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# International Litigation News

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## From the Co-Chairs

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**D**ear friends,  
This is not the usual message from the Co-Chairs, which at this time of the year very much looks forward to our Annual Litigation Forum. As you will now know, in light of the completely unprecedented health emergency facing the world, we had to take the decision to postpone that event. We wish to take this opportunity to thank Rodrigo Garcia of Marval O'Farrell Mairal, and the rest of the organising committee, for all their hard work in developing a superb programme of sessions and social events for us. Whilst it is obviously too early to know when we will be able to hold our annual conference again, we are hopeful that their work will not go to waste and our committee will still be able to visit the beautiful city of Buenos Aires at a later date.

For most of us, current circumstances mean huge changes to our lives. Some of you will always have worked from home from time-to-time, but the majority of us did not do so regularly, let alone with our

families at home with us and with such limited opportunities to go outside and interact face-to-face with other people. Some of us have also seen the closure of our courts, calling into question how we can even do our job. But against the background of these severe challenges, we have been heartened by efforts friends and colleagues have taken to stay in touch, look for opportunities to work together, and share relevant legal updates. There are also opportunities for us as litigators to help clients facing disruption, and the committee officers are discussing a number of possible initiatives on this front. Please watch your emails about this in due course.

2020 promises to be a very challenging year and we are here to show that litigators love challenge and know how to navigate stormy seas.

Finally, please stay safe and well, and we look forward to seeing you all soon, at the next IBA event we are able to hold.

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## From the Co-Editors

As your Co-Editors, we are pleased to share with you this new edition of the IBA Litigation newsletter. In these challenging times, things cannot be taken for granted. We will unfortunately miss our traditional IBA Litigation forum (for now), which has always been a great way to catch up with friends and make new ones. It is why this edition of the IBA Litigation Committee newsletter is particularly special as it allows us to stay in touch with fellow international litigators, enjoy some of the memories of the IBA Committee's life and keep abreast of international litigation developments.

As with previous editions, we have received a great number of articles and it has been enriching to review and edit them. Many thanks to all the contributors. The topics range from black letter law to new law across numerous jurisdictions. In addition to the jurisdictional updates from our members worldwide, this edition includes several

reports on recent IBA litigation events from Seoul, to Milan, to India which is a tribute to the dynamism of our Committee. This edition continues our 'Diversity series' and some of our members' takes on what can be done to promote diversity. It also features a new series, 'Be inspired', which sees one of our members share what inspires him or her. This edition is also the occasion to highlight some of the adventures that the IBA Litigation Committee offers and go on the road with our now traditional IBA Litigation Committee Rally.

In signing off, we would like to thank Jane Colston immensely for co-editing the newsletter over the last two years. Thanks to her inexhaustible energy and brilliant ideas, we were able to take this newsletter to the next level. It has been an enormous pleasure and an inspiration to work alongside her.

Enjoy reading and please keep the contributions coming. Our focus is now on September's edition.

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# Be inspired!

## What are the top three books a lawyer should read in the course of his/her career?

British scientist, James Lovelock's, new book *Novacene* in which he thinks 'Our supremacy as the prime understanders of the cosmos is rapidly coming to end. The understanders of the future will not be humans but what [he calls] "cyborgs" that will have designed and built themselves.'

Richard Susskind's *Future of the Legal Profession*. Start embracing technology fast as Susskind predicts a decade of legal change to old ways of working.

Shoshana Zuboff's *The Age of Surveillance Capitalism*. As technology becomes increasingly sophisticated making every aspect of our lives more streamlined the legal world is wrestling with how best to regulate it. Zuboff's *The Age of Surveillance Capitalism* talks about behavioural surplus which is traded for profit. Zuboff argues that Google was unique in building a sustained billion dollar business around the insights into our future behaviour based on our past searches. The law is in danger of being outrun and out spent by these tech giants. Lord Sales, Justice of the UK Supreme Court, while delivering the Sir Henry Brooke Lecture for BAILII, 'Algorithms, Artificial Intelligence and the Law' likened this dilemma to the 'frog in hot water effect' saying:

'We need to think now about the implications of making human lives subject to these processes, for fear of the frog in hot water effect. We, like the frog, sit pleasantly immersed in warm water with our lives made easier in various ways by information technology. But the water imperceptibly gets hotter and hotter until we find we have gone past a crisis point and our lives have changed irrevocably, in ways outside our control and for the worse, without us even noticing. The water becomes boiling and the frog is dead.'

## What do you hope to see in the next Litigation newsletter?

Sandrine Giroud and I as Co-Editors have started a Diversity series seeking to share inspiration about what our fellow litigators were doing to promote diversity. The aim was to dismantle frontiers and help promote equity and inclusion at all levels within the profession. I hope this series continues not least I hope to gain inspiration for my new role as Brown Rudnick's equity, inclusion and diversity (EID) partner alongside with my New York partner, Chelsea Mullarney. We take over this important role from our Boston partner Sunni Beville as she has now been promoted to Managing Director of Dispute Resolution & Restructuring. The firm's EID initiatives include Social Mobility Fellowship (open to law students who are the first in their families to graduate from college), 'On Ramp' fellowship (which supports experienced lawyers who are committed to returning to work after a career break), and Adoption Benefits.

## Who was a great mentor to you?

My grandmother, Midge, who was hugely energetic, rarely fazed by life's challenges (and she lived in London through two World Wars), very independent and flexible in her thinking. Midge was a super role model/mentor as to how to live well. She lived until she was over 102 attributing her longevity to laughing a lot. I attribute it in part to that but also to her 'can do' spirit and her curiosity in life.



### What do you say to people you mentor?

If at first you don't succeed, try again. Be persistent. Seize and create opportunities rather than waiting to be given them. Work with a business coach so you allocate time to thinking about your career path and life plan. Don't let someone else write your narrative.

### If you had a spare half an hour in a city what would you do first?

Enjoy a good coffee on the way to the city's art gallery and/or a run (ideally with my IBA run club buddies – see recent photo, above).

## Diversity series: What are you doing to promote diversity?

**Jane Colston**

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I have recently been appointed Brown Rudnick's equity, inclusion and diversity (EID) partner along with New York-based partner, Chelsea Mullarney. We take over this role from Boston-based partner Sunni Beville as she has now been promoted to Managing Director of the Dispute Resolution & Restructuring Department.

As part of our commitment to breaking down barriers, we will participate directly in conversations regarding recruitment, integration, professional development, elevation and compensation.

In this context, since December 2016, as part of our commitment to diversity and inclusion, we have been hosting a Women in Business series in our London office. By having inspirational women, leading in their various fields, come and speak about their work and experiences, we hope to create a dynamic forum where

business relationships can be created and opportunities realised.

Brown Rudnick's London offices extend across a townhouse on Clifford Street, in Mayfair, built in 1720 for a wealthy landowner. The building had been used as tailors' premises for a large portion of its life. I was therefore thrilled to kick off the series with Kathryn Sargent who, in 2016, shattered one of London's most enduring glass ceilings when she became the first woman to have her name 'above the door' in the world famous Savile Row's 213-year history.

Our most recent speaker, Dame Jane Dacre, President of the Royal College of Physicians, spoke about not only succeeding in what can be described as a male-dominated field, but also generally about the kind of traits one must possess to be a good leader, namely the five 'C's': capability, confidence, communication, creativity, and courage.

To date, the Women in Business series has had the honour of welcoming a number of inspirational speakers: Amber Rudd (while she was UK Home Secretary), Cressida Dick (Metropolitan Police Commissioner), Cath Kidston MBE (English fashion designer), Inga Beale (CEO, Lloyds of London) and, on 18 April 2019, the 100th anniversary of Women in Law in England and Wales, Christina Blacklaws, the President of the Law Society.

On 24 March 2020, we will have the honour of welcoming Mrs Justice Sue Carr to speak. She will be sworn in as Lady Justice of Appeal in April 2020.

## Ilona Karppinen

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**D**iversity in law firms has received increasing attention within the Finnish legal profession, most recently as a result of a survey published by the Finnish Bar Association in January 2020.<sup>1</sup>

The survey was based on a questionnaire sent to all Bar members and associate lawyers within their firms. Its aim was to evaluate the position of women and parents working in law firms. The results were keenly discussed at a half-day seminar at the Finnish Bar Association's annual conference, and insights into this hot topic were actively shared on social media and even the national news.

Overall, the results of the survey seemed promising. About 60 per cent of all new members accepted to the Finnish Bar Association are women, and equality was generally perceived to be at a rather good level within the profession.

Nonetheless, as in other countries, senior positions within Finnish law firms continue to be dominated by men. Moreover, one-in-four of the female lawyers who answered the questionnaire was actively considering a change of profession. Although the overall burden of work was the leading cause for considering career change for both men and women alike, women's deliberations were more often also influenced by difficulties in work-life balance, perceived lack of equality, and firm values.

A quarter of all respondents reported that they had experienced or witnessed undue favouritism at their workplace, and 14.1 per cent had experienced or witnessed discrimination based on family or pregnancy. The respondents' greatest concern was that men and women were not treated equally in decisions relating to career advancement or partner elections. The results were estimated

to be at least partially related to the fact that women took much longer parental leaves than men.

So what am I – as a member of the Bar, a woman and a parent of two young children – doing about this?

I have been proud to contribute to our firm's *Bridge* initiative, which is designed particularly to support those members of staff who are parents with young children. The aim of the initiative is to encourage these talented people to continue working for the firm by helping them in the transition where they return to work from parental leave, and in the early years of parenthood, when balancing a career and family life can be most intense. The *Bridge* project group wanted to ensure that there is a culture of respect within the firm towards parents, that work practices are designed to enable work-life balance (timing of internal meetings within normal office hours, flexible possibilities for remote work, readily available childcare for a sick child, etc), and that mentorship programmes are available to encourage parents of young children to advance in their careers.

I have also tried to promote female lawyers across firm borders through various professional networks. One such informal network is based on the idea that the selection of female arbitrators could be increased if counsel had better knowledge of the pool of potential female candidates. In addition to this underlying idea of promoting diversity in arbitration, the network has brought me true inspiration through the stories of relentless women that have reached great achievements through hard work.

Most importantly, however, I have strived to make a difference through my everyday actions. Although on some days the struggle between work deadlines and day-care hours is real, overall, I feel privileged to be able to lead a meaningful career together with a rewarding family life. My hope is that by setting a positive example I may also encourage other women, parents and lawyers struggling with work-life balance to believe in their abilities to advance in their careers while pursuing their other passions in life.

### Note

- 1 The Finnish Bar Association, *The position of women and parents within the legal profession (Naisten ja perheellisten asema asianajajalla)*, 2019, available at: <https://asianajajaliitto.fi/asianajajaliitto/organisaatio/viestinta/tutkittua-tietoa/>, (in Finnish).



**A** core value at Gowling WLG is that ‘we all bring something different’ and we invest time and resources to bring this value to life, ensuring that we create an inclusive environment which enables everyone to thrive.

This approach is led from the top: our chairman is the firm’s diversity and inclusion champion and each of our board members sponsors a different employee resource group. Each of them has inclusion-related objectives and has received reverse mentoring from a colleague from the demographic they are championing, which has given them invaluable insights into others’ ‘real life’ experiences.

Much of the work we do to engage with our colleagues comes through our employee networks. We currently have five networks: OpenHouse (LGBT+); Thrive (Gender); EmBRACE (ethnicity); Enable (disability and mental health and wellbeing) and Family Matters (parents and carers).

Our networks provide ‘lunch and learns’, run events for colleagues and raise awareness through powerful story-telling videos. Support takes the form of mental health champions and domestic violence champions, who provide listening and signposting services, which are well used, as well as a confidential employee assistance programme.

Wellbeing is a huge theme running through our work and we have lots of initiatives to boost colleagues’ wellbeing – everything from jigsaws and colouring books in break out areas (hugely popular) to subsidised yoga and massage and visits from our ‘doggy distress’ canine friends (the most popular of all!).

Alongside all of our work to engage with and support our people, we recognise that we need to build inclusion into our processes if we are to achieve sustainable change. Recent examples of process changes include:

- An 18-month Inclusive Leadership Programme for our partners and senior leaders offering in-depth behavioural learning to positively impact both personal and group decision making in key people processes such as recruitment and performance review.



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- A sponsorship programme for high potential female and BAME colleagues.
- We have revolutionised our recruitment processes to attract a more diverse talent pool actively and accurately, designing out bias. Combining Artificial Intelligence and innovative ‘gamification’ talent-selecting technologies, we can unearth big data-supported user personality profiles ensuring that selection is based on suitability and fit, eliminating adverse impact or bias.
- Maternity/paternity coaching is available to all employees either one-to-one or within a group setting. We are piloting an emergency care provision for parents to source qualified childcare professionals at short notice paid for by the firm and introducing parenting cafes.
- A Family Leave Bridging policy has been introduced, recognising that in the lead up to and on returning to the workplace from maternity/adoption/shared parental leave, colleagues benefit from reduced time recording targets.
- We are now a number of years into our agile working practices – recognising that people can work in different patterns and places whilst still meeting the needs of their teams and clients. This has been hugely popular with benefits not just for those with caring responsibilities but for everyone from a wellbeing perspective.

We are very much on a journey: we have done a lot but there is still plenty to do.

**Nicola Kömpf**

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**A**s a partner of Alerion, head of German Desk and recently designated as board member in charge of communication and HR, I am currently contributing to support in our office young lawyers and parents (both women and men) to manage their work-life balance to achieve their personal goals and to reach a higher degree of diversity.

Alerion is a mid-sized French independent full-service law firm based in Paris, which focuses on international business law. Our multidisciplinary team includes over 70 lawyers who are constantly combining their talents to deliver high value added and practical solutions for our clients.

While the fight against discrimination was already enacted in the US by the 1964 Civil Rights Act, pro-diversity activities only appeared in France in the early '90s. Furthermore, people increasingly wish to consume more ethically and responsibly. The same applies to services. A welcoming, open-minded environment is, from my

point of view, also a key issue in recruiting future talent.

Diversity emerges as an important management tool in law firms and we have attempted to harness this evolution. Over the last decade we have implemented different measures built around five basic pillars:

- recruitment of lawyers with different backgrounds, with typical and atypical CVs, focusing on various experiences and strong language skills;
- creating of an environment conducive to wellbeing and allowing personal expression;
- career guidance;
- collective action to strengthen the spirit of belonging to an attractive law firm;
- favouring cross-disciplinary teamwork.

These efforts have been well awarded, as we have reached a good gender balance of 47:53 female/male lawyers. Women account for 27 per cent of our partners, a high score compared to equivalent international law firms in France. And a decent percentage have become partners through internal promotion, ie, seven of the 18 partners are former associates who climbed the corporate ladder including two women lawyers.

Three lawyers have also been admitted to a foreign bar and a great number have foreign diplomas or additional education in addition to their Paris Bar admission. I am myself, a member of both the Paris and Berlin Bar, the mother of three children (18, 16 and 11 years old), and a partner since 2000, a good example of what is possible.

Courage and determination are essential as well, in part, chance meeting the right people at the right time to support the project. Consequently, we have the benefit to develop resourceful solutions adapted to our clients' needs with our flexible, highly qualified, open-minded and diversified team.

*'Equality is being invited into the room, Diversity is getting a seat at the table. Inclusion is sharing your ideas and being heard.'* – Sweeney and Bothwick

**A**s a firm, we are committed to creating an inclusive working environment where everyone has the opportunity to reach their potential, while being themselves at work. We believe that creating a culture of inclusivity is important in helping us deliver on our growth ambitions, while ensuring we attract and retain talent from the widest possible talent pool.

We have an Inclusivity Working Party, headed up by Carol McCormack (partner). This group consists of a cross-section of colleagues from across our firm. The group is initially focusing on four key areas which are gender inclusivity, social mobility, raising awareness of unconscious bias (or unintentional bias), underpinned by looking at how we create a more inclusive environment for all.

During the last two years, the most energy has been directed towards looking at how we can better support the progression of female talent across the firm. With this in mind, we launched Women@Michelmores (W@M) in 2017. Our stated aim is to have at least 30 per cent (ideally higher!) female partners by 2022.

The changes introduced have included:

- promoting agile working, including the ability for all lawyers and senior support staff to work up to one day a week from home every week – this has been hugely popular. We also actively consider all new roles on an agile basis, using flexible recruitment platforms such as Daisy Chain to promote this externally;
- providing unconscious bias training to our senior leadership team, and those who have a key role in decisions affecting our people around selection, promotion and pay;
- making simple process changes to help mitigate against unintentional gender bias as part of our decision making process



**Tim Richards**

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around areas such as selection, promotion and pay;

- promoting our parental leave offering and the uptake of Shared Parental Leave (SPL). We believe that if men and women share family responsibilities, it will encourage gender balance in the workplace;
- creating 'lean-in circles' for female colleagues, providing opportunity to share insights;
- being transparent about the support we provide for maternity, parental and adoption leave and pay on our recruitment website so that potential candidates have access to this information without having to ask at interview.

Other ideas we are currently actively considering include:

- exploring how we can get men and women working together to change workplace culture to be even more gender inclusive;
- introducing Inclusion Advocates who are equipped to call out every day gender bias;
- providing one-to-one coaching for anyone who has an extended period of leave for family responsibilities (maternity leave, parental leave, adoption leave or elder care).

We believe the source of excellence lies in the differences between us as individuals. We encourage people to play to their individual strengths, within a collaborative working environment, which is how we aim to build strong and diverse teams. We realise that while we have made some great progress, there is still much to do!

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## IBA Litigation Committee rally: from Vienna to Seoul

It started as a throwaway comment in September 2014. My Partner Michael O’Kane mused out loud to Matt Denney (who has since become a litigation funder) that it might be fun to drive to Vienna for the IBA Annual Conference a year later in September 2015. Little did we realise the impetus that such a thought might provoke. Cynics might impolitely describe the pastime as *Top Gear* for lawyers but there is a serious point I suggest, namely a group of great friends, colleagues, practitioners and internationalists to enjoy each other’s company driving through wonderful scenery on some of the best driving routes in the world engaging in stimulating intellectual discussion about the Rule of Law, international enforcement of judgments – and the sound of their exhausts!

The Vienna trip in 2015 was soon followed by the Pacific Highway from San Francisco to Los Angeles. A spectacular group of Ford Mustangs (sadly only V6s) and the odd Camaro punctuated by a convertible 911 were gathered outside the Fairmont Hotel as the half-yearly litigation event concluded but were completely upstaged by the 1960s Mustang secured by one Daan Scheurleer. Daan’s pleasure shared by his co-pilot Yvette Borrius was relatively short lived as his (eat your heart out Steve McQueen) ‘pony’ came to a stuttering halt at the world famous and incredibly tacky (trust me!) Madonna Inn in San Luis Obispo, but Daan was luckily able via the specialist provider to secure a replacement for the rest of the drive to LA (a 289 cubic inches V8 no less!). Message to self: ’60s cars have poor braking and are truly rotten going around corners, though they do look mega cool.

The exuberance of the Pacific Highway drive was matched, indeed surpassed I respectively suggest, by the road trip to Rome in 2018. A fine collection of mainly Porsches interspersed with Ferraris beautifully driven and stylishly guiding our way courtesy of John Reynolds and the aforementioned Daan headed from Geneva with spectacular moments and memories of a kind that those

of us who participated will never forget. For the environmentalists among you, rest assured that the future of the earth was secured by Ilya Nikiforov in his Tesla which purred all the way from St Petersburg to meet us and enjoy the pleasures of the IBA Litigation Committee *Italian Job*, 2018 style.

The Half Year Berlin event produced a mini group who undertook a tour of what was formerly East Germany in a demonstration of the German engineering including a very slow Mercedes diesel convertible encouraged by Graham Hain and a less than impressive BMW Z4 driven by yours truly that limped along behind the others with a very weak two litre engine. Star of the show, however, was Professor Wolfgang Spoerr who came along in one of his collection pieces – a stunningly beautiful Mercedes 450 in gold. Wolfgang will be ever known by his new nickname ‘Gold Member’.

Now all roads lead from Berlin not to Rome, but of course to Seoul in South Korea. Those of our group who previously had driven from Amsterdam (Daan and Jack Berk) faced the impossible challenge of taking their own brace of Porsches to Asia for this purpose and a splinter group lead by Graham with a masterful route undertook our own version of *Top Gear* in reasonably priced Kias and Hyundais. The pictures attached say it all, have you ever seen such a fine group of international lawyers looking, with respect to us all, like Uber drivers. The three Kia Avantes and the Hyundai Sonata (to misquote Henry Ford) ‘you can have any colour you like as long as it is *white*’ undertook a spectacular drive to the demilitarised zone and miraculously reached a top speed of 80 kilometres per hour. Yes the cars in aggregate had a collective BHP than less than either of the aforementioned Ferraris but the drive was littered – and you think that London roads are bad – with speed cameras at almost every junction keeping speed down and obviously intended to serve as a motoring/criminal law impediment to Kim Jong Un should he ever plan to head south and see. Mercifully



## IBA LITIGATION COMMITTEE RALLY: FROM VIENNA TO SEOUL

all was quiet on the DMZ front and, joking aside, the impact of the border and of the museum and the stories that one read of the continuing suffering of the Korean people is something that will stay with all of us for many years to come.

The intrepid group on the reasonably priced DMZ drive were respectively Graham, Anthony Maton, Lesley Hannah, John Bramhall, Alexander Troller, Gabriel Lansky, Tomislav Sunjka and Mara Okmazic with Jack sadly delayed by a boarding pass issue (not issued in fact) at Frankfurt. He and I had a mini group hug 'a deux' randomly on the final day of the trip at a motorway junction under a bridge! The other members of the Petrol Heads of Law Group so aptly named

by Daan were there in spirit and will very soon be added into our next adventure which – and please each of the readers secure the space in your diary – will be a round Florida trip – including the Keys immediately prior to this year's IBA Annual Conference in Miami.

So ladies and gentlemen, charge your batteries, rev those engines, secure a decent supply of lithium batteries if you are green, because the Litigation Committee tour of Florida 2020 will soon be starting at a kick-off point near you namely Miami, Tampa or Orlando (to be determined). All interested please notify Daan, Graham or myself before the next summer solstice. And don't give up on the pleasure of driving just yet. There's still life in pistons and rocket fuel!





ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

**IBA 2019 SEOUL**  
 22–27 SEPTEMBER
OFFICIAL CORPORATE  
SUPPORTER

# Annual Conference report

24 September 2019

## Lucinda Orr

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## Global women litigator breakfast

**N**ow in its third year, the Global women litigator breakfast, was held at 0800 on Tuesday 24 September 2019, in the COEX conference centre. On this occasion, the topic for discussion was Wellbeing.

The event was kicked-off by a short presentation from Sam Hosseini, a Partner at Stikeman Elliott, Toronto and myself. I set the scene by exploring definitions of wellbeing and discussing so-called ‘drivers’ to wellbeing. The five drivers focused on were:

- staying connected;
- being active;
- taking notice;
- constant learning; and
- giving.

On the first point, I discussed that research has shown that being lonely can be physically harmful to health, as it carries with it everything from stress and troubled sleep, to cardiovascular and immune problems. Oxytocin, the hormone responsible for affiliation protects us from cardiac ill-health and is released when we are in the presence of people we care about. Interestingly, studies have shown that it needs to be physical presence, so catching up with family and loved ones via social media and emails sadly does not assist.

As for the second point, physical activity can be marvellous because not only does it have physical health benefits, but it also mental health benefits. It increases the production of endorphins (those ‘feel good hormones’) and causes a reduction in cortisol (‘the stress hormone’). Memory and mood are boosted by getting sweaty, as is productivity

back at your desk. However, there was also a cautionary note – tempting as it may be to treat physical activity in the same way as we treat our busy lives and work out very intensely – on a stressed body and mind this can actually have a negative impact. If you are experiencing symptoms of extreme fatigue, a hard bout of physical activity will put the body under too much strain. At such times, the advice is to choose gentle stretching or walking instead and respect the repair and recovery that your body requires.

The third driver explored was on taking notice. The evidence proves that our lives are indeed more full and the demands greater on us than ever before; but similarly, research has been gathering pace that unequivocally demonstrates the value in becoming more aware, moment-by-moment. Tuning into and appreciating bird song for example while we are walking to court. When we are able to live more in the present, we start to train our brains to reduce rumination and worrying about future states. This leads to increased positive mental states, self-regulated behaviour and boosts self-knowledge and awareness.

Being curious and continually learning throughout life has also been shown to drive personal wellbeing, and was the fourth driver discussed. Learning has many benefits including raising self-esteem, confidence and building a sense of purpose. Professor Paul Dolan, a behavioural scientist at the London School of Economics has found that happiness is driven by having a sense of meaning or purpose in our lives, balanced

with enjoyment of one off, hedonistic pursuits. Curiosity is a phenomenon that we see in children but outside our job roles, we may find that as adults our lives have become more one dimensional. Positive psychology (*the scientific study of what makes us flourish and thrive*) demonstrates that being curious broadens our minds to more possibility in life. This has a direct correlation on our ability to cultivate more positive emotion.

Lastly, I discussed the instinctiveness goodness of giving to others. Professor Sonia Lyubomirsky of the University of California, demonstrated that carrying out one simple act of kindness per week over a six-week period increased wellbeing in participants when compared to a group that committed no acts of kindness. Giving can take many forms: it may be a formal volunteering exercise or perhaps a pro bono case or it could be subtler than this. Interestingly, small actions can have just as deep an impact on wellbeing as the more obvious ones. It can even be as simple as sharing a smile with a stranger on your commute to work.

Sam then explored the differences between 'pressure' and 'stress' and the effects on the human body. Those gathered were shown a TED talk clip from Kelly McGonigal, a health psychologist and lecturer at Stanford University, on how to reevaluate stress in our lives and how thinking that stress is bad can adversely affect peoples' health and even life expectancy. McGonigal now advocates choosing to view our stress response as helpful and what actually makes us human.

