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

Welcome to the May 2019 edition of International Litigation News, which, as is becoming the norm now, contains a feast of diverse and topical articles from around the world. Thank you to all who have contributed to it and, in particular, to our hard-working editors, Jane Colston and Sandrine Giroud. From personal experience we know how much work is required in the editorial role.

2018 was a wonderful year for the Litigation Committee guided by the calm, but highly efficient, Ira Nishisato. The Annual Litigation Forum in Chicago, ‘Advocacy in the 21st Century’, was a magnificent success both in terms of the number of attendees and the quality of sessions and social programme. It will be a hard act to follow.

The subsequent gathering at last year’s Annual Conference in Rome also saw further success for the Committee, which led four sessions on as diverse topics as post-closing claims in M&A and cybersecurity litigation, as well as supporting a further six sessions.

Finally for 2018, the Litigation Committee made its first, and very important, foray into Africa, co-presenting a Litigation Conference with the African Regional Forum in Accra, Ghana, in November. This was attended by more than 170 delegates from 17 countries (10 in Africa). The quality of the sessions (which ranged from the workings of the Organisation for the Harmonization of Corporate Law in Africa in dispute resolution, to a highly entertaining debate on whether written advocacy will kill oral advocacy) were, without exception, of the highest standard. Congratulations are due to Jacques Bouyssou from our Committee who took much of the responsibility for putting on an ambitious conference, with results that clearly paid off. A repeat Conference is planned.

2019 also promises to be an exciting year. First of all, we have our Annual Litigation Forum in Berlin on 8–10 May. The topic is ‘Disruption in litigation – new types of disputes in a new world order’. Topics will include class actions, geopolitical disputes arising from sanctions, human rights issues and climate change, as well as litigation arising from artificial intelligence and cryptocurrencies. The Forum will start with a reception in the iconic Reichstag and the Thursday dinner will be at the Charlottenburg Castle. Our thanks go out to Peter Bert and the host committee, who have worked hard at putting together a great programme with wonderful speakers.

Preparations are well under way for the Annual Conference in Seoul in September. It will be fantastic to return to Asia for this flagship event. The Litigation Committee is leading four sessions across a wide variety of topics including, for the first time, a session dealing with the emotional stresses of practicing litigation, as well as more traditional topics of judgment enforcement and litigation crisis management. We will also continue to co-host the Global Women Litigators’ Breakfast and support several other sessions.

Finally for 2019, we are pleased to announce the Third Private International Law Conference in Milan, to be held on 25 October. Preparations are in the capable hands of Carlo Portatadino and Chris Tahbaz, and topics will include sanctions, the rise of commercial courts and the effects of Brexit (by then perhaps more will be known of the consequences).

It has long been the ambition of the Litigation Committee to broaden its reach geographically, and one way to do this is to hold the Annual Forum from time to time outside the traditional venues of Europe and North America. It gives us great pleasure therefore to announce that the Annual Litigation Forum in 2020 will be held in Buenos Aires on 6–8 May. Plans are still inevitably at an early stage, but if anyone would like to be involved in the planning then they should make contact with Angelo Anglani and Rodrigo Garcia.

Additionally, the Committee is delighted to support a further disputes conference that is being planned by the IBA Asia Pacific Regional Forum for Singapore in September 2020. More details for this can be obtained from Preetha Pillai.

Aside from conferences, the Committee continues to be involved in various initiatives and other work, including the consultation
Editors’ note

As your Co-Editors, we are pleased to curate this new edition of the litigation newsletter. We have, as always, had a huge number of articles submitted for publication, and it has been illuminating 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 articles offering more personal experiences and a focus on soft skills, which are more important than ever in our digitalised and artificially intelligent world. There’s a roundtable from former chairs of the Litigation Committee, along with tips on how to litigate healthily.

This edition also sees the start of several new series. ‘What are you doing to promote diversity?’ is an opportunity for practitioners to exchange personal experiences on addressing diversity challenges – an important issue for the IBA. Our ‘Welcome to’ series is the ideal litigator travel guide to discover the places where the Litigation Committee will stop next. Ahead of the Annual Litigation Forum in May, we have a welcome to the host city, Berlin. We also feature an insight into litigating and visiting Korea, with Seoul hosting the IBA Annual Conference in September. Finally, our new ‘My…’ series will enable members to share tips on their home cities – we start with London and Geneva from us, your Co-Editors.

In signing off, we would like to thank Clément Dupoirier for his co-editing of the newsletter over the last two years.

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

Thank you for your continued support of the Committee. We very much look forward to seeing many of you in Berlin, Seoul and Milan.

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Litigation Committee’s sessions

Monday 0930 – 1045
Judges and arbitrators as adjudicators and settlement facilitators and the Singapore convention on enforcement of mediated settlements

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

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

Monday 1430 – 1545
Litigation crisis management

Presented by the Litigation Committee

This panel intends to explore the interplay between different stakeholders who become involved in a corporate crisis as it evolves and their different roles and perspective. The panel will address how to balance the necessity of transparent and quick communication with the public and the different perspective needed when defending the corporation against civil claims or dealing with regulatory or criminal inquiries. The intention is to use a case study or a scenario and through that discuss what roles corporate counsel, outside counsel (litigation as well as investigative teams) and PR professionals will play at different stages; from when the crisis hits until the corporation begins to move on from it despite there – often – being years of litigation and investigation following thereafter. We will seek to involve the audience in the discussion, perhaps also through digital means (ie, by responding to questions/voting not only by a show of hands but digitally).
Tuesday 0800 – 0915

Global women litigator breakfast
Presented by the Litigation Committee and the Women Lawyers’ Interest Group

Tuesday 1615 – 1730

Ways to cope in practice management
Presented by the Litigation Committee

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

Wednesday 0930 – 1045

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

And so I have a judgment; now what?

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

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

Wednesday 1115 – 1230

Justice Machines: dystopia or opportunity?
Judicial function and dispute resolution in the artificial intelligence (AI) era
Presented by the Litigation Committee and the Judges’ Forum

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

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

Is this assumption still valid? Does the development of technology suggest a different view?

To what extent will the judicial function – and therefore the legal profession – be reshaped by the AI phenomenon?

The session will explore the state-of-the-art of AI applied to dispute resolution and debate consequences and perspectives for judges, lawyers and, ultimately, for the parties.
Ich bin ein Berliner: welcome to the Berlin IBA Litigation Forum

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

Germany is a traditional civil law system. Its judicial system is generally considered to be independent, efficient and corruption free. The World Justice Project’s 2019 Rule of Law Index ranks Germany in sixth place overall. Its civil justice system does even better and wins the Bronze Medal. If you plan to do business in Berlin, rest assured that you will be doing so in a safe and reliable legal environment.

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

Two things come to mind:

First, in late 2018 Germany introduced a new type of civil procedure for model proceedings: the Gesetz zur Einführung einer zivilprozessualen Musterfeststellungsklage, which builds, to some extent, on the Kapitalanlegermusterverfahrensgesetz (the Law on Model Litigation in Capital Market Disputes) – a law that proved Mark Twain right when he said that ‘some German words are so long that they have a perspective – these things are not words, they are alphabetical processions’.

The Musterfeststellungsklage is designed to bundle identical or similar cases together, in a streamlined process, with the first practical application being diesel-related consumer litigation. It will be interesting to see whether claimants come on board, how the new procedure performs in practice, and what impact legislative initiatives at the European Union level will have in the field.

Second, the topic of international commercial courts is gaining traction. Like other European jurisdictions, Germany is looking into a modern offering for commercial litigation, triggered in part by Brexit. Frankfurt and Düsseldorf are already offering parties the opportunity to conduct court hearings in English. The interesting question will be whether there will be a comprehensive overhaul of the time-honoured concept of Kammer für Handelsachen (chamber for commercial disputes), resulting in legislation to modernise Germany’s Code of Civil Procedure over and above the issue of language.

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

As a foreign lawyer, I suggest keeping some key characteristics of German procedural law in mind.

German civil procedure is largely paper-based and there is neither discovery nor disclosure. If, on a scale of zero to ten regarding document production, the United States is at ten, and the United Kingdom is at three, then Germany is at zero (in line with most European jurisdictions). There is also no concept of trial. In a typical commercial dispute, there might be a series of relatively short hearings, with relatively little oral advocacy, spread out over a relatively long period of time. You could have a first hearing in March, a second hearing in June and then be in court again in September and November to hear witnesses and experts. If you are acting for the non-German party, you can rest assured that German judges, as a rule, do not have a home bias. However, don’t be surprised if the judge actively addresses the issue of settlement discussions and perhaps even proposes terms for a settlement.

Top tips for attending the IBA Litigation Conference in Berlin in May

Try to come early, or to stay the weekend. If you have little time on your hands, consider a walk from the Reichstag and the Brandenburg Gate to Hackescher Markt. The direct route will mostly follow the Unter den Linden Boulevard and should take about half an hour. You can then add detours, depending on your interests, time and budget, be this the Holocaust Memorial, the Friedrichstraße...
shopping area or Gendarmenmarkt. You will pass through Museuminsel (Museum Island), home to five famous museums and itself a UNESCO World Heritage Site. If you have more time, consider a trip to Potsdam.

What are your favourite spots for a meal in Berlin?

For fine dining, I am a fan of Tim Raue’s self-titled flagship restaurant, Tim Raue. One of his other spots, La Soupe Populaire, was a great combination of art, cuisine and location. It is about to re-open, perhaps just in time for the conference.

If you have an evening to spend in Berlin, it would be…?

Sunset drinks at one of the outdoor bars around Museum Island in summer, or around Gendarmenmarkt in winter, followed by a concert in one of Berlin’s jazz clubs. My favourite is the A-Trane in Charlottenburg.

Bus, taxi or tram to get around Berlin?

If you are in tourist mode, give bus no. 100 a try. The route was created post-reunification to connect East and West Berlin and links many of the top sightseeing spots. If not, try all of the above, depending on the time of day and your destination.

What makes someone a Berliner?

Not being from Berlin myself, I find it hard to tell. Perhaps it is not so much about being from Berlin, but more a state of mind. John F Kennedy famously said ‘Ich bin ein Berliner’. If he could be a Berliner, you can be one too.

Describe your career to date

I did my undergraduate degree and JD in the United States. After my JD, I worked as a federal law clerk to a judge in the United States Bankruptcy Court for the District of New Jersey. As I had emigrated to the US at a very young age, I had always wanted to spend some more time in Korea after becoming a professional. After completing my clerkship in 1997, I therefore moved to Korea to work in cross-border transactions at Bae, Kim & Lee (BKL).

As a result of the Asian financial crisis that occurred around that time, I worked on a number of large M&A deals within the first few years of joining BKL. However, I realised that I did not like transactional work as much as I had thought I would. In the interim, from 1999 onwards, I also became involved in international arbitration and cross-border litigation, which I found to be very much to my liking.

In 2002, I therefore formally left my corporate practice and joined the newly formed International Arbitration and Cross-Border Litigation practice in the firm. The practice had only two members at the time (including me): an associate and a partner. As one of the two founders of the practice, I worked to develop the practice at the firm and in Korea over the next 17 years. Today, the practice has grown to include 21 associates and nine partners.
What characteristics of the Korean legal system would you highlight to someone looking to do business in Korea?

The Korean courts are ever more cognisant of the demands and practices of international commerce and are thoroughly dedicated to providing businesses, both domestic and foreign, with fair and informed decision-making. They also have cosmopolitan and internationally-attuned judges, thanks to the fact that many Korean judges, as part of their career progression, are sent by the government to study abroad several years into their careers. This familiarises the judges with the basics of other legal systems and also allows them to better appreciate Korea’s role in the global commercial system.

The Korean courts and other regulatory bodies have a particular emphasis on speedy and practical decision-making. Even where disputes or obstacles arise in relation to foreign investments in Korea, investors can expect them to be adjudged and resolved in a very timely and practical manner. As a product of the speed and efficiency of the Korean courts, the cost of litigation as a proportion of claim amount is also relatively low in Korea compared to other Organisation for Economic Co-operation and Development (OECD) countries. It is due to these characteristics of the Korean legal system that, over the past four to five years, the World Bank’s ‘Doing Business’ ranking has consistently placed Korea in second place (after Singapore) in terms of the ‘ease of enforcing contracts’.

It is advisable that foreign companies doing business in Korea consider these qualities of the Korean courts before deciding whether they want to submit their disputes to arbitration instead of to the local courts. Parties looking for efficient and affordable adjudication, particularly for smaller transactions, may be best served by opting for the jurisdiction of the Korean courts over arbitration.

How is international arbitration perceived in Korea as a form of dispute resolution?

As Korean business has become more global, with both in-bound and out-bound investment increasing exponentially in the past two decades, Korean companies have realised the need to rely more heavily on international arbitration in their ventures with foreign companies. As a result, Korean legal service providers have also developed their expertise in international arbitration, meaning that clients can expect to avail themselves of the highest standards in international arbitration services by engaging Korean law firms. This access to affordable and convenient legal advice and representation has played a major role in making Korean businesses comfortable with international arbitration as a form of dispute resolution.

The Korean government and legislature have also supported the development of arbitration in Korea by ensuring that Korean arbitration laws and regulations remain arbitration-friendly and follow international best practices. This legislative policy is reflected in the jurisprudence of the Korean courts, which have an established track record of not interfering with arbitral proceedings and upholding arbitral awards.

What traits do you think would serve an arbitration practitioner well in practising in Korea?

Probably the most important quality for arbitration practitioners in Korea is to be very well-attuned to the organisational decision-making and reporting requirements of their clients. Unlike Korean court litigation, with which most Korean in-house counsel and even executives are largely familiar, international arbitration comes in a wide variety of forms, with one form sometimes varying widely from another in terms of the remedies available, the pace of progress, the interim relief available, etc. Businesses in Korea therefore rely on their external counsel to guide them not just in terms of how to argue a case, but also on what to expect from an arbitration and how to tailor the arbitration to the requirements of the client. Korean arbitration practitioners therefore need to understand the organisational demands of their clients and their hierarchy of priorities in order to effectively advise them on how to deal with arbitrations.

