representations made by the company to Australian customers purporting to exclude any requirement to comply with the guarantees will amount to a breach of Australian law, leading to large penalties.

Multinational companies selling goods or services in Australia should be advised to closely consider the wording of any exclusion clauses in their contracts which might breach these provisions.

Notes

1 Set out in Schedule 2 to the *Competition and Consumer Act 2010 (Cth)*.
2 Section 29(1)(m), *Australian Consumer Law*.
3 Similarly, and while the Court was not required to consider this issue, section 64 of the *Australian Consumer Law* voids any term of a contract to the extent that it excludes, restricts or modifies the application of the consumer guarantees. A party to an arbitration agreement, which requires disputes relating to contract to be determined by arbitration in accordance with a law other than Australia or one of its states or territories, could therefore seek to rely on section 64 to avoid arbitration and maintain Court proceedings in Australia.

Syafinaz Vani
SKRINE, Kuala Lumpur
syafinaz.vani@skrine.com

Singapore High Court rules in favour of house – last roll of the dice

Resorts World At Sentosa Pte Ltd (RWS) filed a writ of summons and statement of claim against one of its patrons (the 'patron') in the Singapore High Court. After the cause papers had been served on the patron by substituted service and the time prescribed for entering an appearance had lapsed, RWS obtained a judgment[1] in default against the patron (the 'Singapore Judgment').

The Singapore Judgment was registered by an order of the High Court of Malaya ('Order for Registration') under section 4 of the *Malaysia Reciprocal Enforcement of Judgments Act 1958* (REJA). The Order for Registration together with the Notice of Registration were personally served on the patron.

Application to set aside the order

The patron then filed an application to set aside the Order for Registration on the ground that the enforcement of the Singapore Judgment is contrary to public policy in Malaysia under section 5(1)(a)(v) of REJA, as the Singapore Judgment is based on a gambling debt incurred in RWS's casino in Singapore ('setting aside application'). RWS contended that the registration of a foreign judgment obtained in relation to a lawful gaming transaction in Singapore is not contrary to public policy under section 5(1)(a)(v) of REJA. RWS also contended that the legal position differed from one where a civil suit is filed in Malaysia to enforce a gaming debt.

The High Court agreed with RWS that a distinction must be drawn between suing on a gaming debt and the registration and enforcement of a valid foreign judgment under REJA. The Judge referred to the case of *Jupiters Ltd (Trading as Conrad International Treasury Casino) v Gan Kok Beng & Anor (2008) 7 CLJ 715* wherein it was held inter alia, as follows:

> '… the applicant had merely applied to register a judgment legally obtained in England pursuant to the Reciprocal Enforcement of Judgments Act 1958 but had not sought to enforce a cause of action founded on a gaming or wagering contract – in which case the *lex fori* of the country where the cause of action is sought to be litigated would have to prevail. Surely, it would be entirely consistent with our public policy for our courts to accord due recognition to any reciprocal agreements between our country and another… In Ritz Hotel Casino, the defendants ought to be precluded from going behind the English judgment by submitting on our public policy. Ritz Hotel Casino and Aspinall Curzon ought to be distinguished from this case as those two cases only concern the registration of foreign judgments that has not only been provided for but sanctioned by statute, which enjoins our courts to allow registration if the papers are in order.'

The Learned Judge noted that decision of the High Court in *The Ritz Hotel Casino Ltd & Anor v Datu Seri Osu Hj Sukam (2005) 3 CLJ 390* to set aside the registration of a foreign judgment for a gambling debt on ground that the registration contradicted Malaysia's public policy had been overturned by the Court of Appeal.

The High Court then dismissed the patron's setting aside application on, inter alia, the following grounds:

- RWS was availing itself of the right of reciprocity of registering a valid and lawful judgment of a foreign court as expressly provided under REJA;
- RWS was not filing a civil suit to enforce the gaming debt; and
- when a gaming transaction is lawful in the foreign country from which the judgment originates, the registration and enforcement of the foreign judgment is not against public policy in Malaysia.

Dissatisfied with the decision of the High Court, the Patron appealed to the Court of Appeal.

The Court of Appeal's decision

The Court of Appeal unanimously dismissed the patron's appeal. The Court of Appeal held that there was no appealable error and agreed with the finding of the High Court that the registration and enforcement of the Singapore Judgment was not against public policy in Malaysia.

Commentary

The High Court in this case was correct in drawing a distinction between a case where a party commences legal proceedings in Malaysia based on a cause of action that is founded on a gaming debt, as in *Jupiters*, and one that involves the registration and enforcement of a foreign judgment obtained with respect to a gaming debt under REJA, as in *The Aspinall Curzon Ltd v Khoo Teng Hock (1991) 2 MLJ 484*.