Very kindly, Erin Valentine of Chaffetz Lindsey in New York; Lydia Danon of Cooke, Young & Keidan in London; Ursula Ben-Hammou of Rodrigo, Elias & Medrano in Santiago; Annalisa Reale of Chiomenti in Milan; and Sara Chisholm-Batten from Michelmores in Exeter, had all agreed to be moderators for the Breakfast. Following the presentation, discussions were then thrown open to each of the tables, with a template set of questions provided to the moderators to give the discussions some structure.

Those present at the Breakfast shared their experiences of how to spot stress in themselves and others and also how they had built in mechanisms for reducing it. Examples ranged from box set binge watching, to

kick boxing, or knitting. There was then a question of what, if anything, their law firms or organisations were doing for wellbeing, with fruit baskets, flexible working, and yoga sessions all given as examples. Finally there was a discussion on what more organisations can do?

The table discussions were lively but inevitably each took their own tangent. It was fascinating to swap ideas on how to get the best out of junior lawyers, for example, and how best to cater for the different generational working needs.

One Partner from Buenos Aires explained that the junior lawyers in their firm had been getting to work at 10am or later, and then staying late into the evenings. It turned out that was because the associates could not predict what time they would be able to leave in the evening, and so they had been doing their personal life administration prior to coming to work. A radical decision was therefore taken by the firm's partnership, that all lawyers had to be in the office by 9am, but also that they must leave by 6pm. Apparently this move actually worked exceptionally well, as the associates were now more focused in office hours and free in their evenings to enjoy themselves –and billable hours and productivity actually went up!

Different ideas discussed were the benefits of flexible working and whether allowing lawyers or support staff to work from home also helped wellbeing. Some felt litigation in particular does not lend itself well to remote working and the importance of bouncing ideas of colleagues could not be underestimated. As ever, it was fascinating to hear how different countries and cultures were dealing with a topic that seems to be growing in global prominence.

The Global women litigator breakfast is not just for women – or even just for litigators! And is fast becoming a highlight of the IBA Annual Conference. So, if you find yourself in Miami in November, do come along to this year's Breakfast to meet and share ideas with your peers. As the first driver above states, staying connected is good for your health too, although you may then have to engage with the second driver and partake in some physical activity afterwards so that you can work off all those lovely breakfast pastries!



# Annual Conference report

24 September 2019

## Frederick Acomb

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# Meditation and responding with skill to the daily stress of practising law

Imagine 30 lawyers from around the world sitting together in their suits quietly meditating. That's what happened this last September fall at the IBA Annual Conference in Seoul (see photo). During a panel discussion entitled 'Ways to cope in practice management', I lead the attendees in an eight-minute guided meditation. I talked the participants through a simple meditation that focused on the physical sensations of the breath. When interrupted by thoughts, or emotions or sounds, or itches, or aches, or pains, or boredom, the instructions were to simply notice those things, let them go, and start again: gently moving the focus back to the physical sensations of the breath.

Perhaps you're wondering, 'But what was the point?'

The answer is that by meditating we train our minds to be less reactive, as noted meditation teacher Sharon Salzberg explains:

'The most important moment in the whole process is the moment you notice that you've been distracted, after you've been lost or fallen asleep or whatever. That's when you have the chance to be truly different. Instead of judging and berating yourself, you can practice letting go and beginning again. That's the core teaching.'<sup>1</sup>

But what if you're confronted with particularly strong emotions such as anger, sadness, or fear? Without even noticing it most of us get swept away by strong emotions such as these, and only later realise that we've been hijacked by them. But the moment we notice that we've been carried off is the exact moment we have the opportunity to do something different, to begin again, and to go back to feeling the sensations of the breath. And each time we do this we train ourselves to be a bit less reactive.

Sometimes when we realise that we've been swept away by our emotions we might be tempted to *force* our minds back to the sensations of the breath. The problem with this, however, is that it is a futile act. It's like trying to make a beach ball stay under water. Through great exertion we might be able to force the ball underneath, but only for a moment. Despite our best efforts it will eventually pop to the surface. So too with our thoughts and emotions. And by trying to do the impossible – trying to force our thoughts to go away – all we really do is add to our anxiety.

Perhaps counterintuitively, when strong emotions surface during meditation a good technique is to actually *open up* to them, and to notice where we feel them in the body. For example, if it's worry, is there a tightness in the chest or the arms or stomach? If it's anger, is the heart beating faster? Does the face feel hot or flushed? Whatever the physical sensations are, open up to them and watch what happens. What often happens is that the emotion lessens, and when the emotion lessens we can gently bring our attention back to the physical sensations of the breath. Again, by doing this we train the mind to be less reactive.

My favourite meditation teacher, Joseph Goldstein, speaks eloquently about the great power our thoughts have over us:

'Normally, our thoughts have tremendous power in our lives. They are the dictators of our mind – "Go here, go there, do this, do that". We're the slaves of our thoughts. And yet when we are aware of them, when we are mindful that we're thinking, we see that a thought as a phenomenon is completely empty and fleeting. It's little more than nothing.'<sup>2</sup>

In other words, through meditation we learn to notice our thoughts, and when we



notice our thoughts we learn to notice that they come and go, and when we realise that thoughts come and go, the power of our thoughts is diminished. This helps us to avoid being hijacked and jerked around by them.

One might be forgiven for wondering what any of this has to do with the practice of law. One way to answer the question is to call to mind *that lawyer*. By *that lawyer* I mean the lawyer who never fails to make you angry. When your phone vibrates and you see that you've received an email from him, perhaps you feel your chest tighten and your hands ball into fists. Maybe he has a habit of attacking you personally. Perhaps he lies. Worse, maybe he's good at attacking and lying: so good that you're afraid that the judge might believe him. The question is, how do you relate to his emails, and to the emotions his emails engender? Do you react to them? Does your reaction serve the interests of your client, or does it get you into an unnecessary fight that incurs more fees? Alternatively, instead of showing your emotions, do you silently stuff your emotions down only to take things out on your family and colleagues later that day? Through meditation we slowly learn to avoid reacting, and to avoid stuffing our emotions inside, and to instead notice our emotions, open up to them, and allow ourselves to respond skilfully.

Meditation teacher Jon Kabat Zinn has developed a technique designed to help bring the benefits of meditation into our daily lives. The technique is known as 'STOP'. STOP is an acronym that stands for the following:

**(S)top** and interrupt your thoughts.

**(T)ake** a breath (or two or three!)

**(O)bserve** what is happening around you and inside you. What can I see, hear, sense, smell, feel? What am I thinking?

**(P)roceed** and reconnect with your surroundings and activity.<sup>3</sup>

In other words, when you get the email from that lawyer who drives you nuts, stop, take a breath, notice the sensations in your body, and *then* respond. This will decrease the likelihood that you will immediately react and find yourself in a dispute, and will increase the chances that you'll skilfully respond in a manner that best serves the interests of your client.

In addition to possibly helping you become a better lawyer, preliminary studies suggest that regular meditation may help to lower stress levels, reduce anxiety, improve attention, increase brain grey matter, improve sleep, help prevent depression relapse, and manage chronic pain.<sup>4</sup> Interestingly, these things probably help us be better lawyers too.

If you're interested in trying meditation, there are a large number of apps that can teach you how to do it. I've used a number of them, including *Calm*, *Headspace*, *Waking Up*, and *Insight Timer*. My current favourite is *10% Happier*. It has guided meditations from some of the best meditation teachers in the world, including Joseph Goldstein and Sharon Salzberg.

I also recommend starting slowly. The first time I tried meditation I was shocked to discover how active my mind was. My mind was whipping from one thought to another without a break. This was the first time I'd noticed this. 'No wonder I'm so stressed!' I thought. I couldn't focus on my breathing for longer than a second or two, let alone 30 minutes. There was no way I could meditate for 30 minutes, so I decided to try for ten minutes a day. I couldn't manage ten minutes either, so I tried for five minutes. But that was too much as well, so I finally decided to meditate for just one minute a day. Because it was only one minute, I was able to do it every day without fail. And by doing it every day I made it a habit. Over time I was able to extend my meditation out to longer periods of time (once I got to 60 minutes!), but even one minute helped. My wife started to notice that I was less reactive and more patient. So did my law partners. I noticed that I was better able to focus, and much more skilful in how I responded to the daily stress of the practice of law.



#### Notes

- 1 'You Can't Fail at Meditation', *Lion's Roar*, 19 January 2018, available at: <https://www.lionsroar.com/cant-fail-meditation>, last accessed 1 March 2020.
- 2 *Ibid.*
- 3 Anja Tanhane, 'The Practice of STOP', *Mindfulness Meditation*, 19 May 2013, available at: <https://mindfulnessmeditation.net.au/the-practice-of-stop>, last accessed 1 March 2020.
- 4 Suzanne Kane, '10 Surprising Health Benefits of Mindfulness Meditation', *PsychCentral*, 5 July 2018, available at: <https://psychcentral.com/blog/10-surprising-health-benefits-of-mindfulness-meditation>, last accessed 1 March 2020.

# Annual Conference report

23 September 2019

## Urs Feller

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## Litigation crisis management

The session was chaired by Sverker Bonde (*Advokatfirman Delphi*, Stockholm) who had invited a distinguished group of panellists to provide insights and strategies for a company in a corporate crisis. Speakers were Ms Song-Yi Son, senior counsel for ABB Korea in Seoul, and Giovanni Lombardi of illimity Bank in Milan as well as the private practitioners Peter Calamari (Quinn Emanuel Urquhart & Sullivan, New York) and Urs Hoffmann-Nowotny (Schellenberg Wittmer, Zurich).

The panel addressed how to balance the necessity of transparent and quick communication to the public against the different perspective required when defending the company against civil claims or dealing with regulatory or criminal inquiries.

### Hypothetical scenario

The following hypothetical scenario was put to the panellists. Your client, a listed company in the IT sector, is subject to a massive data hacking attack involving the theft of private data of millions of customers. The hackers threaten to sell the data to the highest bidder unless the company pays a substantial sum to the hackers in bitcoins. News reports are being aired on an hourly basis, making the situation for the client increasingly difficult. How can general and external counsel prepare in advance for the possibility of such a challenging scenario?

### Preparation and priorities

Song-Yi Son explained that preparation was key in such a situation. If the company only sets up a crisis organisation when things are at such a stage and are threatening to get out of hand, it's too late. The company needs to know in advance who is in charge in a corporate crisis, where the survival of the company is the top priority.

According to Song-Yi Son, a company needs to set the narrative, and respond to the most relevant question, namely how to communicate the crisis to shareholders, employees, the regulatory authority and to the wider public. The company urgently needs to mitigate the negative impact to survive.

Peter Calamari suggested that the company identified a single point of control where all information was available and the vital decisions are taken. The company needed a consistent approach in order to re-establish confidence in the market and with the public.

Giovanni Lombardi, having experienced the Parmalat demise, explained that a crisis committee with a clear chain of command was required to avoid the onset of a crisis in the first place.

### Independent external investigation required

The hypothetical scenario was then further developed. The internal investigation showed that the company had failed to invest sufficiently in data protection measures which may have facilitated the attack in the first place.

Urs Hoffmann-Nowotny explained the challenges facing external counsel in such a situation. In a first step, the client's expectation and the set-up needed to be clarified. A simple defence strategy might not be sufficient to restore public confidence. Even when litigation was threatened or already pending, the litigation risk assessment was not the decisive factor in the public communication. For a company in crisis, the client should try to shape the public opinion proactively.

There was a fine line drawn between transparency and the unnecessary divulging of confidential information. To get back on top of the situation, the communication needed to focus on known facts. Any information that could be proved incorrect

needed to be avoided. The company had to apply a policy of rigorous consistency and reliability. The worst for a company would be, if it had to change the facts after disclosure.

Especially if the problem was within the company, an independent factual investigation by an external provider could be crucial. Such an inquiry could enable a full review of the facts and identify the failures. Another crucial question was whether the external report of the investigator was to be released or held back by the board of the company. The panellists identified both advantages and disadvantages in the two scenarios. In any event, the company needed to take responsibility without admitting liability. It was helpful to bear in mind that different audiences (ad hoc body, wider public, supervising authority, investigating authority) might require different levels of transparency. A further layer of complexity arose in case the company was active in different jurisdictions or had worldwide operations. The company had to address the eminent issues in all jurisdictions in which it was operating, keeping in mind that different regulators might require different remedial actions.

### **Different strategy for the company in crisis compared to classic litigation**

The hypothetical scenario was developed even further. It came as no surprise that the share price of the company quickly plummets in the context of such a disaster scenario. Affected individuals, shareholders and consumer threaten to bring (class action) litigation against the client. The regulatory authority, the government, employees and competitors are considering regulatory action and litigation against the company. The client quickly faces the real threat of bankruptcy.

Peter Calamari outlined that a normal approach in litigation would be insufficient in such a situation. Rather, an opposite strategy needed to be applied: a single court action was no longer the decisive issue, but rather the crisis as a whole. To restore public confidence, transparency rules over confidentiality and a prompt remedy were required, otherwise the company would not survive.

Whereas in the classic approach in litigation, the company maintained confidentiality and applied a delay and defend strategy to win the litigation, in a corporate crisis such an approach could lead directly to bankruptcy

because the public confidence could not be restored by such measures. Winning civil suits had a low priority in existential battles; the strategy had to be to protect the company including its brand itself. The financial survival became paramount for the company. The panellists seemed to agree that it is often better to settle disputes, even at substantial costs, than to face the public outcry. Defending an ongoing piece of litigation became secondary under such circumstances.

Song-Yi Son made reference to a huge scandal in South Korea, where a company experienced problems due to the use of a certain chemical in food. The only defence the attacked company had was to publicise that it was not the only producer who used this chemical. It goes without saying such a crisis strategy was insufficient.

In relation to the approach regarding the regulator, a cooperative approach might in some jurisdictions lead to an admission of guilt. A balance needed to be struck between cooperation with the regulator on one hand and maintaining the notion that the company could defend its case on the other. Often, a cooperative approach could prove less damaging to the company.

### **Important role of the company's general counsel in the follow-up**

For the general counsel, the focus was on rebuilding the brand and consumer confidence. Having survived a crisis as a company, its general counsel was to stay at the centre of the follow-up work. The organising of sharing data between different counsel, possibly in different jurisdictions, could often pose a challenge in itself.

Frequently, though only limited facts needed to be protected by legal privilege, the main set of facts could regularly be shared allowing external legal teams in different jurisdictions to work on the same set of documents. The general counsel also needed to ensure that lessons learnt are implemented. If the fix was identified but not properly applied, eg, owing to high costs, the general counsel could assume the potential point of view of a regulating authority to overcome such resistance.

Needless to say, that the regulatory authority might apply an even stricter review of the implemented measures for a certain period after the incident in order to consider appropriate sanctions.

# Annual Conference report

24 September 2019

## Mike Fandel

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## Ways to cope in practice management

The session was chaired by John P Bang (Bae Kim & Lee, Seoul), who moderated a panel that included Christopher Tahbaz (Debevoise & Plimpton, New York), Frederick Acomb (Miller Canfield Paddock and Stone, Detroit), Anna Grischenkova (KIAP Attorneys at Law, Moscow) and Amit Garg (Singapore International).

John Bang introduced the topic by discussing the well-known stresses that accompanies our profession. Despite the prevalence of professional stress it is rare to find an organised effort to deal with it. Most work it out on their own by osmosis. That approach works for some but not for others. The panellists have discovered ways to deal with professional stress in their practices and will offer some insight into the techniques they have developed.

Chris Tahbaz began the discussion by addressing Big Law responses to lawyer mental health issues. He cited sobering statistics about the prevalence of mental pressures among lawyers and emphasised the need to develop systems to balance the external and internal pressures we all face so that good mental health can be maintained. He discussed three key building blocks noted by consultant Bill Mitchell: (1) protecting physiology (exercise, sleep, good habits etc); (2) making healthy choices; and (3) maintaining a positive mind-set.

Chris pointed out that, from a firm management perspective, enhancing employee mental health is not just a humanitarian exercise. It is also a matter of risk management. There is a high percentage of depression and anxiety in our profession and it is often ignored because of the social stigma associated with mental illness. But depression affects judgement in a way that those affected by it may not even realise, so

promoting mental health can avoid costly professional mistakes.

Big firms have begun to make resources available to promote healthy ways of dealing with stress and anxiety. Best practices include encouraging people to talk about their stress, destigmatising mental illness, improving connectivity and collegiality, and training colleagues to look for warning signs. Some firms have launched branded wellness campaigns, deemphasised alcohol at social events, and appointed directors of wellbeing.

Fred Acomb followed Chris and related how he has learnt the value of meditation and mindfulness since joining a Buddhist temple. Meditation has helped him understand the impermanence of stressors we all face at work, making him a less reactive and more calm and composed lawyer. Fred took the audience through a brief meditation exercise, encouraging them to relax and clear their minds.

Anna Grischenkova then spoke of how she applies her interest in psychology to her litigation practice. Anna discussed three aspects of psychology that she relies on. The first is storytelling: storytelling triggers the brain to create memorable pictures, making impressions that stick with the listener. The second is the power of first impression: initial reactions are important because they often set the stage for how a judge or factfinder interprets evidence and arguments that follow. The third aspect she called the IKEA effect, which involves getting a judge to reach his or her own conclusion that supports your case. If the judge comes to the conclusion on his or her own those conclusions will be more enduring and significant. Anna admitted that her focus on psychology comes from a need to 'control everything', which she acknowledged may tend to enhance rather than relieve stress in her practice.



Finally, Amit Garg provided advice on dealing with stress as a testifying expert, including fear of forgetting, apprehension about cross-examination, and concern about mistakes. Amit's main message was to 'keep calm and know your stuff'. In preparation,

emphasise what truly matters. Focus in key areas of disagreement and know your weak points. Always bear in mind your role in litigation: you're there to help the tribunal. These issues and words of wisdom apply equally to lawyers.

## Conference report

# 3rd IBA Litigation Committee Conference on Private International Law – The latest on Brexit, International Commercial Courts and Sanctions

24–25 October 2019, Milan

### Brexit – the impact on jurisdiction and private international

One of the three conference sessions which attracted particular attention was dedicated to Brexit and related jurisdictional and private international law issues, led by Professor Stefania Bariatti and Alexander Layton QC under the Chair, Carlo Portatadino.

Since the United Kingdom voted to leave the European Union on 23 June 2016, speculation has run wild among international private (and public) law specialists about the likely consequences of Brexit on cross-border litigation involving the UK and EU Member States. Will torpedo actions resume? Will the UK respect choice of court clauses in favour of EU Member States, or will anti-suit injunctions blossom again? Will UK judgments be easily exportable to EU jurisdictions?

As a knowledgeable local observer, Alexander Layton QC began by explaining the current situation in the UK.

In brief, the UK parliament has passed successive domestic legislation since 2016

with a view to enforcing the leave vote. The cornerstone of the UK legislation in this area is the EU (Withdrawal) Act 2018, which provides that the European Communities Act 1972 (ECA) – giving direct effect in the UK to EU law and hence to the *acquis communautaire* – which will be repealed on the day the UK leaves.<sup>1</sup> However with certain exceptions, EU law will globally be upheld, and will continue to apply as UK domestic law with the following notable features:

- **Direct EU legislation**  
EU regulations, decisions and tertiary legislation (eg provisions made under regulations and directives), will form part of UK domestic law;<sup>2</sup>
- **EU-derived domestic legislation**  
principally domestic secondary legislation made under the ECA to implement EU directives, will be upheld as part of UK domestic law;<sup>3</sup>
- **Rights derived from EU law**  
directly effective treaty provisions that are recognised and available as part of UK domestic law by way of the ECA shall also be upheld;<sup>4</sup>

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- The **Charter of Fundamental Rights** ceases to form part of UK law;<sup>5</sup>
- Ministers may pass regulation to **remedy deficiencies or inconsistencies in relation to retained EU law**.<sup>6</sup> Pursuant to these powers, the Secretary of State passed the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (CJJ Reg), approved by parliament, which will notably revoke 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 (Brussels Recast)<sup>7</sup> as well as the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 2007 (Lugano Convention 2007), Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 1968 (Brussels Convention) and related treaties.<sup>8</sup>

At the time of the Milan conference, the UK's leave date was still uncertain due to political workings. Since then, the UK and the EU agreed a revised Withdrawal Agreement on 19 December 2019 (the EU-UK revised WA), which delayed the effects of Brexit until the end of the transition period<sup>9</sup> lapsing on 31 December 2020.<sup>10</sup> In the meantime, EU law shall continue to apply fully and directly in the UK. Notably, the Lugano Convention 2007 and Hague Convention on Choice of Court Agreements 2005 (HCCC) will also continue to apply<sup>11</sup> and the Court of Justice of the European Union (CJEU) will continue to have jurisdiction and retain the same after expiry of the transition period for cases brought by or against the UK before the end of the transition period.<sup>12</sup> The EU-UK revised WA has been ratified by the UK parliament by way of enacting the EU (Withdrawal Agreement) Bill of 19 December 2019.<sup>13</sup> This prompted the European Parliament to approve the EU-UK revised WA at its 29 January 2020 session, effectively making Brexit a reality on 31 January 2020.

With the Brexit milestone now reached, a major question remains unanswered: what will happen in the area of international judicial cooperation in civil matters after the transition period?

Professor Stefania Bariatti took the floor and highlighted that Brexit and the resulting repeal of topical international conventions and treaties by the CJJ Reg will not entail the automatic revival of former superseded conventions. This means that neither the Brussels Convention nor the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 1988 (Lugano Convention 1988) will automatically resume applying. In other words, no international instrument will govern these issues unless the UK and the EU agree otherwise.

In a Revised Political Declaration of 17 October 2019,<sup>14</sup> the EU and the UK declared themselves open to negotiations. However, this document makes no mention of judicial cooperation in civil and commercial matters (by contrast to family<sup>15</sup> and criminal matters).<sup>16</sup> This raises the question about the foreseeable scenarios in this field of law after the end of the ongoing negotiations between the EU and the UK.

For Professor Bariatti, a solution inspired by the regime applicable to Denmark, ie, the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 19 October 2005, is unlikely because of the embedded jurisdictional powers granted to the CJEU to interpret<sup>17</sup> and rule on the alleged non-compliance<sup>18</sup> with the same. A solution inspired by the Brussels Recast is equally unlikely as the EU would probably not accept a situation where the UK would enjoy the advantages without having to subject itself to the jurisdiction of the CJEU. It is also improbable that the UK would join the Lugano Convention 2007 in its own right, which would in any event require the consent from the EU,<sup>19</sup> because of the overseeing role of the CJEU.<sup>20</sup> For the foregoing reasons, a no deal situation may not be ruled out.

Assuming a no deal scenario, Alexander Layton QC outlined the regime that would prevail in the UK following the transition period:

- **Applicable law**

Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) will continue to apply in the UK as retained EU law.

• **Jurisdiction**

CJJ Reg will notably revoke the Brussels Recast<sup>21</sup> as well as the Lugano Convention 2007, the Brussels Convention and related treaties<sup>22</sup> but will re-enact the consumer and employment provisions of the Brussels Recast as domestic legislation.<sup>23</sup> Jurisdiction of UK courts over defendants located in any foreign country (EU or non-EU) will be assessed exclusively pursuant to UK domestic law so that *forum non conveniens* and anti-suit injunctions will again be available.<sup>24</sup>

• **Jurisdiction clauses**

HCCC, to which the UK acceded in its own right as of 1 April 2019, will apply and will govern jurisdiction clauses in favour of EU Member States, Singapore, Mexico, and Montenegro. It notably obliges courts of HCCC Member States to refrain from entertaining a claim in presence of an exclusive choice of court agreements in favour of another court.<sup>25</sup> Clauses in favour of non-HCCC Member States will be assessed pursuant to domestic rules.<sup>26</sup>

• **Recognition and enforcement**

As CJJ Reg will revoke the Brussels Recast and the Lugano Convention 2007 as well as related treaties, the Maintenance Orders (Facilities for Enforcement) Act 1920, the Foreign Judgments (Reciprocal Enforcement) Act 1933 and common law principles will resume governing this question. Registration of foreign decisions will as a result be required and enforcement may only be obtained for: (i) final and conclusive judgments, and (ii) for a definite sum of money.

Professor Bariatti outlined the mirror situation from the perspective of EU Member States:

• **Applicable law (Rome I and II)**

As these instruments have universal application:<sup>27</sup> (i) English law will apply when the connecting factors point to England;<sup>28</sup> and (ii) the choice of English law will be respected.<sup>29</sup> However, the UK will qualify as a non-EU Member State so that mandatory provisions of EU law of the forum will trump otherwise applicable English law.<sup>30</sup> This will pose limited problems as long as the retained EU law continues to mirror EU law but discrepancies will necessarily increase over time.

• **Jurisdiction/recognition and enforcement (Brussels Recast)**

Defendants domiciled in the UK will be attracted before EU courts in matters related to consumer and employment contracts.<sup>31</sup> Moreover, proceedings

commenced in the UK will not be given priority over proceedings started later in courts of an EU Member State.

- **Jurisdiction clauses** in favour of UK courts will not be given priority under the Brussels Recast but will prevail under the HCCC regime provided that the choice of court agreement was entered into at a time when this convention was considered as into force in the UK by the courts of the EU Member State.<sup>32</sup> There is indeed a controversy in this respect as to whether the UK is to be considered as having been a party to the HCCC between 1 October 2015, ie, when the convention became applicable to the UK through its membership in the EU, and 1 April 2019, ie, when the UK joined the convention in its own right.

Although the regime that will prevail after the transition period has become fairly clear in a no deal situation, everything will ultimately hinge on the ongoing negotiations between the UK and the EU, which may profoundly change the legal landscape.