5. In the past ten years what changes in the dispute resolution space in Korea have you seen?

One of the major changes that I have seen in the past decade is that clients have become more sophisticated in how they engage and rely on external counsel, with the result that dispute resolution practitioners have had to be...
more innovative and service-oriented than ever before to meet the needs of the client.

As Korean clients have grown in size and international reach, the level of sophistication with which they use external legal services, and the quality they demand from legal service providers, has increased. This has particularly been the case for companies that have sought to hire both Korean- and foreign-licensed in-house counsel, in order to more effectively utilise the legal services available in Korea and abroad.

In the case of dispute resolution practitioners, this means that clients expect more nuanced and wide-ranging legal advice, not limited solely to the immediate dispute, but also aimed at dispute avoidance and the efficient use of alternative dispute resolution (ADR) to minimise litigation risk at the company level.

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

One of the most important changes that I foresee in Korean dispute resolution over the next few years is based on my personal work and experience at BKL. One of the major achievements of the firm’s International Arbitration and Cross-Border Litigation practice in the past five years has been that it has successfully implemented a new approach to handling international arbitrations and cross-border litigation in Korea by having one of the most diverse legal practices in the region. Where the traditional approach had been to primarily have lawyers trained in the US and Korean legal systems, we moved beyond this to include, at various times, lawyers trained in India, Pakistan, Australia, Singapore, Mexico and the United Kingdom.

The philosophy behind our approach has been that the skills and knowledge required for conducting arbitration and cross-border disputes can be found in competent lawyers from any jurisdiction. We believe that once lawyers with such basic qualities join the team, the team’s own work volume and collective experience enable it to effectively train these young members to be successful lawyers and international arbitration advocates.

I believe that, in the long run, our move towards a more global and cosmopolitan international arbitration and cross-border litigation team will influence other practices and firms within Korea to become more diverse and global.

Separately, in terms of the Korean legal market, I expect that (given Korea’s continued rise in the construction and engineering sector) Korean companies are likely to be involved in a greater number of construction projects and, as a result, a relatively higher number of construction disputes. I therefore expect that both Korean and international law firms with strong construction dispute practices are likely to see increasing workloads in this regard over the next few years.

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

Having received my legal education and initial training outside of Korea, in a common law jurisdiction, I realise that there are several aspects of Korean litigation that might catch foreign litigators by surprise, and for which they may have to adjust their tactics.

One example is the lack of discovery in Korean litigation. Compared to the broad concept of discovery in the US courts or of disclosure in the UK courts, the Korean courts are much more conservative in ordering parties to produce documents that the parties have not produced voluntarily. Requests or applications to this effect are granted less frequently than in common law jurisdictions, and even when granted, are limited to certain specific documents. Litigators therefore have to adjust their tactics to rely primarily on the documents and oral testimony available to them, and should not expect to be able to obtain documents in the possession of their opposing party unless such documents can be identified with a high degree of specificity and can be shown to be pertinent to deciding the dispute.

Another aspect of Korean litigation often overlooked by foreign litigators involved in Korean proceedings is the difference in the doctrine of privilege in Korea. The Korean legal system does not recognise a formal doctrine of legal, litigation or without prejudice privilege, among other types. While attorneys have an obligation and an entitlement to refuse to disclose any confidential information obtained in the course of performing their duties as attorneys, parties themselves have no such right. It is therefore important that litigators take this difference into account early in any
Top tips for attending the IBA Annual Conference in Seoul (22–27 September 2019)

As always, I expect that the IBA Annual Conference will have highly informative working sessions and great social events. In addition, with Seoul as the venue, the conference is likely to be attended by lawyers from some of the largest corporations in the world, particularly in the areas of electronics, telecom, automotive, construction and shipping industries, among others. I would encourage all IBA litigators to take this opportunity to hear the insights and feedback of in-house counsel from these industries, to see how we, as a profession, can best serve such clients.

To have one of the best views of Seoul, go to the Lotte World Tower, the tallest building in Korea and the fifth tallest in the world. Separately, for those attendees who have time to venture out into the city of Seoul, I would particularly recommend visiting the royal tombs of the Joseon Dynasty located at Seongjeongneung, the Changdeokgung Palace Complex (which includes the famous Secret Garden), the Royal Palace at Gyeongbokgung and of course the Demilitarised Zone on the border between South and North Korea.

Lastly, it would be remiss of me if I did not recommend that all attendees take every opportunity to try the excellent Korean cuisine. My recommendation would be to, at a minimum, sample the Korean beef (Hanwol) barbecue and the traditional bean paste stews that go along with it, since the export of Hanwol outside Korea is prohibited.

What are you doing to promote diversity?

In a new series, litigators share their thoughts, lessons learned and progresses made to promote diversity in the practice of international litigation

One of my initiatives with a longer-lasting effect has been the IBA Global Women Litigators’ Breakfast, hosted by the Litigation Committee at the Annual IBA Conference. After three successful events since 2016, when I had the honour of starting to chair the Litigation Committee, one can say it has become a popular event in the IBA’s programme. I find it important to create professional fora, where more experienced female lawyers can share their stories and worries with the younger generation: concrete examples of success have the potential to encourage others to reach for the stars, rather than to give up and leave the profession.

I have tried to help raise awareness of the issue with several publications and public speeches. Two of these have included ‘It’s a Man’s World’, in Austrian monthly lawyers’ magazine AnwB 2013 and, more recently, when a female quota was introduced to supervisory boards of larger companies, ‘Wir brauchen keine Goldröcke’ (‘We do not need golden skirts’), in daily newspaper der Standard. The latter argued that there are enough highly-qualified women to fill supervisory boards: there is no need to strive to circumvent the new law, which we see quite a bit, nor to select a ‘professional’ female supervisory board member (called a ‘golden skirt’).

When my five partners and I founded Knoetzl, we were determined to only select the best possible people to join us. Only a couple of days after we had started our operation, we noticed, by having applied simply this the standard of excellence in staffing, how remarkably diverse the firm had become in reality. Diversity could be seen at all ranks (and can still be seen) because quality—not quotas—is the decisive criterion. We can say that we have discovered the formula. Of course, we recognise that we must accommodate special people with compelling life circumstances, but we do that on a purely non-discriminatory basis.

Bettina Knoetzl
Knoetzl, Vienna
WHAT ARE YOU DOING TO PROMOTE DIVERSITY?

The Law Society of England and Wales fully believes that we should always be aiming for a more diverse profession that better reflects the wider society we serve. We have a number of leading initiatives in place to promote diversity and inclusion in the legal profession. These include:

Diversity and Inclusion Charter
This encourages and supports firms in turning their commitment to diversity and inclusion into positive, practical action for their businesses, staff and clients. The Charter was launched in 2009 and we conducted a full review of it last year. As a result of this review, we will soon pilot our new proposition: a robust and challenging set of accreditations designed to push our members to achieve more in the areas of diversity and inclusion.

Positive action programmes
We work closely with the Judicial Appointments Commission, the Bar Council and CILEX on career development and progression. We deliver a programme of activities, such as workshops for Black, Asian and minority ethnic (BAME) members interested in a career in the judiciary and sessions for BAME students interested in a career in law.

Diversity Access Scheme
This aims to increase social mobility in the legal profession by supporting promising entrants from non-traditional backgrounds or those who face exceptional obstacles to qualification. We offer the following support to successful applicants:
• financial assistance through the provision of Legal Practice Course fees;
• access to relevant high-quality work experience; and
• a professional mentor.

Our Social Mobility Ambassadors
Our vision is of a profession in which all solicitors – present and aspiring – can be confident that talent, ability and application are rewarded irrespective of background, gender or ethnicity.

The Law Society’s Social Mobility Ambassadors are a growing network of solicitors from diverse backgrounds who are passionate about social mobility, the profession and the law. They work with the Law Society and with schools, universities and non-profit organisations to promote social mobility in the legal profession.

Over the last four years, Ambassadors have reached hundreds of budding solicitors and helped to inform their ambitions and find a way through the difficulties they may face.

Women in Leadership in Law project
On International Women’s Day, we launched our report building on evidence from over 8,000 global contributors and over 230 international roundtables to identify barriers to women progressing in the legal sector and remedies to ensure more women aspire to, and reach, leadership positions.

Divisions
These key communities represent groups in our profession that still face discrimination today and for whom it is harder to get to the top. The Divisions provide an avenue for sharing best practices, addressing issues and challenges, making key voices heard during topical debates and identifying solutions to improve equal opportunities for everyone.

With an Ethnic Minority Lawyers Division, an LGBT+ Lawyers Division, a Lawyers with Disabilities Division and a Women Lawyers Division, each with representation on our Council, we aim to centre the needs of those who differ from what has for too long been considered the stereotypical lawyer.

I believe these initiatives demonstrate our strong commitment to equality, diversity and inclusion in the profession, allowing us to continue to promote, represent and support solicitors.
At Debevoise, we are committed to a highly diverse and fully-inclusive law firm at every level. We believe that when we work effectively across difference we deliver better advice, build better relationships with more clients and are strengthened as a firm. We have a range of programmes in place to help build an inclusive community, in which people with diverse backgrounds, perspectives and experiences work together as a team to provide the best legal service to our clients and in which all of our colleagues can develop to their full potential.

For example, three years ago we founded the Debevoise Women’s Review or DWR (https://women.debevoise.com), an online space designed to create meaningful opportunities for women and men to engage in frank dialogue around issues of gender equality in the workplace and the world. The site features original stories relevant to professional women and their allies, including interviews with trailblazing women, essays inspired by personal experiences, advice pieces for women navigating their careers and more. In addition to DWR, we sponsor events focused on developing professional networks of women in law, at all levels of seniority, from summer associates to general counsels and C-suite client officers. Regular events focused on groups such as women in private equity and female litigators foster the networks that help promote the professional advancement of women at all levels of the legal profession.

Programmes such as DWR are complemented and strengthened by supportive workplace policies. Debevoise has, for many years, allowed lawyers with demonstrated parental, family care or personal medical needs to work part-time. Although the policy is designed and applied in a gender-neutral manner, it has significantly contributed to the promotion of women in our firm: over the past 11 years, 40 per cent of our internal promotions to partnership have been women. Many of those women had participated in our part-time programme prior to promotion.

In addition to DWR, we have other initiatives in place to help our diverse talent see a career path for themselves at the firm and beyond, including a monthly diversity speaker series in which prominent diverse lawyers who are leaders in their respective fields – legal executives, members of the judiciary, and more – come and speak about their professional experiences and the path to success in the legal profession. More recently, we launched a Diversity & Inclusion Advisory Council, a group of lawyers and senior staff that is broadly representative of the firm as a whole, to provide a forum for engagement, dialogue and interaction with firm leaders around issues of diversity and inclusion within the firm and beyond.

Recognising the particular challenges and concerns that may be faced by first generation professionals, we recently launched a First Generation Professionals affinity group to provide a forum for those with similar backgrounds and interests, and their allies, to form a community and to offer programming that will respond to their needs. Similar affinity groups already exist in our firm to provide forums for discussion, programming and advocacy within the firm to other groups of diverse lawyers.

Since December 2016, as part of our commitment to promoting equality and inclusivity in the workplace, we have been hosting a Women in Business Series in our London office, where we ask inspirational women speakers from various areas of business to speak about their work. We hope to create a dynamic forum where business relationships can be forged and where opportunities can be created and shared.

When I started to think about the idea of hosting a series of women-in-business events, I was inspired by our first speaker, Kathryn Sargent. In 2016 Kathryn smashed one of London’s most enduring glass ceilings. Kathryn was the first woman who had her name ‘above the door’ in the world-famous Saville Row’s 213-year history. Kathryn, who has dressed clients ranging from members of the royal family to politicians, launched her premises on Savile Row. The launch caused a media storm: it was a great story. On the day of her launch, I heard Kathryn speaking on the BBC. I had just started at Brown Rudnick and I was inspired by Kathryn’s description of how she had made history. She spoke with...
the high energy of someone who is motivated and doing something they are good at and love. As a new neighbour, I emailed her congratulations. It says much about Kathryn that, despite being overwhelmed by the media and the demands of her launch day, she took the time to email back.

Our offices extend across a house that was built in 1720 for a wealthy landowner, who commissioned its very lavish staircase painting in 1722. Throughout its long life, it has served as the premises for tailors. I was therefore thrilled to kick-start our Women in Business Series with Kathryn’s story of how she had built her global business. I was determined that this was not going to be a one-off event and I am happy to say that, since 2016, we have had the pleasure of being joined by some excellent speakers, including: Amber Rudd (while she was Home Secretary); Cressida Dick (Metropolitan Police Commissioner); Cath Kidston MBE (English fashion designer); and Inga Beale DBE (CEO, Lloyds of London). On 18 April 2019, the 100th anniversary of women in law in England and Wales, Christina Blacklaws, the President of the Law Society, will be our speaker.

If you would like to join the event, feel free to contact me directly.

As a firm, Herbert Smith Freehills (HSF) is committed to being a leading global law firm for diversity and inclusion. Our ‘Leading for Inclusion’ strategy is framed around four pillars: clients, talents, innovation and values. In January 2015, the Paris office (where I am a partner) launched its dedicated Diversity and Inclusion programme, led by the Paris Diversity & Inclusion Committee, which includes lawyers and non-lawyers. Over the last few years, the Committee has been focusing on promoting gender equality and multicultural diversity, as well as on raising awareness of the LGBT+ community, amongst other initiatives.