Jupiters Ltd

In *Jupiters Ltd*, the plaintiff commenced legal proceedings in Malaysia on six dishonoured cheques issued by the defendant to the plaintiff to settle debts incurred while gambling at a licensed casino operated by the plaintiff in Australia. As the cause of action arising from the dishonouring of the six cheques was being litigated in Malaysia, the *lex fori*, (ie, the law of the country in which the action is brought) would be Malaysian law.

The court noted that section 26 of the *Civil Law Act 1956* and section 31 of the *Contracts Act 1950* stipulate, inter alia, that gaming or wagering agreements are null and void. As the cheques were issued to settle gambling losses owing to the plaintiff, the court held that they were given for no consideration by virtue of those statutory provisions. Accordingly, the High Court ruled that the plaintiff's claim against the defendant could not be sustained.

Aspinall Curzon

The defendant in this case appealed against the decision by a senior assistant registrar to register a judgment obtained by the plaintiff in England against him. The defendant said that the money which he owed the plaintiff was in respect of cheques that he had issued for moneys which he had lost while gambling at the plaintiff's casino. The defendant contended that the cheques were given for an illegal consideration and the contract was therefore void under section 24 of the *Contracts Act 1950*. The defendant also argued that the judgment should not be enforced as it was against public policy of Malaysia and cited section 31 of the *Contracts Act*, section 26 of the *Civil Law Act and section 5(1)(a)(v) of REJA* in support of this contention.

The plaintiff disputed the defendant's contention. According to the plaintiff, the defendant had issued the cheques to obtain cash and gaming chips so that he could gamble at the plaintiff's casino. The plaintiff submitted that even if the judgment was for a gambling debt, the gambling took place in the United Kingdom in a casino licensed under the UK Gambling Act 1968.

The Judge said that the cheques had been issued in exchange for cash and gaming chips for the purposes of gaming at a licensed gaming casino. Therefore, it was not for an unlawful purpose under the laws of England and the enforcement of the UK judgment could not be considered as being contrary to public policy in Malaysia. The defendant's appeal was dismissed.

The last roll of the dice

Although he failed on two occasions to set aside the registration of the Singapore Judgment, the patron tried one last roll of the dice in this game of high stakes by seeking leave to appeal to the Federal Court on the question, 'Whether on a true construction of Section 5(1)(a)(v) of the *Reciprocal Enforcement of Judgment Act 1958*, the enforcement of a foreign judgment based on a gambling debt is contrary to public policy of Malaysia.' However, the patron's application for leave was also dismissed by the Federal Court. As such, the position of law in Malaysia on this issue of public policy under REJA for enforcement of gambling debt is rather settled (ie, where a gaming transaction is lawful in the foreign country from which the judgment originates, the registration and enforcement of the foreign judgment is not against public policy in Malaysia.

Note

1 The decision of the High Court is reported in the Malaysian Current Law Journal as *Resorts World At Sentosa Pte Ltd v Lim Soo Kok (2017) 1 CLJ 363*. The Court of Appeal's decision is unreported. The Federal Court's decision is also unreported.

NORTH AMERICA

Richard Marshall
Penningtons Manches, London
richard.marshall@penningtons.co.uk

Kim Stephenson
Penningtons Manches, San Francisco
kim.stephenson@penningtons.co.uk

Taking and obtaining evidence from a UK-based entity for use in US proceedings

In the age of the global economy and the inevitable accompanying cross-border disputes, United States based litigants are commonly facing the dilemma of how they can obtain evidence for use in US proceedings from individuals and entities based in foreign jurisdictions. In particular and due to increased levels of trade and business dealings between the two regions, US corporations frequently find they need access to documentation or information held by individuals and entities based in the United Kingdom.

Note: in the following article, mention of the UK refers to the legal jurisdiction of England and Wales and reference to the UK court or English court means the High Court of England and Wales.

Where to start

The starting point should always be to ask the relevant individual/entity directly whether they will voluntarily provide the documentation and information required. If they are willing to cooperate, it will be a simple matter for the lawyers to the respective parties to agree the terms for the provision of evidence. The parties will also need to ensure that all procedures undertaken satisfy the requirements of both the local US court and the rules in the UK and consider how they will address the issue of costs and expenses arising out of the provision of the evidence.

Of course, in the context of a commercial dispute, it is highly probable that a party, or non-party to the proceedings, will be uncooperative. So, what do you do when you have an individual or entity that is subject to the jurisdiction of the English court and you want to compel the production of documents or the taking of a deposition for use in US proceedings?

Under English law, there is a particular process that a party to litigation in a foreign jurisdiction must go through in order to obtain evidence from an individual or entity under the jurisdiction of the English court. This derives from the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ('Hague Evidence Convention'), to which the US and the UK are both signatories. In the English courts, the procedure is also governed by the Evidence (Proceedings in Other Jurisdictions) Act 1975 (EPOJA) and the Civil Procedure Rules 1998 (CPR).