**Note**

- 1 Section 1.
- 2 Section 3, however only in the English version, see section 3(4).
- 3 Section 2.
- 4 Section 4.
- 5 Section 5(4).
- 6 Section 8.
- 7 Section 89.
- 8 Section 82.
- 9 Article 2(e) and 126.
- 10 Article 126.
- 11 Article 129(1).
- 12 Article 86.
- 13 The UK parliament adopted the bill on 22 January 2020. Royal assent was received on 23 January 2020.
- 14 Available at: [https://ec.europa.eu/commission/sites/beta-political/files/revised\\_political\\_declaration.pdf](https://ec.europa.eu/commission/sites/beta-political/files/revised_political_declaration.pdf), last accessed 10 March 2020.
- 15 Paragraph 56, p 11.
- 16 Paragraph 79 et seq, p 16.
- 17 Article 6.
- 18 Article 7.
- 19 Article 72(4). On this topic, see Gabriel/Giroud/Mauron/Meerovich, 'Brexit: A New Era for Recognition and Enforcement of English Judgments in Europe or Turning Back the Clock? Lessons to Be Learned from the Swiss Example', in IBA *Dispute Resolution International*, Vol. 13 No 1, May 2019, pp 81-96, available at: [https://www.lalive.law/wp-content/uploads/2019/05/2019-SGIBAM-Brexit\\_A-New-Era-for-Recognition-and-Enforcement-of-English-Judgments-in-Europe....pdf](https://www.lalive.law/wp-content/uploads/2019/05/2019-SGIBAM-Brexit_A-New-Era-for-Recognition-and-Enforcement-of-English-Judgments-in-Europe....pdf), last accessed 10 March 2020.
- 20 Protocol 2.
- 21 Section 89.
- 22 Section 82.
- 23 To be found at future section 15A-15E of the Civil Jurisdiction and Judgments Act 1982.
- 24 Section 6.37 of the CPR – Rules and Practice Directions, as well as Practice Direction 6B.

25 Article 6.  
 26 Section 6.37 of the CPR – Rules and Practice Directions,  
 as well as Practice Direction 6B.  
 27 Article 2.  
 28 Article 4.

29 Article 3.  
 30 Article 3(4) Rome I and Article 14(3) Rome II.  
 31 Article 18(2)) and limitations to jurisdiction clauses in  
 Article 19.  
 32 Article 16.

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## Conference report

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# IBA India Litigation Symposium 2020: taking reforms to the last mile

8 February 2020, New Delhi

**T**he India Litigation Symposium in New Delhi was organised by the Asia Pacific Forum and supported by the Litigation Committee and Mediation Committee. The event took place on 8 February 2020, and was attended by distinguished lawyers, judges, and arbitrators. Interesting topics were discussed relating to dispute resolution and arbitration, insolvency law, art of case management, and mediation in India.

### Litigating in India

India follows a three-tier system for litigation with Subordinate Courts at the district level, High Courts at the state level, and the central Supreme Court. Additionally, there are appellate and specialised tribunals for specific matters, such as the National Company Law Tribunal, the Debt Recovery Tribunal, and the Income Tax Tribunal. In India, litigators of foreign origin should be cognisant of these tribunals and layers of dispute resolution mechanisms, so as to make better use of the judicial forums and remedies available. Moreover, foreign litigators should be aware that trials before India's courts takes longer, compared to seeking interim or restraining relief. Therefore, they should explore the possibility of mediation, followed by a binding arbitration.

After having risen as a premier foreign investment destination in the South Asia, India has been pushing remarkable legal measures to protect investors' commercial interests. Over the years arbitration in India has become a preferred mode of alternate dispute resolution, with tighter timelines and reduced judicial intervention. Through the 2015 Arbitration and Conciliation (Amendment) Act, India instructed arbitrators to adjudicate disputes within a maximum of 18 months, which is much more aggressive than other institutions' rules.

In 2016, India introduced the Insolvency and Bankruptcy Code (IBC) which aims at consolidating various laws relating to insolvency and bankruptcy. The IBC appoints an insolvency resolution professional to coordinate with creditors to restructure the repayment schedule or to sell the assets of the stressed entity. This is a significant measure as previously, banks were not able to recover bad loans from these entities. The IBC restricts the timeline to a maximum of 330 days, which, according to the World Bank's 2019 *Doing Business* survey, is much longer than the global average.

On a similar note, in 2015 India introduced the Commercial Courts Act (CCA), which has been a welcome proposal to fast track commercial disputes in courts. Through the CCA separate courts are set up at District and High Court level, mainly, to provide a



streamlined process for commercial litigation. The CCA also mandates the commercial courts to have case management hearings, and gives the Commercial Court the power to set timelines, structure proceedings and hear arguments and rebuttals in an accelerated manner. However, the CCA requires more time and robust implementation to become effective.

Mediation is another mainstream option in India, and usually precedes any arbitration or litigation proceedings in

a dispute. As India is a signatory to the Singapore Mediation Convention 2019, it must take steps to make mediation a popular mechanism for resolving disputes.

There has been an appreciable rise in cross-border transactions in recent years and legislation is developing further to keep up with the market. One significant issue faced by foreign investors in India has been multiple laws and compliances at state and federal level, which will be resolved in time.

## Structural issues in litigation funding documentation

### Litigation funding

The past two decades have seen litigation funding increase from a few isolated cases into a US\$39bn global sector. The growth of litigation funding as a new asset class has been fuelled by a combination of relatively poor returns from traditional investment asset classes such as securities or real estate which are more susceptible to macroeconomic and political changes, along with a more distressed and litigious environment.

This combination has captured the attention of the investment sector with hedge funds, asset managers, banks, family offices and other institutional investors steadily increasing their allocation to this new alternative asset class. Litigation funders appear in every shape and size driving different investment criteria, expectation of return and risk appetite for different contentious matters. In addition to the funds focused exclusively on funding litigation, distressed and loan trading funds are now building litigation finance teams. Family offices are also newcomers to the sector, often focusing on litigation in higher risk markets to which they may have familiarity such as Russia/CIS, Asia or Latin America.

### Investment return analysis

As the litigation funder's return is inextricably linked to the success of the case, strict investment criteria must be applied when assessing the merits of funding a case. Each

fund will approach their decision with different strategies and criteria, but the most important will include:

- the ability of a defendant to pay an award if the litigation is successful;
- the minimum realistic monetary value of the claim, ie, whether the pay-out is worth the time and effort;
- the maximum legal budget for the case and whether the funder has sufficient capital committed to cover it (the illiquid nature of this asset class can cause funds to fail where they overstretch their capital and receive slower than expected returns);
- the merit and the legal value of the claim; and
- the length of the trial and any enforcement risk.

### Structural issues

The course of litigation contains a number of procedural milestones and situations when the interests of a funder and the funded party may diverge, which can cause differences of opinion to arise regarding how to best proceed with the litigation. Independent legal counsel can assist by assessing the merits of the claim and advise on enforceability of any litigation funding arrangement at the outset of the opportunity, structure an appropriate security package, provide ongoing advice on key milestones (eg, settlement opportunities), test the litigation approach and strategy, structure legal costs to minimise the funder's

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exposure, maintain control over the litigation process and advice on the enforcement risk. A number of such situations are set out in more detail below.

### Funding

Parties should consider how the funds are advanced to the funded party. Where possible, it is preferable to advance funds directly to the legal counsel for the funded entity rather than to the account of the funded entity itself. If the funds are disbursed directly to the funded entity's bank account, the funder should consider taking security over this bank account.

It is also worth considering the cost of funds to the funder itself and when and how these costs are payable. If funds are advanced in a single drawdown this may not be an issue but it is common practice to advance the funds in multiple drawdowns throughout the course of the litigation against legal invoices. This can cause issues where the funder needs to pay the cost of funds for the total amount to be funded.

### Additional finance requirements

The funder should incorporate protections where additional funding is required due to legal costs overruns (eg, relating to extensive disclosure, multiple jurisdictions or additional parties joining the claim). In this event, the funder should seek:

- the right of first refusal to consider injecting any new funds into the case (though it should be made clear that this is not an obligation to provide additional funds);
- the right to syndicate its funding obligations or involve another funder provided that any new funder signs up to the existing litigation funding documentation; and
- a renegotiation right in respect of the amount or structure of its return/success fee depending on how much additional funding is required and the reason for it (this allows the funder to reassess if the case has become riskier).

### Termination rights

Funders should detail their rights to stop funding upon agreed circumstances in the funding documentation (eg, where the funded entity commits a material breach, makes a misrepresentation, breaches relevant reporting requirements or a fails

to assist in the proceedings) or in the event of a material and detrimental change of circumstances. Parties often agree that whether a change in circumstances of this nature has occurred must be confirmed by a legal opinion of an independent lawyer stating that the prospects of the litigation success have materially diminished.

It may be appropriate to negotiate an obligation of the funded party to repay back part of the funded amount and pay part of the success fee to the funder where the funding arrangement is terminated under certain circumstances.

### Fee structures

Multiple potential structures and fee arrangements exist for litigation funding. The structure chosen will be driven by the nature of the dispute, the borrower and the investment mandate of the funder. It is common that deductions made to cover the drawdown amount which should be repaid to the funder, insurance premium and applicable tax payments are given priority in the payment waterfall. The balance is then split in the agreed proportions. The agreed split is often variable, depending on the level of recoveries made and may include a 'springing success fee', where the percentage recovered by the claimant is increased after a certain threshold.

Counsel should also be able to structure additional protections to limit or mitigate the funder's liability and cost exposure. In particular, it is advisable that a cap on the indemnity of the funder to contribute to the legal costs of the other party if the litigation is lost is negotiated and all legal costs and expenses are disbursed pursuant to a pre-agreed budget. Furthermore, there are now a number of various 'after the event' insurance structures that help to minimise the funder's overall cost exposure.

### Security structures

A thorough due diligence of the funded entity and its group should be carried out to determine the best security package to fit the case and reflect its particular risks. The following options should be considered besides the standard security over the assets of the funded entity:

- the possibility of assigning the claims upon a trigger event should be considered and weighted against the Champerty rules in particular jurisdiction;

- an undertaking from the legal counsel of the funded entity could be a helpful way to have more control over the cash flows during the litigation process and on receipt of a successful award; and
- in addition to traditional security over the asset of the funded entity, a share charge over the claimant and or over its bank accounts should be considered.

In certain cases, it may be appropriate to incorporate a poison pill in the claimant's corporate documents which can be triggered upon a change of control or a hostile event and which provides the funder with control over the board of the claimant. This concept again should be checked against applicable Champerty rules (see below).

### Tax implications

The funder should seek tax advice prior to structuring any funding arrangement in order to prevent success fees becoming invalidated or any increase in the funder's tax exposure. By way of example, in certain jurisdictions success fees must be structured as a gain from an asset rather than as an interest on the loan. Where the funded entity is incorporated in the UK, advice should be taken to minimise the UK withholding tax risk.

### Transfer rights

The right of the funder to assign or 'syndicate' its obligations under the litigation funding documentation (eg, in the event of a costs overrun or a material detrimental change in circumstances) is an important right to be incorporated into the documentation. Assignment rights of both parties are particularly relevant in the context of the developing market for the sale of arbitration awards.

### Regulatory requirements – disclosure

Protections can be put into the documentation to protect the identity of the funder in sensitive litigation cases, high risk jurisdictions or to limit their exposure for third-party costs. Disclosure and transparency have been key market trends in the litigation space, particularly in the UK and the US

where litigants have recently been required to disclose to court if their litigation is being funded by third parties and the funders may also be required to disclose their capital adequacy and the source of funds to ensure proper funding of the claim.

### Regulatory requirements – Champerty

The litigation funding documentation must be carefully drafted to balance the desire of the funder to maintain input regarding any key litigation decisions versus the risk of triggering the Champerty concept which can invalidate the litigation funding agreement and relevant success fee provisions where the funder has too much influence/control over the litigation strategy and process. The question of whether a funding arrangement falls foul of the rule against maintenance and Champerty will be vary case by case and depend on various factors, including:

- the level of control the funder has over the litigation;
- the level of communication between the funded party and the solicitor;
- the extent to which the funded party is provided with information and is able to make informed decisions about the litigation;
- the amount of any return that the funder stands to receive relative to the total damages claimed;
- whether there is a risk of inflaming damages or distorting evidence; and
- the funder's rights to withdraw funding.

### The future of litigation funding

With approximately US\$1.3bn of funds raised in the past year alone, it is evident that the litigation funding sector will continue to grow with an increasing number and diversity of entrants to the market, financing a wide range of disputes across numerous jurisdictions. Legal documentation remains bespoke and complex for each particular dispute but an expanding legal framework and developing guidelines for participants is assisting the progress of litigation funding in becoming an increasingly credible asset class, delivering potentially greater returns for investors as well as removing the costs and burden from litigants.

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# The law of anti-suit injunctions in India

An anti-suit injunction order is made against a party in personam restraining them from instituting a legal action or from continuing with proceedings that have already been instituted. This injunction can be granted in respect of proceedings in both the local and foreign courts. In other words, anti-suit injunctions prohibit a party from taking or continuing a case in another jurisdiction. Anti-suit injunctions are used to enforce exclusive jurisdiction clauses and to prevent forum shopping.

Anti-suit injunctions in India broadly fall into two main categories: to prevent a contractual breach, or to prevent a non-contractual breach.

The important considerations when granting an anti-suit injunction to prevent a contractual breach includes:

- the court must have jurisdiction in relation to the party against whom an anti-injunction is granted;
- if the proceedings have advanced to a stage where it is not equitable to grant an anti-suit injunction, then the court will dismiss the application for anti-suit injunction;
- the court can grant an anti-suit injunction only in respect of a valid agreement;
- normally, the court will give effect to the intention of the parties as expressed in the agreement entered into by them.

The Hon'ble Supreme Court in *Modi Entertainment Network and Anr v WSG Cricket PTE Ltd*<sup>1</sup> has propounded the principles for granting anti-suit injunctions. They are as follows:

1. In exercising discretion to grant an anti-suit injunction, the court must be satisfied of the following aspects –
  - a. the Defendant, against whom injunction is sought, is amenable to the personal jurisdiction of the court;
  - b. if the injunction is declined the ends of justice will be defeated and injustice will be perpetuated; and
  - c. the principle of comity – respect for the court in which the commencement or continuance of action/proceeding in sought to be restrained – must be borne in mind.

2. In a case where more than one forums are available, the court will examine which is the forum conveniens having regard to the convenience of the parties and may grant an anti-suit injunction in regard to proceedings which are oppressive or vexatious or in a forum non-conveniens.
3. Where jurisdiction of a court is invoked on the basis of jurisdiction clause in a contract, the recitals therein in regard to exclusive or non-exclusive jurisdiction of the court of choice of the parties are not determinative but are relevant factors and when a question arises as to the nature of jurisdiction agreed to between the parties the court has to decide the same on a true interpretation of the contract on the facts and in the circumstances of each case.
4. A court of natural jurisdiction will not normally grant an anti-suit injunction against a defendant before it where parties have agreed to submit to the exclusive jurisdiction of a court including a foreign court, a forum of their choice in regard to the commencement or continuance of proceedings in the court of choice, save in an exceptional case for good and sufficient reasons, with a view to prevent injustice in circumstances such as which permit a contracting party to be relieved of the burden of the contract; or since the date of the contract the circumstances or subsequent events have made it impossible for the party seeking injunction to prosecute the case in the court of choice because the essence of the jurisdiction of the court does not exist or because of a vis major or force majeure and the like.
5. Where parties have agreed, under a non-exclusive jurisdiction clause, to approach a neutral foreign forum and be governed by the law applicable to it for the resolution of their disputes arising under the contract, ordinarily no anti-suit injunction will be granted in regard to proceedings in such a forum conveniens and favoured forum as it shall be presumed that the parties have thought over their convenience and all



other relevant factors before submitting to non-exclusive jurisdiction of the court of their choice which cannot be treated just an alternative forum.

6. A party to the contract containing jurisdiction clause cannot normally be prevented from approaching the court of choice of the parties as it would amount to aiding breach of the contract; yet when one of the parties to the jurisdiction clause approaches the court of choice in which exclusive or non-exclusive jurisdiction is created, the proceedings in that court cannot per se be treated as vexatious or oppressive nor can the court be said to be forum non-conveniens.
7. The burden of establishing that the forum of the choice is a forum non-conveniens or the proceedings therein are oppressive or vexatious would be on the party so contending to aver and prove the same.

In *Board of Control for Cricket in India v Essel Sports (Pvt) Ltd*<sup>2</sup> the Hon'ble Delhi High Court held that:

'In a situation where an Indian Court is moved for an anti-suit injunction, two possible situations arise so far as the Defendant is concerned: one, where a party against whom an anti-suit injunction is sought is an Indian party or resident in India; and the other, where Defendant is a foreign party or resident abroad. Insofar as a party is Indian or resident in India, it presents no difficulty; however, in case of a foreign party or those resident abroad, the Court in India will necessarily have to tread carefully in issuing an anti-suit injunction as in such circumstances it will have to base it on the principle of sufficiency of connection in the context of appropriateness of the forum. Courts in India will have to be even more circumspect where the foreign party has already instituted an action in a foreign court. An Indian Court will necessarily bear in mind if summons are issued outside territorial jurisdiction of Indian Courts, it may not be complied with or, that the foreign party may attempt to seek remedy in the jurisdiction of the court where it is resident.'

Furthermore, in *(India TV) Independent News Service Pvt Ltd v India Broadcast Live LLC & Ors*,<sup>3</sup> the Hon'ble Delhi High Court held that while deciding an application for anti-suit injunction, held that 'factors such as convenience of parties, expenses involved and law governing the transaction are important while determining the appropriate forum'.

However, there have been instances where the courts have refused to grant anti-suit injunction orders, and the Supreme Court has also observed that anti-suit injunctions should be granted sparingly and not as a matter of routine and that before passing the order of anti-suit injunction, courts should be extremely cautious.<sup>4</sup>

In another instance, the High Court of Calcutta in *Rotomac Electricals Pvt Ltd v National Railway Equipment Company*,<sup>5</sup> while refusing to grant an anti-suit injunction, the Hon'ble Court observed that: 'when two parties to a contract belong to two different countries and proceedings are initiated in the country of origin of one of the parties to the contract, it cannot be said that the proceedings are initiated in a forum non conveniens, if the forum is competent otherwise. When the parties to a suit belong to different countries thousands of miles away from each other, one or the other of the parties would be inconvenienced. Proceedings in India would not be convenient to the party from the United States and proceedings in United States would not be convenient for the party from India.'

Therefore, the question of whether or not an anti-suit injunction may be granted by an Indian court varies from case to case, as the facts of each case may be peculiar to one but not to the other.

#### Notes

- 1 *Modi Entertainment Network and Anr v WSG Cricket PTE Ltd*, (2003) AIR SC 1177.
- 2 *Board of Control for Cricket in India v Essel Sports (Pvt) Ltd*, (2010) 167 DLT 176.
- 3 *(India TV) Independent News Service Pvt Ltd v India Broadcast Live LLC & Ors*, (2007) 35 PTC 177 (Del).
- 4 *Dinesh Singh Thakur v Sonal Thakur*, (2018) AIRSC 2094.
- 5 *Rotomac Electricals Pvt Ltd v National Railway Equipment Company*, CS No 10 of 2011.

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# Privilege and ethics in cross-border litigation

Imagine the following scenario. A lawyer at a law firm's headquarters in Washington DC sends a legal memorandum to a client's general counsel in New York, advising about developments in antitrust law. The general counsel forwards the email to the company's CEO and senior leadership in South Korea, Germany, and China. The CEO responds by email asking a follow-up question about whether the group thinks it would make strategic sense to attempt to merge with a competitor, and general counsel replies that the legal risks identified in outside counsel's memo suggests such a merger would be costly and unlikely to succeed. Executives in each foreign office print the emails and attached memorandum and file them away with related business documents.

Rapid digital communication and changing norms of legal representation have made what might have been unusual 20 years ago – and almost unheard of 30 or 40 years ago – common and routine in the modern relationship between lawyers and their foreign or multinational clients. These developments have created a world of new possibilities for cross-border representation, litigation, and dispute resolution.

They've also exponentially multiplied the privilege and ethics issues that can place lawyers and their clients at risk, and created complex and confusing questions about how best to protect confidential documents or information. Is outside counsel's legal memo privileged? Is the general counsel's legal advice to the CEO? What about the general counsel's legal advice to senior leadership in foreign jurisdictions? And does who's asking the question – a US court, or a court in Asia or the European Union (EU), or an arbitral panel somewhere else – change the answer?

US privilege laws protect confidential communications between a lawyer and their client, and the privilege rests with the client. A lawyer's email and memo to a client conveying legal advice is privileged unless the privilege is waived, and if the material is prepared in anticipation of litigation, it is also protected attorney work product. Communications between American executives and a New

York-based general counsel, where the primary purpose of the communications is legal advice, are also privileged and can be work-product protected. And, of course, any communication back to general counsel or outside counsel asking a legal question enjoys privilege protection.

But not all privilege laws are alike. In South Korea, for example, privilege rests with the lawyer, not the client. In the EU, an in-house lawyer's communication conveying legal advice about antitrust liability would plainly *not* be covered by legal professional privilege in the event of a dawn raid; in fact, even communications with *outside* counsel might be seized and reviewed by authorities if an EU antitrust investigation is not commenced until after the communications are made. German law establishes criminal liability for lawyers who disclose confidential client information, but does not protect documents located on the client's premises if those documents aren't related to the client's defence of criminal or regulatory offenses; in-house counsel's communications are privileged only if they provide legal, and not business, advice, and if they maintain separate offices that other company officials cannot access. In China, lawyers may keep certain confidences during a criminal representation, but in civil cases the government may compel their testimony as to confidential matters.

Given the differences in scope and power of privilege in the US and abroad, understanding and predicting choice of law issues is critical. US courts typically apply a traditional 'contacts' test to determine which country has the 'predominant' or 'most direct and compelling interest' in whether and to what extent communications should remain confidential.<sup>1</sup> The test is easy to apply when outside counsel and the client are both US residents conducting business in the US. It's also easy when both outside counsel and the client are located and operate in the same foreign jurisdiction: the foreign jurisdiction's privilege will rules control. When client and counsel reside in different jurisdictions, or when one or each of them is a multinational entity, the task is considerably more complicated.

The cost of miscalculation can be as extreme as complete waiver of privilege: disclosure in a foreign jurisdiction, whether by choice or by compulsion, can defeat privilege even in US proceedings. A client may be found to lack a reasonable expectation of privacy in lawyer-client communications sent to a jurisdiction that does not recognise a privilege. Even absent a finding of waiver, these issues can present thorny questions for US courts to grapple with, and litigating them can be like walking a tightrope. In one recent case in the Southern District of New York, for example, a court allowing clawback of an inadvertently disclosed confidential document emphasised the fact that the document had not been ordered disclosed by a foreign court with the authority to issue such an order; it was not at all clear that the court would have reached the same decision under different circumstances.<sup>2</sup>

Lawyers engaged in international practice should consider taking preventative steps to avoid potential privilege pratfalls. For example, each of us is well aware of the benefits of having knowledgeable and capable local counsel even for domestic litigation: sensitive matters in foreign

jurisdictions are especially demanding of local counsel that understands the ins and outs of the relevant privilege laws. Vigilant lawyers engaged in cross-border practice should also develop good habits that help to protect privilege. Always mark privileged files clearly and keep them separate from other files to protect them from dawn raids, circulate sensitive materials among as small a group as possible, and ensure that contracts include choice-of-law provisions that specify preferred privilege rules. And changing the way one thinks about in-house counsel can make an enormous difference when complex privilege questions arise; especially when working with clients in the EU, lawyers can improve the chances that sensitive material remains confidential by warning in-house counsel against summarising or annotating outside counsel communications and by minimising written communications on matters that have previously been the subject of Commission investigations.

#### Notes

- <sup>1</sup> *Wultz v Bank of China Ltd*, 979 F. Supp. 2d 479, 489 (SDNY 2013).
- <sup>2</sup> *In re: Interest Rate Swaps Antitrust Litigation*, No. 16-MD-2704, 2018 WL 5919515 (SDNY 13 November 2018).

## Class actions in Australia: recent developments

Australia has a well-developed class action system, in its Federal Court and several State courts. There are numerous plaintiff class action law firms, and claims are supported by a highly active and competitive litigation funding market. The number of class actions filed in Australia has tripled in the last seven years.

Shareholder class actions are especially common. They are driven by continuous disclosure laws which require companies listed on the Australian stock exchange to make immediate disclosure of information that might have a material impact on the company's share price. These laws enable plaintiff shareholders to base claims on allegations that a company has delayed in

informing the market about developments that would lower the company's share price. Almost any negative announcement by companies which results in a share price drop will be investigated by litigation funders or plaintiff class action law firms to determine whether it can be alleged that the company should have released the information earlier and that shareholders have suffered loss as a result.

In late 2019, two judgments were handed down which will have a material effect on the viability of many future class actions. These are the decisions of the Federal Court of Australia in, *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Ltd*<sup>1</sup> (*Myer Holdings*) and the High Court of

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Australia in, *BMW Australia Ltd v Brewster*; *Westpac Banking Corporation v Lenthall (BMW)*.<sup>2</sup>

*Myer Holdings* is the first time an Australian court has considered in a class action context whether shareholders in a class can rely on the theory of market-based causation in proving that they have suffered loss. *BMW* considered the availability of common fund orders.

***TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Ltd***

On 11 September 2014, Myer's chief executive officer, Bernie Brookes, made statements in presentations to analysts and journalists, about Myer's forecast net profit after tax (NPAT), including that Myer's NPAT for the 2015 financial year would exceed the previous year's figure.<sup>3</sup>

On 19 March 2015, Myer released an announcement on the Australian Securities Exchange (ASX), significantly downgrading its forecasted 2015 financial year NPAT to between AUD75m to AUD80m, approximately AUD20m less than foreshadowed by Brookes. Following the announcement, the Myer share price fell significantly, with its market capitalisation shrinking by AUD90.8m, or more than ten per cent.