As part of its efforts to promote diversity, HSF Paris office:
• became a member of the French Association for Diversity Managers and is now one of its board members;
• was the first law firm to sign the Charter of LGBT Commitment, sponsored by l’Autre Cercle (a French association created in 1998 to combat discrimination based on sexual orientation and gender identity) in December 2016;
• promoted and signed, on behalf of the firm, the UN Standards of Conduct for LGBTI inclusion, making a commitment to support a culture of respect and equality in the workplace and the communities in which we operate; and
• runs a range of initiatives promoting gender balance (such as our partnership with Arborus, an association promoting women and gender equality) and pro bono advice on women-led initiatives (such as Cité Tech, which aims at giving everyone access to technology).
My London – My Geneva

Home is…

Jane Colston: Next to the Tate Modern. It and St Paul’s cathedral never fail to make me stop and stare when I walk to work in the morning, across the wobbly bridge over the Thames.

Sandrine Giroud: In a small village just outside Geneva, lost in the vineyards above a beautiful natural park. The park is a stop-over for birds when migrating for warmer horizons in the winter.

Which local hotels do you stay at?

JC: As I live in London, I don’t use hotels, but my parents stayed at Claridge’s recently and it felt like a fabulous scene out of Jeeves and Wooster.

SG: Difficult to say, given that I am a local, but the Hôtel des Bergues or the Hôtel de la Paix is always impressive.

What are your favourite spots for a meal?

JC: Spring, in Somerset House, or Pollen Street Social, around the corner from my office.

SG: Our office is in a buzzing area and my favourite restaurant is L’Adresse, which combines creative cuisine and a sophisticated ‘bobo’ atmosphere.

Where do you work out?

JC: I get my exercise cycling and walking around London, doing yoga at the atrium in the office with a group from work and running along the Thames each Thursday morning with a group of other litigators (so if you are in town, join us!).

SG: Our firm has a small fitness room and I enjoy pilates sessions twice a week there, as well lots of walking and running after the bus to catch my train.

Have you ever had a run-in with a policeman?

JC: No, but last month I helped the police chase an offender who ran into my flat’s gardens.

SG: Not yet, but my co-trainee and I got a policeman to help us prank our maître de stage (the partners supervising us during our traineeship) by making them believe we had been arrested for collusion in a drugs case. They rushed to our defence and we caught them on camera just before they reached court to plead for our liberty. The look on their faces was priceless and they were a good sport for not firing us.

What would you do if you were Mayor for the day?

JC: I would ban cars.

SG: I would definitely follow in Mayor Jane Colston’s footsteps and ban cars.

What makes someone a Londoner?

JC: Being outward-looking.

What makes someone a Geneva-sider?

SG: An openness to the world, together with humanitarian sensibilities (Geneva is the United Nations capital of human rights and the birthplace of the International Committee of the Red Cross), a pinch of Calvinist Protestantism (Geneva is called the ‘City of Calvin’, after all), a Swiss finish and a touch of creative disorganisation and entrepreneurship.
Roundtable: views from the top

Jane Colston and Sandrine Giroud interview the current and former chairs of the IBA Litigation Committee to get their views on the current trends in litigation and their role within the IBA.

Mike Hales
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Mike Hales has 30 years of dispute resolution experience both in the UK and Australia. He has advised on a wide range of disputes covering many industries, including banking, construction, energy and resources and real estate. Much of his work is international, both before courts and in arbitrations.

Liam Kennedy
A&L Goodbody, Dublin
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Liam Kennedy specialises in international and domestic commercial disputes including: product liability; M&A; securities/auditors’ litigation (including international class actions); European Union and competition law; and constitutional litigation.

Bettina Knoetzl
Knoetzl, Vienna
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Bettina Knoetzl, co-founder of Knoetzl, was recognised as ‘The Lawyer of the Year’ in Asset Recovery by Who’s Who Legal in 2017. Chambers ranks her in Band 1 in both Litigation and White Collar Crime.

Ira Nishisato
Borden Ladner Gervais, Toronto
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Ira Nishisato is a litigation partner and National Leader of Borden Ladner Gervais’ Cybersecurity and Cyber-Risk Management practice. He focuses on complex commercial litigation, commercial fraud, intellectual property litigation, cybersecurity and information technology litigation and international disputes and investigations. He has extensive experience in extraordinary remedies and has appeared in nearly 100 injunction proceedings before Canadian courts.
Michael Novicoff has extensive experience handling complex business litigation, arbitration and mediation throughout North America, Europe and Asia, with particular emphasis on matters involving entertainment, media and intellectual property, and on the liability of corporate entities and their directors and officers.

Tom Price specialises in complex and high-value cross-border commercial disputes. He has over 20 years of experience resolving disputes (usually of a cross-border nature) both in the English courts and through international arbitration in numerous arbitration centres around the globe. He is also an expert in jurisdictional issues, cross-border enforcement of judgments and arbitral awards, and the taking of evidence in cross-border disputes.

John Reynolds is a well-known dispute resolution lawyer whose broad international practice has a particular focus on banking, finance and investment disputes. He also litigates in jurisdictions outside the UK, with recent experience in territories including the US, Nigeria, Eastern Caribbean and other offshore jurisdictions.

Describe your career to date

Hales: I started my career at Clifford-Turner, which soon after merged to become Clifford Chance. After four years there, I moved to Sydney where I worked for two years for what was then Freehill Hollingdale & Page. After returning to the United Kingdom, I became a partner at Nabarro Nathanson. I left that firm in 2012 to move to Perth as a partner at Minter Ellison. In addition to being admitted in England & Wales and Australia, I am also admitted in the British Virgin Islands as a result of work that I have done there.

Kennedy: I studied law at the University of Otago in New Zealand, before joining Wellington firm, Kensington Swan, for three years. In 1989, I travelled to the UK and worked in Herbert Smith’s litigation department for four years, before joining A&L Goodbody. Throughout my career, I have specialised in commercial litigation, particularly financial services litigation, product liability disputes, regulatory litigation, investments and the like. As well as being a former Chair of the IBA’s Litigation Committee, I have been a member of the Council of the Law Society of Ireland for the last ten years and I am the current chair of its litigation committee.

Knoetzl: After spending two years in academia at the law faculty in Vienna, I was selected by what is today’s UniCredit Bank Austria for a year and a half elite trainee programme. Here, I acquired valuable business skills, completed an education as a merchant banker with a legal background and worked in the finance department, before joining Wolf Theiss in 1993. There, I came to understand that my heart belongs to litigation and I belong in the courtroom. We developed that firm into the market leader in Austria and added offices in 13 jurisdictions. In 2002, I practised at Allen & Overy’s litigation department in London, with a focus on fraud matters. For more than a decade, I helped build and headed Wolf Theiss’s firm-wide litigation and dispute resolution department.
In 2016, I co-founded Knoetzl, a leading dispute resolution firm, with a focus on litigation, arbitration, alternative dispute resolution and white collar crime.

Nishisato: I have practised in two of Canada’s largest litigation firms and have spent the last 20 years with Borden Ladner Gervais in Toronto. I am a product of the generalist barrister tradition that was prevalent in Canada when I started out but that is increasingly rare in our hyper-specialised world. I’m proud that my practice gets me to court often and that I’ve appeared in an enormous variety of interesting and challenging cases before all levels of courts in Canada.

Novicoff: I began my career at Sidley Austin and then practised at three major Los Angeles litigation firms, specialising primarily in cross-border commercial disputes and on matters involving media, technology, entertainment and other intellectual property-based industries. I am now a partner in the Los Angeles office of Pryor Cashman, a 225-lawyer full-service firm based in New York City, carrying on the same practice but with a significantly broader national reach.

Price: I spent the first ten years of my practising life at Macfarlanes in the City of London and since then have been at Gowling WLG (formerly known in the UK as Wragge Lawrence Graham). Over the last 30 years, I have practiced both commercial litigation (always with an international element) and international arbitration. I have worked in a number of sectors (including financial services, energy and natural resources) and along the way have been seconded to, among others, Barclays Capital and BP, as well as chairing the IBA’s Litigation Committee. I also head up the firm’s Commonwealth of Independent States and Central and Eastern Europe desk.

Reynolds: I trained at a small firm in Mayfair in London, where I did the sort of work that you see lawyers do on television: criminal, divorce, etc. I joined Herbert Smith when I qualified and spent a formative period as a junior associate in the New York office. Eventually, I joined a United States firm and, in 2006, moved to White & Case.

What traits do you think serve a litigator well?

Hales: The list could be endless but one trait I would emphasise is never losing sight of the big picture. Disputes are business problems first, legal ones second. If you understand the business dispute, you will be in a good position to resolve the legal one and, more importantly, meet your client’s commercial expectations.

Kennedy: A litigator needs to be confident, articulate and incisive in terms of developing and presenting an argument, but he or she also needs to be a good listener, a lateral thinker and flexible in developing and being receptive to novel solutions to legal problems and in negotiating.

Knoetzl: Put curiosity, creativity, the stamina to know your case inside out, technical legal excellence and great advocacy skills into a shaker, stir well, add a spoonful of fun and charm and some nerves of steel, and here you have your great litigator cocktail. Not to be forgotten: a big splash of team spirit. Behind a great litigator is a great team.

Nishisato: The conventional wisdom is that litigators must be silver-tongued. While eloquence helps, the more time I spend in the courts, the more I realise that the ability to listen and really think about what you’ve heard is actually more important. To be able to think well, it’s important to disconnect from email and the outside world and focus on the issues before you. Developing ways to shut out the ‘noise’ all around you and identify what really matters is a critical element of effective advocacy. Cases are complex and there are no shortcuts. That is why we admire the great litigators who distil cases down and focus on a few points. Ultimately, there is no substitute for clarity of thought and expression. But that only comes with the investment of time, great organisational skills and unrelenting hard work.

Novicoff: Especially for a litigator, I think there are no substitutes for intellectual curiosity, hard work, and an ability to devise solutions which are both innovative and practical. Almost by definition, the problems that cross our desks are unique and have no easy solution, so every industry, every client and every matter presents an opportunity to confront something new. A really great litigator, I think, sees that challenge as the very best part of the job.
Price: Thoroughness, an eye for detail, strategic thinking and the ability to keep the big picture in mind at all times. Help the client manage what, for them, is usually a very stressful process (unless they are a professional litigator) and be courteous at all times.

Reynolds: Attention to detail and mastery of the facts. When I look back on my biggest successes, they have been because we took the time to explore every angle. Most important, though, a love of the law. (It may seem obvious, but some lawyers don’t use the law that much.)

In five years, what changes in the litigation space do you hope we’ll see?

Hales: In a word, increased efficiency. Dispute resolution has got to become more affordable. Western Australia has just abandoned witness statements partly for this reason. Efficiency can come in many forms: narrower or no discovery; greater promotion of settlement in international arbitrations to match the court’ approach to this; better use of technology; better cost forecasting, to name a few.

Kennedy: The increased use of technology is clearly a feature of modern litigation and this will accelerate. I hope lawyers will be the masters of, rather than servants to, that process. As a profession, we are outsourcing much of our responsibility for data analysis and interpretation to external providers and non-lawyers. Ultimately, it will be crucial for lawyers themselves to have the ability to use the increasing powerful technological tools to rapidly comprehend, analyse and digest the facts regarding legal problems and to provide cogent, practical and high-quality legal advice for our clients. If external providers become ‘gatekeepers’ over the underlying data, this could impede our effectiveness in meeting the client’s requirements.

Knoetzl: Other than the obvious change of huge progress in technology, which should ease our forensic research work significantly, I hope to see a development in understanding from buyers (of legal services) that high specialisation serves them better. In many legal markets across the world, there are still businesspeople who do not know that ‘litigation’ requires special skills, different to those required by a tax or corporate lawyer.

Nishisato: I believe that litigators add the greatest value when we are examining witnesses and appearing in court. I hope that technology-assisted review (TAR) and artificial intelligence (AI) will enable us to spend less time reviewing documents and assembling data, and more time focused on strategy and submissions. This will mean that some of the traditional tasks performed by lawyers will eventually be replaced by computers, but in dispute resolution there will be no substitute for the advocacy, strategy and judgment calls that we make every day. Technologies will help to ‘high grade’ the tasks that we perform and, I hope, bring economies to the escalating costs of litigation.

Novicoff: The key word there is ‘hope’: I hope that we’ll see a more globalised and inclusive approach to legal problems and the legal profession, along with a reversal of some of the dangerous and nationalistic trends that have begun to erode the rule of law, or at least the dependability and predictability of legal outcomes, all over the world. At a more practical level, it also seems clear that continuing technological advancements will drive further change and, if managed properly, help litigators to deliver better value for their clients.

Price: The profession has made great strides towards the holy grail of keeping disclosure in proportion, through electronic search platforms and tools but also through changes to the court rules. It would be great for those reforms and improvements to continue and be successful and so, in some way, help keep a lid on the spiralling costs of litigation.

Reynolds: A simplification of the process, in particular of the extent of document disclosure and witness statements in the English jurisdiction. This should lead to a reduction in time and cost. I also hope that AI can be used to more accurately predict the cost of litigation, by learning from the times recorded for previous matters.
How do you ensure effective coordination between litigators and teams around the globe?

**Hales:** In addition to great communication, it is important that there is a clear agreement about the client’s objectives and priorities. This may mean favouring one jurisdiction over another and, if so, it is important that the whole team buys into that strategy. Respect across the team is essential; egos are not. It is also important to appreciate the different legal cultures within the team that can lead people to see issues in different ways.

**Kennedy:** I frequently work with lawyers in other jurisdictions when a client is facing a global litigation or regulatory issues. Effective communication is crucial. Regular meetings or calls are invaluable so everybody knows what is happening and can make sure that issues in one jurisdiction don’t impact on others: their implications need to be identified and understood. There also needs to be an awareness of the different procedural and substantive rules across jurisdictions, including as to privilege, and these differences may impact on how communications are conducted and the extent to which drafts can appropriately be exchanged.