The Procedure

The procedure is initiated by the US court in which the proceedings are taking place making a request to the Senior Master of the High Court of England and Wales (as the designated Central Authority), via a 'letter of request', that the English court takes evidence and transmits that evidence back to the US court for use in the US proceedings. These requests are known in the US as 'letters rogatory'.

The letter of request must contain certain information regarding the details of the authority requesting its execution, the authority that has been requested to make the order, information relating to the parties of the current proceedings and details surrounding the nature of the proceedings. It must also set out the evidence to be obtained or any other judicial act to be performed.

The letter of request, where appropriate, should also specify details of the people sought to be examined, list the questions to be put to the proposed witnesses (or a detailed statement of the subject matter about which they are to be examined), list any documents or other property to be inspected and state any specific procedures which the US federal or state courts require to be followed.

The English court derives its authority to act in aid of a foreign court from the EPOJA. Consequently, where an application is made to the High Court for an order that evidence be obtained in England and Wales to assist in foreign proceedings, the letter of request received by the High Court of England and

Wales will likely only be complied with, and the application granted, if the following conditions under the EPOJA are met:

- the court is satisfied that the application is made in pursuance of a request issued by or on behalf of a court or tribunal exercising jurisdiction outside of the UK; and
- the evidence to which the application relates is to be obtained for the purposes of civil proceedings which have been instituted, or which it is intended to institute before the court by which the request is made.

If those conditions are met, the court will likely make the order as it is the policy of the UK courts to 'give effect to requests which are made to it by foreign courts wherever it can properly do so within the jurisdiction given to it by the EPOJA' (*United States v Phillips Morris Inc (No1) (2003) All ER (D) 191*).

An application for an order under the EPOJA is made pursuant to CPR 34.17. The application must be made to the High Court of England and Wales, be supported by written evidence and be accompanied by a copy of the letter of request from the foreign court which has given rise to the application. The application may be made without notice. If an application is made that satisfies the conditions listed above, the court has the discretion to make an order granting the application for assistance. Such an order may direct that a party produces specific documents or that a witness be examined (a deposition). Subsequently, if the order(s) made are not complied with, they can be enforced through the English court. Non-compliance by a party may result in cost sanctions or other enforcement avenues, such as contempt of court proceedings.

Disclosure of documents

It is important to note that the UK courts are very strict when it comes to the contents of a letter of request. A request cannot be wide-ranging, investigatory in nature or seem to be a 'fishing expedition'. If documentary evidence is sought, then the individual documents or a specific, clearly identified class of documents must be named. The court must also be satisfied that the documents actually exist; the mere suggestion they do will not suffice (s2(4)(a) EPOJA).

The UK disclosure rules as set out in the CPR are very restrictive in comparison to the discovery rules in the US. The English courts will not execute a letter of request where the evidence sought is not possible, permissible or practical to give effect to under English Law. Nor will an order be made against a non-party to US proceedings requiring them to state what documents they have or had in their possession, custody and control relevant to the issues in the proceeding (ie, to provide general disclosure) (*Rio Tinto Zinc Corporation v Westinghouse Electric (1978) 1 All ER 434*). The court will only require the non-party to produce specific documents in their possession, custody and control which are adequately particularised. In circumstances where the UK court receives a letter of request which has not been sufficiently particularised, it is entitled to apply the metaphorical 'blue pencil' to edit the request by deleting aspects which are objectionable but it cannot substitute a different request entirely (*Refco Capital Markets v Credit Suisse (First Boston) Ltd (2001) EWCA Civ 1733*).

Accordingly, when preparing a letter of request, it is very important to ensure that the documentation sought is described in as much detail as possible, so as to enable each document to be individually identifiable. By way of example, an order would likely be granted when an applicant sought the party's 'monthly bank statements for the calendar year of 2017 for account number XXX-XXX, held at XXX bank', where it can be established that the account is in the party's name and that they receive the bank statements for that account on a monthly basis. In comparison however, a request for 'all the party's bank statements for 2017' would fail (see *Re Asbestos Insurance Coverage Cases (1985)1 WLR 331 at 337–8*).

Deposition of witnesses

If the English court orders an examination of a witness, the court may specify that this evidence be taken before any fit and proper person nominated by the party applying for the order or an examiner of the court. Usually, the deposition will take place in local law firm offices, it will be recorded and the questioning will be undertaken by a US qualified lawyer, qualified to practice in the state in which the case originated. It is common for English solicitors to attend to ensure that all applicable English procedural rules are followed. Witnesses subject to an examination order will be afforded the same privilege protections as would be available to them under English law and the applicable US federal and state laws, that is witnesses

are able to invoke their fifth amendment right against self-incrimination even where they are UK-based entities/individuals (s3 EPOJA). When the deposition is complete, the examiner will send a copy to the Senior Master, who will then make the appropriate arrangements to send it to the relevant US federal or state court.