This substantial decrease in Myer's share price led to shareholders commencing a class action against Myer.<sup>4</sup> Broadly speaking, the plaintiffs (or 'applicants') claimed that they and all other shareholders had suffered loss due to:

- (a) their or the market's reliance on the positive statements made by Brookes on 11 September 2014;
- (b) Myer's NPAT downgrade announced on 19 March 2015; and
- (c) Myer's interim non-compliance with its continuous disclosure obligations, by failing to correct Brookes's statements between 11 September 2014 and 19 March 2015. It was also alleged that Myer engaged in misleading and deceptive conduct as it did not have reasonable grounds for the representation made by Brookes.

The Court found that Myer had breached its continuous disclosure obligations and had engaged in misleading and deceptive conduct.<sup>5</sup> The Court then considered the question of loss.

A multitude of different causation theories have been advanced in shareholder class action cases, each attempting to establish causation using varying formulations

of reliance.<sup>6</sup> In this case, the applicants relied on market-based causation which, if successful, would not require any shareholder to prove their own individual reliance on Brookes's representation.<sup>7</sup>

Typically, the share price of a company will fluctuate in accordance with its disclosures to the market, in particular financial disclosures such as a company's NPAT or forward looking earnings estimates.<sup>8</sup> The market-based causation principle advanced in *Myer Holdings* is relatively simple; it is the concept that the market determines the price of securities in accordance with its view of the company's financial position and potential. Where a company fails to disclose material information to the market, the market is uninformed. Where that information is damaging to the company, as in *Myer Holdings*, the share price is artificially inflated, as the market has not had the chance to price in the material information. When investors purchase the shares, they do so at the inflated price as set by the uninformed market.<sup>9</sup>

The court held that reliance and causation could be proven on application of market-based causation. The result is that a court may find a causal link between the representations and loss, even though there has been no direct reliance by the shareholder in question on a statement or disclosure by the company. Interestingly, this also means that an investor may have a right to recover, notwithstanding that they held no belief as to the integrity of the market price.<sup>10</sup> In fact, an investor may not have read any information disclosed by the company, merely assuming that in paying the market price, such a price reflected all information disclosed and disclosable to the market at the relevant time.<sup>11</sup>

It should be noted that the Australian market-based causation theory differs slightly from the US 'fraud on the market' doctrine. The US position is born out of similar considerations, namely that investors have relied on the integrity of the market price when purchasing securities on market.<sup>12</sup> However, in Australia, a shareholder need not demonstrate direct reliance on the integrity of the market price of securities. The US position, pursuant to section 10(b) of the US Securities Exchange Act 1934, requires each individual to prove reliance on the integrity of the market price. This gave rise to the rebuttable presumption embodied in the 'fraud on the market' doctrine, the presumption that the investor has relied upon the integrity of the market price when



deciding to purchase securities on market.<sup>13</sup> This allows class actions to proceed more easily, as reliance does not need to be proven by each individual in the class.

The shareholders' success in *Myer Holdings* is a significant boost for shareholders wishing to commence class actions in the future. However, there was a sting in the tail on the facts of this case. The applicants argued that their loss was the difference between the price the Myer securities were acquired for and the amount they would actually have been acquired for, had Myer issued corrective disclosures.<sup>14</sup>

Expert evidence was led on Myer's internal NPAT forecasts and the Bloomberg NPAT consensus figures, which represented the market's forecast of Myer's NPAT.<sup>15</sup> Beach J determined that no loss could be made out unless it was the case that Myer was under an obligation to disclose, earlier than it did, that it expected its 2015 financial year NPAT to be below the Bloomberg forecasts, not just below the forecast announced by Brookes.<sup>16</sup>

Even though Myer had failed to make corrective disclosures, the market consensus, as demonstrated by the Bloomberg NPAT consensus figures, was always consistent with, or above, Myer's internal forecasts. Consequently, the applicants could not demonstrate that the share price was inflated by Myer's failure to disclose, as any disclosure of Myer's own internal forecasted NPAT would have otherwise been in accordance with, or above, the NPAT the market predicted, and would not have deflated the share price. The court therefore held that although shareholders could rely on market-based causation, they nonetheless suffered no loss. Effectively, the court found that the market had never believed Brookes's representations, so the share price was not artificially inflated by Myer's failure to issue timely corrective announcements.

How this decision changes the landscape for shareholder class action in Australia remains to be answered. On face of it, the acceptance of the market-based causation theory resolves an area of extreme uncertainty in favour of shareholders. Conversely, the decision emphasises the need for shareholders to be able to articulate not just how a company's forecasts were incorrect and/or unreasonable, but that they were actually relied on by the market in pricing that company's securities, so that loss can potentially be established.

The latter is particularly important, as most shareholder class actions are commenced with the support of litigation funders. They fund the litigation on the basis that they will be able to recoup their fee out of the class settlement or awarded damages, commonly as a fixed percentage of the quantum, or less so, as a multiple of the plaintiff's legal costs.<sup>17</sup> In recent years, funders have obtained orders at the outset of the claim known as common fund orders (CFO).<sup>18</sup> These orders confirm that the funder can be paid from the amount awarded to the class, even though at that stage the size of the class is unknown, and not all members of the class may have signed a funding agreement with the funder conferring a right of recovery over a proportion of the class members' share of a settlement or judgment. CFOs therefore provide funders with certainty that if the claim succeeds, funders will be paid, avoiding the need to obtain the agreement of the entire class. The legitimacy of CFOs was the subject of *BMW*.

#### ***BMW Australia Ltd v Brewster***

On 4 December 2019, in *BMW* the High Court of Australia found by a 5-2 majority that the *Federal Court Act 1976* (Cth) (the FCA) and the *Civil Procedure Act 2006* (NSW) (the CPA) does not empower the Courts to make CFOs at the outset of a case.<sup>19</sup> The decision in *BMW* has therefore voided the mechanism which has given security to applicants and funders: CFOs.

Historically, CFOs were sought by applicants under section 33ZF of the FCA and section 183 of the CPA.<sup>20</sup> These two sections, being almost identical, confer a wide statutory power on the courts in a class action context, permitting the court to 'make any order that the court thinks appropriate or necessary to ensure that justice is done in the proceedings'.

A CFO bound all the members in the applicant class, despite whether they had entered into a contractual arrangement with the litigation funder. Generally, a CFO would also stipulate the amount that the funder would recover. While not removing the funder's risk of incurring irrecoverable costs if the litigation was unsuccessful, CFOs provided a degree of certainty with respect to the amount that would be recovered in circumstances of a settlement or successful litigation. CFOs also alleviated the funder's need to 'book build', the process by which a funder will seek out and seek to commit

members of the class who wish to proceed with the action, in order to determine whether it is commercially viable.

The Court determined that CFOs were not appropriate for several reasons, one being that Pt IVA and Pt 10 of the FCA and CPA respectively, expressly provide for the making of orders distributing any proceeds of a representative proceeding.<sup>21</sup> The difficulty for funders is that any order that a distribution be made to funders, is made at the conclusion of the proceeding and will then be capable of assessment by the Court.<sup>22</sup>

Further, the CFO had the effect of involving the court in the decision by a funder of whether to proceed with a claim. The High Court held this was not the court's function and was therefore a misuse of the power contained in the rules to make a CFO.

Importantly, section 33ZJ and its CPA equivalent section 184, provide that 'if the Court is satisfied that the costs reasonably incurred in relation to the representative proceeding by the person making the application are likely to exceed the costs recoverable by the person from the respondent, the Court may order that an amount equal to the whole or a part of the excess be paid to that person out of the damages awarded.' Not only do funders need to factor in a potential reduction in their recovery,<sup>23</sup> they will have to regress to the process of book building, the process which was necessary before the widespread adoption of CFOs, although still engaged in to a degree as a proxy for eventual shareholder participation.

A return to compulsory book building will require litigation funders to identify plaintiffs and have them sign up to the class action by entering into individual litigation funding agreements. This is a time consuming and expensive process,<sup>24</sup> factors which will become important considerations for funders when determining the commercial viability of a class action claim.

The return to book building may also involve the return of 'closed classes', meaning the action is only brought on behalf of those shareholders who have entered into litigation funding agreements with that funder.

## Conclusion

Both of *Myer Holdings* and *BMW* will have a significant impact on class actions in Australia. Further changes are also likely to arise as a result of two ongoing developments: (i) the Australian Law Reform Commission report, Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders, recommending that mechanisms be included in statute and legal frameworks to allow courts to deal with multiple class actions; and (ii) legislation currently before Victoria's parliament which, if passed, will allow law firms to charge contingency fees and potentially emerge as competitors to litigation funders.

## Notes

- 1 [2019] FCA 1747.
- 2 [2019] HCA 1982.
- 3 *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Limited* [2019] FCA 1747, [3].
- 4 *Ibid*, [23]–[49].
- 5 *Ibid*, [16]–[18].
- 6 *Ibid*, [1514]–[1536]; see also *Re HIH Insurance Limited (in liq)* (2016) 335 ALR 320.
- 7 *Ibid*, [1639].
- 8 *Ibid*, [1675].
- 9 *Ibid*, [1524]–[1526].
- 10 *Ibid*, [1530].
- 11 *Ibid*, [1523].
- 12 *Basic Inc v Levinson* 485 US 224 (1988).
- 13 *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Limited* [2019] FCA 1747, [1535].
- 14 *Ibid*, [48].
- 15 *Ibid*, [566].
- 16 *Ibid*, [1713]–[1717].
- 17 *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* [2019] HCA 45, [28]–[29].
- 18 *Money Max Int Pty Ltd (as trustee for the Goldie Superannuation Fund) v QBE Insurance Group Ltd* [2016] FCAFC 148.
- 19 *Ibid*, [3], [48].
- 20 *Money Max Int Pty Ltd (as trustee for the Goldie Superannuation Fund) v QBE Insurance Group Ltd* [2016] FCAFC 148; *Westpac Banking Corporation v Lenthall* [2019] FCAFC 34; *Brewster v BMW Australia Ltd* [2019] NSWCA 35.
- 21 *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* [2019] HCA 45, [68].
- 22 *Ibid*, [68].
- 23 For example in *Liverpool City Council v McGraw-Hill* [2018] FCA 1289 the litigation funders were paid approximately AUD92m, while total legal costs funded were approximately AUD20m, representing AUD72m in profit.
- 24 *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* [2019] HCA 45, [71].

# No black holes in the British Virgin Islands: the *Black Swan* jurisdiction

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In 2010, Justice Bannister bravely created what is now known as the *Black Swan* jurisdiction through incremental development of the common law in his judgment in *Black Swan Investment ISA v Harvest View Ltd.*<sup>1</sup> The *Black Swan* jurisdiction provides the British Virgin Islands (BVI) courts with the power to grant an interim freezing order in support of foreign proceedings. It is a key weapon in the British Virgin Island's arsenal in the fight against fraud. In expanding the freezing injunction jurisdiction Justice Bannister acknowledged the judgment of the Jersey courts in *Solvalub Ltd v March Investments Ltd*<sup>2</sup> and decided to follow Lord Nicholls' dissenting judgment in *Mercedes Benz v Leiduck*<sup>3</sup> in order to ensure that the BVI would not be the black hole into which fraudsters could disappear with their assets.

## English approach

It is interesting to compare the development of the common law in the British Virgin Islands with the English approach. As explained in *Republic of Haiti v Duvalier*,<sup>4</sup> until the Civil Jurisdiction and Judgments Act 1982 (CJJA) came into force, an English court would not have entertained relief of this nature. The jurisdiction was limited by the House of Lords in *Siskina (Owners of cargo lately laden on board) v Distos Compania Naviera S.A. (The Siskina)*:

'A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own... The High Court had no power to grant an interlocutory injunction except in protection or assertion of some legal or equitable right which it has jurisdiction to enforce by final judgment...'<sup>5</sup>

The conclusion of Lord Diplock in *The Siskina* has been superseded by section 25(1) of the CJJA introduced due to the requirements of article 24 of the 1968 Brussels Convention on jurisdiction and the enforcement of

judgments in civil and commercial matters (the Brussels Convention):<sup>6</sup>

'the High Court in England and Wales or Northern Ireland shall have power to grant interim relief where (a) proceedings have been or are to be commenced in a contracting state other than the United Kingdom'.

This provision expressly permitted English proceedings in which only interim relief is sought. However, other common law jurisdictions, not being subject to European Union law, have been left to interpret the law and authorities in determining how to resolve this issue in the absence of section 25 of the CJJA.

## BVI approach

In the BVI, Justice Bannister analysed the authorities in this area before deciding to fill the lacuna in the law by adopting the reasoning of Lord Nicholls in his dissenting judgment in *Mercedes Benz* which he described as 'compelling' and which the learned authors of Dicey, Morris and Collins have described as 'powerful'.<sup>7</sup>

According to *Channel Tunnel Group Ltd v Balfour Beatty*,<sup>8</sup> *The Siskina*<sup>9</sup> did not prevent an English court from granting an interlocutory injunction ancillary to a claim for substantive relief to be granted by a foreign court or arbitral body. In *Fourie v Le Roux*<sup>10</sup> Lord Scott held that the passage from Lord Brown-Wilkinson speech in *Channel Tunnel* and the other authorities showed that the English court does have jurisdiction, in the strict sense to make an order in aid of a prospective judgment to be obtained in foreign proceedings provided that the person restrained is subject to the in personam jurisdiction of the English court. Lord Scott noted that in 1977 freezing injunctions were in their infancy and that the position was settled in England due to section 25 of the CJJA.

Summarising the authorities, Justice Bannister found that there was high authority

to suggest that in the absence of a provision to the effect of section 25 CJA, the BVI Court may not grant a freezing order in aid of foreign proceedings against a defendant who is not subject to the court's *in personam* jurisdiction. He also found that the question as to whether a freezing order should be granted in aid of foreign proceedings against a defendant who is subject to the court's jurisdiction is open. It was not dealt with by the court in *The Siskina*, a case which was not dealing with that set of facts.

Lord Nicholls in *Mercedes Benz* pointed out that freezing orders are unlike 'ordinary' interlocutory injunctions because they bear no relation to the subject matter of the proceedings. Their only purpose is to prevent dissipation of assets available to satisfy a money judgment. They do not depend on there being a pre-existing cause of action. Bannister agreed with Lord Nicholls that *Channel Tunnel* is high authority for the proposition that standalone writs may be issued. Other examples include anti-suit claims and Norwich Pharmacal relief.

Justice Bannister was fortified in this conclusion, by findings of the Court of Appeal in Jersey which had reached a similar conclusion in *Solvalub* (noting that he had not yet had a chance to read the judgment). The Court of Appeal in *Solvalub* adopted the reasoning of Lord Nicholls and held that the Royal Court had the jurisdiction to issue a Mareva injunction in aid of proceedings overseas where that was the only remedy claimed in the jurisdiction. Justice Bannister went on to say:

'[Q]uite apart from the jurisdictional analysis of Lord Nicholls which I have respectfully adopted, there are sound policy reasons why important offshore financial centres, such as Jersey and the BVI, should be in a position to grant in aid where necessary. The business of companies registered within such jurisdiction is invariably transacted abroad and disputes between parties who own them and others are often resolved abroad. It seems to me that when a party to such a dispute is seeking a money judgment against someone with assets within this jurisdiction it would be highly detrimental to its reputation if potential foreign creditors were to be told that they could not, if successful, have resort to such assets unless they were to commence substantive proceedings here in circumstances

where, in all probability, they would be unable to obtain permission to serve them abroad – thus presenting them with an effective brick wall or double bind of the sort so deplored by Lord Nicholls in *Mercedes Benz*.'<sup>11</sup>

The test for a Black Swan freezing injunction in the BVI has since been summarised by the Court of Appeal in *Yukos CIS Investments Ltd & Another v Yukos Hydrocarbons Investments Ltd & Ors*.<sup>12</sup>

1. the jurisdiction to grant an interim freezing order is not ordinarily exercised unless it is necessary to do so in the aid of either relief the applicant is likely to obtain from the local court or from a competent foreign court;
2. the relief the applicant is likely to obtain from a foreign court must lead to a foreign judgment which may be enforceable by whatever means against BVI assets owned or controlled by the defendant;
3. in appropriate cases, interim relief might be granted to an applicant in support of a foreign claim against third parties to the foreign proceedings who are resident in the BVI; and
4. a failure to seek equivalent injunctive relief in the foreign proceedings is a discretionary factor which may mitigate against relief being granted.

Over the last ten years, the BVI courts have frequently applied this test and granted *Black Swan* injunctions in order to preserve assets in the BVI against which a foreign judgment will be enforced.

### Recent developments

In the BVI, we are currently awaiting two critically important judgments from the Court of Appeal on the scope of the Black Swan jurisdiction (BVIHCMAP 2019/0014 *Convoy Collateral Ltd v Cho Kwai Chee Roy* and BVIHCMAP 2019/0026 *Broad Idea International Ltd v Convoy Collateral Ltd*).<sup>13</sup> One appeal seeks to expand the jurisdiction to permit service out on persons who own assets within the BVI but who are not subject to the *in personam* jurisdiction of the BVI court and the other appeal quite incomprehensibly seeks to reverse the scope of the Court's jurisdiction to the limited scope set out in *The Siskina*. A contention, that can only be described as 'Dickensian' in its regressive nature.

It is hoped that the Court of Appeal will be persuaded on the facts of CCL's case and



by the Jersey decision in *Krohn GmbH v Varna Shipyard and Others (No. 2)*<sup>14</sup> which represents the completion of the decision of the Jersey Court of Appeal in *Solvalub*. Krohn closed the circle in Jersey by permitting service out of the freezing injunction granted in support of foreign proceedings. If the BVI Court of Appeal were to follow Jersey in this regard, it would represent a necessary and much desired expansion of the existing common law without the need for recourse to fresh legislation.

These are in short critical appeal judgments. The appeal where CCL is a respondent should be dismissed in limine to ensure that the Black Swan injunction remains part of the BVI's armoury and the other should be granted (in CCL's favour) so that the BVI is properly equipped to protect international creditors and victims of fraud.

Lord Nicholls' comments in *Mercedes Benz* could not be more apposite as international fraud becomes instant and more sophisticated in the digital era. There should not be a black hole into which a defendant can escape out of sight and become unreachable. The BVI should not be that black hole.

We await developments with keen interest.

#### Notes

- 1 BVIHCV 2009/399 *Black Swan Investment ISA v Harvest View Ltd*, Unreported 23 March 2010.
- 2 *Solvalub Ltd v March Investments Ltd* [1998] ILPR 419
- 3 *Mercedes Benz v Leiduck* [1996] 1 AC 284.
- 4 *Republic of Haiti v Duvalier* [1990] 1 QB 202 at page 210.
- 5 *Siskina (Owners of cargo lately laden on board) v Distos Compania Naviera SA* [1979] AC 210 at p 256 per Lord Diplock.
- 6 Article 24 of the Brussels Convention provides that an application may be made to the courts of a contracting state for such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention, the courts of another contracting state have jurisdiction as to the substance of the matter.
- 7 Dicey, Morris & Collins on *The Conflicts of Laws*, 14th edn at [8-023].
- 8 *Channel Tunnel Group v Balfour Beatty* [1993] AC 334.
- 9 *Siskina (Owners of cargo lately laden on board) v Distos Compania Naviera SA* [1979] AC 210 at p 256 per Lord Diplock.
- 10 *Fovrie v Le Roux* [2007] 1 WLR 320 at [29], [30].
- 11 BVIHCV 2009/399 *Black Swan Investment ISA v Harvest View Ltd*, Unreported 23 March 2010 at [15].
- 12 HCVAP 2010/028 *Yukos CIS Investments Ltd & Another v Yukos Hydrocarbons Investments Ltd & Ors*. Unreported 26 September 2011.
- 13 Harneys acts for Convoy Collateral Ltd (CCL) in both appeals. The Black Swan injunction proceedings were commenced by CCL in support of Hong Kong proceedings filed by CCL against Roy Cho and others for breach of fiduciary duty arising out of The Enigma Network, an interlinked web of 50 Hong Kong listed companies trading in each other's shares while concealing that activity. Cho Kwai Chee Roy has been charged with conspiracy to defraud the Hong Kong Stock Exchange and CCL's parent, Convoy Global Holdings Ltd which is currently suspended from trading due to ongoing investigations.
- 14 *Krohn GmbH v Varna Shipyard and Others (No. 2)* 1 OFLR (ITELR) 482.

## California court declines enforcement of choice of forum and choice of law provisions, citing right to jury trial

In October 2019, in a case with international litigation implications, the California Court of Appeal declined to enforce forum selection and choice of law clauses in a commercial contract because enforcement of those clauses would result in the denial of the plaintiff's right to a jury trial, *Handoush v Lease Finance Group, LLC*.<sup>1</sup>

The holding in *Handoush* follows the California Supreme Court decision in *Grafton Partners LP v Superior Court*,<sup>2</sup> in which the state Supreme Court held that predispute

contractual jury waivers are unenforceable under California law. The *Handoush* case takes this principle a step further by rendering unenforceable choice of forum and choice of law clauses which would impair a California litigant's right to a jury trial.

In *Handoush*, the plaintiff entered into a lease agreement for credit card processing equipment. The lease provided that any disputes arising out of the lease would be governed by New York law and that any such disputes arising out of the lease would be

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instituted and prosecuted solely in the federal or state courts located in New York. The lease also contained an express waiver of the parties' right to a jury trial.

Handoush brought a suit against his lessor Lease Finance Group in Superior Court, alleging causes of action for fraud, rescission, injunctive relief and violation of California Business and Professions Code section 17200. Lease Finance Group moved to dismiss the complaint under California Code of Civil Procedure section 410.30(a) based on the forum selection clause in the lease agreement.

The Court declined to enforce the choice of forum and choice of law provisions, noting that the right to a jury trial is constitutional in nature and, based on the Supreme Court's holding in *Grafton Partners*, and that right is not waivable at the predispute stage. Importantly, the court characterised *Grafton Partners*' prohibition against predispute waivers of the right to a trial by jury to be substantive in nature and not merely procedural.

The implications arising from *Handoush* for international litigation are clear. California residents, especially those who are plaintiffs in California courts, can now seek to avoid enforcement of choice of forum and choice of law provisions on the ground that their fundamental right to a jury trial under California law would be compromised if a pending action were transferred to forum where predispute jury trial waivers are enforced.

Although *Handoush* involved a choice of forum provision that called for transfer of the litigation from one US state to another, there is no reason to believe that its impact will be limited to domestic litigation. This means that overseas parties contracting with persons or companies domiciled in California need to be aware that dispute resolution provisions calling for litigation in a foreign jurisdiction,

or under foreign law, may be subject to challenge in California courts, if those parties seek to rely on a predispute jury trial waiver.

Foreign counter-parties seeking to avoid a jury trial in California would be well advised to provide for arbitration of any disputes with persons or companies domiciled in California, as an agreement to arbitrate disputes is considered to be an enforceable method for effectuating a waiver of a party's right to a jury trial.

At the same time, the California Legislature continues to express hostility toward arbitration, especially in the employment context. In a new law effective from 1 January 2020, California employers can therefore no longer require workers to arbitrate state-law discrimination and labour code claims. The law actually criminalises the use of mandatory arbitration agreements by making such a practice a misdemeanour offense. Although the enforcement of that new law has been temporarily stayed, its enactment was inspired by the #MeToo movement and was intended to prevent businesses from silencing workers who have experienced discrimination and colleagues who have witnessed the misconduct.

This new law arises in the larger context of an ongoing battle between the California appellate courts and the federal appellate courts about whether state laws, such as the Legislature's recent enactment, which subject arbitration agreements for special treatment or special scrutiny, violate the Federal Arbitration Act.<sup>3</sup> In this regard, there will undoubtedly be constitutional challenges to the new law, which will ultimately have to be resolved by the federal courts.

#### Notes

- <sup>1</sup> *Handoush v Lease Finance Group, LLC*, 41 Cal App 5th 729 (2019).
- <sup>2</sup> *Grafton Partners LP v Superior Court*, 36 Cal 4th 944 (2005).
- <sup>3</sup> See for example, *AT&T Mobility LLC v Concepcion*, 563 US 333 (2011).

# Damages for breach of choice-of-court agreement: a landmark ruling by the German Federal Supreme Court

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## Introduction

Choice-of-court agreements are of great importance in international contracts, especially when they stipulate the exclusive jurisdiction of the designated forum. Such clauses aim to create certainty about the competent forum as well as the applicable legal framework to potential disputes. Parties to exclusive jurisdiction agreements are in a better position to quantify the risks associated with their contracts and can more reliably assess the chances to succeed in court when a dispute arises. An exclusive choice-of-court clause further allows parties to designate a neutral forum and to thereby arrange for a level playing-field for future disputes.

Yet, once a dispute has arisen parties sometimes consider themselves no longer bound by a jurisdiction agreement and initiate court proceedings outside the designated forum. Such an action is often followed by a cost- and time-consuming dispute on which is the competent forum to hear the case. Even if the claim in the wrong forum is dismissed for lack of jurisdiction, the defendant might suffer financial loss as under some procedural laws (for instance under the American Rule on costs) a party has to bear their lawyer's fees irrespective of the outcome of the proceedings. The question therefore arises as to whether a party sued in a wrong forum can claim compensation for the legal costs incurred in this forum based on the breach of the choice-of-court agreement.

In the past, courts in the United States,<sup>1</sup> United Kingdom<sup>2</sup> and Spain<sup>3</sup> have repeatedly answered this question in the affirmative and awarded parties to forum-choice-agreements the costs incurred as a result of the battle on jurisdiction in the wrong forum. In contrast, the issue has been the subject of a longstanding controversy among legal scholars in Germany<sup>4</sup> and it was only a few months ago that the German Federal

Supreme Court (BGH) dealt with this topic for the first time.