**Knoetzl:** Communication is the obvious answer. Mine is slightly modified and therefore more difficult to comply with: crystal-clear communication. This requires a lead counsel who steps up and takes this role, with all other teams accepting their own role as supporting and helping to form the strategy, which then is executed by clear instructions from the top. How to communicate? Nothing can substitute a meeting in person. However, technology has progressed so much that missing team members can join by video conference, providing an ‘almost-there’ feeling. In the last two years I have come to recommend using two-dimensional, face-to-face calls rather than traditional conference calls.

**Nishisato:** In the age of mass email and conference calls, it is critically important for teams to actually spend time together and build the trust and confidence that is necessary to work as an integrated unit. Unfortunately, all too often, someone decides to ‘dial-in’ or only stay for part of the meeting. Effective coordination, particularly on a global scale, requires the building and maintaining of many bridges, with parties that often have slightly different interests. Sometimes you have to get on a plane to make sure those relationships are forged and continue to work well in the future. Email is a very poor substitute for building real relationships.

**Novicoff:** I think that real-time communication is essential and the irony is that, in some cases, technology has actually made this a bit more difficult. Email and document-management software have (superficially) made it far easier to work together, but these tools can lead us to forget that, especially amongst professionals, there is still no substitute for actually speaking and debating with one another, challenging our assumptions and bringing our different skills to bear upon the same problem in real time, through actual conversation. And, of course, professional networks like those built up through the IBA are invaluable, since coordination is always easier and more efficient when the team leaders actually know one another.

**Price:** Regular communication, with as much of it being oral or by video link as possible or, even better, face-to-face meetings where costs allow.

**Reynolds:** Regular (scheduled) communication. However efficient email may be, use the telephone often. However expensive and inconvenient travel may be, meet face-to-face when you can.

What are the pros and cons to using AI in litigation?

**Hales:** The clear ‘pro’ is the saving of time and costs, particularly in areas like discovery. Inevitably, a number of ‘cons’ will be learned on the job as we find out more about the strengths and weaknesses of the technology. It will be important to ensure that we are firmly in control of what the technology is doing and understand its output. Having said that, I have no doubt that the ‘pros’ will firmly outweigh the ‘cons’.

**Kennedy:** A key advantage of using AI in litigation is that the increasing volumes of data makes this the only cost-effective, practical way of analysing some of the huge data sets which can arise in modern litigation or investigations.
However, technology is not perfect. Computers will do what they are trained to do and cannot be expected (yet, anyway) to, for example, react to an issue which they have not been specifically tasked to focus upon. However, the tools are becoming increasingly powerful and effective and it would be very difficult to run cases of any scale without such tools. That said, the use of AI to, for instance, review entire data sets does not mean that more traditional tools should be abandoned completely. It may still be appropriate, for example, to do a document-by-document review of a key individual’s folders if the circumstances warrant this.

Knoetzl: Technology, which is currently available and provided by the top leading forensic IT experts in my market, can be a tremendous help. That said, it has been our experience that none of these programs can operate without lawyers providing input, reviewing the results and refining the process. To answer the question, initially I would probably be scared to deal with such a tool. However, I can see that AI replacing my research assistant could be a tremendous help for the whole team and our clients. Not only would the results be more reliable, as AI does not get tired after ten hours of concentrated work, it would save our clients a lot of time and cost. It has been discussed that associates would lack training in a world like this. I beg to differ: they could fully focus on using the AI’s output for building their argument. In my view, this is by far the more creative exercise (and much more fun). As having fun at work is key for success, my hope is that technology will soon advance to the level where everybody can focus much more at the core of this beautiful profession, rather than working his/her way through mountains of data.

Nishisato: AI represents change. Lawyers – and litigators – often resist change and deploy arguments as to how the ‘old ways’ are tried and true. But AI offers a path to the future that is full of promise. In jurisdictions that have broad discovery rights, it was inconceivable – only a few years ago – that a litigator would not review all of the documents. Today, we have cases with millions of documents and technology that is ever better at assisting us with document review. I think this is entirely appropriate, since when cases get to trial, they still turn on a relatively small number of documents. AI can help us find what matters most and, while it may not be perfect, neither are human reviewers. In legal research, AI offers the ability to review and synthesise countless records in hours, if not minutes, and its ability to find exactly what we need is only improving. To succeed, AI needs litigators to test the tools and teach the machines, so that they improve. I wonder if we will eventually mentor the machines in the same way that we mentor our associates today!

Novicoff: The ‘pro’, of course, is that AI is a tremendous force-multiplier, allowing us to sift through data and draw conclusions in ways and at speeds not previously possible. AI will, however, always be a mere tool and there is danger when litigators delegate or abdicate their own role in the process. The result produced by AI will never be better than its underlying data and algorithm, so AI challenges litigators to use even better judgement, even earlier in the process, to ensure that case strategies are not founded upon untrustworthy AI results. As litigators we must also never forget to be sceptical and to continually test our theories as new evidence comes in. AI obviously has a role to play there as well.

Price: For users of dispute resolution processes, AI and other technological advances can have significant benefits. For example it, can allow them to approach disclosure/discovery in a more efficient way, by whittling-down the number of documents to be manually reviewed. It can even be used to shortcut settlement, deploying algorithms and game theory to determine the optimal acceptable meeting point between two disputants. ‘ChatBots’ have also had some success in automating more formulaic legal processes, like overturning parking fines. AI also has the potential to help law firms mine valuable historic data in order to model the likely costs and cash flow of litigation for clients, though the benefits of AI are so far mainly being felt in more straightforward-volume legal processes. There is also a risk that applying AI indiscriminately, in pursuit of efficiency alone, may (or may be seen to) undermine the human element of justice, in a search for litigation by numbers.

Reynolds: One ‘pro’ of AI is the potentially enormous savings in time and cost. A ‘con’ is that factual and cultural nuance is hard for a machine to learn. There will be no replacement for painstaking human review at some level. Machines don’t develop hunches or act on instinct.
What advice would you give to young lawyers hoping to one day be in your position?

Hales: Your professional reputation is all-important: never compromise it or put it at risk. Make sure that you treat your fellow professionals, particularly your opponents, in the manner that you would wish to be treated. Also, law creates the opportunity for a long career. It can be easy to let it dominate but it is vital to have balance in your life, looking after your physical and mental well-being and plenty of outside interests. Issuing and defending proceedings may often be the best, perhaps the only way, of achieving that objective but we need to ensure that our work is very much focused on understanding the client’s objectives.

Kennedy: Our role is to provide practical, ethical, legal solutions to the client’s problems, rather than to be tied to any particular process, including litigation as an end in itself. I also think it’s important for lawyers to get involved in a diverse range of work, including pro bono work, and to build their profile not just with one or two big cases, but by doing a range of work within their own firms.

Knoetzl: Pursue your dreams. If you have identified being a litigator as the best possible way to utilise all of your amazing talents, grab every chance you get to help your client prevail. Be better prepared than your opponent, be more creative, work harder, sleep less and enjoy, at every possible moment, the privilege of being a litigator, which is arguably the most exciting job in the world (and certainly is for me).

Nishisato: Step up. Jump in. Get things done. You will find the IBA Litigation Committee to be a very welcoming and receptive place. Bring forward new ideas and show that you will see them through. And then carry them out. Don’t be deterred by the fact that others are more seasoned or have been around longer than you. The Committee needs you and the future of the Committee depends on you getting involved, continuing our traditions and propelling us forward. The time you spend being active in the Committee will be among the most satisfying and enjoyable parts of your career, so take full advantage of the opportunities that are before you.

Novicoff: Of course, any legal career needs to be founded upon excellence, in both product and value, but that alone is no longer enough. A lawyer today needs to remain focused upon professional growth and seek out new opportunities to expand both skills and relationships, both inside and outside of the law firm. Specialised associations like the IBA are great for this, but every professional interaction can and should be seen as a chance to learn, develop and impress. I have always been the most proud of work referred to me by former opposing counsel!

Price: While it is impossible to tell how the profession might change over the next ten years, let alone 30 years (as far as litigation is concerned), I think there will still be a call for many of the skills we practice today. The young lawyer should therefore be flexible and ready to adapt, but I suspect there will still be just as much demand to form strong professional relationships around the world as there is today and the need to travel, in order to make and maintain those relationships. The young lawyers of today need to be prepared to make those investments.

Reynolds: You need good fortune and, by taking every opportunity, you can go some way to making your own good fortune. Always hire people smarter than yourself.

While IBA Litigation Chair, what was one of the things you best remember or are most proud of?

Hales: I was proud to put on a very popular mid-year conference in Istanbul (in a less troubled time) to reach out to new members. I started a programme of providing local scholarships for the mid-year conference. I liked the idea because it involved the local law firms and their younger lawyers. Unfortunately, I am not sure that it stood the test of time. I was also the first Chair to ask for the parting gift to be given to charity and I am pleased that this has now become the tradition. At a less noble level, I also reinstated the current officers and past chairs’ dinner at the annual conference!

Kennedy: I was very proud of the significant growth of the membership of the Committee, including its greatly increased diversity over the period during which I was most active on the Committee. I was also proud of the additional initiatives to reach out past our
traditional mid-year and annual conference, with our dynamic Italian colleagues starting the Milan Private International Law Conferences and with the Committee laying the foundations for our first litigation conference in Africa, under the stewardship of Jacques Bouyssou.

Knoetzl: There are three things. First, kicking off a better, deeper, understanding of (and preparedness for) the upcoming changes and challenges in the legal profession related to AI and new forensic tools when we introduced our Annual Litigation Forum in the spring. We organised the 2017 IBA Annual Litigation Forum to discuss Innovation in Litigation. The event quickly sold out, with over 350 participants, and received overwhelmingly positive feedback. Second, another initiative with long-lasting impact has been the Global Female Litigators’ Breakfast at the IBA Annual Conference. After three successful events since 2016, when my chairmanship started, one can say it has become a popular event in the IBA’s programme. Third, bringing the Annual Litigation Forum to Berlin in Spring 2019. Given the significant German under-representation in our membership, it was my goal to enhance the IBA’s attractiveness by hosting an event in the important jurisdiction of Germany.

Nishisato: That’s easy to answer: the warmth of the friendships between those on the Litigation Committee. As Chair, I had the unique opportunity to meet members from around the world and to conceive of ways to make our events and activities even more enjoyable. Identifying conference venues, developing session themes and creating opportunities for new members to speak on panels and rise in the ranks was very satisfying. Many people helped me on the proverbial ‘way up’ and the chance to return that favour and help others was a great privilege. Finally, I’m proud of the fact that we have institutionalised the Committee officer retreats. This helps to knit the officers together into a cohesive, mutually-reinforcing team.

Novicoff: I served as Chair when the financial crisis was at its worst and when the legal profession faced unprecedented challenges at every level. Firms were cutting staff, management was lean and clients had little patience for litigation or anything else that was not providing immediate value. I was especially proud that we not only maintained but also grew our Committee during that time, and I think we helped our members realise that deep personal relationships with colleagues around the world mattered even more at times like that, as people looked after their friends a little more closely and were especially careful to refer work only to colleagues of known quality. I am also very proud of our inclusivity initiatives while I was Chair, as every single programme sponsored by our Committee during those two years included female litigators, first-time speakers and speakers from outside Europe and North America.

Price: I will tell you when I am done, but I suspect it will be about the 30 incredible officers who support me.
Working as a personal trainer in London, I train many lawyers, all of whom are hard-working high achievers and often share the same characteristics when it comes to health and fitness. Many of my clients enter challenging events during the year such as obstacle fitness courses, marathons and triathlons. Running, cycling and swimming are of course great forms of cardiovascular exercise, but I also recommend incorporating weight training and yoga or pilates into any fitness regime.

I am also trained as a pilates teacher and understand how important our core and posture is for everyday activities and life in general. It is also very important to exercise with correct technique and movement to avoid injury.

This article aims to provide litigators with simple but effective tips on nutrition, hydration, sleep and exercising, to obtain ideal posture while working at a desk.

**Exercise regimes and stretching**

Regular exercising has shown to boost positive mood and self-esteem, lower rates of anxiety and depression, improve strength and endurance and help maintain a healthy weight. It is recommended an average adult do at least 150 minutes of moderate aerobic activity every week, which includes cardiovascular exercises such as running, cycling and swimming, along with strength exercises such as resistance/weight training by working every major muscle in the body (chest, arms, back, legs, hips and abdominals). 10,000 steps a day is the recommended amount an adult should be doing. This, however, can prove challenging to office workers as the jobs requires sitting for a lot of the day. Neck and back pain are common complaints due to the amount of sitting done.

There are four different types of postures: kyphosis, lordosis, sway back and flat back. Office workers tend to have a kyphosis posture due to the nature of positioning the back as naturally the upper back is in a hunch position.

The kyphosis posture alignment shows an excessive curve in the upper spine. It normally leads to tight muscles in the neck as the head is forward and tightness in the chest muscles. Exercise and stretches can help improve and correct the muscle imbalance and posture alignment. The following pilates exercises are great for posture and back strengthening, and can be done throughout the day when seated at your desk.
ON TOP OF YOUR GAME: TIPS FOR HOW TO LITIGATE HEALTHILY

Spine twist exercise
Place your hands together with middle fingers underneath your chin, shoulders down and head neutral, exhale and twist to one side, hold this position for a second feeling the stretch in your back, inhale back to the centre and exhale change sides.

Roll down exercise
This exercise stretches your spine and strengthens the abdominals which will help with posture, as a stable and strong core helps you sit upright and not slouch. This exercise can also be done seated. Keep your knees soft, nod your chin onto your chest and start rolling down. Once you have a curve in your spine, hold this stretch for a few seconds before curling back up to your start position.
ON TOP OF YOUR GAME: TIPS FOR HOW TO LITIGATE HEALTHILY

**Neck stretches to release tension**

Place one hand on the side of your head and push down slightly until you feel the stretch in your neck, hold for 30 seconds then change sides.

**Upper back stretch**

Interlink your fingers together, palms facing inwards and keeping your head down, focus on pushing your arms away from you to stretch your upper back section.