Although there are no time limits specified in either the Hague Evidence Convention or the CPR for any of the processes detailed above, the Hague Evidence Convention indicates that letters of request 'shall be executed expeditiously'. Most commonly, an order for the production of documents or the examination of a witness made under the EPOJA will be made without notice (thereby expediting the process). However, this of course means that the party in receipt of the order can take steps to challenge it and have it set aside.

Conclusion

Given the above, when a party to proceedings in the US realises that evidence held by a UK-based individual or entity will be vital to their litigation, it is strongly advisable for them to instruct local English solicitors as soon as possible. Steps can then be taken, with US and UK lawyers working together, to prepare the necessary letters of request and application, in order to avoid falling foul of any procedural and discovery requirements.

Thomas J Hall
Norton Rose Fulbright, New York
thomas.hall@nortonrosefulbright.com

Alexis Wilpon
Norton Rose Fulbright, New York
alexis.wilpon@nortonrosefulbright.com

Women in the courtroom: US efforts to increase the role of female litigators in court

The New York Times recently published an article by retired New York federal judge, Shira Sheindlin, highlighting the disparity in female attorneys playing an active role in the courtroom. She noted: 'Women often sat at counsel table but were usually junior and silent. It was a rare day when a woman had a lead role…'. This is notwithstanding the fact that women make up about half of law school graduates in the United States.

Given that roughly only three per cent of civil cases in the US end up making it to trial, efforts are underway in the US to afford female attorneys more opportunities to play an active role in court. Recognising this disparity, more and more US judges and bar associations have proposed or adopted rules to allow female attorneys to play a more active role alongside their male counterparts and US law firms continue to employ policies designed to enhance diversity in the practice of law.

Recent rules

Jack B Weinstein, a New York federal judge, has recognised the need to take affirmative steps to bolster the role of women in the courtroom. In 2017, he issued a court rule urging junior female lawyers to take a more substantive role in trials and hearings. His rule sheet says that 'junior members of legal teams [are] invited to argue motions they have helped prepare and to question witnesses with whom they have worked.' The rule came following a New York State Bar Association report showing that female lawyers appear in court less frequently than males and, when they do appear, they often play a minor role. Judge Weinstein states he was particularly motivated by the fact that women reportedly led only 25 per cent of New York trials and court hearings in 2016.

Judge Ann M Donnelly, another New York federal judge, has a similar rule in her courtroom. Her rules state: 'The participation of relatively inexperienced attorneys in all court proceedings – including but not limited to pre-motion conferences, pre-trial conference, hearings on discovery motions and examination of witnesses at trial – is strongly encouraged.'

Chief Judge Barbara M G Lynn, a Texas federal judge, also has recognised the need

to provide female attorneys substantive courtroom experience. She recently instituted a rule which 'encourages litigants to be mindful of opportunities for young lawyers to conduct hearings before the Court, particularly for motions where the young lawyer drafted or contributed significantly to the underlying motion or response.' In Delaware, Magistrate Judge Christopher J Burke has a standing order which states that the court will make extra effort to grant argument when a party intends to have a newer attorney argue the motion and will consider allocating additional time for oral arguments argued by the newer attorney.

In total, we count 19 US federal judges that have issued standing orders with the intention of encouraging law firms to provide their junior associates with opportunities to gain substantive experience in court. While the benefit of those rule changes is surely broader than enhancing female litigators' roles, the judges involved often cite studies reflecting low female litigation participation as their motivation.

The role of law firms

In addition to these efforts by the judiciary, many US law firms have recognised the need to offer their female associates increased courtroom experience. For example, many law firms have created women's initiatives or diversity groups in order to provide female attorneys with the skills and experience necessary to obtain opportunities to appear in court and to succeed within their law firms generally. The recent New York State Bar Association report, *Women's Initiatives*, recommends steps that firms should take towards achieving equality for female attorneys in court. For one, the report recommends law firms institute mentorship programmes to discuss ways in which female attorneys can gain courtroom experience. It also encourages law firm partners to provide female associates with opportunities to argue motions, conduct examinations of witnesses and conduct depositions under supervision of the partner. Further, the report states that law firms should encourage female associates to join bar associations and other groups that regularly provide speaking opportunities so that young associates can gain public speaking experience.

Parental leave

Female litigators' family obligations cannot be overlooked as affecting their role in the courtroom. Often, female attorneys are forced to choose between their personal and professional lives when it comes to their role in court. For example, female litigators have been denied continuances based on the need for parental leave.