## The decision of the BGH of 17 October 2019 (III ZB 42/19)

The underlying dispute arose out of an internet peering agreement between a telecoms company seated in the US and a German telecoms provider. The agreement provided that it 'shall be subject to the law of the Federal Republic of Germany' and that 'Bonn (Germany) shall be the place of jurisdiction.'

In 2016, the US company initiated a claim against the German company before a US district court based on the argument that it was entitled to further transmission capacities. The German company contested the jurisdiction of the US court by reference to the exclusive choice-of-court agreement in favour of Bonn. While the US district court declined jurisdiction and dismissed the claim, as a result of the American Rule on costs, it did not award the German company the lawyer's fees related to the US proceedings (approx. US\$197,000).

The US company subsequently brought the same claim before the District Court of Bonn. The German company raised a counterclaim seeking compensation for the legal costs incurred in the US proceedings due to a breach of the jurisdiction clause. While the District Court of Bonn granted the counterclaim, its decision was overturned in the second instance by the Higher Regional Court of Cologne. Eventually, the BGH was seized to rule on whether a claim brought in breach of a choice-of-court agreement could give rise to damages.

At the outset, the BGH confirmed the jurisdiction of the German courts to hear the counterclaim by reference to Article 25 Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

(Brussels Ia Regulation). Obviously, the BGH is of the view that the forum designated in a jurisdiction agreement is also competent to hear disputes arising out of a violation of this agreement.

The BGH further clarified that granting damages for breach of the jurisdiction agreement would not conflict with the decision of the US court to not award the successful defendant its lawyer's fees. While the decision of the US court is based on the American Rule on costs and therefore on a solely procedural basis for reimbursement of costs, according to the BGH, it does not say anything about the entitlement of a party to request compensation for procedural costs due to a breach of contract.

By reference to the choice-of-law and jurisdiction clause in the internet peering agreement, the BGH further held that the parties have agreed on the applicability of German substantive and procedural law which was thus relevant for the decision on the counterclaim.

On that basis, the BGH went on to interpret the choice-of-court agreement in light of the parties' interests. The BGH thereby emphasised that by entering into an exclusive choice-of-court agreement, parties to international contracts express their interest in creating legal certainty and seek to prevent subsequent forum shopping. According to the BGH, these aims mean that the parties to a jurisdiction clause are deemed to have committed themselves to bring future claims only before the designated forum.

The BGH further held that by choosing German substantive law, the parties acknowledged the general principle stipulated in the German Civil Code that a breach of a contractual duty can give rise to a claim for damages. In the BGH's view, the parties further accepted the rule of the German Civil Procedure Code that the losing party has to bear all reasonable costs of the proceedings.

In light of the parties' interests and the applicable principles of German law, the BGH rejected the argument of the Higher Regional Court of Cologne which considered that choice-of-court agreements merely had a procedural effect (ie, that they only establish the jurisdiction of a court and/or derogate from the jurisdiction of otherwise competent courts) and did not entail an obligation to refrain from claims outside the designated forum.

The BGH finally clarified that the risk of being subsequently confronted with a claim for damages does not unduly restrict the contract-breaker's constitutional right of access to justice. In the BGH's view, the risk for a party to be ordered to reimburse the costs of a counter-party in a dispute where the latter has prevailed is inherent in every legal action as a result of the 'loser-pays-principle' underlying the German Civil Procedure Code.

To summarise, the BGH has held that a party to an exclusive jurisdiction agreement who has initiated proceedings outside the designated courts may become liable for the legal costs incurred by the defendant for the battle on jurisdiction in the wrong forum.

### Conclusion and unanswered questions

The decision of the BGH is to be welcomed as it protects the interests and expectations of parties to exclusive choice-of-court agreements. At the same time, it leaves interesting questions open:

- Would a party sued in a breach of a jurisdiction clause be entitled to damages if the wrong forum refuses to enforce the choice-of-court agreement and renders a decision on the merits?
- Are damages for breach of a jurisdiction clause compatible with the principle of mutual trust underlying the Brussels Ia Regulation?
- Does the Hague Convention on Choice of Court Agreements of 30 June 2005 impose any restrictions on a contractual claim for damages?
- What are the chances that a court ruling awarding damages for breach of a jurisdiction clause is enforced abroad?
- Does the violation of an arbitration clause also give rise to damages?

The future will show how courts in Germany and abroad will deal with these issues.

### Notes

- 1 *Indosuez International Finance BV v National Reserve Bank*, 304 AD 2d 429 (2003), 758 N YS 2d 308 (NY App Div 2003); *Masionale Electrical-Mechanical Inc v Construction One Inc*, 102 Ohio St 3d 1, 806 N E 2d 148 (Ohio 2004); *Ball v Versar Inc*, 454 F Supp 2d 783, 808 (S D Ind 2006).
- 2 *Union Discount Co v Zoller*, [2001] EWCA Civ 1755; *Donohue v Armco Inc*, [2002] 1 Lloyd's Rep 425; *A/S D/S Svendborg v Akar*, [2003] EWHC 797 (Comm).
- 3 *Sogo USA Inc v Angel Jesus* (Tribunal Supremo, Sentencia 6/2009), [2009] Repertorio de Jurisprudencia 542.
- 4 For details see *Eugenia Peiffer*, *Schutz gegen Klagen im forum derogatum*, 2013, pp. 330 et seq.



# A brave new world: enforcement of foreign judgments in China

**O**n 2 July 2019, the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the Convention) was adopted by the delegates of the Hague Conference on Private International Law. It has been described as a ‘game changer’ for cross-border litigation.<sup>1</sup> The Convention aims to obtain recognition and enforcement of civil and commercial judgments internationally by promoting ‘effective access to justice for all and to facilitate rule-based multilateral trade and investment, and mobility’.<sup>2</sup>

According to China’s International Commercial Court, China played an active role in the conference: participating in negotiations, supporting multilateralism, building consensus among parties and leading the rule making. More specifically, the delegation’s proposals on anti-monopoly, intellectual property and other topics were adopted by the General Assembly, which contributed towards the conclusion and drafting of the Convention.<sup>3</sup>

Although Convention currently only has one signatory (Uruguay),<sup>4</sup> if widely ratified, it is likely to reduce transaction and litigation costs in cross-border dealings and promote effective access to justice for all. Ultimately, the Convention could challenge the status of arbitration as the dispute resolution process of choice for international disputes.

## The Judgments Convention: an overview

The Convention regulates the recognition and enforcement of judgments made in civil or commercial matters, with an exhaustive list of grounds being provided.<sup>5</sup> By way of example, a judgment will be eligible if:

- the person against whom recognition or enforcement is sought was habitually resident in, or had their principle place of business in, the state of origin at the time they became a party to the proceedings in the court of origin;

- the judgment ruled on a contractual obligation and it was given by a court of the state in which performance of that obligation took place, or should have taken place;
- the defendant expressly consented to the jurisdiction of the court of origin in the proceedings in which the judgment was given;
- the defendant argued on the merits before the court of origin without contesting jurisdiction; or
- on the basis of a non-exclusive jurisdiction agreement.

The final point is a notable contrast with the 2005 Hague Convention of Choice of Court Agreements, which only provides for the recognition of an exclusive jurisdiction agreement.

If one of these broad grounds are met, the judgment will be eligible.

The Convention outlines a relatively simple procedure to have a foreign judgment recognised and enforced. The party applying for recognition or enforcement must provide the requested court with a certified copy of the judgment in question as well as a certified translation of the document in the language of the requested state.<sup>6</sup> The remainder of the procedure is left to the law of the state in which judgment is to be enforced.<sup>7</sup>

There are limits to the Convention.

Excluded categories of civil and commercial disputes include insolvency, the carriage of passengers and goods, defamation, intellectual property and certain anti-trust disputes.<sup>8</sup> The Convention also does not apply to judgments subject to appeal (as would be expected).

Recognition and enforcement of a foreign judgment may only be refused by a contracting state where it falls under one of the grounds of refusal listed in article 7 of the Convention, such as:

- if the defendant was not properly notified of the proceedings against them;
- if the judgment was obtained by fraud;
- if enforcement would be incompatible with public policy; or

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- if the proceedings in the court of origin were contrary to a choice of court agreement. It therefore follows that the Convention should be of assistance to parties in a large majority of civil or commercial disputes.

### Current enforcement mechanisms of judgments in China

Broadly speaking, there are two official ways to enforce foreign judgments in China, either through a bilateral treaty or 'reciprocity'. China has bilateral treaties with many of its trading partners such as the UK, France, Russia, and Vietnam, however some of its largest trading partners, such as the United States and Japan, do not have such a treaty in place. These countries must therefore rely on judgments being recognised and enforced by a Chinese court on the basis of 'reciprocity', which to date has only happened in a handful of foreign judgments.

By way of example, China has only recently recognised and enforced two US judgments, the most recent judgment being No (2017) *Hu 01 Xie Wai Ren No16* (2017) 沪01协外认16号. The case arose from a dispute between a US company which sued a US individual over a debt of approximately US\$3.3m. As the individual held a position in a Chinese company and had assets in China, the US company applied to a Shanghai intermediate court for recognition and enforcement of the US judgment. In recognition of the judgment, the Chinese court noted that as long as a US judgment does not violate the laws of China or its public interest, it may be recognised and enforced in China.

By virtue of these examples, it is hoped that this new practice will become more common in China in future. Despite this, in light of the limited number of foreign judgments that have been recognised and enforced in China to date, it is clear that, if the Convention is widely ratified, it will be of great interest to those who trade and deal with China.

### Why now for China?

In promoting the Belt and Road international trade initiative (BRI), China's President Xi Jinping has advocated that China 'should build the Belt and Road into a road of opening up. Opening up brings progress while isolation results in backwardness'.<sup>9</sup>

The BRI is a multi-billion dollar programme through which China aims to finance infrastructure projects along a

transcontinental passage connecting Asia, Europe and Africa to revive the ancient Silk Road trade route. While presenting a huge trading opportunity, China is anticipating that it will face a vast number of international commercial disputes because of the planned success of the BRI. As a result, China has begun to 'open up' and develop its international dispute resolution and enforcement capabilities in furtherance of promoting the BRI.

By way of example, in June 2018 the Supreme People's Court established two international commercial courts to handle international commercial disputes, particularly those arising from the BRI. In December 2019, it was announced that the first five cases accepted by the First International Commercial Court were judged on 18 September and 25 October 2019. The parties involved in the cases were companies from Japan, Italy, the British Virgin Islands, and companies and individuals from the Chinese mainland, Hong Kong (SAR) and Taiwan. With the introduction of these new international commercial courts, it is hoped that in future, parties to international commercial agreements will choose to settle disputes in the Supreme People's Court's International Commercial Court.<sup>10</sup>

### A 'game changer' after all?

Whether the Convention will eventually have the same impact as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards remains to be seen. The Convention will undoubtedly have a beneficial effect to the countries which sign up to it and agree to recognise and enforce judgments between them, leading to greater certainty and efficiency of international disputes and therefore a reduction in the costs of such disputes. With just one state currently signed up to the Convention however, it is not currently in force and has no contracting parties. It therefore has a long way to go before its impact can be realised in the world of international disputes, and will be of benefit to those who trade in or with China.

#### Notes

- <sup>1</sup> 'Gamechanger for cross-border litigation in civil and commercial matters to be finalised in The Hague', *Hague Convention on Private International Law*, 18 June 2019, available at: <https://www.hcch.net/en/news-archive/details/?varevent=683>, last accessed 7 March 2020.

- 2 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, 2 July 2019 (Judgments Convention).
- 3 'The 2019 HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters has been adopted', China International Commercial Court, 3 July 2019, available at: <http://cicc.court.gov.cn/html/1/219/208/209/1303.html>, last accessed 7 March 2020.
- 4 Status table, Hague Conference website, available at: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=137>, last accessed 7 March 2020.
- 5 Judgments Convention, article 5.
- 6 *Ibid*, articles 1 and 4.
- 7 *Ibid*, article 4(4).
- 8 *Ibid*, article 2.
- 9 Xi Jinping 'Work Together to Build the Silk Road Economic Belt and The 21st Century Maritime Silk Road', Speech by H E Xi Jinping President of the People's Republic of China At the Opening Ceremony of The Belt and Road Forum for International Cooperation, 14 May 2017, available at: [http://en.cidca.gov.cn/2017-05/16/c\\_260434.htm](http://en.cidca.gov.cn/2017-05/16/c_260434.htm), last accessed 7 March 2020.
- 10 'The First International Commercial Court of the Supreme People's Court effectively concluded the first five cases', China International Commercial Court, 30 December 2019, available at: <http://cicc.court.gov.cn/html/1/219/208/209/1547.html>, last accessed 7 March 2020.

## Champerty re-emerges: an overview of recent US Circuit Court rulings on third-party funding

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While the use of third-party funding agreements has undoubtedly proliferated both globally and as to types of claims covered, champerty still stands precluding their enforcement in some jurisdictions. The issue of whether third-party lending agreements come into conflict with state champerty laws may arise in a variety of scenarios: in a direct action seeking to invalidate or enforce a lending agreement or as a procedural hurdle in determining whether a party has standing to pursue such claims. In a related vein, cash advance agreements of settlement proceeds may face similar enforcement hurdles. This article provides a summary of recent US Circuit Court decisions examining and brushing back third-party lending agreements.

In *Boling v Prospect Funding Holdings, LLC*,<sup>1</sup> the Court reviewed a declaratory judgment action that set aside litigation funding agreements in an action filed by borrowers against their funder. The funder provided US\$30,000 through four loan agreements to the borrowers to pursue damages for personal injuries arising from a gas explosion. When the claim was ultimately settled, the funder sought some US\$340,000 (bearing compound interest of approximately 80 per cent) from the borrowers who then filed suit in a Kentucky

district court for declaratory relief that the loan was void and unenforceable.

Notably, none of the four underlying loan agreements at issue in the borrowers' suit provided for application of Kentucky law. Two of the agreements contained New Jersey choice of law provisions, another Minnesota law and one New York law. The borrowers sued in their home state of Kentucky to set aside the agreements.

The district court made a series of orders which were the subject of review. The Kentucky district court held the agreements were governed by Kentucky law and that they violated Kentucky champerty and usury laws. As a result, the district court held the agreements void and unenforceable but granted summary judgment to the funder on its unjust enrichment and promissory estoppel claims for the loan proceeds plus loan fees (approximately US\$34,000).

First, the district court determined that the suit was properly filed in Kentucky pursuant to the first agreement which afforded either party the right to select a competent forum. The district court found the varying law provisions in the agreements entitled it to decline enforcing any one of them in favour of principles of judicial economy. Notably, despite the presence of mandatory forum selection clauses, the Circuit Court held that

the lender's failure to seek transfer before the district court had essentially waived application of the clauses. The Circuit Court also affirmed the decision to exercise jurisdiction over all of the agreements, thereby denying the lenders' motion to dismiss for forum non conveniens, again because the arguments had not been properly presented to the district court.

Of course, the key holding by the district court was its decision to apply Kentucky law. The district court applied Kentucky choice of law analysis and held Kentucky law applied despite the varying choice of law provisions contained in the agreements, none of which called for Kentucky law. The district court relied on Kentucky's preference of its own law and application of the most-significant relationship test to determine the applicable law. In this case, the injury occurred in Kentucky, the borrowers resided in Kentucky, and while negotiations related to the agreements occurred in several states, including Kentucky, the agreements were executed in Kentucky. The district court also emphasised that each of the other states had minimal connections to the dispute. Moreover, Kentucky had a strong interest in applying its statutes prohibiting champerty and usury. As a result, the Circuit Court affirmed the determination that Kentucky had the most significant relationship to the underlying dispute and applied to all four agreements.

Review of the district court's finding that the agreements were void began with the principle that federal courts sitting in diversity must apply the state law consistent with the determination of the state's highest court. Although Kentucky courts had not addressed the legality of litigation funding agreements, Kentucky's champerty statute provides:

'Any contract, agreement or conveyance made in consideration of services to be rendered in the prosecution or defense, or aiding in the prosecution or defense, in or out of court, of any suit, by any person not a party on record in the suit, whereby the thing sued for or in controversy or any part thereof, is to be taken, paid or received for such services or assistance, is void.'<sup>2</sup>

The district court determined Kentucky courts would likely void the agreements as champertous. The Third Circuit agreed based primarily on the plain language of the statute and the fact that the 'Agreements effectively represented an advance on Boling's recovery, contingent on Boling recovering funds'

and likely 'constitute "assistance" within the meaning of the statute.'<sup>3</sup> Another key factor was the degree of control over the litigation the funder could exercise, including a mandatory pay-out in the event the borrowers changed legal counsel without the funder's consent. The Court found such a provision in violation of Kentucky's strong policy favouring settlement of disputes. As such, the agreements were held to be void as in violation of Kentucky's champerty statute and public policy as well as its usury statute.

Dissatisfied with that result, the funder then filed suit in a New Jersey district court against the borrower's counsel on his acknowledgements to the agreements and obligation to pay the funder from the settlement proceeds before the borrowers. In *Prospect Funding Holdings, LLC v Breen*,<sup>4</sup> the Third Circuit affirmed the dismissal of the funder's case for breach of contract, conversion and promissory estoppel arising from failure to remit the proceeds pursuant to the funding arrangements.

The district court dismissed the case based on issue preclusion arising from the Kentucky district court's prior determination that the loan violated Kentucky champerty and usury laws. The district court rejected the funder's contention that counsel's acknowledgement was separate from the underlying funding agreements and dismissed the action as precluded by the Kentucky district court's ruling that the underlying loan agreements were void and unenforceable. On appeal, the Circuit Court affirmed the dismissal based on the Kentucky court's decision that the agreements were void and enforceable.

In another case, the Third Circuit applied Pennsylvania law to the issue of whether an assignment of a claim was champertous. In *Riffin v Consolidated Rail Corp*,<sup>5</sup> the Court summarised the issue as follows:

'Under Pennsylvania's champerty doctrine, "an arrangement offends public policy against champerty and is illegal if it provides for the institution of litigation by and at the expense of a person who, but for that agreement, has no interest in it, with the understanding that his reward is to be a share of whatever proceeds the litigation may yield." "[T]he common law doctrine of champerty remains a viable defense in Pennsylvania," and, "if an assignment is champertous, it is invalid." "An assignment is champertous when the party involved: (1) has no legitimate interest in the suit, but for the



agreement; (2) expends his own money in prosecuting the suit; and (3) is entitled by the bargain to share in the proceeds of the suit.” (internal citations omitted).<sup>6</sup> The Court easily disposed of Riffin’s claim as champertous under Pennsylvania law because he had no interest in the subject matter of the underlying dispute (involving property rights from the sale of historic rail to developers); expended his own funds to bring the claim while the real party in interest expended no funds; and was to obtain a percentage of the ultimate recovery.

Riffin argued that New Jersey law, which did not prohibit champerty, applied to his claims. The Court undertook a choice of law analysis and ultimately determined that Pennsylvania had a greater interest in application of its laws because champerty offends its public policy. Reasoning that New Jersey had little interest in enforcement of such agreements, the Court held Pennsylvania law applied thereby rendering the assignment champertous and finding the Plaintiff lacked standing to pursue his claim.

The related issue of cash advances on settlement proceeds was also addressed by the Third District, this time applying New York law. *In Re: National Football League Players’ Concussion Injury Litigation*,<sup>7</sup> involved the enforceability of cash advance agreements entered by class members. There, a Pennsylvania district court presided over a class action suit brought by former professional football players against the NFL for concussion-related injuries. The settlement agreement subsequently approved by the court contained an anti-assignment provision of the underlying claims rendering them void and unenforceable. Several players subsequently entered into cash advance agreements with various lenders under varying terms to obtain funds while awaiting the class pay-out. The district court retained jurisdiction to enforce the settlement and invalidated the cash advance agreements through a series of orders aimed at protecting the class members from predatory funders.

On appeal, the Third Circuit affirmed that portion of the district court’s order that voided any lender’s right to seek funds directly from the class settlement fund as contrary to the plain language of the district court’s anti-assignment provision contained in the settlement agreement and adopted

by the court. However, the Court reversed the district court’s order that purported to set aside the cash advance agreements in their entirety reasoning that the district court lacked jurisdiction to do so after disbursement of the funds.

‘...the Court had the option of invalidating only the assignment portions of the agreements containing true assignments and directing the Claims Administrator not to recognise any true assignments, without voiding the agreements in their entirety. Some of the agreements contained severance clauses or alternative loan agreements, and there is a dispute as to whether the purported assignments in the funding agreements were true assignments at all. Accordingly, there are portions of the cash advance agreements that may be enforceable even after any true assignments are voided. Of course, once the funds are disbursed to the players, the District Court’s power over the funds, and any contracts affecting the funds, is at an end.’<sup>8</sup>

As a result, the Court confirmed that the enforceability of the cash advance agreements that did not contain assignments would require independent challenge and review in subsequent cases.

In each of these Circuit Court decisions over the past year or so, lending agreements were analysed and denied enforcement. Although the practice of third-party funding continues to grow across jurisdictions and over a variety of claims, these cases serve as a reminder that champerty precludes such funding arrangements in certain jurisdictions. Further, as demonstrated in *Boling*, the attempt to draft around application of champerty laws by selecting more favourable choice of law provisions is not always successful. While these cases appear to be in the minority, it is important to recognise that in some US jurisdictions, champerty remains viable.

#### Notes

- 1 771 Fed Appx 562 (6th Cir 2019).
- 2 Ky Rev Stat section 372.060.
- 3 Ky Rev Stat section 372.060, at 519.
- 4 757 Fed Appx130 (3d Cir. 2018), the opinion was issued in December 2018 while the appeal from the earlier decision on which it was based was issued in April 2019.
- 5 783 Fed Appx 246 (3d Cir 2019).
- 6 Ky Rev Stat section 372.060, at 249.
- 7 923 F 3d 96 (3d Cir 2019).
- 8 Ky Rev Stat section 372.060, at 111.

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# Mind the third party in the gap: breach of contract, third-party liability simplified by the *Cour de Cassation*

## Can third parties sue a party to a contract for a breach of its contractual obligations under statutory law?

Third-party liability refers to the right of a person to seek remedies for damages suffered as a result of the performance of a contract they are not a party to.

French law does not specifically provide for an autonomous right of action based on a contractual breach/non-performance for the benefit of third parties, even when such breach has caused them damage. Third-party liability derives from a *contrario* reasoning.

The French Civil Code states that a contract can only create legal obligations between parties. However, the performance of a contract must not cause harm to third parties. This legal framework has not been amended by the 2016 Contract law reform, the wording of article 1,165 of the French Civil Code<sup>1</sup> was moved to article 1,199.<sup>2</sup>

Moreover, it is a well-established principle of French law that parties issuing a claim must choose their legal ground: a party may only seek a remedy for specific damage either on the basis of a contractual (article 1217 of the French Civil Code) or a tortious breach (article 1240 of the French Civil Code).<sup>3</sup> If the damage suffered derives from a breach of contract, claimants have no option but to base their claim on a breach of contract. This principle is known as the non-cumulative right of action.

Consequently, it should not, in principle, be possible for third parties to base their claim on a breach of a contract. After all, the law is clear, a contract only creates obligations among the parties.<sup>4</sup> Furthermore, the imperative to choose a legal ground can further constitute a barrier to third parties' right of action if the non-performance/breach of contract does not constitute on its own a civil offence.

However, the French Judiciary Supreme Court (*Cour de Cassation*) has set two exceptions

to the principle of non-cumulative legal action on contract and tort law. The first exception relates to the right of victims of personal injury to choose on which legal ground to sue. The second exception is the option given to third parties to obtain compensation for damage suffered from a breach of a contract.<sup>5</sup>

## What is the legal test third parties have to meet?

The *Cour de Cassation's* position on the legal requirements to be met by third parties has fluctuated over time, creating legal uncertainty.

In its early decisions, the *Cour de Cassation* required the claimant to prove that the contractual breach alleged could also be qualified, independently from the provisions of the contract, as a civil misdemeanour. Therefore, the onus was on the claimant to prove that the breach of contract could also fit in an established ground for civil liability, ie, tort.<sup>6</sup> From an English law perspective, it meant the claimant had to show that the defendant's breach of contract amounted to, for example, a breach of a general duty of care or a nuisance.

Conversely in some cases, the court chose to equate a breach of contract to a civil wrong,<sup>7</sup> essentially lessening the evidentiary burden for the claimant.

These diverging precedents are understandable since every breach of contract does not necessarily qualify as a civil wrong.<sup>8</sup>

In 2006 the *Cour de Cassation*<sup>9</sup> decided to clarify the divergent positions of its different divisions and equated a contractual breach to a civil wrong. Following this decision, it should have been enough for a third party to simply establish the breach of contract and show causation to win his case.<sup>10</sup>

However, the 2006 decision was not always followed in subsequent cases decided by the *Cour de Cassation* itself. Its Commercial division



followed the 2006 decision and equated a breach of contract to a tortious wrong,<sup>11</sup> whereas the Civil division reverted back to the civil fault-base mechanism; therefore, applying the legal test prior to the 2006 decision.<sup>12</sup>

Fast-forward to 2017, on the 18 May 2017, in the midst of the reform of French Contract Law, the Civil Division of the *Cour de Cassation* rendered a decision that was published in the *Court Journal*.

In substance, the *Cour de Cassation* decided that a breach of contract, being a breach of an obligation of result, on its own was not sufficient to give rise to a civil liability toward a third party.<sup>13</sup> Yet, six days later, on 24 May 2017, a different Chamber of the Civil Division of the same court applied the 2006 precedent in the case before it. Although the second case was not published in the *Journal*, it appeared that, even within the various Chambers of the Civil Division of the *Cour de Cassation*, there were two diverging positions.

The decision rendered on 18 May 2017 was interpreted by legal professionals as a signal that the 2006 case had been overruled, especially considering the nature of the contractual obligation at stake.