**Wrist/forearm stretch to help with hand and finger stiffness resulting from keyboard and mouse use**

Have one arm straight and place your other hand on your fingers and push them downwards. You should feel a stretch in the wrist and forearm. Hold for 30 seconds before changing sides.
Nutrition

Average males should consume 2,500kcal and females 2,000kcal per day, to ensure the balance between nutrients is met. Both protein and carbohydrates contain four calories per gram, while fat contains nine calories per gram. Protein is needed in our diets as it is the building blocks for growth and repair in tissue, bones, muscles, blood, skin and cartilage. Protein is also used as a source of energy and makes enzymes, hormones and other chemicals for our body. It will keep us fuller for longer and we should consume it at every meal. Food sources that are high in protein are meat, fish, dairy, eggs, nuts, pulses and soya products. Consuming a high protein breakfast will help kick-start your morning.

Fats are needed to keep our bodies warm, produce healthy skin and act as a source of energy when food is not available. Polyunsaturated and monounsaturated fats are considered the healthy fats for your heart and can be found in food sources such as salmon, pine, brazil and walnuts, linseed, almonds, cashews, flaxseeds, chia seeds and avocado. Eating a handful of nuts as a snack will provide a great amount of healthy fat and protein, just ensure not to consume high amounts, as they are high in calories.

Carbohydrates are used as the main source of energy from our body, breaking down starches into glucose which then gets released into the blood stream to be used as energy. Any excess carbohydrates we consume then gets stored as fat. Consuming wholegrain foods such as wholegrain rice, pasta and bread will contain more nutrients and fibre than eating refined grains such as white rice, pasta and bread. It is recommended that the portion sizes are as follows: a serving of protein is the size of one palm, a serving of fats is the size of one thumb, a serving of carbohydrates is the size of one cupped hand and the serving size of vegetable is one fist.

Water is an essential part of life and is needed for daily body functions; it represents between 45–75 per cent of our body composition. At least two litres of water should be consumed per day. Dehydration causes decreased general performance in people and can cause headaches and dizziness.

Sleep

Eight hours of sleep per night is the recommended amount needed for average adults for optimal daily function. Less than six to seven hours of sleep can cause low energy levels and concentration, and an increased feeling in hunger. Studies have shown that adults with deficient sleep gain weight and, if dieting, instead of losing fat, weight is lost from lean body mass.

If you find it hard to sleep at night, getting yourself into a routine will help: try having a bath, dim the lights, avoid distractions such as the television or mobile phones, and ensure your bedroom is dark and cool.
Duty of cooperation for directors of an insolvent company and information to be provided

This article aims to highlight practical aspects for an insolvency practitioner, relating to access to the documents and information that belong to an insolvent company, and in the light of the duty that directors of the insolvent company have to cooperate with the receiver.

The directors need to collaborate, even if they have little incentive to do so

A question that often creates tension between the insolvency practitioner and the directors of the newly insolvent company (whatever the type of insolvency/restructuring involved) is the collaboration of the directors with that practitioner and the transmission of any documentation to the insolvent company.

There are generally conflicting interests at stake. On the one hand, it is not uncommon for directors’ mandates to be unpaid, which means that there is little financial incentive to assist the insolvency practitioner on an ongoing basis after the insolvency proceedings have been opened. On the other hand, there may be substantial costs involved for directors in retrieving documentation and information, such as research costs (getting the documents unarchived), or costs to identify the documents that may or may not be subject to privilege, especially in the case of group companies.

What documents should insolvency practitioners look for?

Every insolvency practitioner should ask, on day one, to obtain the books of the company (most importantly, the general ledger) or, even better, an electronic copy of the database that contains the accounting and any related supporting evidence and corporate documentation.

The bank statements (reaching a few years into the past) should also be obtained, as they might contain valuable information that is hidden in the accounting.

If possible, all these should be obtained in an electronic form (not only as pdfs but also as database-style data), in order to be able to exploit the data as much as possible through automatic processing and analytic tools.

Emails are probably the most useful piece of information to be requested by an insolvency practitioner

Emails will always contain a lot of important information as they often replace person-to-person conversations, especially in larger groups of companies, which leaves a digital trace for almost everything. The emails might reveal the decision-making process and any potential criminal offences that may have been committed.

However, the analysis of emails constitutes a huge challenge for the insolvency practitioner, given the likely volume of them, and the insolvency practitioner will likely have to resort increasingly to electronic tools, such as e-discovery software. This may incur significant upfront costs.

Depending on the type of management, WhatsApp (or similar discussion platforms) may also be relevant, as this is a common communication tool used. Directors might argue that these are private. In our view, that should not be the case: any conversation, be it verbal or electronic (for example, email or WhatsApp) relating to the insolvent company remains the property of the company and thus must be given to the insolvency practitioner.

EUROPE

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practitioner. Furthermore, such emails and WhatsApp are often sent from devices (for example, Blackberry, iPhone, iPad, etc) that belong to the insolvent company.

If the directors do not pass on this type of material, they may be civilly and, in some countries, even criminally liable.

**Emails should be requested on day one**

The insolvency practitioner should therefore ask, as soon as they enter office, for full access to the email server (or to the email inboxes, if they are rented out) and, better yet, they should immediately take a copy of the whole server, to avoid the loss of potentially useful information. Access to company phones, in order to obtain a copy of the WhatsApp (or similar) conversations relating to the insolvent company, should also be sought.

If the emails are held in online email inboxes, the insolvency practitioner should immediately change the passwords, to avoid any tampering or deletions.

However, this might not always be easy: take, for instance, the example of an international group of companies that is strongly integrated (to avoid saying intertwined). The documentation, and most specifically the emails, will be mixed together in millions of other emails related to other companies in the group. If only one entity in the group is insolvent (or if the insolvency of the group is subject to various jurisdictions with very different legal standards), it might become almost impossible to obtain access, as the directors will be very reluctant (especially if they are involved in various entities within the group) to provide the emails.

This is especially true if the holding entities of a group are under restructuring proceedings (and may potentially continue business later on) and the entities held in other countries are under liquidation-type proceedings. In such a case, the directors have very little incentive to provide as much information as possible, as it potentially contains trade secrets.

The insolvency practitioner may encounter difficulty. His/her best option is potentially to threaten to engage personal liability if the directors do not cooperate and do not provide the information requested.

**Sanctions for non-collaboration**

The refusal of the director to provide such information may give rise to liability and a court claim by the insolvency practitioner. Under Luxembourg law, the failure of the directors to cooperate with the insolvency practitioner constitutes a criminal offence. In France, the failure to cooperate constitutes a civil sanction. A director who fails to cooperate with the insolvency practitioner and causes an obstacle to the progress of the insolvency proceedings may be declared personally insolvent and may be prohibited from becoming a director in the future.

In England and Wales, there is an obligation on any director to cooperate with the insolvency practitioner. In cases where the director(s) do(es) not cooperate, the insolvency practitioner may obtain a court order to require the director to disclose the requested information. Should the director fail to comply, he may be held in contempt of Court, which may result in imprisonment or a fine.

**Notes**

1 With special thanks to Marine Simmonot of UGGC Avocats in Paris for her input on French law and Steven Philippson of PCB Litigation from London for his input on the law of England and Wales
2 Art 573 of the Commercial Code
3 Art L-653-5 5° of the French Commercial Code
4 S 235 and 236 of the Insolvency Act 1986
In Austria, it is now established by Supreme Court case law that the personality of a deceased person enjoys protection after death and that this protection is not limited to the personal rights of the deceased’s relatives alone. Such rights are derived from a series of provisions designed to ensure the development of personality as far as possible (although it is more limited than among living persons), which is only possible if the protection extends beyond death.

The Austrian Supreme Court (hereinafter: Oberster Gerichtshof or OGH) has recently been involved in three civil proceedings, each of which concerned the rights of the same deceased. The deceased, who had been accused of murder and was in custody, committed suicide shortly before the trial against him regarding the accusation of murder began. In two defamation cases, the respective lawsuit of the widow of the deceased (‘The Plaintiff’) was filed against a natural person and in one case against a media publisher under the Austrian Media Act (‘MedienG’).

The essential questions in these proceedings for defamation were, first, whether a violation of the presumption of innocence is conceivable at all in the case of a deceased person and, subsequently, whether a violation of the presumption of innocence can entail the claims arising from the violation of the post-mortem right of personality, where the truth of the defaming allegations complained about by the widow of the deceased person can be essentially proven to be true.

The Plaintiff argued that, according to section 7b of the MedienG, a violation of the presumption of innocence leads to claims under media law: media publishers must always point out in any reporting of a case which happens before conviction that guilt has not been proven. In the absence of such a reference – if the other prerequisites for entitlement are met – a claim arises.

With regard to claims against a natural person rather than an entity, the Plaintiff argued that the presumption of innocence is a consequence of Article 6 of the European Convention on Human Rights (ECHR), so that a stipulation under section 7b of the MedienG would not be needed, and furthermore, that the presumption of innocence is still in force even after his or her death.

The OGG disagreed with this argument of the Plaintiff. In the decision 6 Ob 226/16b, the OGH very briefly states that section 7b of the MedienG does not serve to protect the presumption of innocence in relation to a deceased person. According to the OGH, the post-mortem right of personality does not already protect against being designated in a report as the perpetrator of a criminal offence only because the deceased has not been convicted for this punishable offence. Therefore, the scope of the presumption of innocence of Article 6 of the ECHR and section 7b of the MedienG in the context of post-mortem personal rights still leaves room for the defendant to prove the truth of the assertion.

The view of the Supreme Court also derives from the following considerations.

The protection of the presumption of innocence is designed to prevent media prejudices and their possible impact on the outcome of criminal proceedings. It therefore ends with the termination of the criminal proceedings. The presumption of innocence therefore primarily concerns the preliminary stage of the judicial decision and does not serve to protect honour. A claim for violation of a ‘post-mortem presumption of innocence’ would provide protection that goes beyond the protection due to the living. It is generally accepted that the protection of the dead cannot go further than that of the living.

The protection of the presumption of innocence shall cease if the accused cannot be prosecuted for the offence in question. The person concerned is to be protected with regard to the court proceedings, not ad infinitum. If it has been established that no criminal prosecution can be carried out against the person concerned, a claim under section 7b of the MedienG (which directly imposes a presumption of innocence on the media by law), for example, is no longer possible because...
the person concerned is no longer ‘suspected’ of a judicially punishable offence.⁵

This also corresponds to the decision of the ECHR of 2 February 2007, 26.606/04, Falter v Österreich,⁶ in which the ECHR condemned Austria for the violation of freedom of expression after the final discontinuation of criminal proceedings for a violation of Article 10 of the ECHR. In the context of a report in the magazine Falter, the Higher Regional Court of Vienna had accepted the violation of the presumption of innocence for the chairman of the Vienna Freedom Party at the time, Hilmar Kabas, because Falter had presented him as guilty without reference to the presumption of innocence, even though the criminal proceedings against Hilmar Kabas had already been discontinued. In particular, the ECHR assumed that the freedom of expression of Falter had been violated because, at the time the article was published, the investigations against Hilmar Kabas had already been finally terminated, so that the article in question could not influence the outcome of criminal proceedings. In this decision, the ECHR also reminded the Austrian judiciary that Article 10 (2) of the ECHR leaves little room for restriction with regard to a discussion of issues of public interest. From the point of view of the ECHR, the Falter article was justified in that it was indeed not unreasonable to doubt the discontinuation of criminal proceedings.⁷

Although the criminal proceedings against Hilmar Kabas had already been discontinued and although Falter could not prove his guilt but could only cite doubts about his innocence, the ECHR considered the press report to be justified. In a case where the criminal proceedings were not even discontinued at the time of the defendant’s death, this must be all the more true.

As a result, the decisions of the Supreme Court are not objectionable regarding the scope of the presumption of innocence. If anything else were to apply, this could lead to intolerable results and an unacceptable restriction of the fundamental right to freedom of expression under Article 10 of the ECHR.

Notes
1 S 16 of the Austrian Civil Code (AGBG) and Art 8 of the European Convention on Human Rights (ECHR) and others.
2 Posch in Schwimann/Kodek (Hrsg), ABGB Praxiskommentar Aufl. 4 (2011) to s 16 ABGB, Rz 48 ff; OGH, 6 Ob 9/06a, OGH 1 Ob 341/99z, OGH 6 Ob 283/01p, OGH 4 Ob 112/10b, OGH 6 Ob 283/01p, OGH 6 Ob 193/17a, OGH 6 Ob 226/10b, OGH 6 Ob 193/17a.
4 Hanusch, Kommentar zum Mediengesetz (Commentary on the Austrian Media Act), s 7b Rz 5.
6 ÖJZ 2007, 663/664
May the parties derogate both general and special jurisdiction in Italy?

Any lawyer dealing with international contracts knows that reaching an agreement on the jurisdiction clause may be quite a difficult task, because each party generally feels more comfortable knowing that disputes arising out of the contract will be referred to a court system it is familiar with. Any such lawyer also knows that the bargaining strength of the parties is only one of the factors to be taken into consideration in negotiating these clauses and is possibly not the key one.

The first issue to consider carefully is whether the clause is valid and effective under the laws of the party that agreed, under an international contract, to be sued before a court of a foreign country. In particular: what happens if the defendant sues before a domestic court challenges the clause claiming that a foreign court is to have jurisdiction? The Italian Corte di Cassazione (Court of Cassation) has recently handed down two interesting judgments on these issues.

Legal framework

The defendant’s domicile or residence in Italy is the general criterion for the jurisdiction of the Italian courts (the citizenship being a connecting factor only in some residual matters).

The parties may conventionally accept the jurisdiction of a foreign court in writing; lacking such an agreement, the Italian defendant may sue before a foreign court can object to the lack of jurisdiction in its first defence.