In response, in 2016 a rule was proposed in Florida that would require state judges to grant motions for continuance for parental leave. The proposed rule would allow for pregnant attorneys to obtain three-month continuances for parental leave, so long as it does not cause 'substantial prejudice' to opposing parties. This historic rule would have removed the burden from the attorney to justify the need for parental leave and would instead require the judge to identify how the requested continuance would result in substantial prejudice to the parties before he or she may deny the continuance. Opponents of the rule cited concerns that law firms might take advantage of the rule to attempt to get more time on a case and that the rule might impinge on judicial discretion in the sense that a judge may be forced to 'check off the blocks with rules' rather than to make their own decisions. However, the rule garnered wide support and unanimous backing from the Florida Bar's Diversity and Inclusion Committee and a resolution of support from the Dade County Bar Association. While the rule was approved by the Bar Board of Governors in 2017 and submitted for adoption to the Florida Supreme Court which has jurisdiction to amend rules of practice and procedure, the Court rejected the rule in January 2018, stating that the Board of Governors lacked standing under the applicable rules to propose it.

Conclusion

The actions taken by the judiciary, law firms and bar associations to date are a positive step in the right direction to address the gender gap in the courtroom. Much work remains to be done to close the gap and afford female attorneys opportunities equal to those of their male counterparts.

Ava Borrasso
FCIArb
Ava J Borrasso, Miami
ajb@ajborrassolaw.com

Overview of recent developments in Section 1782 of Title 28 of the United States Code

The significance of Section 1782 of Title 28 of the United States Code ('28 USC §1782') as a tool to discover evidence for proceedings abroad has been much heralded and the subject of considerable discourse. The evolution of discovery available through Section 1782 has recently expanded. Arguably, the most impactful decision in the area applied Section 1782 extraterritorially and to affiliated entities. Discovery originally obtained through the statute has also been held available for use in subsequent US and foreign proceedings. Finally, the flexibility of the statute has permitted discovery of a variety of evidence – all as further discussed below.

This brief overview highlights recent developments in Section 1782 that underscore the breadth and significance of the statute.

Extraterritorial application and extension to affiliates

In a case of first impression, the Eleventh Circuit Court of Appeal in *Sergeeva v Tripleton Int'l Ltd,* held that Section 1782 applied *extraterritorially* and to *affiliates* in line with federal court practice.[1] By granting extraterritorial discovery in support of an asset recovery case, the Court clarified that the reach of Section 1782 extends to those subject to the jurisdiction of US courts. It also confirmed that access to documents beyond US shores includes documents within the 'possession, custody or control' of those subject to the federal subpoena power.[2] In short, *Sergeeva* determined that Section 1782 applies extraterritorially and to parties within the control of those subject to the subpoena power of US courts, including affiliated entities in proper circumstances. That finding is consistent with the Federal Rules of Civil Procedure as expressly incorporated into Section 1782. The extraterritorial reach of Section 1782 was subsequently re-affirmed by the Court in *Fuhr v Credit Suisse AG, 687 Fed Appx 810 (11th Cir 2017)* (unpublished).

By contrast, the Second Circuit, as of yet, has not decided the precise issue of extraterritorial application of Section 1782. In *Bouvier v Adelson (In re Accent Delight Int'l Ltd), 696 Fed Appx 537 (2d Cir. 2017)* the Court declined to address the issue noting the absence of a factual record demonstrating that the documents sought were located on foreign soil. The issue is one of historical division of the circuit.[3] As a result, the Eleventh Circuit is currently at the forefront on the issue of extraterritorial application of Section 1782.

Use of Section 1782 discovery in subsequent proceedings – domestic and foreign

A year before *Sergeeva,* the Eleventh Circuit decided another issue of first impression – whether information obtained via Section 1782 could be used in subsequent proceedings *within the US.* In *Glock v Glock,*[4] the court permitted a former wife to use evidence she obtained through a Section 1782 petition in a subsequent case under the Racketeer Influenced and Corrupt Organizations (RICO) Act she filed against her former husband. The Court addressed the implicit recognition that evidence secured by Section 1782 cannot be used for US proceedings (given its requirement to support a foreign proceeding) but went on to analyse the statute itself which is silent on the precise issue of *subsequent* use.

After reviewing the legislative history, policy rationales and principles of statutory construction that expressly incorporated the Federal Rules of Civil Procedure, the Court held subsequent use was permitted. Notably, in the underlying Section 1782 action, a protective order was in place that required the parties to revert to the issuing court for

any further use of the evidence. Once the former wife satisfied that requirement, the Court held she could use the evidence in the subsequent US RICO case and was not required to initiate new discovery in order to obtain documents already in her possession.

Similarly, in another issue of first impression, the Second Circuit held that discovery obtained through Section 1782 in connection with a foreign proceeding could be used subsequently in *other* foreign proceedings – again, subject to the discretion of the district court. In *Bouvier v Adelson (In re Accent Delight Int'l Ltd), 869 F3d 121 (2d Cir 2017)*, the petitioner sought discovery in connection with three foreign proceedings in France, Monaco and Singapore involving fraud allegations arising from the purchase and sale of original art. The application was ultimately granted with respect to the Monégasque proceeding with a protective order requiring the petitioner to seek permission of the court to use the discovery in any other proceeding.