That analysis was also supported by a draft article in the proposed Civil Law Reform bill which sought to limit the right of a third party to sue for a contractual breach.

Article 1,234 of the preliminary draft proposal on Civil liability stated that third parties who suffered a damage as a result of the performance of a contract can only issue a claim under tort law and must demonstrate that the breach of contract fits into an established ground for civil liability. Alternatively, third parties with a legitimate interest could sue for a contractual breach if they accepted they would be bound by all the terms and conditions of the contract. In this second option, third parties would potentially be subject to all restriction of liability clauses.<sup>14</sup>

In June 2019, the Paris Court of Appeal reviewed this proposal and issued a report recommending a departure from the 2006 case to make French law more attractive for investors. The Paris Court of Appeal is in favour of distinguishing a contractual breach from a tortious breach to set a stricter legal test.

The legal uncertainty remained intact until the decision of the *Cour de Cassation* of January 2020. In a decision published in its *Journal*, the *Cour de Cassation* set out, once again, to clarify its position on third party liability.<sup>15</sup>

Reverting back to its 2006 precedent, the *Cour de Cassation* decided that a contractual

breach amounts to a civil wrong; therefore, a third party is not required to prove that the breach of contract may also qualify as a misconduct under tort law.

### **The consequences of the 2020 case on the burden of proof**

In its legal reasoning, the *Cour de Cassation* stated that a breach of contract which causes damage to a third party qualifies as a misdemeanour under tort law, which should not be made difficult to remedy. The Court therefore intends to simplify the burden of proof for third parties.

Article 1,200 of the French Civil Code seems to support this lighter evidentiary burden as it allows third parties to rely on a contract to prove a fact.

Third parties only need to show that a party to a contract has not fulfilled its obligations, and establish causation. The defendant would in turn bear the burden of showing that it has in fact adequately performed its obligations, or alternatively to show that the breach did not cause damage to the claimant.

### **How does the 2020 case affect the enforceability of restriction of liability or insurance pact clauses?**

When drafting a contract, the parties may seek to limit their personal liability to the extent allowed by law, in case of breach of contract. To that end, it is customary to insert in the contract a clause restricting the parties' personal liability. Some clauses in English contracts go as far as excluding liability for physical harm. Under French law, it is a public policy that parties may not exclude their liability for physical injury, death or tortious wrongdoing.

Moreover, clauses which restrict a party's liability are not enforceable against third parties suing on a tortious ground. Article 1,199 of the French Civil Code states that contracts cannot create obligations or rights (unless otherwise provided/accepted) for third parties. As a result, third parties may avail themselves of a breach of contract to seek compensation, and yet be shielded from the restrictions negotiated by the parties.

To mitigate the risk of having to indemnify third parties for bad performance of the contract, it is advisable to rely on insurance pact clauses. Such clauses provide that the party which is at fault shall indemnify the other against any actions, sanctions or

damages it is ordered to pay to a third party. Clauses that shield a party against the harm caused to third parties by the other side are valid and enforceable under French law.<sup>16</sup> It is important to note that these clauses do not create a blanket immunity against third parties' legal actions. It simply gives the innocent parties a right to sue their contracting partners in order to recover any sum they may have to pay to third parties or to call them as a guarantor in a legal action.

It is therefore highly advisable to negotiate insurance pact clauses carefully or to require the subscription of a third party's liability insurance policy especially in contracts involving a high risk of damage to third parties.

As the *Cour de Cassation* has just clarified its position, one can speculate on whether the legislator will codify the draft proposal of article 1,234 on civil liability or abandon it in the light of the *Cour de Cassation*'s recent decision.

In the meantime, contracting parties in France should be mindful of the ability of third parties to recover loss as a result of damage caused by the performance of the contract, and consider avoiding this 'gap' by using a carefully negotiated insurance pact clause.

#### Notes

- 1 'Conventions shall have effect only as between the contracting parties; they shall not be detrimental to the third party, and they shall benefit him only in the case provided for in article 1,121.' Article 1,165 of the French Civil Code, in its wording prior to the reform.
- 2 'The contract creates obligations only between the parties. Third parties may neither seek performance of the contract nor be compelled to perform it, subject to the provisions of this section and to those of Chapter III of Title IV.' Article 1,199 of the French Civil Code, after reform.
- 3 Cass civ, 2<sup>e</sup>, 29 May 1996, No 94-18.820; Cass civ, 2<sup>e</sup>, 9 July 2002, No 99-15.471.
- 4 See footnotes 1 and 2 *op cit*.
- 5 Civil liability: Necessary developments (Senate) .
- 6 Cass civ, 3<sup>e</sup>, 18 April 1972, No 70-13.826; Cass civ, 1<sup>e</sup>, 11 April 1995, No 91-21.137 and 92-11.086; Cass com, 2 April 1996, No 93-20.225; Cass com, 5 April 2005, No 03-19.370.
- 7 Cass civ, 1<sup>e</sup>, 15 December 1998, No 96-21905 and No 96-22440.
- 8 'Any contractual fault is not necessarily tortious with regard to third parties.' Dimitri Houtcieff, *Contract Law*, 3rd edn, Brylant, p 530.
- 9 Judges from the Chancery and the Civil division of the *Court de Cassation*.
- 10 Cass Ass, Pl, 5 October 2006, No 05-13.255.
- 11 Cass com, 6 March 2007, No 04-13.689.
- 12 Cass civ, 3<sup>e</sup>, 22 October 2008, No 07-15.692; Cass civ, 1<sup>e</sup>, 15 December 2011, No 10-17.691.
- 13 Cass civ, 3<sup>e</sup>, 18 May 2017, No 16-11.203.
- 14 'Relativity of contractual breach: The turnaround is confirmed', *Dalloz News*, 16 June 2017.
- 15 Cass Ass Pl, 13 January 2020, No 17-19.963.
- 16 Cass civ, 2<sup>e</sup>, 15 April 1961, No 275.

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## The Singapore Convention on Mediation: could 2020 be the year of the ratification?

The United Nations Convention on International Settlement Agreements resulting from Mediation, also known as the Singapore Convention, opened for signature in Singapore on 7 August 2019. The Convention seeks to facilitate international trade by furthering the promotion of mediation as a fast and cost-efficient way of resolving international disputes.

At its opening, the Singapore Convention was signed by 46 countries, including three of the world's largest economies: China, India and the United States.<sup>1</sup> This far surpasses the ten countries which had initially signed the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the

New York Convention) when it opened for signature in 1958.<sup>2</sup>

The European Union is yet to sign the Singapore Convention as it is undecided if it has the authority to sign the Singapore Convention as the EU or, alternatively, whether each member state should sign the Convention individually. It is currently unknown whether the United Kingdom will enter into the Singapore Convention following its departure from the EU on 31 January 2020.

Following the cultural tradition in Asia, mediation has been gaining popularity in the West for many years as an alternative mechanism to resolve commercial disputes.



It has, however limited scope in cross-border disputes because a settlement reached by mediation can only be enforced in the same way as any other contract – through commencing a claim for failure to fulfil it and trying to enforce any award or judgment obtained. In an international context, this can prove to be difficult, lengthy and costly. As such, there has been limited incentive to use mediation in international disputes as the New York Convention already provides a ready framework for enforcing arbitration awards in over 150 countries.

The Singapore Convention is therefore a significant addition to the international dispute enforcement framework as it is effectively the mediation version of the New York Convention and, as such, will give teeth to mediated agreements in their own right across borders when ratified.

This article looks at the key provisions of the Singapore Convention and examines the potential impact that the Convention may have on trade and dispute resolution in China.

### The Singapore Convention: when will it apply?

The Singapore Convention is a relatively brief document and resembles the New York Convention in both structure and content.

### Scope of application: inclusions and exclusions

The Singapore Convention applies to settlement agreements resulting from mediation to resolve commercial disputes which are international in nature, in that:

- at least two parties to the agreement have their place of business in different contracting states; or
- the state in which the settlement agreement is to be performed, or the state with which the agreement is most closely connected, is different to the parties' place of business.<sup>3</sup>

It follows that certain categories of settlement agreements are excluded from the broad scope of the Singapore Convention. These are agreements which:

- result from transactions engaged in by a party for personal, family or household purposes
- relate to family, inheritance or employment law
- have been approved by a court and are enforceable as a judgment
- have been recorded and are enforceable as an arbitral award.<sup>4</sup>

### Definitions

The term 'mediation' has a broad definition in the Convention and is described as a process whereby 'parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute'.<sup>5</sup> There is neither a requirement that the mediator be accredited by a recognised institution nor that the mediation be administered or adjudicated by or at a dispute resolution institution. At first glance this would seem to open every mediated agreement up for enforcement.

### Requirements for reliance on a settlement agreement

A party seeking relief under the Convention must submit the following:

- the signed settlement agreement; and
- evidence that the settlement agreement was achieved through mediation.<sup>6</sup>

The non-exhaustive list of the types of evidence that would be acceptable includes:

- a mediator's signature on the settlement agreement;
- an attestation by the institution which administered the mediation; or
- a document signed by the mediator stating that the mediation took place.<sup>7</sup>

### Grounds for refusing to grant relief

The Singapore Convention sets out an exhaustive list of the grounds on which a court may refuse to grant relief under the Convention.

These grounds are discretionary rather than mandatory and it is open to the courts to enforce an agreement even if one of these grounds exists. Relief may therefore be refused if:

- a party to the agreement was under some incapacity;
- granting relief would be contrary to public policy;
- there was a serious breach by the mediator of standards applicable to the mediator;
- there was a failure by the mediator to disclose circumstances that raise justifiable doubts as to the mediator's impartiality;
- the settlement agreement is null and void, inoperative or incapable of being performed under the law;
- the settlement agreement is not binding or final; or
- the subject matter of the dispute is not capable of settlement by mediation under the law where the relief is sought.<sup>8</sup>

### The potential impact on trade and dispute resolution in China

In his opening speech at the Opening Ceremony of The Belt and Road Forum for International Cooperation on 14 May 2017, China's President Xi Jinping spoke of the need for an 'equitable and transparent system of international trade' and the global promotion of 'mediation in the spirit of justice'.<sup>9</sup> The People's Republic of China has followed through with these ideals by showing their support towards and participation in the drafting of the Singapore Convention.<sup>10</sup>

China's Belt and Road Initiative (BRI) is a multi-billion-dollar programme through which China aims to finance infrastructure projects along a transcontinental passage connecting Asia, Europe and Africa in order to revive the ancient Silk Road trade route. While presenting a huge trading opportunity, the BRI also raises the potential for wide-scale international commercial disputes.

At present, despite China's historic use of mediation, owing to cultural factors as well as its socialist approach to seek to resolve conflicts, regulatory rules on mediation in China are relatively unsophisticated. This is with the exception of Hong Kong (SAR) which has been investing in mediation infrastructure, institutions and regulation for some time.

With the introduction of the Singapore Convention, it is expected that commercial mediation in China will gain international and professional strength, particularly in the context of the BRI.<sup>11</sup> It is also expected that China's mediation practices will become more sophisticated over time with the use of formal mediators and the adoption of similar procedural rules.

This bodes well because non-Chinese parties have typically been hesitant to sign up to contracts that require them to litigate or arbitrate in China. However, the benefit of mediation is that the time, costs and friction

associated with traditional litigation and arbitration are usually much reduced and, as such, it is anticipated that the Singapore Convention will improve the business environment of China.

### Conclusion

The Singapore Convention provides for the enforcement of mediated settlement agreements across contracting states. However, it will first need to be ratified by these countries before it can come into force.<sup>12</sup> Given the potential economic and trade advantages that the Convention affords China, it begs the question: Will 2020 be the year of the *ratification*?

### Notes

- 1 United Nations Commission on International Trade website, *Status: United Nations Convention on International Settlement Agreements Resulting from Mediation*, available at: [https://uncitral.un.org/en/texts/mediation/conventions/international\\_settlement\\_agreements/status](https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status), last accessed 7 March 2020.
- 2 New York Arbitration Convention website, '*Contracting States*', available at: <http://www.newyorkconvention.org/countries>, last accessed 7 March 2020.
- 3 United Nations Convention on International Settlement Agreements resulting from Mediation, 20 December 2018, article 1(1).
- 4 *Ibid*, article 1(2), (3).
- 5 *Ibid*, article 2.
- 6 *Ibid*, article 4(1) (a) and (3).
- 7 *Ibid*, article 4(1) (b).
- 8 *Ibid*, article 5.
- 9 Xi Jinping '*Work Together to Build the Silk Road Economic Belt and The 21st Century Maritime Silk Road*', Speech by H E Xi Jinping President of the People's Republic of China At the Opening Ceremony of The Belt and Road Forum for International Cooperation, 14 May 2017, available at: [http://en.cidca.gov.cn/2017-05/16/c\\_260434.htm](http://en.cidca.gov.cn/2017-05/16/c_260434.htm), last accessed 7 March 2020.
- 10 Peter Corne and Matthew Erie, *China's Mediation Revolution? Opportunities and Challenges of the Singapore Mediation Convention*, OpinioJuris website, 28 August 2019, available at: <http://opiniojuris.org/2019/08/28/chinas-media-revolution-opportunities-and-challenges-of-the-singapore-mediation-convention/>, last accessed 7 March 2020.
- 11 *Ibid*.
- 12 United Nations Commission on International Trade website (n 1).

# How to obtain section 1782 discovery: a step-by-step guide

United States discovery mechanisms are document requests and depositions of key witnesses or entities, among others, and are powerful tools for proving your case. Discovery requests can cover a broad array of subject matter. So long as the discovery sought is not covered by privilege and is 'relevant' to the party's claim or defence, it is fair game. It is no wonder that lawyers outside of the US, particularly on the plaintiff or claimant-side, often wish they had similar tools at their disposal.

Section 1782 of title 28 of the United States Code grants that wish. It authorises US federal district courts (ie, a federal trial courts) to order a person or entity that 'resides' within the court's jurisdiction 'to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal.' This article provides a guide for foreign lawyers interested in section 1782 discovery.

## Use of section 1782 discovery for proceedings around the globe

Section 1782 has been used to obtain discovery for a range of proceedings all around the world: from labour cases in Brazil to probate disputes in Hong Kong and maritime law arbitrations in London, as well as many other cases in between.

In *In re Application for an Order for Judicial Assistance in a Foreign Proceeding in the Labour Court of Brazil*, for example, a federal trial court in the Northern District of Illinois (in Chicago) granted a petition seeking section 1782 discovery for use in proceedings in the 68th and 72nd Labour Courts of São Paulo. That case concerned a wrongful termination suit by the former CEO and former Financial Director of McDonald's Comercio de Alimentos Ltda, a Brazilian subsidiary of McDonald's Corporation. The officers sought very broad discovery: interrogatories, documents, and depositions of McDonald's employees, covering a wide-range of subjects, including personnel files, the decision to dismiss the employees, McDonald's

termination policies, franchise issues, tax issues, employee benefits, compliance with US laws, accounting audits, insurance claims, and other topics. The US court granted the discovery, with only a few, specific limitations.

United States courts have also ordered section 1782 discovery for use in probate disputes. For example, in *Application of Esses*, the US Court of Appeals for the Second Circuit, which covers New York among other states, affirmed a trial court's order granting a section 1782 petition that sought discovery for use in judicial proceedings in Hong Kong to determine the administrator of an estate of an individual who died intestate. The case arose from a dispute between the deceased's brother and sister before the Hong Kong courts regarding who should be appointed as administrator of the estate. The brother, who lived in Argentina, filed a section 1782 petition with the United States District Court for the Southern District of New York (in New York City), seeking information he claimed would show he was entitled to be appointed administrator. The application was successful.

Section 1782 discovery has also been granted for use in family law cases. In *In re Solines*, for example, a federal court in Louisiana granted a section 1782 petition seeking documents for use in an Ecuadorian child support dispute. Ms Solines sought documents concerning her ex-husband's compensation: a critical point of contention in the child support dispute. The court granted the petition, allowing the plaintiff to obtain discovery from her ex-husband's employer, a hospital located in the US.

Petitions seeking discovery under section 1782 have also been authorised for maritime law proceedings. In *In re Ex Parte Application of Kleimar NV*, the US District Court for the Southern District of New York granted an ex parte section 1782 application seeking discovery for use in arbitrations before the London Maritime Arbitration Association. The court granted the application, authorising discovery regarding pricing and other information relevant to the London proceedings.

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Courts have also granted discovery under section 1782 for use in criminal proceedings. For example, in *Super Vitaminas, SA*, a company filed a section 1782 petition seeking discovery for use in criminal proceedings in Guatemala relating to the company's alleged non-payment of import taxes. The company believed that certain emails to which it no longer had access would prove its innocence. Using section 1782, the company obtained a subpoena requiring Microsoft and Google to turn over the exonerating emails.

### How to conduct Discovery under section 1782

A section 1782 petition must show that:

- the target of the discovery either resides or is found in the US jurisdiction where the motion was filed;
- the discovery sought is for use in foreign 'proceeding(s)'; and
- the party seeking discovery is an 'interested person'.

#### *Step one: Identify the US jurisdiction where the party with the discovery resides*

Determining whether a person or entity 'resides or is found' in the US is very similar to determining whether a court has personal jurisdiction over a certain individual or entity. For a natural person, residence is usually the person's domicile, ie, where that person lives. For corporations and other entities, the inquiry is a little more complicated, but their residence is typically the jurisdiction where they are incorporated or maintain their principal place of business.

Filing the section 1782 application in the jurisdiction where the target resides satisfies that residence requirement. But sometimes it is not that simple.

In *In re Escallón*, for example, the petitioner, Arturo Escallón, sought deposition testimony and document discovery from two individuals, Patricia and Carlos Ardila, for use in contemplated proceedings in Colombia. The court denied the petition, in part because Escallón had not shown that the Ardilas resided in the Southern District of New York, meaning that the district was their permanent residence, merely by showing that they maintained an apartment in New York City. Additionally, the court determined the Ardilas were not 'found in' the district because they were not physically present in the district when served with process.

Similarly, in *In re Application of Fernando Celso De Aquino Chad*, a judicial administrator of a bankruptcy proceeding in Brazil filed a request under section 1782 to compel certain US banks to produce transaction records, which, he argued, would provide proof that the entities had dissipated assets in anticipation of their bankruptcy filing. The court granted the petition, but limited it to banks that were headquartered in New York, where the petition was filed. Jurisdiction could not be exercised over the other banks, the court explained, because, although they operated in New York, none of their alleged conduct in New York was connected to the dissipation of assets that formed the basis for the 1782 petition.

#### *Step two: Establish that the discovery is 'for use in' a foreign or international proceeding*

The party seeking discovery must also establish that the documents or testimony sought are 'for use in a proceeding in a foreign or international tribunal'. Note that the statute does not say anything about the proceeding being ongoing or already initiated. The party must only identify objective indicia suggesting that the filing or initiation is being contemplated if the proceeding is not yet underway.

Some courts, including the US Court of Appeals for the Second Circuit, have held that to count as a 'proceeding', there must be some dispute regarding liability that the foreign or international tribunal must resolve, imposing a requirement that the proceedings be 'adjudicative' in nature. Other courts, however, have disagreed. The US Court of Appeals for the Eleventh Circuit, which covers Florida, among other states, has held that section 1782 authorises discovery, for example, for use in post-judgment proceedings where liability has already been established.

Another significant unresolved question regarding the 'proceeding' requirement is whether private foreign arbitrations count as 'proceeding[s] in a foreign or international tribunal.' At least the Second and Fifth Circuit Court of Appeals (covering, most significantly, New York and Texas) have held that they do not. Other courts, including the US Court of Appeals for the Sixth Circuit, have disagreed. In *Abdul Latif Jameel Transportation Company Ltd v FedEx Corp*, that court ruled that section 1782 authorises discovery in private commercial arbitrations. The issue is



currently pending in *Servotronics, Inc v Rolls-Royce PLC*, before the US Court of Appeals for the Seventh Circuit, which covers Illinois, among other states.

Apart from showing that the proceeding actually counts as a ‘proceeding’, the party seeking section 1782 discovery must also show that the documents or testimony can actually *be used* in the foreign or international proceeding. The party does not have to show that it will in fact use the discovery. The party must simply show the *ability* to use the discovery. Therefore, if the documents or testimony are subject to exclusion under a foreign rule or privilege, the section 1782 motion may not be successful.

#### **Step three: Show that the party seeking discovery is an ‘interested person’**

A party to a foreign or international proceeding is clearly an ‘interested person’ under section 1782. But a person or entity with a mere financial or ideological stake in the proceeding is not.

The space between those two extremes, however, is somewhat unclear. Where a non-party is seeking section 1782 discovery, courts typically assess whether the person has a right to provide evidence, whether the person has an established relationship (ie, agent-

principal or employee-employer) with a party, or whether the person is a creditor.

#### **Step four: Overcome discretionary factors**

Even where a party has met all three statutory requirements, whether to grant the section 1782 application is left to the district court’s discretion.

In deciding whether to exercise discretion to grant a section 1782 application courts typically consider whether the foreign or international tribunal could order the discovery itself, the nature of the tribunal, the character of the foreign or international proceedings, whether the tribunal would be receptive to US-court assistance, whether the party seeking discovery is attempting to circumvent proof-gathering restrictions imposed by the foreign country or international body, and whether the request is unduly burdensome. The party opposing discovery bears the burden of showing that any of those discretionary factors (or other factors) warrant denial of the motion.

It is therefore critically important that section 1782 applications not only satisfy the statutory requirements but also provide the court comfort that the discovery sought is appropriate for the proceedings in which it will be used and is not overly broad.

## **Do acquired companies survive in merger transactions? Sometimes it happens...**

**A**ccording to a recent judgment of the Italian *Corte di Cassazione*<sup>1</sup>, although – as a general rule – in merger by acquisition transactions the acquired company loses its legal standing, such a company can still *be sued* whenever this is needed to protect a counterparty that, without any fault, is unaware of the merger.

#### **The acquired company according to Italian *Corte di Cassazione* case-law**

Under the Italian law, the consolidation or merger of several companies can be

effected by the establishment of a new company, or by absorbing one or more others into a company. Article 2504-*bis* of the Italian Civil Code provides that the company resulting from the merger, or the absorbing company, assumes the rights and obligations of the extinguished companies. The company resulting from the merger, or the absorbing company, continues all of the existing relationships of the extinguished company(ies) prior to the merger, including those deriving from litigation.

According to traditional case-law,<sup>2</sup> mergers imply the extinction of the merged or

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absorbed companies and the consequent universal succession of company resulting from the merger, or of absorbing company, in all the existing legal and procedural positions of the acquired company.

However, this traditional case-law has been superseded by the so-called ‘modification’ thesis, according to which a merger or a consolidation is a mere amending event affecting the act of incorporation of a company.

The aforementioned thesis is supported by the following points: (a) the Company Law Reform<sup>3</sup> amended art 2504-bis, Italian Civil Code, replacing the words ‘*extinguished company*’ with ‘*the companies involved in the merger operation*’; (b) the words ‘*continuing in all their relationships prior to the operation*’. This would suggest that the company resulting from the merger, or the absorbing company succeeds the extinguished company(ies) in all their pre-existing relationships, but they do not necessarily imply the extinguished company ceases to exist completely.

Therefore, merger transactions imply mutual integration between companies, where individual relationships are integrated into a unified asset but maintain their link with the original source. In other words, merger operations can be qualified as merely formal subjective variations that do not extinguish a legal entity and, correlatively, do not create a new one.

As a result, a company that, in the course of a trial, is merged, or absorbed, into another should maintain its standing, in order to avoid, according to the principle of due process, any interruption of the pending proceedings involving the acquired company.

### **The cancellation of the acquired company from the Company Register**

With judgment no 23641/2019, the Italian *Corte di Cassazione* addressed the procedural aspects of a case in which the extinguished company had also been deleted from the Company Register.

The Italian *Corte di Cassazione* stated that, after an extinguished company’s cancellation from the Company Register, there is a clear distinction between (a) its capacity to act as a claimant and sue a defendant in court and (b) its standing to be sued in court as a defendant.

According to the Italian *Corte di Cassazione*, when a company absorbed into another has been deleted from the Companies Register, it has no standing to sue, although it may maintain standing to be sued in court.

The continuation of the legal relationships in the company resulting from the merger, or in the absorbing company (as provided in art 2504-bis, Italian Civil Code) does not authorise the extinguished company(ies) to assert it maintains its standing to sue defendants in court after cancellation from the Companies Register. However, it may justify any claimant acting in good faith bringing claims against the extinguished company(ies) even after its cancellation from the Companies Register.

The need to protect the counterparty (who cannot be burdened with the obligation to continuously monitor the Companies Register) may justify a plaintiff suing the extinguished company(ies) instead of the company resulting from the merger, or the absorbing company. In order to apply this principle, however, it is necessary that the claimant suing the extinguished company in court after it has been deleted from the Companies’ Register acts in good faith and genuinely has no knowledge of the merger/consolidation. ‘Knowledge’ is assessed according to the criteria of ‘normal diligence’ and is not assumed merely from the registration of the transaction in the Companies Register.

As a general rule, in the Italian legal system the Companies Register performs the important function of providing publicity to third parties of events regarding the company.

According to art 2193 of the Italian Civil Code, ignorance of facts which the law requires to be inscribed in the Companies Register cannot be pleaded by third parties from the moment in which the entry has been made.

As a result, the statement of the *Corte di Cassazione* shall be considered as an exception to the aforementioned rule of presumption of knowledge, which, according to the *Corte di Cassazione*,<sup>4</sup> in general does not apply in procedural law.

### **Conclusions**

Mergers and consolidations achieve unification through the mutual integration of the companies involved in the transaction.

However, this shall not justify the extinguished company(ies), deleted from the Register of Companies, to maintain its standing to sue a defendant in court.