European Union Regulation 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 (the ‘Regulation’) also provides the criterion for the domicile of the defendant as the general criterion for the attribution of jurisdiction.

According to such Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. The defendant’s domicile criterion may be waived in cases of special jurisdiction because of: (1) the particular subject matter of the proceedings (ie, in case of contractual obligations, civil claims for damages, trusts); or (2) other procedural features (ie, in case of several defendants and closely-connected claims, action on a warranty or guarantee, counter-claims).

The Regulation also provides for an exclusive jurisdiction, regardless of the domicile of the defendants, in disputes regarding real estate, company law, trademarks and other specific matters. Moreover, if the parties have agreed that the courts of a Member State are to have jurisdiction to settle any dispute which may arise in connection with a particular contract, those courts shall have exclusive jurisdiction unless the parties have agreed otherwise, regardless the domicile of the defendant.

This notwithstanding, the issue of forum-selection clauses has been debated in Italy for quite some time.

Recent case law

By judgment no. 20349 of 31 July 2018, the Italian Court of Cassation recognises that parties’ agreements may derogate both ordinary and special jurisdiction.

According to the Court, when the parties (pursuant to the Regulation) assign to a foreign judge the exclusive jurisdiction on disputes arising from a specific legal relationship, the agreement prevails not only on the general criterion of jurisdiction, but also on the special ones.

The decision of the Court of Cassation is consistent with the literal interpretation of
THE DOLCE & GABBANA CASE: THE LATEST EPISODE IN THE 'TAX INVERSION WAR'

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The judicial case that has surrounded the iconic Italian brand Dolce & Gabbana for the last ten or more years has just recorded a further and important result in favour of the stylists. The proceedings, which started in 2007 with a tax verification served to the worldwide-known fashion company, related to the sale of the Dolce & Gabbana and ‘D&G’ brands, which had allegedly been sold at an inadequate price to Gado, a newly-established company based in Luxembourg. The accusation, in synthesis, concerned a so-called ‘tax inversion’, which is the practice of relocating a corporation’s legal domicile to a lower-tax country, while retaining its most relevant material operations (such as management, headquarters and majority shareholders) in its (higher-tax) country of origin.

The Dolce & Gabbana case: the latest episode in the ‘tax inversion war’

The judicial case that has surrounded the iconic Italian brand Dolce & Gabbana for the last ten or more years has just recorded a further and important result in favour of the stylists. The proceedings, which started in 2007 with a tax verification served to the worldwide-known fashion company, related to the sale of the Dolce & Gabbana and ‘D&G’ brands, which had allegedly been sold at an inadequate price to Gado, a newly-established company based in Luxembourg. The accusation, in synthesis, concerned a so-called ‘tax inversion’, which is the practice of relocating a corporation’s legal domicile to a lower-tax country, while retaining its most relevant material operations (such as management, headquarters and majority shareholders) in its (higher-tax) country of origin.
The fact that Gado, after its establishment, had not immediately hired employees and that the same, moreover, operated solely and exclusively according to the directives given by the Italian parent company, prompted the Fraud Department of the Italian Police and the Revenue Agency to consider the foreign company as an entity created in Luxembourg with the sole purpose of achieving significant tax savings.

After years of litigation, both in criminal matters (in 2011, at the conclusion of the investigation, the judge acquitted the defendants from the accusation of fraud and unfaithful declaration and, in 2014, from the accusation of tax evasion) and in the fiscal area for alleged undue tax advantages, a new round between Dolce & Gabbana and the Italian tax authorities has been concluded.

This time, after initial decisions to the detriment of the two designers, the Supreme Court upheld the appeals and cancelled the rulings previously rendered in June 2011, with judgments no 33234/2018 and no 33235/2018 issued on 21 December 2018.

Such decisions found their grounds on the assumption that the position of the Luxembourg company Gado (then Dolce & Gabbana trademarks), accused of externalisation and tax inversion, should be reviewed in the light of the European Union principles of freedom of establishment.

After outlining the criteria for determining the tax residence pursuant to the relevant Italian legislation, the Supreme Court focused on the concept of ‘effective management’, stating that limiting the identification of the headquarters of the foreign company exclusively to the place from which ‘decision-making impulses’ start would lead to ‘aberrant conclusions’.

The Italian judges noted that the Court of Justice of the European Union, when considering the right of freedom of establishment, had already clarified that ‘in case of a taxable subject which has the choice between two options, the Sixth Directive does not require to choose the one that implies a greater tax imposition’ and, as a consequence, that the tax advantage obtained by the entrepreneurs using the most convenient tax legislation cannot be considered undue. Moreover, ‘[w]ith regard to the phenomenon of the localization of a company’s tax residency abroad, it was […] therefore underlined that, in terms of freedom of establishment, the fact that a company was created in a Member State to use a more advantageous legislation does not constitute an abuse of such kind of freedom on its own.’

In the light of the above, the Supreme Court concluded by stating that ‘The Court of Appeal has exhausted his/her assessment in the quick consideration, purely assertive, that “the top management of Gado operated in Italy” […] without considering the activity carried out in Luxembourg that emerges from the correspondence e-mail valued in the opposite direction and transcribed in the appeal’.

In other words, since the Court found no relevant proof of artificial deception, no abuse of the right can exist in this case, because the company that owns the ‘D&G’ brands was considered to be a genuinely operational establishment.

Note

1 Freedom of establishment, based on the abolition of discriminations on the ground of nationality, includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Art 54(2) of the Treaty on the functioning of the EU (ex Art 48 TEC), that is, companies established under the conditions laid down for its own nationals by the law of the country where such establishment is effected. The freedom of establishment of companies extends to what is known as freedom of secondary establishment, that is, the setting up of agencies, branches or subsidiaries (Art 49 TFEU, ex Art 43 TEC).
Laundromat no more? Unexplained Wealth Orders in London

The United Kingdom has faced criticism due to a perception that it (primarily, London) is something of a preferred destination for those who wish to launder the proceeds of crime.1 In recent years, the UK government’s reforms in this area2 have led to, amongst other things: a new, unified anti-money laundering oversight body for all professional regulators; the launch of a coordinating National Economic Crime Centre with a focus on intelligence operations; and the introduction, through the Criminal Finances Act 2017, of new corporate criminal offences for facilitating tax evasion and of a new investigative tool called the Unexplained Wealth Order (UWO).

In November 2018, UK and global media began to report certain details from the first UWO case, which had been decided by a court in London. The judgment of the High Court in National Crime Agency v Mrs A [2018] EWHC 25343 is the first public example of enforcers’ application for and judicial examination of a UWO. Looking beyond the media headlines about the luxury spending habits of Mrs A (subsequently named as Zamira Hajiyeva), we can draw a number of instructive observations for lawyers with a financial crime or private wealth practice.

Background

In January 2018, UK enforcement agencies were empowered to apply for UWOs, which force the respondent person to explain source of the funds that they used to acquire any property with a value of over £50,000. Introduced by the Criminal Finances Act 2017, UWOs can be applied for by: the Serious Fraud Office, the National Crime Agency (the NCA), immigration officers, HM Revenue and Customs and the Financial Conduct Authority. Broadly speaking, UWOs can be sought by these public entities when there is an obvious gap between the value of an asset and the income of the person who appears to own it, for example, a foreign politician or senior military officer who claims to earn only a modest salary yet owns a range of overseas properties.

When determining the application, the High Court must be satisfied on the balance of probabilities:

- that the person is a ‘politically exposed person’ (PEP) (see below) of a state beyond the European Economic Area; or
- that there are reasonable grounds for suspecting that the person, or someone connected to the person, is or has been involved in serious crime

Incorporated by reference to the European Union’s Fourth Money Laundering Directive (EU Directive 2015/849), the definition of PEP is ‘a natural person who is or who has been entrusted with prominent public functions’. The circumstances in which someone may be considered to be a PEP are widely drawn and include the immediate families and associates of PEPs. In the Hajiyeva case, the Court explored the scope of that definition as the appellant disputed, inter alia, that characterisation of her husband (see below).

The subject of a UWO can be forced to explain:
- the nature and extent of their interest in the property which is subject to the order;
- how they obtained the property, and the funds used to purchase it;
- the details of any settlement or trust if the property is held on trust; and
- any other information in connection with the property as may be specified by the court.

If the subject of a UWO is unable to explain, and prove, the source of their funds, or fails to respond to a request to explain the source of the funds, then the property may be subjected to subsequent civil recovery proceedings, under Part 5 of the Proceeds of Crime Act 2002 and by the above mentioned public bodies.
UWOs have been characterised as a draconian measure as applications can, and presumably often will, be made without notice to a respondent, who must then shoulder the burden of justifying their wealth. In addition, the court can impose interim freezing orders on assets at the same time as a UWO, in order to prevent the relevant property being dealt with in any way.

The law surrounding UWOs represents a close interface between the criminal law and civil enforcement. Whilst a UWO is essentially an order to provide information and documents, UWOs can have serious consequences for the respondent, whether or not they comply with its terms. While the court must still be presented with evidence, and the respondent is entitled to challenge the allegations at hearings after the initial *ex parte* application (made without notice), it is fair to say that UWOs enable UK authorities to cause potentially significant disruption to their targets and to ultimately seize suspected assets, without actually securing a criminal conviction at trial. Therefore, lawyers, accountants, tax advisers and private wealth managers should understand how UWOs work and why their clients might be targeted.

The Hajiyeva case

In October 2018, it was publicly reported that Zamira Hajiyeva, wife of the former chairman of an Azerbaijani state bank, was the subject of the UK’s first UWO obtained by the NCA. The UWO, issued in February 2018, required Mrs Hajiyeva to explain the source of funds used in the acquisition of two UK properties reportedly worth a combined £22m. Mrs Hajiyeva’s husband is currently serving a prison sentence in Azerbaijan, having been convicted of fraud and embezzlement relating to his tenure at the head of the International Bank of Azerbaijan.

The High Court’s judgment reveals points of note. First, the Court applied apparently wide latitude in respect of the evidence the NCA could rely upon, at what was a purely investigative stage of proceedings. Second, the Court rejected Mrs Hajiyeva’s argument that the UWO process breached the rule against self-incrimination and spousal privilege relating to his tenure at the head of the International Bank of Azerbaijan.

The court’s decision caused considerable media interest, demonstrating the invasion of privacy and reputational harm that an individual can face as part of UWO proceedings. Although the Court, in this instance, initially granted Mrs Hajiyeva an anonymity order, it refused to maintain that confidentiality once the proceedings were resolved. It is reasonable to expect that any advisers to, or business associates of, Mrs Hajiyeva would have had cause to consider their own relationship with her, and the adequacy of any risk management measures they had in place.

It is quite possible that the Hajiyeva case will be the first of many. Shortly after the UWO was granted earlier this year, the *Financial Times* quoted a senior officer of the NCA as saying, “we have a number of other cases which we’re currently developing, involving both PEPs and people with links to serious crime. We have live investigations into professional enablers.” Professional enablers – such as lawyers, trust companies, and accountants – have been a key focus of the NCA and its predecessor agency for some years now. That has found support from various quarters, including NGOs such as Transparency International and Global Witness, and certain Russian exiles and dissidents, who have proposed targeting the wealth of Vladimir Putin’s associates living in the UK.

When considered alongside other developments in this area, such as the launch of the new National Economic Crime Centre as a coordinating hub
for certain enforcement agencies, the availability and use of UWOs demonstrate an escalation in the pre-existing trend toward greater economic crime enforcement within the UK. Therefore, all businesses – including law firms – should review and refresh their financial crime policies and procedures accordingly.

This apparent escalation is consistent with both: (1) reported policy considerations regarding the national security threat presented by Russia; and (2) the UK government’s recently published Serious and Organised Crime Strategy, which states that the first of its four strategic objectives is ‘relentless disruption and targeted action against the highest harm serious and organised criminals and networks’ and notes that the government ‘will use new and improved powers and capabilities to identify, freeze, seize or otherwise deny criminals access to their finances, assets and infrastructure, at home and overseas including Unexplained Wealth Orders and Serious Crime Prevention Orders’.7

Whilst such sentiments are laudable, it remains to be seen whether the current focus really is the start of a significant and (crucially) lasting change in enforcement appetite and practice in the UK. Relevant clients and their professional advisers should keep an eye on when, how and where UK enforcers next reach for the UWO component in their toolkits.

Notes
1 For example, see the Transparency International ‘Paradise Lost’ report of 2016: www.transparency.org.uk/publications/paradise-lost/
4 Henry Foy and Barney Thompson, ‘Are unexplained wealth orders the cure for Britain’s reputation as a haven for dirty money?’ Financial Times (30 April 2018) www.ft.com/content/8ea63e4-43e2-11e8-93cf-67ac3a64f8fd.5
6 Chatham House, Managed Confrontation: UK policy towards Russia after the Salisbury attack (30 October 2018). See also the House of Commons Foreign Affairs Committee, Moscow’s Gold: Russian Corruption in the UK (21 May 2018).

Cross examination of an expert witness

‘Cross examination is the greatest legal engine ever invented for the discovery of truth’ – John Henry Wigmore

Once you have done your report as an expert, met with the other expert and completed the joint memorandum, the final stage of the work is the trial itself. This is where all the work that has been completed so far comes together and there is the chance for the other side to test the evidence and opinions that you have already articulated. As such it is one of the most exacting phases of the legal process, yet also one of the most important. The preparation is also probably the most intimidating stage of the work that you will complete as an expert.

I have given evidence a number of times both in court and also as part of a deposition, which is the process in the United States whereby cross examination happens before the trial starts. The most important advice I can give to anyone is to be well prepared. It is never possible to think of everything but the opportunity to re-read your report and read the witness statements and the other experts’
report(s) often will provide good pointers as to what the areas are that may be covered. However, it is impossible to predict all the angles and so your capability as an expert will undoubtedly be tested. I regard this as an opportunity to show the depth of your knowledge.