The intervenor/respondent appealed the protective order arguing that the petitioner should be required to meet the legal requirements of the statute separately for each proceeding. The Second Circuit addressed the issue of first impression, relying, in part, on the Eleventh Circuit's holding in *Glock* that discovery obtained through Section 1782 could be used in subsequent US litigation noting 'the Federal Rules of Civil Procedure do not regulate what litigants may do with discovery after it lawfully has been obtained.' The Court decided the paramount aim of the statute is to place discretion in the district court to determine the discovery issues and saw 'no reason why the number or identity of the foreign proceedings in which a successful applicant may use discovery produced pursuant to the statute would fall outside that discretionary grant.'

Finality

In *Fuhr v Credit Suisse AG, 687 Fed Appx 810 (11th Cir 2017)* (unpublished), the Eleventh Circuit vacated and remanded an order granting a Section 1782 application on a disputed factual issue. In doing so, the Court decided an issue of first impression for the Circuit in line with the holdings of courts from several other circuits. Although discovery orders are typically not subject to appeal, the Court held that it had jurisdiction to review the denial of a motion to quash a subpoena issued pursuant to 28 USC §1782. Given that the denial of such relief effectively resolves the case, the Court held that the finality requirement for appeal was satisfied. The Court subsequently affirmed this holding in a published opinion, *Furstenberg Fin SAS v Litai Assets LLC, 877 F3d 1031 (11th Cir 2017)*.

Interesting applications

The flexibility of 28 USC §1782 permits its use in a variety of circumstances. For instance, a US district court recently granted a US Attorney's application to act as a commissioner to obtain evidence from a non-party financial services company for a case pending in Argentina.[5] The request was issued by the Federal Tax Court of Argentina through letters rogatory. The Court granted the request, in part, to promote the twin aims of Section 1782 as 'an efficient means of assistance to foreign countries' and to encourage 'foreign countries by example to provide similar means of assistance to our courts.'

A California district court recently granted a Section 1782 application from another US Attorney to obtain DNA evidence from an American citizen for use in a German paternity proceeding.[6] The German court originally sought letters of request pursuant to The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. Three requests for voluntary compliance from the German court were rejected by the defendant, a participant in the German case. The court addressed the mandatory and discretionary factors to obtain relief by Section 1782 and determined, notably, that the request for DNA was not unduly intrusive or burdensome. The decision is consistent with an earlier ruling by the US District Court for the Southern District of Florida granting similar relief.[7]

Finally, in *In re Stati,*[8] the court rejected the argument that 28 USC §1782 could not be used to support a proceeding to enforce an arbitral award. After rejecting challenges to set aside a $500m award against the Republic of Kazakhstan in an investment dispute, various proceedings were filed to enforce the final award in Sweden, Luxembourg and Belgium. The petitioners sought discovery through 28 USC §1782 of related bank accounts held by or for the National Bank of Kazakhstan as well as assets owned by or for the Republic of Kazakhstan.

The respondents first opposed discovery on the grounds that the ongoing collection proceedings were not 'adjudicatory' in nature and, therefore, not subject to discovery pursuant to the statute. The district court first noted that Section 1782 does not impose an adjudicatory requirement. However, because the argument was not directly contested, the court nonetheless decided the case assuming that such a requirement was imposed. The court handily rejected the notion that the ongoing enforcement actions were not adjudicatory because they involved material factual issues. As a result, the court decided 'petitioners need the discovery concerning ownership of assets and the interrelationship of the foregoing entities for use in these ongoing, contested, and adjudicatory foreign proceedings.'[9]

The respondents next argued the petitioners could not obtain information located in their London based subsidiaries through Section 1782. The court noted that the argument did not pertain to the pending Fed R Civ P 30(b)(6) deposition for testimony and documents but the petitioners' failure to comply with the subpoena requirements of Fed R Civ P 45 rendered relief premature. As a result, *Stati* addressed the split of authority discussed above with respect to extraterritorial application of Section 1782 but sidestepped the issue by resorting to the 'possession, custody or control' requirement of the federal subpoena power to determine whether the documents would be subject to production. The court granted the subpoena for the corporate representative deposition with documents and denied without prejudice the document subpoena pending proper service and additional information as to whether sufficient control existed over the subsidiaries so as to warrant the application.

Summary

In the midst of an overall global trend toward greater transparency and access to information, the use of 28 USC §1782 is likely to expand as a vehicle to obtain evidence to support foreign proceedings. Extraterritorial application of the statute appears to rest on solid ground. Coupled with the district court's discretion to compel production of evidence by a party located before it of documents within that party's 'possession, custody or control' (or those of its affiliates under proper circumstances), the use of this critical vehicle to obtain evidence is likely to increase.

Notes

1 834 F3d 1194 (11th Cir 2016). Both *Sergeeva* and *Glock*, discussed infra, are the subject of greater analysis in my recent article *Significant Developments in International Litigation By Way of 28 USC §1782* (Young Arbitration Review, Spring 2017).