Such company(ies) can, however, be sued instead of the company resulting from the merger, or the absorbing company,

when this is necessary to protect the counterparty that, in good faith is unaware of the merger/consolidation. Provided that, such ‘good-faith’ of the plaintiff shall be interpreted restrictively and assessed on a case-by-case basis.

**Notes**

- 1 *Corte di Cassazione*, judgment no 23641/2019
- 2 *Corte di Cassazione*, judgment no 50/2004, 5973/2005 and 1413/2006.
- 3 Legislative Decree no 5 and no 6, 17 January 2003.
- 4 See also *Corte di Cassazione*, judgment no 15234/2007.

# Australasian class actions: funding arrangements

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In Australia, a ‘common fund order’ or CFO was often made, early, in a representative proceeding. The CFO provided for the amount of the litigation funder’s fee to be fixed as a proportion of ultimate recovery in the proceedings. It also ensured that all group members are to bear proportionate shares of the liability, and for that liability to be paid first from monies recovered. The CFO tended to prevent freeriding, as explained below.

The assumed basis for making such order in Australia was a general power in similarly drafted State and Federal legislation empowering a court to make such order as appropriate or necessary to ensure justice is done in the representative proceeding.

On 4 December 2019, the High Court of Australia (the ultimate appellate Court) said however that this assumed statutory power was not sufficient to justify making a CFO.<sup>1</sup>

It is unnecessary here to deal with the specific legislation, nor with the reasoning of the High Court of Australia, which turns on particular provisions. The present focus is on whether this will change the availability of funding, mode of composition of class actions, or simply lead to a different approach by the courts in finding some other power enabling CFOs to be made.

The third possibility, finding another path to get to the same result as a CFO, arises under the Federal Court of Australia’s subsequent Class Actions Practice Note of 20 December 2019,<sup>2</sup> issued two weeks after the High Court of Australia’s decision. The Practice Note reassures those involved in so-called ‘open class actions’.<sup>3</sup>

Subject to other indication, the Federal Court of Australia would be inclined to make ‘an appropriately framed order to prevent unjust enrichment and equitably and fairly to distribute the burden of reasonable legal costs, fees and other expenses, including reasonable litigation funding charges or commission, amongst all persons who have benefited from the action.’

This followed uncertainty about the matter and disquiet in the market. It has been reported that a CFO was vacated in one open class action.<sup>4</sup>

In that case the barrister for the representative party is reported nevertheless to have indicated that an appropriate application would be made at a later point in time regarding remuneration for the litigation funder. The barrister is reported to have said: ‘Funding arrangements are in place at the moment and we’ll make an application to seek what we need in the future.’ It was also reported that the same judge had ordered another six class actions to come back to court for resolution of the status of their respective CFOs.

Open class actions are particularly vulnerable to free rider exploitation, where a person settles separately without intending to contribute to the costs incurred in driving the defendant to the point of settlement, such as incurring costs of experts’ reports revealing important matters related to liability. A CFO requires everyone in the open class to account for any settlement monies received so that costs can be borne across the group.

An obvious alternative to a CFO would be to close the class, have participants in the

class signed up individually to terms which necessarily extend to payment of litigation funding costs, and leave those outside the closed class to pursue their own actions. Leaving aside the potential for inefficiency in use of court facilities that this might generate, it nevertheless appears entirely suitable for smaller classes involving high value per claimant. An example would be a claim on behalf of small businesses affected by the same negligence of, say, a supplier in providing a defective product to the businesses. The small businesses will be motivated to sign up individually as members of a closed class, particularly where the loss is quite large. The law of diminishing returns means that potential class members with lesser losses either would not be asked to form part of the class, or may be less motivated to go to the trouble of signing on.

Nevertheless, the sector is still digesting the results of the High Court of Australia's decision, and looking for other solutions.

Meanwhile in New Zealand the Law Commission has restarted its review of the law about class actions and litigation funding last year.<sup>5</sup>

Late last year, in *Ross v Southern Response*,<sup>6</sup> New Zealand's intermediate appellate court set new boundaries by allowing a class action to proceed on the basis that it was an 'optout' class action. The *Ross v Southern Response* decision predated the High Court of Australia's decision about CFOs.

The New Zealand Court of Appeal stated that, while the New Zealand legislation did not specifically deal with that kind of funding arrangement, it was confident that sufficient power existed for a CFO or similar order to be made.<sup>7</sup>

On 9 December 2019, the New Zealand Supreme Court (the ultimate appellate court)

granted leave to appeal the New Zealand Court of Appeal's decision.

The New Zealand Supreme Court stated that it would be 'assisted by submissions from the New Zealand Law Society and the New Zealand Bar Association' on the 'principles applicable to deciding whether representative claims proceed on an optin or optout basis'.<sup>8</sup>

It is understood that the NZBA has accepted the invitation to put a submission to the Supreme Court, and that members' views are being sought. While the NZBA's submission in this matter is not available at date of writing (being due for filing in March 2020), the NZBA's submission in 2018 to the New Zealand High Court's Rules Committee called for procedures that did not dictate only opt-in formation of a class.

The New Zealand Supreme Court's hearing is scheduled for 23 and 24 March 2020.

At time of writing, the litigation funding market faces continued uncertainty in Australasia, but is considering innovative ways of proceeding.

#### Notes

- 1 *BMW Australia v Brewster*, (2019) HCA 45.
- 2 Class Actions Practice Note, 20 December 2019, available at: <https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-ca>, last accessed 8 March 2020.
- 3 Class Actions Practice Note, Federal Court of Australia, paragraph 15.4.
- 4 Liz Main, 'Common fund order removed from GetSwift class action', *Australian Financial Review*, 17 December 2019, available at: <https://www.afr.com/technology/common-fund-order-removed-from-getswift-class-action-20191217-p53kp3> (paywall).
- 5 Class Actions and Litigation Funding – Project Overview, available at: <https://www.lawcom.govt.nz/our-projects/class-actions-and-litigation-funding>, last accessed 8 March 2020.
- 6 *Ross v Southern Response*, (2019) NZCA 431.
- 7 *Ibid*, 110.
- 8 *Southern Response Earthquake Services Ltd v Ross*, (2019) NZSC 140.



# EU directives, legislative amendments and changes to the rules for registering ultimate beneficial owners in Austria

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**T**he incremental decline in Austrian litigation activity can largely be ascribed to the continued popularity of ADR methods, allowing for global enforceability in cross-border disputes. Notwithstanding these trends, Austria has also witnessed a surge of new developments relating to public and private enforcement.

In an effort to implement recent EU Directives, Austria has undertaken a number of legislative changes and amendments. The amendments made to Austrian competition law are particularly noteworthy. These are based on EU Directive 2014/104, as set out in the Austrian Cartel Act (KartG). The new rules include provisions on the submission of damages claims regarding antitrust infringements and are aimed at establishing greater certainty surrounding enforcement. They also offer changes to the limitation period for bringing such actions, extend rules on disclosure and shift the burden of proof to the defendant. This development has been supplemented by the implementation of EU Directive 2016/943 and amendments to the Federal Act against Unfair Competition (UWG), which centres on the protection of undisclosed business information and the prevention of industrial espionage.

The most recent implementation has been that of EU Directive 2018/843, which amends the local Ultimate Beneficial Owner Registry Law. It has attracted particular attention as the latest addition to what has become an intricate and highly sophisticated compliance scheme. Since coming into force on 10 January 2020, its amendments have introduced profound changes, some of which are highlighted below. Further revisions are effective as of November 2020 and March 2021.

## Public access

- Access has traditionally been reserved to a limited group of individuals (eg, notaries, creditors, lawyers etc) and those having a legitimate interest to obtain information from the Register.
- Now anyone seeking access is guaranteed to obtain information on any legal entity's beneficial owner.

## Notification requirements

- Annual reviews to verify whether data entries are both complete and correct have formerly been deemed sufficient. Changes had to be documented and required notification. If no alterations were made to the register no further action would be required.
- At present, necessary changes must be registered within four weeks of the annual review being finalised. In the absence of such changes, an express notification must be provided confirming the validity of the registered data.

## Trusts

- Transactions focussing on the use of trusts have previously been subject to the Austrian *WiEReG* (Economic Ownership Register) assuming there is a direct relationship between their administration and the forum. Potential indicators include the trustee's permanent residence or legal seat.
- Registration is required irrespective of the location of administration, whether in Austria or another EU Member State, provided the trustee has entered into business relationships within or engaged in transactions involving purchases of real estate located in Austria. With regard to trusteeships, ownership interests must be identified in the register.

### Penalties

- Incorrect/incomplete notifications, failures to comply with notification requirements (following two requests) or neglecting to register relevant changes within a four-week timeframe have been penalised in monetary terms (€200,000 for intent; €100,000 for gross negligence).
- The grounds for imposing penalties remain unchanged but have been extended. Failing to retain documents or other information necessary to ensure compliance with the aforementioned obligations allows for the imposition of fines (€75,000 for intent, €25,000 for gross negligence). Should a party become aware of information being either incomplete or false an electronic note has to be entered unless revisions are offered within a reasonable time. Penalties may now be imposed within six weeks rather than three months.

### Compliance package

- As of November, a new data platform will come into force, aimed at centralising all relevant documentation surrounding the verification of ultimate beneficial ownership. Termed the 'Compliance Package', it purports to facilitate the register's operation by storing previously uploaded notes, records and confirmations supplied by reporting entities.

### Conclusion

Austria's commitment to the creation of a minimum standard of public access to beneficial ownership has been strengthened and expanded by the recent amendments to the UBO register that came into force at the start of 2020. As an extensive platform that centralises beneficial ownership information, it serves as an essential tool, preventing money laundering, tax evasion and terrorist financing. In addition to the often overlooked but critical role of establishing citizen trust, this revised and streamlined approach also allows businesses to reduce costs and minimise the complexity surrounding their exercise of due diligence and risk management. By facilitating accessibility and increasing transparency, the recent changes of Austria's legal provisions on UBO registers have the potential to solidify market stability as well as increase investor confidence and effectiveness in the allocation of capital.

The central location for recording both natural persons and legal entities taken together with the newly implemented procedural amendments, constitute critical tools in the practice of litigators both in relation to their asset tracing abilities and enforcement powers. With access to a now significantly broadened scope of information, they will be better equipped to combat complex crime and corruption in a manner that is not merely reactive but more effective and expedient.

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## India's changing litigation landscape

Litigation in India has experienced huge setbacks due to its over-burdened legal system, shortages of judges, indefinite hold ups in case disposal, and issues with the enforcement of foreign awards/decrees, etc. All these issues fairly fit the phrase, 'justice delayed is justice denied'.

The last decade or so, however, has experienced major improvements due to the introduction of several reforms aimed at ensuring a speedier dispensation of justice. These reforms were very much demanded by India's expanding economy and high value

commercial disputes. A number of measures, such as the 2016 Insolvency and Bankruptcy Code, the 2015 Arbitration Amendment Act, and the introduction of Commercial Courts, among others, were promulgated so as to facilitate a more business-friendly environment for global investors.

### The Insolvency and Bankruptcy Code, 2016

The Code was enacted to consolidate and amend pre-existing laws, providing a single piece of legislation to deal with the

reorganisation and resolution of corporate persons, partnership firms and individuals in a timely way. The booming phase of the economy in the early 2000s resulted in disproportionate bank lending which had a heavy impact during the global financial crisis, leading to an increase in non-performing assets. Prior to the Code coming into force, the process for insolvency resolution was disorganised with several pieces of parallel legislation dealing with similar legal issues. The introduction of the Code brings about a paradigm shift in the insolvency resolution process from the 'debtor in possession' to a 'creditor in control' model. Furthermore, India's Supreme Court provided a agreed interpretation of the 2016 Real Estate (Regulation and Development) Act, along with the Code by upholding the constitutional validity of the Insolvency and Bankruptcy (Second Amendment) Act 2018 which classified home-buyers as financial creditors so as to facilitate initiation of insolvency proceedings by them under section 7 of the Code. This thereby increases the scope of the Code and revives faith of commercial stakeholders with its strong framework for a timely resolution.

According to the Code, the Adjudicating Authority is required to act in a timely manner from the admission date of application by the Tribunal. The Code has further ensured the early detection of insolvency by providing that the corporate insolvency process can be initiated on a minimum default of Indian Rupees INR 100,000 (approx. US\$1,350), therefore encompassing a wide spectrum of debtors. Additionally, the judiciary has played a crucial role in streamlining the Code by providing interpretations and clarifications where necessary and upholding the object of the Code to its broadest extent. For example, in the case of *Mobilox Innovations Private Ltd v Kirusa Software Private Ltd*,<sup>1</sup> the Supreme Court interpreted the meaning of the word 'dispute' with regards to the initiation of the corporate insolvency resolution process in such a manner so as to accommodate and protect the creditors' interests, while interpreting section 8 of the 2016 Insolvency and Bankruptcy Code. Section 8 provides that a demand notice must be served on the corporate debtor before filing an application for initiation of corporate insolvency resolution process and the corporate debtor must inform the operational creditor about the payment of debt or 'dispute' if any, within

ten days of receiving notice. The Supreme Court held that the definition of 'dispute' is inclusive and it must not be restricted only to pending suits and arbitrations.

In another landmark decision, the National Company Law Appellate Tribunal (NCLAT) held that a corporate insolvency resolution process under sections 7 and 9 of the Code can be initiated against a corporate debtor even if the name of the corporate debtor has been struck off the Registrar of Companies register and further clarified that the insolvency process needs to be filed within 20 years of the name being struck off.<sup>2</sup> Recently, when parallel insolvency proceedings were initiated against Jet Airways in India and Netherlands,<sup>3</sup> the NCLAT took an extremely liberal view and recognised the Dutch trustee by allowing its attendance at the Committee of Creditors' meetings in India.

The directions of the Gujarat High Court in the petition filed by Essar Steel India Ltd,<sup>4</sup> upholding the insolvency proceedings initiated by the RBI against 12 entities indicates that there is a better chance of recovery in the current dispute resolution regime.

### **The Arbitration and Conciliation Act, 1996**

A well-developed alternate dispute resolution (ADR) mechanism is a must for any country that wishes to attract and retain foreign investment. The Arbitration and Conciliation Act, 1996 (the Act) was enacted to set out provisions for international as well as local commercial arbitration. In addition to general provisions relating to arbitration, the Act also provides for the enforcement of foreign awards, conciliation and supplementary provisions. In an effort to promote arbitration as a preferred mode of dispute resolution, the Arbitration and Conciliation (Amendment) Act, 2015 (Amendment Act, 2015) was enacted. This was a most welcome response to the challenge of both domestic and foreign arbitral awards. Prior to this amendment, an arbitral award could be challenged merely by filing an arbitration petition which would put an automatic stay on the arbitral award's enforcement. The 2015 Act now clarifies that mere filing of the arbitration petition would no longer stay the enforcement of an award. The judgment debtor will now have to make a separate application for stay of the arbitral award. In cases of awards involving money payments, the courts have seldom directed the judgment debtors to deposit money/security before hearing the petition

challenging the enforcement of award. This will ensure that arbitral awards are enforced smoothly and keep trivial or distressing challenges at bay.

The Amendment Act, 2015 also sets out requirements for arbitrators to ensure the timely completion of arbitral proceedings. It provides arbitral proceedings should be completed within a one-year period which may be further extended by six months. If the arbitration proceedings do not conclude within this timescale, the arbitrators' mandate will cease, unless an extension is sought by the parties showing cause, which will be at the discretion of the courts.

For international commercial arbitrations, the Amendment Act, 2015 has defined 'court' to mean only High Court of relevant jurisdiction. Prior to the Amendment Act, 2015 the precedent set in *Bharat Aluminium Company Ltd v Kaiser Aluminium* excluded the applicability of Part I (namely interim measures by the court, court's assistance in taking evidence) of the Act to foreign seated arbitrations. The Amendment Act has made some provisions of Part I applicable to foreign seated arbitrations pursuant to which foreign parties can apply for interim relief against Indian parties or to safeguard assets based in India. The Amendment Act has transformed India's arbitration environment by bringing about significant changes pertaining to international commercial arbitration, the time bound conclusion of arbitrations, appointment of arbitrators and grounds to challenge an appointment, thereby minimising judicial interference as against the earlier Act.

The Arbitration and Conciliation (Amendment) Act, 2019 (Amendment Act 2019) was intended to institutionalise the ADR mechanism, and make India an arbitration-friendly jurisdiction. The Amendment Act, 2019 has a major focus on the constitution of the Arbitration Council of India, stricter timelines, improved procedures, and the provision of protection to the Arbitrators. India's courts are implementing a pro-arbitration approach by encouraging parties to adopt arbitrations or in some cases mediation, to resolve disputes.

### Commercial Courts Act, 2015

The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 replaced the Commercial Courts, Commercial Division

and Commercial Appellate Division of High Courts Ordinance, 2015. It provides for the constitution of Commercial Courts, Commercial Divisions and Commercial Appellate Divisions for the adjudication of disputes pertaining to high-value commercial transactions. One of the important facets of the Act is the adherence to strict timelines which it prescribes. The Supreme Court has observed in *Rameshwari Devi v Nirmala Devi* that the trial court must finalise a timeline with respect to the pleadings and filings and all the parties involved must abide by such timelines.<sup>5</sup> The Act provides comprehensive procedures pertaining to discovery, disclosure, admission and denial of documents, verification of pleadings etc, so as streamline the process and provide clarity to the parties involved.

### Enforcement of foreign decrees

Regarding the enforcement of foreign decrees in India, countries belonging to the list of reciprocating territories have a greater advantage as opposed to other jurisdictions. The United Kingdom, Aden, Fiji, Republic of Singapore, Federation of Malaya, Trinidad and Tobago, New Zealand, the Cook Islands (including Niue) and the Trust Territories of Western Samoa, Hong Kong, Papua and New Guinea, Bangladesh and United Arab Emirates (UAE) are the countries that have been notified as reciprocating territories under the Code of Civil Procedure, 1908. In January 2020, the UAE has been notified in the official gazette as a 'reciprocating territory'. This means that decrees passed by a 'superior court' of UAE can be directly executed in India by filing a certified copy of the decree before an Indian court of appropriate jurisdiction. The Indian court will treat this decree as if passed by itself. Whereas, when enforcing a foreign judgment/decree from a non-reciprocating countries, a fresh suit in an Indian court with appropriate jurisdiction has to be instituted.

The recent developments in the Indian legal system, particularly in the procedural framework of litigation have brought about a positive transformation. The judiciary in tandem with the legislature continue to make procedural amendments with significant efforts to overcome delays and reduce the backlog of cases in India's courts. For India, as a leading global economy, these legal and procedural reforms will have a positive impact on economic growth within a democratic framework.



## Notes

- 1 (2018) 1 SCC 353.
- 2 *Hemang Phophalia v The Greater Bombay Co-operative Bank Ltd*, Company Appeal (AT) (Insolvency) No. 765 of 2019.
- 3 Company Appeal (AT) (Insolvency) No 707 of 2019.
- 4 (2017) SCC OnLine Guj 995; (2018) Comp Cas 101.
- 5 (2011) 8 SCC 249.

# UNCITRAL envisaging work on asset tracing and recovery

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## Introduction

The United Nations Commission on International Trade Law (UNCITRAL) held a Colloquium on Asset Tracing and Recovery, with the support of its Working Group V (Insolvency Law). The events took place at UNCITRAL's headquarters in Vienna on 6 December 2019. More than 100 professionals who deal with asset tracing and recovery attended.

The aim of the Colloquium was to instigate a process of debate and analysis among practitioners and academicians from different jurisdictions. Its ultimate goal is to assist UNCITRAL in its decision on whether to engage in drawing up legal instruments to deal with asset tracing and recovery at an international level. If so, then another important aspect must be determined which is the best approach in tackling the problem, in view of its complexity and different ramifications. After this first session, it is expected that the debate will continue in future UNCITRAL Working Group V meetings, the next being scheduled in New York on 11–14 May, 2020.

## General issues arising from asset tracing and recovery

While acknowledging that there is no common definition of asset tracing and recovery: 'asset tracing' generally refers to a legal process of identifying and locating assets (whether misappropriated or not) or their proceeds; 'asset recovery' follows the asset tracing process and put simply, is the process of returning an asset to its legitimate claimant.<sup>1</sup>

Asset tracing and recovery is therefore a multidimensional concept encompassing

criminal, civil and insolvency legal aspects among others. As such, its tools are used in different jurisdictional contexts such as criminal proceedings, insolvency proceedings, civil proceedings (eg, family and succession matters), as well as in the enforcement of judgements and arbitral awards.

In spite of being essential for the actual effectiveness of the rule of law, there are great disparities among jurisdictions on its regulation. Many jurisdictions lack proper tools for asset tracing and recovery.

Existing regulations also show a stark contrast among common and civil law traditions on aspects of asset tracing and recovery. For example, the obligations of parties, the role of courts, discovery and evidentiary means, third-party obligations, the availability and efficiency of sanctions for non-compliance.<sup>2</sup> Consequently, the extraterritorial effect of some asset tracing and recovery measures may prove challenging, and tools used in some jurisdictions may oppose basic legal principles in others.

Finally, the issues arising around digital assets and digital tracing of assets (two concepts that need to be differentiated) must also be addressed in our current era of rapid technological change. In this respect, blockchain technology presents huge barriers for tracing and recovering certain digital assets, ad ex, cryptocurrency.

## The work of international organisations: asset tracing and recovery tools which already exist in current international legal instruments

A highlight of the Colloquium was the opportunity to get to know the work

being undertaken by several international organisations in the different fields where asset tracing and recovery is relevant. The presentations made clear how the different tools of asset tracing and recovery which currently exist in different contexts (criminal, civil and insolvency) intertwine with each other in practice.

In this respect, the publications of the Stolen Asset Recovery Initiative (StAR) which is a partnership between the UN Office on Drugs and Crime (UNODC) and the World Bank Group, are of utmost importance in propagating knowledge about the best potential combined use of civil, criminal and insolvency asset tracing and recovery tools. StAR's publications include:

- *The Asset Recovery Handbook* (2011);
- *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It* (2011);
- *Public Wrongs, and Private Action: Civil Lawsuits to Recover Stolen Assets* (2015); and
- *Going for Broke: Insolvency Tools to Support Cross-Border Asset Recovery* (2020).<sup>3</sup>

The latest of these publications was presented at the Colloquium.

For civil and commercial law matters, the work of UNIDROIT and of The Hague Conference on Private International Law (HcCH) was also discussed at the Colloquium. In particular, *the 2001 Convention on International Interests in Mobile Equipment* (known as the Cape Town Convention) and its Protocols, covers asset tracing and recovery tools aimed at seizing leased or financed equipment and arranging for its de-registration and export.

Also, the *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970* (or the Hague Evidence Convention) allows for evidentiary information on asset tracing to be exchanged by jurisdictions through issuing letters rogatory. Practical experiences based on the use of The Hague Evidence Convention were discussed at the Colloquium.

A number of European Union regulations enable taking evidence and other asset tracing and recovery measures in civil or commercial matters across EU Member States. These include:

- Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters;

- Regulation (EU) No 805/2004 creating a European Enforcement Order for uncontested claims;
  - Regulation (EC) No 1896/2006 creating a European order for payment procedure;
  - Regulation (EC) No 861/2007 establishing a European Small Claims Procedure; and
  - Regulation (EU) No 655/2014 establishing a European Account Preservation Order).
- Nevertheless, a uniform approach in the EU-wide application of the measures foreseen in such instruments remains a seemingly difficult goal to attain in some cases.

Finally, various UNCITRAL Model Laws also refer to measures that can be used in asset tracing and recovery in insolvency, arbitration and public procurement contexts, including its ongoing work on issues of beneficial ownership.

The Colloquium offered a comprehensive view of which instruments are currently available and of common challenges faced in several jurisdictions, particularly in cross-border matters. It also gave the opportunity to discuss potential ways to move forward in the legal treatment of the topic at an international level with UNCITRAL support.

## Conclusion

The Colloquium ended with attendees generally encouraging UNCITRAL to continue its analysis of the topic, with a view of undertaking future work, particularly in the field of civil asset tracing and recovery. A survey of attendees at the end of the Colloquium revealed that the majority considered possible work should start in the area of insolvency, and should subsequently be expanded to other areas such as those addressed during the Colloquium.

It will be interesting to observe future developments and specific activities performed in the near future, which will most likely be announced at the next meeting of UNCITRAL's Working Group V in May 2020.

## Notes

- 1 See 'UNCITRAL Colloquium on Civil Asset Tracing and Recovery (Vienna 6 December 2019)', *Concept Note*, p 2.
- 2 *Ibid*, p 4.
- 3 STaR's publications are available at: [https://star.worldbank.org/publications?keys=&sort\\_by=score&sort\\_order=DESC&items\\_per\\_page=10](https://star.worldbank.org/publications?keys=&sort_by=score&sort_order=DESC&items_per_page=10), last accessed 11 March 2020.

# The treatment of foreign parties in Austrian Civil Procedure: security for procedural costs

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The Austrian Code of Civil Procedure (*Zivilprozessordnung*, or ZPO) regulates the costs of civil proceedings in Austria. As a general rule, the parties to a dispute pay the costs they incur for their involvement in proceedings, and in principle the prevailing party is eventually awarded their costs.

The prevailing party seeking to enforce a decision on costs against a foreign party, ie, a party without Austrian citizenship or with its place of habitual residence outside of Austria, may find it difficult to do so if the foreign party does not own any assets in Austria against which the decision on costs could be enforced.<sup>1</sup> The prevailing party would therefore be required to seek enforcement of an Austrian court's decision abroad which could lead to further difficulties.

Section 57(1) ZPO ensures that the costs of proceedings can be claimed by the prevailing party. It stipulates that if a foreign party to a dispute appears as a plaintiff before an Austrian court with a claim arising out of or in connection with the provisions of the ZPO, then at the defendant's request, the foreign plaintiff is required to provide the defendant with security for the costs of proceedings. The purpose of this provision is to ensure enforceability of any potential claim concerning costs.