Many trials are now resolved prior to the hearing and, as a result, fewer cases are coming to court. There are a large number of experts who have never therefore needed to give verbal evidence in court and so will never have had to be cross examined.

For anyone going into this process, I would always encourage them to relax and remember they are not on trial. The expert does not deal with points of law, but is there to explain the normal process that would be followed by a reasonably competent practitioner in their field of expertise. This obviously is a problem in that it is not how you, the expert, would have acted; it is how a normal person engaged in the field would have acted.

There are a number of important guidelines which experts called to give evidence may like to remember:

- Think about your answer and make sure it is the answer to the question.
- Don’t be rushed.
- Don’t get riled.
- Never be concerned about not knowing the answer or not having considered an aspect of the evidence (if this is the case, just say so).
- Always reply to questions in full – you never know when that will be your last chance to make a specific point.
- Provide your answers to whoever is going to make the final decision in the case; that is, the jury for jury trials and the judge for non-jury trials.
- Keep it clear and simple.
- Ensure that what you say is consistent with your report, the evidence to the court and any previous answers you have given.
- Avoid jargon; do not use acronyms, however prevalent they are, in your field, as they will always put the listener off.

- Make all your points firmly and refer to any assumptions you have made (alternatively, caveat your answer).
- Never agree to any opinions in cross examination but put your views or opinions in your own words. This is a standard ploy of cross examination barristers with a view to leading you into an area outside your expertise. Be very careful of anything hypothetical.
- Always end an answer with your conclusion and opinions.
- A good answer to a question or scenario that you largely agree with is to say, ‘Yes, but with reservations’. This is not a full agreement, so you cannot be represented with something that you previously agreed with, and it will normally mean that the judge will then ask what the reservations are. This enables you to provide the full reasoning and views without appearing to wasting the courts’ time with overly-long answers.
- Remember this is not a point-scoring exercise; you are there to defend your position and no more. The real facts and opinions should have been in your report.
- Check what you should call the judge.
- Remember that credibility comes from never overstating a position.
- I always find it a good solution to quote from your report, as you will have thought about this in detail and written it in a balanced way.
- Remember ‘LADS’. One very senior US advocate once told me that giving evidence was easy if you just remembered the acronym ‘LADS’ which stands for:
  - listen to the question asked;
  - answer the question asked and only that;
  - don’t argue; and
  - be short and succinct.
I always like to attend court before being called to give evidence. This gives you a chance to see the barristers in action and get a feeling for their questioning style.
We all know it is hard to be a parent. The difficulty of knowing when, and when not, to relinquish control of one’s offspring in far-flung places is one which large international businesses also have to face. International parents with subsidiaries operating in countries with a very different cultural and political environment (to that to which the parent is accustomed) can, in certain circumstances, find themselves unwittingly being held responsible for the actions of wayward offspring.

Recently, the consumer conglomerate Unilever had to deal with this issue when it was facing a claim for negligence based on the allegedly negligent actions of its overseas subsidiary. Ultimately, Unilever was not held responsible for the actions of its subsidiary, but this case provides a timely reminder of the circumstances which may give rise to parent company liability.

When is a parent company liable in tort for the actions of its subsidiaries?

This is a relatively new concept, but is a fascinating developing body of English case law. In essence, a parent company may owe a duty of care to third parties affected by the operations of its subsidiaries. The landmark decision of Lungowe v Vedanta Resources introduced this concept with the Court of Appeal’s ruling that a number of claimants could pursue their claim against a Zambian mining company and its English parent in the English courts.

In this case, the residents of the Zambian city of Chingola brought proceedings against Vedanta Resources plc, the UK-incorporated parent company, and Konkola Copper Mines (KCM), its Zambian subsidiary, for personal injury, damage to property and loss of income caused by water pollution from waste discharged from the Nchanga copper mine. The mine was owned and operated by KCM.

The claimants successfully argued, at an interlocutory hearing, that Vedanta owed them a duty of care because, inter alia, it exercised substantial control over KCM, as evidenced by:

- a sustainability report, stressing that oversight of all of Vedanta’s subsidiaries rested with the Board of Vedanta;
- the existence of management and shareholder agreements, under which Vedanta was obligated to provide various services to KCM, including employee training;
- Vedanta’s financial support for KCM (in the region of US$3bn); and
- a former employee who testified about the high degree of control Vedanta exercised over KCM’s operational affairs, noting ‘almost all senior positions at KCM were given to people from Vedanta Group Companies’.

The Test

Lord Justice Simons summarised the factors the court would consider when imposing a duty of care on a parent company. The usual test for the existence of a duty of care is as follows:

- the damage complained of was foreseeable;
- there is a relationship of sufficient proximity between the parent and the subsidiary; and
- the circumstances are such that it is fair, just and reasonable to impose a duty of care on the parent for the acts of the subsidiary.

A duty may be owed by a parent to the employee of a subsidiary, or a party directly affected by the operations of that subsidiary in the following circumstances:

- where the parent has taken direct responsibility for devising a material health and safety policy, the adequacy of which is the subject of the claim; or
- the parent ‘controls’ the operations which give rise to the claim.

Simons LJ also endorsed the ‘helpful guidance’ of Chandler v Cape, which described circumstances in which the three-part negligence test referred to above may, or may not, be satisfied:
• the businesses of the two are in a relevant respect the same;
• the parent had or ought to have had superior or specialist knowledge compared to the subsidiary;
• the parent had knowledge of the subsidiary’s systems of work; and
• the parent knew or ought to have foreseen that the subsidiary was relying on it to use that superior knowledge to protect the claimants.

Simons LJ further clarified that point one of the Chandler v Cape guidance requires not simply that the businesses are in the relevant respect the same, but that the parent must be well placed, because of its knowledge and expertise, to protect the employees of the subsidiary. Therefore, if both parent and subsidiary have similar expertise and knowledge and if they take joint decisions about safety, which the subsidiary implements, both companies may owe a duty of care to those affected by these decisions (ie, not just employees).5

Okpabi and others v Royal Dutch Shell plc and another6

Approximately four months after the Vedanta decision was published, a similar claim followed. In this case, the claimants were the inhabitants of areas in Nigeria affected by oil leaks who brought claims against Shell’s Nigerian subsidiary and Shell. This was on the basis that Shell owed them a duty of care, because it controlled the production subsidiary incorporated in Nigeria responsible for the operation of pipelines and infrastructure in Nigeria from which the leaks occurred.

The Court of Appeal decided, at an interlocutory stage, that the claimants had not managed to establish the requisite level of proximity. Simon LJ commented that, in light of all the evidence, particularly the documentary evidence, there was nothing to suggest that Shell had a sufficient degree of control over the operation of pipelines and infrastructure. In particular, he noted that the issuing of mandatory policies may not mean that a parent has taken control of the operations of a subsidiary such as to give rise to a duty of care.

It is worth noting that the Court of Appeal referred to and distinguished from Lungowe v Vedanta Resources, on the basis that Shell’s Nigerian subsidiary (not Shell itself) operated the pipeline pursuant to a joint venture agreement with the Nigeria National Petroleum Corporation (which held the majority interest) and two other parties. By contrast, in the Vedanta case the parent company held a majority interest of 80 per cent in the subsidiary, which directly carried out the operations in question. Furthermore, there was more documentary evidence that the Vedanta parent company was involved in the work of the subsidiary and the witness evidence specifically explained how the parent company imposed its own management and operational policies on the subsidiary.

AAA & Others v Unilever and Unilever Tea Kenya Limited [2018] EWCA Civ 1532

Against that background, the Unilever case was brought and decided in 2018. The claimants were employees, former employees or residents of a Kenyan tea plantation (‘the claimants’) who initiated proceedings in England against Unilever (UPLC, incorporated in England) and Unilever Tea Kenya Limited (UTKL), the Kenyan subsidiary which operated the tea plantation.

Factual background

In 2007 there was a close-run general election in Kenya which provoked nationwide inter-tribal violence. The claimants were victims of this inter-tribal violence at the tea plantation operated by UTKL. The claimants claimed that UPLC and UTKL owed them a duty of care to take effective steps to protect them from the electoral inter-tribal violence.

Proceedings in the High Court7

The initial proceedings concerned a jurisdictional challenge brought by the defendants on the basis that the claims should not be brought in England. In order to determine this point, the Court was required to consider the prospects of success of the claim.

The claimants asserted that UTKL and UPLC, in failing to implement adequate safety measures, breached their duty of care to protect the claimants from the foreseeable risk of attack. As there had been tribal violence at every election since 1992, which even occurred in the areas surrounding the plantation, UPLC and UTKL knew, or should have known, that there was a pattern of ethnic violence in Kenya which intensified
at elections. The claimants contended that the duty of care owed to them by UPLC arose from UPLC’s assumption of responsibility for the health, safety and security of employees of UTKL, as evidenced by its high degree of direction and supervision of UTKL’s risk assessment, health and safety and crisis management policies.

UPLC and UTKL argued that the violence at the 2007 election was unique since it was the only election in which large bands of several hundred young men invaded the plantation to attack employees and residents. A commission set up after the election found that the violence in 2007 was ‘unprecedented’ and was ‘by far the most deadly and the most destructive violence ever experienced in Kenya’. As such, the levels of violence experienced and the harm caused to the claimants were not foreseeable. Furthermore, it was reasonable for UTKL to rely on the Kenyan police for protection when violence did break out.

Elisabeth Laing J held that no duty of care was owed to the claimants by UPLC or UTKL as the damage was not foreseeable by either company, since nothing remotely comparable had ever occurred on the plantation before. It was also not foreseeable that general law and order in Kenya would break down and that the police would be unable to provide adequate protection to the plantation’s residents. Furthermore, in relation to UPLC, Laing J held that it would not be fair, just and reasonable to impose a duty of care, since the duty would require UPLC to act as a surrogate police force to maintain law and order, whereas UPLC was entitled to rely on the Kenyan authorities to do that. However the judge held, albeit with hesitation, that there was a sufficient degree of connection between the activities of (and omissions to act by) UPLC and the damage suffered by the claimants to satisfy the test of proximity. Nonetheless, the claim was dismissed.

Proceedings in the Court of Appeal

The claimants appealed the decision to the Court of Appeal. The Court forensically reviewed company guidance and advice given by UPLC to UTKL regarding crisis management plans and possible warnings of electoral violence, as well as UPLC’s and UTKL’s separate management policies, procedures and corporate governance documents. The Court noted that, at the relevant time, UTKL’s business was managed locally by UTKL itself. The Managing Director of UTKL provided witness statements explaining that the UTKL management team never had any cause to refer to anybody else within the Unilever group for advice with regards the running of the plantation or its relations with the local community in Kenya. Furthermore, in 2007, since the Unilever Group had become almost exclusively a consumer goods group, there was no one in the group outside of UTKL with relevant expertise or experience and UPLC did not have superior knowledge or expertise in relation to local political or ethnic matters. The evidence showed that UTKL carried out its own crisis management training programme. It was not subject to direction from UPLC when carrying out this training, nor when drafting its crisis management and occupational health and safety policies.

The Court held that a parent company is more likely to meet the relevant test for the imposition of a duty of care where: (1) the parent has in substance taken over the management of the relevant activity of the subsidiary in place of (or jointly with) the subsidiary’s own management; or (2) where the parent has given relevant advice to the subsidiary about how it should manage a particular risk.

The Court of Appeal rejected the claim but, interestingly, disagreed with the lower court’s judgment in relation to proximity on the basis that, in relation to (1) above, the management of the affairs of UTKL was clearly conducted by UTKL itself; and in relation to (2) above, the evidence clearly showed that UTKL did not receive advice from UPLC in relation to such matters and UTKL understood that it was responsible for devising its own risk management policy and for handling the 2007 crisis, which it did.

The issue of proximity is very pertinent to the way that large international companies structure their overseas businesses and assets.

Conclusion

The Vedanta case sets the basis for when a parent company may owe a duty of care to persons affected by the operation of a subsidiary. The Shell case and the Unilever case provided good examples of how not to fall within the parameters of that duty of care, on the basis that there was not enough control implemented by the parent, over the subsidiary, to give rise to a duty of care.
Although the requirement for there to be a ‘relationship of proximity’ between the parent company and subsidiary is only one of three parts of the legal test to establish a duty of care, this part of the test will depend on the facts, as well as on the documentary evidence available, in each individual case.

**Practical points**

- Be specific about which policies apply to which subsidiaries and why, if implementing subsidiary/territory-specific policies.
- When implementing a globally-applicable policy framework, ensure that it is clear that the responsibility for implementation at an operational level is the responsibility of the subsidiaries.
- Entrust local subsidiaries with the responsibility for drafting locally-relevant policies, procedures and training, particularly if they have the relevant expertise (as in the Unilever case).
- Ensure that there are adequate records when parent companies contribute to local operational decision-making or corporate governance, to clearly record which entity had ‘control’ over the decision.
- Draft clear and cogent corporate governance policies as courts will review these documents and take them into account when attempting to establish the existence of a ‘relationship of proximity’.

**Notes**

1. [2017] EWCA Civ 1528
2. Ibid, para 83
3. Caparo Industries plc v Dickman [1990] 2 AC 605
4. [2012] EWCA 525
5. On 10 April 2019, the Supreme Court upheld the decisions of the Technology and Construction Court and the Court of Appeal on the basis that (1) there was a real issue to be tried; (2) KCM was a necessary and proper party to that claim; and (3) although England was not the proper place to bring the claim, the English courts should still take jurisdiction because substantial justice for the claimants would not be obtained in Zambia. As such, the position is ultimately unchanged.
6. 2018] EWCA Civ 191
7. [2017] EWHC 371 (QB)
8. para [37]

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Rage against the machine: crypto-frauds – one scandal too many?