2 Fed R Civ P 45(a)(iii).

3 Compare *In re Application of Godfrey*, 526 F Supp 2d 417 (SDNY 2007) (documents located outside US not subject to discovery pursuant to Section 1782), with *In re Application of Gemeinshcaftspraxis Dr Med. Schottdorf*, No M19-88 (BSJ), 2006 US Dist LEXIS 94161, 2006 WL 3844464 (SDNY 29 Dec 2006) (opposite result).

4 797 F3d 1002 (11th Cir 2015).

5 *In re Letter of Request*, 2017 US Dist LEXIS 149976 (MD Fla, 15 Sept 2017).

6 *HUTG v Nomura*, 2017 US Dist LEXIS 212101 (ED Cal, 26 Dec 2017).

7 *In re Letter of Request*, No 10-60445-MC, 2010 US Dist LEXIS 49241, 2010 WL 1655823 (SD Fla, 23 April 2010).

8 Case No 15-MC-91059-LTS, 2018 US Dist LEXIS 8111, 2018 WL 474999 (D Mass, 18 Jan 2018)

9 But see, *Hulley Enters v Baker Botts LLP* (*In re* application for an Order Pursuant to 28 USC §1782 to Conduct Discovery for Use in a Foreign Proceeding), Misc Case No 17-1466 (BAH), 2017 US Dist LEXIS 203066 (DDC, 9 Dec 2017) (rejecting 28 USC §1782 application seeking information from law firm to support unclean hands defence against related entities in foreign proceedings arising from Yukos-related dispute because information was tenuous to claims asserted and protected by attorney-client and work-product privileges).

US authorities can forfeit assets by surprise but the right response strategy is key to speedy relief

Jason A Masimore
Kobre & Kim, London
jason.masimore@kobrekim.co.uk

Robin Rathmell
Kobre & Kim, Washington, DC
robin.rathmell@kobrekim.com

Andrew D Wang
Kobre & Kim, New York
andrew.wang@kobrekim.com

Authorities in the United States have broad powers to seize assets suspected of being traceable to criminal activity. Moreover, the government has several means of seizing assets without giving any prior notice, even before filing criminal charges or a civil forfeiture complaint against those assets. Each of those mechanisms – (i) administrative forfeiture, (ii) temporary restraining orders, and (iii) seizure warrants – has specific and unique procedural requirements. To properly advise clients whose assets might be, or were, seized by the US government, it is crucial to have a firm grasp of those procedures to formulate a swift and effective response.

Imagine a client with substantial assets held in a bank account or trust. One day, the client attempts to access their funds, only to find that they have been frozen. The client then discovers that the funds have been seized by the FBI, although no official notice of the seizure had been received. Relying on the notice provision of the federal administrative forfeiture statute, a motion is filed, arguing that the failure to give proper notice means the government must return the funds. However, the district court denies the motion because the wrong seizure method was challenged – the government used a seizure warrant, not administrative forfeiture. This hypothetical broadly mirrors the facts of a March 2017 case from the US Court of Appeals for the Ninth Circuit and highlights the perils of not understanding the distinctions between the various seizure mechanisms.[1]

To avoid a similar outcome, here are some practical steps to take when the US government uses one of the three mechanisms available under US asset forfeiture law to seize assets without notice:

1. Administrative forfeiture

US law enforcement agencies can simply take unlimited amounts of monetary instruments (like cash or cheques) and up to $500k's worth of property on mere suspicion that it is traceable to criminal activity.[2] There is no court involvement or prior notice to the property owner. After the seizure, the government must send written notice to all interested parties 'as soon as practicable, and in no case more than 60 days after the date of the seizure.'[3] It also must publish a public notice of the seizure and its intent to dispose of the property. If no one files a claim within certain time periods, the agency that seized the assets will declare the property forfeit and sell it. Note that this mechanism is purely domestic and cannot be used to seize assets held outside the US.

How to respond: A property owner must file a claim – within the timetable and under the processes detailed in US statutes and regulations – directly with the agency that took the assets. After that, federal prosecutors must begin formal asset forfeiture court proceedings within 90 days or the agency must return the property to the owner. Once court proceedings begin, the government will have the burden of proving that the property is forfeitable. Claimants will also have the benefit of discovery and the right to a hearing or trial on the merits.

2. Temporary restraining order

Upon secret application by the US government and before formal proceedings have begun, a court may issue a temporary restraining order to seize or freeze property without prior notice to the owner, the opportunity for a hearing or the filing of a

complaint.[4] By default, such an order expires after 14 days, though it can be extended for good cause shown.

How to respond: After the assets are frozen or seized, an owner is entitled to a court hearing before the temporary order expires. The government bears the burden of establishing a substantial probability that the property is forfeitable and that the failure to restrain the property will result in it being made unavailable for final forfeiture. Notably, during the hearing, the court may consider evidence that would be otherwise inadmissible under the Federal Rules of Evidence.