In this regard, section 60(2) ZPO determines the amount of the security to be provided on the basis of the costs which the defendant is reasonably expected to incur during the course of the proceedings. The onus is on the defendant to justify their costs. Such costs could include lawyer and court fees, experts' fees and any other costs arising during the course of the proceedings. It is important to note however, that costs arising out of possible counterclaims are not considered in the determination of the amount of security for costs.

## Comment

In theory, the above provisions serve to provide a certain degree of stability and accountability

for the costs of court proceedings in Austria. In practice, and depending on the nature of a dispute, the security could constitute a heavy burden for the foreign plaintiff to overcome and may therefore effectively act as a barrier to accessing justice in Austria, thus disadvantaging a foreign plaintiff in front of Austrian courts.

To remedy this eventuality, section 57(2) ZPO provides for certain concessions that would exempt a foreign plaintiff of any requirement to provide security for costs. In short, there is no requirement for a foreign plaintiff to provide security for costs if:

- the plaintiff has its habitual place of residence in Austria (section 57(2) (1) ZPO);
- the Austrian court's decision on costs is subject to enforcement in the foreign plaintiff's state of residence (section 57(2) (1a) ZPO);
- the foreign plaintiff disposes of sufficient immovable assets in Austria (section 57(2) (2) ZPO); and
- the subject matter of the claim is of marital nature (section 57(2) (3) ZPO).

The exception to the provision of security for procedural costs enshrined under section 57(2) (1a) ensures that foreign plaintiffs are placed on an equal footing to their Austrian counterparts with respect to the matter of procedural costs within Austria's court system.

In this regard, an Austrian court holding an application by a foreign plaintiff pursuant to section 57(2) (1a) ZPO must assess the enforceability of a costs decision in accordance with the state law of the foreign plaintiff's place of habitual residence.

The Austrian Supreme Court in its decision in 2001 (OGH Rkv 1/01), relying on an earlier decision in 1997 (1 Ob 63/97i), outlined the general considerations that should be assessed in determining the applicability of section 57(2) (1a) ZPO. The Court held that the national enforcement law and corresponding provisions of international treaties, including the enforcement behaviour of the state (*Verhalten*

*des anderen Staats*) in which the foreign plaintiff has their habitual place of residence are decisive in the consideration of section 57(2)(1a) ZPO's applicability.<sup>2</sup> In total, the foreign plaintiff applying for an exemption pursuant of section 57(2)(1a) must be able to demonstrate that a decision by an Austrian court would be enforceable in their place of habitual residence.

### Conclusion

The Austrian Code of Civil Procedure provides for a framework for handling procedural costs within Austria's court system. As a general rule, the prevailing party is awarded the costs of the proceedings. In response to a claim by a foreign plaintiff, the defendant may request that the foreign plaintiff deposit security for the procedural costs that would reflect the defendant's costs of proceedings. A broad exception to

this rule is found under section 57(2)(1a) ZPO for decisions on costs which would be enforceable in the foreign plaintiff's place of habitual residence. In this regard the onus lies with the foreign plaintiff to apply for the exception by demonstrating that the decision by the Austrian courts is enforceable in their habitual place of residence. This provision, among others, provides for a certain degree of fairness and equality in the treatment of foreign parties in Austria's courts.

### Notes

- 1 For a more detailed assessment of the definition of what constitutes a foreign party for the purposes of the Austrian Code on Civil Procedure, see for example, Walter H. Rechberger, 'Legal Aspects Regarding Foreign Parties in Austrian Civil Courts' in *The Culture of Judicial Independence in a Globalised World*, edited by Shimon Shetreet, Wayne McCormack. Brill Nijhoff, 2016, pp 263-4.
- 2 These considerations laid out by the Supreme Court were most recently relied upon by the Regional High Court of Linz in its January 2020 decision, (2 R 186/19t).

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## The truth, the whole truth, and nothing but the truth

### Introduction

A Witness Evidence Working Group (the 'Working Group') published a report in December 2019 on the current practice relating to factual witness evidence in trials before the Business and Property Courts in England and Wales (BPCs) (the 'Report').

The Report and suggested reforms represent a further example of the way in which the BPCs, and our judiciary more widely, are seeking to remain a world leader in the administration of justice. The BPCs first came into operation in October 2017. According to National Statistics, 12,236 claims were issued in the BPCs at the Royal Courts of Justice (Rolls Building) in Q1–Q3 2019. Similar data is not yet available for regional courts. However, on this forecast the final number of claims brought before the BPCs in London is likely to have reached approximately 16,000 in 2019. The BPCs therefore hear a vast quantity of cases, which differ widely in their nature, size and complexity.

The Working Group, chaired by Lord Justice Popplewell, was originally established amid concerns that 'factual witness statements were often ineffective in performing their core function of achieving best evidence at proportionate cost in Commercial Court Trials.' However, it was subsequently suggested by the Chancellor of the High Court, Lord Justice Vos, that the Working Group's discussions might usefully be broadened to address issues around witness evidence beyond just the Commercial Court, to the BPCs as a whole.

The Working Group identified the main issues with current practice to be over-lawyered witness statements which do not reflect witnesses' true evidence; witness statements that are too long, argumentative and/or contain irrelevant material; and an increase and front-loading in costs. The preparation of such statements has in turn become 'very time-consuming, increasing cost and lengthening the pre-trial timetable'.



For example, according to National Statistics, over the first three quarters of 2019, the average time from date of issue to trial in civil claims on the fast and multi-tracks was 59 weeks.

It has been suggested by some that these concerns might best be dealt with by abolishing the use of witness statements altogether. Other jurisdictions rely on alternative approaches to getting to the truth. US courts, for example, rely on lengthy depositions of witnesses taken under oath, recorded during the discovery process in transcripts which ultimately stand as evidence at trial. French courts will only rarely rely on written declarations of witnesses in civil proceedings, preferring to rely solely on contemporaneous documents rather than the potentially unreliable recollection of a witness. Furthermore, written witness statements are not admissible at all in the Swiss courts. Witnesses are instead questioned by the court directly, rather than cross-examined by the parties.

Following the Working Group's initial discussions, an online survey was launched to canvass opinions of practitioners and litigation parties in relation to current practice. Participants rejected a number of the Working Group's radical recommendations, including: having examination-in-chief and/or cross examination prior to trial in a US-style deposition procedure, with transcripts and/or digital video recordings standing as evidence at trial; lifting privilege in the production of witness statements; permitting the opposing party's representative to be present at interview of the witness; or replacing witness statements with alternatives such as a pre-trial statement from the parties as to their factual case.

Participants instead favoured less radical reform to the current rules. Informed by the results of the online survey, the Report makes a number of recommendations to improve the use of witness statements in the BPCs.

### **Perceived problems with current practice**

Current practice relating to factual witness evidence in trials before the BPCs is governed by the Civil Procedure Rules and the Commercial Court, Chancery Division or Technology & Construction Court Guides, as applicable. While it is acknowledged that witness statements fully complying with the current rules and guidance in both letter

and spirit have a number of advantages, the Report highlights a number of drawbacks associated with current practice, including:

#### *Current practice does not always achieve best evidence*

The Report suggests 'best evidence is often obtained by a traditional examination-in-chief, when witnesses are giving their evidence in their own words and give a more genuine version of their recollection.' This is in part because of the lengthy process of preparation of witness statements which can result in the final version 'being far from the witness' own words'. The development of witness statements through numerous drafts may 'corrupt memory and render the final product less reliable than the first "unvarnished" recollection.' Therefore, 'witnesses will often be prepared to sign up in a pre-trial statement to an "aspirational" version of what they may be able to recall.' This encourages 'counterproductive over-lawyering and lengthening of witness statements in an attempt to anticipate cross-examination.'

Furthermore, pressures on BPC time often require the 'guillotining' of cross-examination time, resulting in a skewing of oral evidence before the court. This risks the court 'losing sight of important evidence because written evidence which is read outside court sitting hours tends to make less impact than that which is explored as part of the hearing process.'

#### *The majority of practitioners and most judges have no experience of trying commercial disputes under the previous system or oral evidence-in-chief at trial*

The Report argues that, as a result of this, the principle in paragraph H1.1 (a) of the Commercial Court Guide that 'the function of a witness statement is to set out in writing the evidence-in-chief of the witness' is now of limited practical utility.

#### *Witness statements frequently stray far beyond any evidence the witness would in fact give if asked proper questions in chief*

The Report states that witness statements often 'cover matters of marginal relevance and/or stray into comment and "spin", even if blatant argument is avoided.' One particular criticism is that 'current practice

involves regular and lengthy recitation of background which is either wholly irrelevant or of such marginal relevance that it would not justify it being adduced at trial in the interests of proportionate and cost efficient trial management.'

*The time and costs savings of the current practice are somewhat illusory*

The Report argues that cross-examination of witnesses presently takes much longer, both in terms of trial and preparation, due to the extensive ground that cross-examiners feel it necessary to cover. Any perceived advantages of efficiency and cost saving at trial are no longer realised, as cross-examination has become 'a process of challenging the contents of the witness statements rather than a process of exploring and testing only the critical evidence of the witness.'

*The witness statement phase of the pre-trial process has itself become very time consuming*

The Report acknowledged that the introduction of witness statements undoubtedly resulted in a substantial increase and front-loading in costs and a lengthening of the pre-trial timetable, 'which is both undesirable in itself and can have the effect of inhibiting rather than promoting settlement.'

**The Working Group's recommendations**

The Working Group identified little appetite for radical reform to current practice among practitioners, judges and the wider business community; nor did the Working Group itself favour such reform. Following completion of the online survey, the Working Group noted the wide range of views expressed by participants, and the consensus for more mild changes to current practice.

On the basis of a number of proposals considered in light of the online survey, the Report made the following recommendations:

*An authoritative statement of the best practice regarding the preparation of witness statements should be formulated, based on the principles identified in the Report*

This proposal was met with universal agreement among the members of the Working Group due to the current lack of guidance available to lawyers in charge of

drafting witness statements, and particularly given that junior lawyers with limited experience of the function and role of witness statements are frequently charged with first drafts.

*Witness statements should contain a more developed statement of truth whereby the witness confirms that they have had explained to them and understand the objective of a witness statement and the appropriate practices in relation to its drafting*

The Report recognises that compliance with the rules will primarily be the responsibility of a party's legal advisers. However, care should be taken not to require factual witnesses to certify matters outside of their expertise. The proposed statement of truth should ensure that the witness fully understands the parameters of the statement and has complied with them so far as within their ability to do so.

*The solicitor in charge of drafting the witness statement should be required to sign a solicitor's certificate of compliance with the rules and the relevant court guide*

The Report suggests that this will encourage witnesses and solicitors to focus on the relevant requirements without adding substantially to costs. Furthermore, the named solicitor will be at risk of identification before the court, if criticism is subsequently expressed by the judge.

*The individual courts within the BPCs should give further consideration to the introduction of a requirement for parties to produce a pre-trial statement of facts setting out their factual case. This would be in addition to witness statements and exchanged at the same time, with a view to confining the witness statements themselves to evidence which can properly be given by that witness at trial.*

According to the Report, there was a significant divergence of views among the Working Group as to the utility of such a suggestion. While on the Report's suggestion a pre-trial statement of facts should not be mandatory in every case and ought to be assessed at CMC on a case-by-case basis, a number of members of the Working Group considered this proposal to have fewer benefits than drawbacks.

*Examination-in-chief on specific issues/topics should be available as an option, to be considered at the CMC and ordered in appropriate cases. The issues/topics that are addressed by way of examination-in-chief should be covered in a witness statement or (at least) in a witness summary.*

The Report suggests that a specific question should be included in the Case Management Information Sheet in order to require the parties ‘to identify whether they would be seeking oral examination-in-chief of any witness and, if so, on what topics/issues.’

*An extension of the page limit for a witness statement should rarely be granted unless the judge has had the opportunity to scrutinise its contents. The general practice should be to consider such applications retrospectively at the Pre-Trial Review (PTR) stage.*

Under this proposal, the parties will be required to serve witness statements at the time of exchange at their own costs risk if they are longer than the present 30-page limit prescribed by the Commercial Court Guide. If the judge subsequently determines that the witness statement contains inappropriate material, there will be no permission to rely on the witness statement in its served form, and redrafting will be at that party’s cost.

*The Court should more readily apply costs sanctions and express judicial criticism of non-compliance with the rules and guidance, both at the PTR and following trial.*

The Report suggests that judges should be encouraged to refuse permission to rely on witness statements which are clearly non-compliant in significant respects at PTR. In such a case, the judge should require a further statement to be served without the offending material, at that party’s cost.

*There should be a harmonisation of the Guides of the Commercial Court, Chancery Division and Technology & Construction Court insofar as they address the general principles as to the content and drafting of witness statements.*

The Report acknowledges the varying considerations applicable to a large Commercial Court case in London, for example, as opposed to a smaller Chancery

Division on circuit. However, it is proposed that ‘it is desirable that the Guides should be harmonised so far as possible, particularly when dealing with general principles as to the content of statements’.

#### **Comment**

Commentators have welcomed the Working Group’s suggested reforms. The Report’s recommendations were endorsed in principle by the BPC board, chaired by Sir Geoffrey Vos, Chancellor of the High Court and further work is now due to take place, including further consideration of the detailed substance, form and timing of any change, under the new chairmanship of Mr Justice Andrew Baker.

It is clearly essential in achieving best evidence, at proportionate cost, to have focused, high quality, factual evidence which is useful to the court. As highlighted in the Report, the key criticisms associated with current practice are that it results in ‘over-lawyered’ and lengthy witness statements, often containing irrelevant material.

Significantly, a number of noteworthy amendments to Practice Direction 32, as regards witness statements, have taken effect since the Report was published. A witness statement must now explain ‘the process by which it has been prepared, for example, face-to-face, over the telephone, and/or through an interpreter’ (paragraph 18.1(5)) and must be ‘drafted in the witnesses’ own language’ (paragraph 19.1(8)). Furthermore, and possibly in answer to the Working Group’s recommendation, a more developed statement of truth has been introduced to focus the witness’ attention to the consequences of signing a witness statement without an honest belief in its veracity. These reforms are arguably long overdue and the Working Group’s proposals would no doubt go some way to further improving the present position. Nevertheless, some commentators have questioned whether mild reforms are likely to achieve substantial change.

Notably, any requirement for a pre-trial statement of facts would add yet another stage to the pre-trial process, resulting in further front-loading of costs and risk of delay to the pre-trial timetable. If such a document were to fully and accurately reflect the evidence then it would have to be prepared at a stage when the witness statements are largely finalised and is therefore unlikely to reduce the amount of inappropriate material included in the witness statements themselves.

The Report also acknowledges that the 30-page limit to witness statements (unless otherwise directed by the court) to be a ‘blunt tool’. As discussed above, to apply the same page limit to a large commercial court case in London, as a smaller Chancery Division on circuit, for example, would be inappropriate. Furthermore, the proposed retrospective evaluation of applications for extensions at PTR is also likely to attract criticisms around lack of certainty and potential for wasted costs.

These particular recommendations are therefore unlikely to resolve the concern that commercial litigation has become excessively expensive. Under current practice, the time-consuming process of preparation of witness statements, and the gathering of information and documentation in support of witness statements in particular, exacerbates this position. The most efficient means of reducing the time and resultant cost of

preparing witness statements, is likely to be the use of technology. Litigating parties should consider the use of technology to assist with the evidence gathering process in particular. The courts’ general promotion of technology in commercial litigation is welcome in this regard. However, any amendment to the current rules should arguably require litigating parties to consider the use of technology in the preparation of witness statements, in the same way as the discovery process under the Disclosure Pilot scheme, in Practice Direction 51U.

We currently await the more detailed and refined proposals of the Working Group and in the meantime invite contributions from readers in other jurisdictions as to the approach to witness statements and factual evidence under their own legal system.

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# Yes we can: Remote justice in England and Wales – the new norm?

*‘The default position now in all jurisdictions must be that hearings should be conducted with one, more than one or all participants attending remotely.’*

Message to the Judges in the Civil and Family Courts, Lord Burnett of Maldon (19 March 2020)

*‘It remains the obligation of all involved and at all stages of the hearing, to continue to evaluate whether fairness to all the parties is being achieved. Fairness cannot be sacrificed to convenience.’*

Remote Access to the Court of Protection Guidance, Mr Justice Hayden (31 March 2020)

*‘It’s time to come together, globally, to accelerate the introduction of remote hearings by judges. We must seize the moment and come together to accelerate the development of new ways of delivering just outcomes for court users.’*

Professor Richard Susskind, President of the Society for Computers and Law, and an expert in online courts.

## Introduction

In order to make sure that the courts in England and Wales can continue to function, parties, court users, legal practitioners and judges have been forced to adopt an entirely new way of operating within a matter of days. Restrictions on our movement in order to safeguard our public health mean that remote access to the court is now a necessity.





## YES WE CAN: REMOTE JUSTICE IN ENGLAND AND WALES – THE NEW NORM?

This article: (i) reviews the recent changes to legislation, guidance and protocols as they apply to commercial litigation in the High Court of England and Wales; (ii) identifies some of the key practical challenges for court users and judges; and (iii) raises some (so far) unanswered questions. It is interesting to note that this is part of a general trend across the world, which has been usefully gathered on Remote Courts Worldwide website.<sup>1</sup>

### The recent changes in England and Wales

The legislation, guidance, protocols and rule changes of March/April 2020 have been substantial and frequent as court users get used to operating in the new normal.

An overview of the key recent developments of March/April includes the following:

- Lord Chief Justice: Coronavirus update (17 March 2020);<sup>2</sup>
- Lord Chief Justice: Message to the judges in the Civil and Family Courts (19 March 2020);<sup>3</sup>
- HMCTS guidance on priorities during the Covid-19 outbreak;
- Civil Justice in England and Wales: Protocol Regarding Remote Hearings ('Remote Hearings Protocol') (20 March 2020);<sup>4</sup>
- Lord Chief Justice: Review of court arrangements due to Covid-19 (23 March 2020);<sup>5</sup>
- CPR Practice Direction 51Y – Video or Audio Hearings During Coronavirus Pandemic
- Coronavirus Act 2020;
- High Court Business: Contingency Plan for maintaining Urgent Court Hearings;
- HMCTS updated guidance on telephone and video hearings including re oaths and affirmations (last updated 14 April 2020);<sup>6</sup>
- HMCTS guidance on civil court listing priorities and daily operational summary on courts and tribunals during Covid-19 outbreak.<sup>7</sup>

### The Remote Hearings Protocol

This protocol is the main place where the new guidance for the preparation and conduct of remote hearings is set out. It applies to all hearings in the County Court, High Court and the Court of Appeal (Civil Division).

The method by which remote hearings are conducted is always a matter for the judge.

When a hearing is fixed, the court will propose one of three solutions to the parties:

- a. a remote communications method for the hearing;
- b. that the case will proceed in court with

appropriate precautions to prevent transmission of Covid-19; or

- c. adjournment 'because a remote hearing is not possible and the length of the hearing combined with the number of parties or overseas parties, representatives and/or witnesses make it undesirable to go ahead with a hearing in court at the current time.'

Unless it is necessary for a hearing to be in private, remote hearings should be public hearings. Unless the judge has directed that the proceedings will not be recorded, a recording will be made by a court official or, if arranged by the parties and with the court's permission, private transcribers.

### Other legislation, guidance, protocols and rule changes

HM Courts and Tribunal ('HMCTS') Service, which is responsible for the administration of criminal, civil and family courts and tribunals in England and Wales, has issued **Guidance on telephone and video hearings during Coronavirus outbreak**. HMCTS confirms that they are 'rapidly scaling up' their audio and video capabilities and are 'working hard to find solutions to problems that haven't been seen before.'

Section 55 of the **Coronavirus Act 2020** is entitled 'Public participation in proceedings conducted by video or audio'. Schedule 25 of the Act makes amendments to the Courts Act 2003 in relation to video or audio recordings of hearings. The new sections 85A-C of the Act provides that the court may permit video and audio proceedings to be broadcast or recorded and prohibits unauthorised broadcasting and recording.

The new **Civil Procedure Rules Practice Direction 51Y (PD)** confirms that where the proceedings are to be conducted wholly by video or audio and it is not practicable for the hearing to be broadcast in a court building then, if it is 'necessary to do so to secure the proper administration of justice', the court may direct that the hearing must take place in private. The PD states it is not necessary to make such a direction where a representative of the media is able to access the proceedings remotely while they are taking place. Where a private hearing takes place, such a hearing must be recorded either by video or audio. With the Court's permission, the public may have access to such a recording.

On 26 March 2020, the judiciary produced a **Contingency Plan for maintaining Urgent**

**Court Hearings** and civil court listing priorities which differentiates between ‘urgent business’ and ‘business as usual’ and explains how these two types of work are to be dealt with. The plan explains that any business that is sufficiently urgent to warrant an out-of-hours application in normal times will be considered urgent business for the purposes of the Contingency Plan.

Business that is not urgent (ie ‘business as usual’) will continue to be dealt with as far as possible in accordance with the contingency plans put in place by the different Divisions and Courts. However, urgent business will be given priority. On 2 April 2020, HMCTS identified listing priorities in the civil courts according to ‘work that must be done’ (Priority 1) and ‘work that could be done’ (Priority 2). As far as commercial litigation is concerned:

- Priority 1 cases are: committals, freezing orders, injunctions (and return days for ex parte injunctions), enforcement work that does not involve bailiffs (eg third party debt orders), any applications in cases listed for trial in the next three months, any application where there is a substantial hearing listed in the next month and appeals in these cases.
- Priority 2 cases are: applications for summary judgment for a specified sum, applications to set aside judgment in default, applications for security for costs and preliminary assessment of costs.

### Key practical challenges

Various reports have emerged about how the guidance is operating in practice. In general, the view is that while the guidance ought not to affect adversely the conduct of applications or short hearings, even where they are fixed in the near future, there is concern about conducting witness actions in a remote court.

Some of the challenges of an upcoming trial including:

- providing bundles to witnesses and requiring witnesses – maybe with poor internet connection – to navigate documents without assistance placing them under undue pressure;
- lack of a solicitor present to ensure witness probity; and
- the risk of interruptions to internet service or failure of the technology altogether.

There are many video conference providers out there. Deciding which online platform to use for hearings is fraught with difficulties and

judgment calls. Many courts have used Skype for Business, Webex and Zoom to conduct remote hearings. Press reports in recent days have raised questions about the integrity of certain software (eg Zoom). Preserving confidentiality given the highly sensitive nature of some court hearings is paramount. Blind reliance on what the other side offer is not advisable. Liaising with your firm’s IT experts to weigh the pros and cons of each online platform is key. But no system or software is completely immune to cyber-attack. What we can do is (1) recognise that users, ie the human factor, are a crucial element of any organisation’s information vulnerability, and (2) take steps to mitigate that risk. Brown Rudnick currently uses a platform which we have road tested and which has high security suitable for the highly sensitive nature of our clients’ matters. The platform has a helpful security feature which allows the host to lock a ‘meeting’ at any point to prevent others from joining and to put participants in the ‘waiting room’ while for example the hearing continues in private.

### Unanswered questions

It is inevitable that these wholesale changes in our way of conducting hearings, trials and appeals will throw up lots of different problems which the Government and the judiciary will need to address, such as:

- **Open justice** – some commentators have suggested that the new provisions may require further elaboration and standardisation to ensure compliance with the constitutional principle of open justice (ie ‘*participation*’, ‘*observation*’ and ‘*accessibility*’).<sup>8</sup>
- **Access to justice** – the Justice Committee was particularly concerned about how ‘*poor digital skills, limited access to technology and low levels of literacy and legal knowledge*’ might raise barriers to access to new digital services. Those concerns apply even more forcefully under the new guidance.<sup>9</sup>
- **International parties and witnesses** – the logistics of arranging fully remote hearings with witnesses based abroad raises another set of considerations (eg use of e-bundles, restricted access to internet and certain audio/video conferencing facilities).
- **The lessons of international arbitration** – the practice of remote hearings is familiar to many arbitration practitioners and various soft law guidance has been published.<sup>10</sup> The judiciary and HMCTS could usefully consider how arbitral tribunals have dealt with similar issues of concern.

## Conclusion

In our view, it is almost inevitable that remote courts in England and Wales are here to stay in some form or other. The current pandemic offers up a real opportunity for courts to offer justice online thereby making it more accessible. Using technology to conduct more hearings also suits our now much more global, mobile, and connected society, saving clients from having to jet in from different parts of the world, in turn mitigating the impact on the environment.

### Notes

- 1 Available at <https://remotecourts.org/>.
- 2 Available at <https://www.judiciary.uk/announcements/coronavirus-update-from-the-lord-chief-justice/>.
- 3 Available at <https://www.judiciary.uk/announcements/coronavirus-covid-19-message-from-the-lord-chief-justice-to-judges-in-the-civil-and-family-courts/>.
- 4 Available at [https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil\\_GenerallyApplicableVersion.famend-24\\_03\\_20-1.pdf](https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_GenerallyApplicableVersion.famend-24_03_20-1.pdf).
- 5 Available at <https://www.judiciary.uk/announcements/review-of-court-arrangements-due-to-covid-19-message-from-the-lord-chief-justice/>.
- 6 Available at <https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak>.
- 7 Available at <https://www.gov.uk/guidance/hmcts-daily-operational-summary-on-courts-and-tribunals-during-coronavirus-covid-19-outbreak>.
- 8 Available at <https://coronavirus.blackstonechambers.com/coronavirus-and-public-civil-hearings/>.
- 9 Available at <https://publications.parliament.uk/pa/cm201919/cmselect/cmjust/190/190.pdf>.
- 10 See for example, Hague Conference Draft Guide to Good Practice on the Use of Video-Links Under the Evidence Convention, March 2019; ICC Commission Report on Information Technology in International Arbitration, October 2017 and the Seoul Protocol on Video Conferencing in International Arbitration.