3. Seizure warrant

US law enforcement agencies also may secretly apply to a judge for a seizure warrant against property without notice to the owner and before forfeiture proceedings have begun.[5] A court will issue a warrant against property after it finds there is probable cause (the lowest standard of proof in the US)[6] to believe that the property is subject to forfeiture, on the basis of a secret affidavit sworn to by a law enforcement agent, which is typically drafted by a federal prosecutor. The seizure warrant orders the holder of the property, such as a bank, to give the property to the US Marshals Service.

How to respond: An owner can file an action in court against the government. Rule 41 of the Federal Rules of Criminal Procedure allows anyone whose property is being held by the US government to challenge the seizure and seek the return of the property. Courts balance several discretionary factors in determining whether to allow the government to retain the property, including whether the property owner is likely to suffer irreparable injury if the property remains restrained. A Rule 41 proceeding reverses the burden of proof and places it on the owner of seized property. In challenges to administrative forfeiture or temporary restraining orders, the government bears the burden; in a Rule 41 challenge to a warrant, the owner must prove that that the seizure was unlawful and that he or she is entitled to lawful possession of the property.[7]

In the case described earlier, the property owner's fatal error was making purely procedural arguments under the standard for administrative forfeitures, rather than any substantive arguments relating to whether the property was forfeitable, which might have succeeded in a challenge to a seizure warrant.[8] As this situation illustrates, it is critical to assemble a team that understands which specific asset seizure mechanism the US government used or is likely to use before developing or commencing a defence strategy.

Notes

1 See *Omidi v United States, 851 F 3d 859 (9th Cir 2017).*
2 19 USC s 981.
3 18 USC s 983(a)(1)(A)(i).
4 19 USC s 983.
5 19 USC s 981(b).
6 The oft-cited definition of 'probable cause' is the existence of 'facts and circumstances within [the government's] knowledge and of which [it] had reasonably trustworthy information... sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.' *Brinegar v United States, 338 US 160, 175–76 (1949)* (citation and quotation marks omitted).
7 See *Fed R Crim p 41(e)* ('A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized.'); see *United States v Chambers, 192 F 3d 374, 377 (3d Cir 1999).*
8 Indeed, the Ninth Circuit pointed out that the district court construed the property owner's motion for return of the seized funds as a motion under Rule 41 and thus could have, but failed to, make such substantive arguments. See *Omidi, 851 F 3d at 863.*

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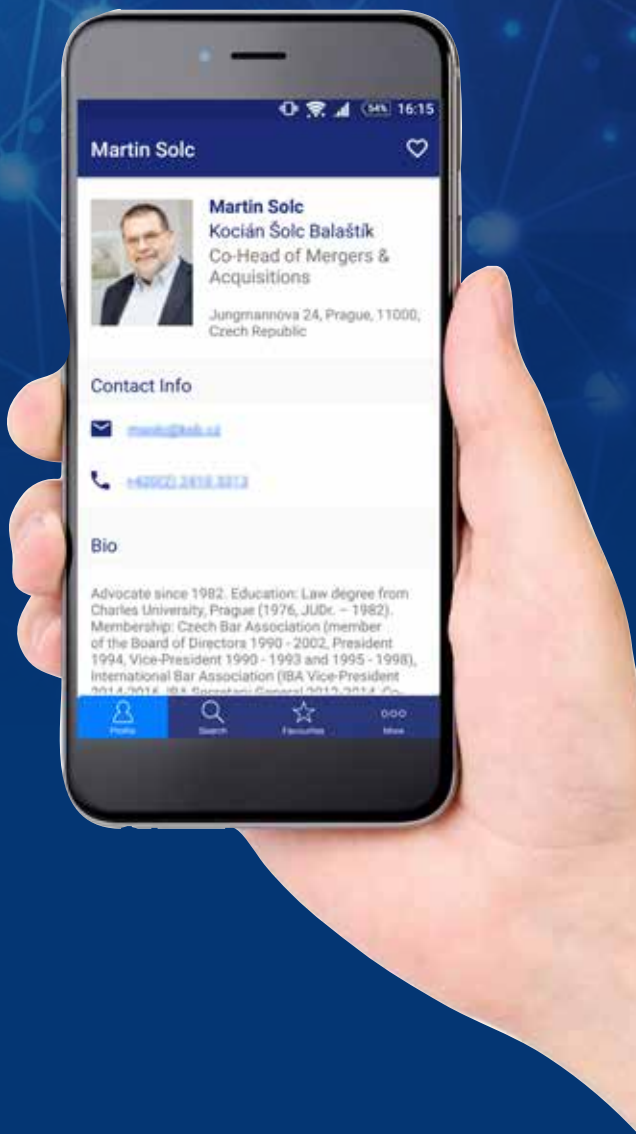

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