What’s your mother’s maiden name? What’s the name of the street you lived on when you were seven? What was the name of your twelfth childhood pet? These are password prompt questions. We have all had to rack the recesses of our brains to remember the answers to these obscure and often inane questions, in order to access a plethora of accounts (bank, email or even Netflix) when we’ve forgotten our passwords. Ridiculous as some of these questions may seem, they are a welcome safety net: a catch-all when inevitably one, if not all, of our electronic access keys slip through our memory banks. There is no such cushion with cryptocurrencies.

Take the most recent scandal, for example. Over 115,000 investors have been left staring into a crypto-abyss, after the 30-year-old founder of Canada’s largest cryptocurrency exchange (QuadrigaCX), unexpectedly died last December. Messages of condolence were soon overshadowed after it was revealed that Gerald Cotten had, with his death, sealed off any and all access to over £145m worth of cryptocurrency. The founder and CEO was the only custodian of the password and recovery key to the digital wallet used to store the currency. Despite repeated attempts to access the funds, including the use of a specialist hacker, they remain impenetrable. The cryptocurrencies were stored in an offline facility known as a ‘cold wallet’, which does not connect to the internet.

In theory, this is to add another layer of protection and combat the problem of hacking that has plagued many previous crypto-exchanges. Mt. Gox is the most high-profile of these (the subsequent litigation will be discussed below). That exchange was crippled into oblivion by repeated instances of fraud and embezzlement, many of which were perpetrated by its own employees, causing it to file for bankruptcy as it had lost 850,000 Bitcoins (approximately US$3.3bn worth in today’s market value).
It is understandable that Warren Buffet went as far as to say that virtual currencies were ‘rat poison squared’. Who could blame him? The plethora of cyber disgraces that have reared their ugly heads since the birth of cryptocurrency have been very public and very dramatic. When things go wrong, they go wrong. This article briefly discusses how we can make things go right. We already have the tools: they just need a few upgrades.

Nothing new under the sun

There are already wealth of orders at the court’s disposal that can be useful weapons in the fight against crypto-corruption. One of the key issues that victims of virtual currency fraud face is whom to sue. This is a pretty big hurdle that must be surmounted before any meaningful action can be taken. In the fiat currency sphere, it’s simple enough to go to your bank, alert them of the fraud and work towards some form of reparation.

With cryptocurrency, things are never that simple. One cannot simply go to an exchange and demand to be made whole again. This is one of the paradoxical difficulties of virtual currencies. Satoshi Nakamoto’s 2008 white paper preached a shift away from third-party intermediaries, such as banks, controlling transactions. This approach was in direct response to the financial crash and to eliminate fraud through the use of public, decentralised ledger technology known as Blockchain. Hence the birth of Bitcoin.

On the one hand, punters were drawn to crypto because of a deep-seated mistrust of ‘the man’ post-crash. However, cryptocurrencies are no better. In fact, their decentralised nature breeds corruption, with fraudsters dreaming up newer and more nefarious methodologies. A key contribution to these advancements is the fact that, despite the public nature of Blockchain, user’s identities are masked through layers of encryption. Therein lies the rub: how to sue when you don’t know precisely who is or are to be the defendants?

Mercifully, the courts are already making headway on this very issue, as in the recent case of CMOC Sales & Marketing Limited v Person Unknown and others [2018] EWHC 2230. While not a crypto-case per se, it concerned an alleged fraud, committed by persons unknown infiltrating the email account of a senior official at a company. The fraudsters then sent payment instructions purporting to come from the manager. As a result, a total of £6.3m was sent out from the company’s bank account, at Bank of China in London, to various other banks around the world. The claimant did not know who was responsible, or even where the money was.

This is identical to the crypto-arena, where assets can be pinched and bounced via proxy-servers across the globe in a matter of minutes. CMOC provides us with a template on how to act, after the claimant was awarded a Worldwide Freezing Order (WFO) and disclosure orders against the ‘persons unknown’ and third-party banks. Additionally, the dicta discussed the use of technological platforms to aid alternative methods of service when there are grounds to believe that the defendant will evade service/ where urgent relief is necessary. Service via email, Facebook, WhatsApp and by access to a data room can be effective. These tools are seamlessly transferable to crypto-fraud cases. Here, it would be relatively simple to impose a WFO against the wallet holder, who would be identified by their activity in Blockchain.

The novel order granted in the Bank of Moscow v Andrey Chernyakov litigation is another important development in the fight against crypto-asset theft. Again, while not a crypto-case, it displays the transferability of methods already employed in ‘traditional fraud’ claims. As part of the ongoing legal gripes against Chernyakov, in November 2016 he was forced to allow bailiffs to enter his London residence to search and seize his assets. Among the assets seized were a number of electronic devices. A without-notice order to image the devices and review what information they had concerning other assets was granted against Chernyakov and others who were claiming the electronics belonged to them. The second order allowed the authorities to run password ‘cracking’ software to retrieve information stored on the devices. As a result of the data gleaned, information (perhaps inevitably) came to light on numerous assets, including a hidden stash of cash in a safe in Dubai that he had failed to disclose under the requirements of a previous disclosure order. The courts will utilise advances in technology to assist victims in punishing fraudsters worldwide. Passwords do not ordinarily disappear into infinity.

Meanwhile, our friends in the United States are now looking to secure freezing injunctions and search orders. These freezing powers are accompanied by asset disclosure requirements, which can go a long way to locating assets globally. One
such order was granted in *Brian Paige v Bitconnect International, et al*, where a class action fraud claim was brought against the crypto-exchange on the grounds that it was a Ponzi scheme.

Going one step further, a freezing injunction can also subject individuals with knowledge concerning the location and identities of defendants or assets to questioning (under oath). In a crypto-context, this is a powerful device that can be used in situations when little to no information regarding the identities of the fraudsters is known. It has previously been used with great success in *Greene v Mt. Gox Inc, et al*, where the plaintiff was granted an order that allowed them to question any individual, regardless of whether they were a party to the litigation, to find out the location, status and extent of any of the defendant’s assets, including examining documents relating to their business transactions, the location of those businesses and any related companies. Additionally, search orders allow for the search and seizure of evidence when there is a real risk of dissipation. While it is not possible to physically ‘destroy’ Bitcoin or other crypto-assets, it is possible to get rid of any evidence relating to the access key or wallet, as well as any electronic devices used in the commission of the purported offence, which these orders seek to prevent.

**The way of the future?**

Despite all of this postulating and theorising, there is very little case law that has tested out these new vamped-up methods of clawing back stolen crypto in purely crypto-cases. We base most of our predictions on how to use these tools in cases where ‘traditional bad guys’ have stolen ‘traditional money’. As far as crypto is concerned, we are in uncharted territory. While some straightforward instances involving crypto-theft have been effectively aided through the use of freezing orders and disclosure orders, what will become of those unlucky thousands who have lost their investments in QuadrigaCX? Disclosure orders are all well and good when there is information that can be disclosed. Here, there is nothing. One can hardly interrogate a corpse in the absence of cryogenic recovery. Is the sophistication of new software leaving the legal system behind?

Every day there is a new scandal, a new hack, a new controversy. The latest rumours surrounding QuadrigaCX are that Gerald Cotten faked his death, to avoid the fallout from his failing business. In January 2018, five accounts linked to the exchange were frozen by the Canadian Imperial Bank of Commerce over concerns about who owned those accounts. Pay-outs from the exchange subsequently slowed, causing Cotten to funnel payments through his personal accounts to make up for any deficit. The exchange has since filed for creditor protection in Nova Scotia. This is what happens in the unregulated financial space. Crypto is still the ‘Wild West’, and although we have come some way to tackling the problem of rampant fraud and hacking, there are instances, like this one, where the law may be impotent to assist victims.

Yet Bitcoin and its sister currencies are here to stay. Regardless of claims that the bubble has burst, ten years on from its birth, crypto is still pulling in the punters. And with the punters come the fraudsters. What should be interesting to watch play out in the next few months is the introduction of ‘privacy coins’ that run on the ‘Mimblewimble’ protocol. Do not be fooled by the whimsical quality of this name. The protocol essentially adds another level of confidentiality to transactions which, in effect, makes them untraceable. It is unclear what will happen next: just as the courts appear to be making progress, new technology emerges. We must therefore ramp up efforts to meet the threat head-on. We must supercharge our existing orders by underpinning them with a comprehensive regulatory framework, as confusion begets corruption.
The new disclosure pilot for the Business and Property Courts: a co-pilot’s perspective

The new disclosure pilot scheme for the Business and Property Courts introduced by Practice Direction 51U (‘PD51U’; the ‘Pilot Scheme’) came into effect as of 1 January 2019. For the next two years, it will apply to both new proceedings and existing proceedings where no order for disclosure has been made. While the Pilot Scheme is in operation, the disclosure rules in Civil Procedure Rules (CPR) 31, 31A and 31B will not apply (save for those provisions expressly carried forward into the Pilot Scheme and their related provisions).

The Pilot Scheme was introduced with the aim of reducing the length, complexity and ultimately the cost of the disclosure process. It seeks to place greater emphasis on the parties’ obligations regarding disclosure from the very outset of proceedings. Key changes include to the duties of the parties and their legal representatives, the introduction of initial disclosure at the time of statements of case and five new models for ‘extended’ disclosure.

New duties of the parties and their legal representatives

The Pilot Scheme introduces an ongoing duty for parties to disclose ‘known adverse documents’ unless such documents are privileged. Known adverse documents are those documents that a party is actually aware are (or were previously) within its control and are adverse. However, there is no requirement that the party undertakes any further search for such documents than it has already undertaken or caused to be undertaken.

Importantly, a party is considered to be ‘aware’ if any person with accountability or responsibility within the company or organisation for the events or circumstances which are the subject of the dispute, or for the conduct of the proceedings, is aware. Parties are also required to take reasonable steps to check the position with any persons with such accountability or responsibility, but who have since left the company or organisation.

Parties have additional duties in relation to preservation of documents, including to send written notification to employees and former employees and to take reasonable steps to ensure agents and third parties do not delete or destroy documents that may be relevant to an issue in proceedings.

The parties’ legal representatives are now also required to file a Certificate of Compliance confirming that they have advised their clients with respect to their obligations regarding disclosure, issues for disclosure and extended disclosure. The Certificate must be filed as soon as reasonably practicable after the Claimant files the finalised joint DRD and in any event prior to the case management conference (CMC).

The Business and Property Courts have real ‘teeth’ to sanction those failing to comply with their disclosure obligations. Where the parties fail to cooperate with each other, or discharge their disclosure duties, the Court has the power to make an adverse order for costs, order that any further disclosure by a party be conditional on any matter the Court shall specify, or even deal with the failure as a contempt of court in an appropriate case.

Initial disclosure

The introduction of the concepts of ‘initial’ and ‘extended’ disclosure have been characterised as a ‘wholesale cultural change’ to the disclosure regime.

‘Initial disclosure’, a concept borrowed from international arbitration proceedings, requires that each party provide the key documents on which it relies at the same time as its statement of case. A significant failure to comply with initial disclosure can be taken into account by the Court when considering ‘extended disclosure’ and/or costs. Initial
Disclosure may not be required where:
- the parties agree to dispense with or defer initial disclosure, provided they record their reasons for doing so (the Court may request such reasons at the CMC and may set aside any such agreement);
- the Court orders that initial disclosure is not required; or
- a party concludes and states in writing, approaching the matter in good faith, that giving initial disclosure would require supplying more than 1,000 pages or 200 documents (whichever is greater).

Initial disclosure does not impose any obligation to undertake a search for documents beyond any search already undertaken for the purposes of proceedings (including prior to commencement of proceedings). There is similarly no duty to provide documents which have already been provided or are known to be in the other party’s possession. Parties continue to be able to make CPR 31.14-type requests for copies of documents mentioned in evidence or statements of case under similar provisions in paragraph 21 of PD51U.

Extended disclosure

Any party wishing to seek disclosure of documents in addition, or as an alternative, to initial disclosure must request extended disclosure. There is no presumption that a party is entitled to extended disclosure and the Court will only make an order where it is persuaded that it is appropriate to do so in order to fairly resolve one of the issues for disclosure. This is a marked change from the previous default to seeking standard disclosure, as the onus is now on the party seeking extended disclosure to explain in detail what is sought and why, with reference to the issues for disclosure. This seeks to impose greater responsibility on the parties to consider and agree the issues for disclosure and the appropriate scope of disclosure from an early stage.

Where a party has indicated that it is likely to request extended disclosure, the claimant must, within 42 days of the final statement of case, prepare and serve on the other parties a draft List of Issues for Disclosure in section 1A of the pro forma DRD. This triggers the successive timetable provided by the Pilot Scheme for agreeing the remaining sections of the DRD. The parties are required to agree the DRD as far as possible prior to filing by the claimant, in a finalised joint document, no later than five days before the CMC.

The issues for disclosure (a defined term) (‘Issues’) are those key issues in dispute which the parties consider will need to be determined by the Court by reference to contemporaneous documents in order for there to be a fair resolution to proceedings.

Extended disclosure on each of these Issues must be made by reference to one of the 5 ‘disclosure models’:
- Model A: ‘no order for disclosure’;
- Model B: ‘limited disclosure’;
- Model C: ‘request-led search-based disclosure’;
- Model D: ‘narrow search-based disclosure, with or without narrative documents’; or
- Model E: ‘wide search-based disclosure’.

In essence, Model B requires no search to be undertaken by the disclosing party, whereas Models C to E are search-based models of increasing scope.

Any party proposing Model C extended disclosure must also complete section 1B of the DRD, formulating specific requests for documents or categories of documents that they seek disclosure of in relation to that Issue. Parties seeking Models D or E must be prepared to explain to the Court why Model C is not sufficient.

Once the Issues and disclosure models have been agreed, the parties should seek to agree section 2 of the DRD, with the purpose of sharing information about storage of documents and how those documents might be provided, including through use of technology-assisted review (ie, the application of technology to the actual review of huge volumes of data in relatively short order to spot patterns that assist the litigator in their initial assessment/triage of, or subsequent detailed review of, the case material).

Parties should be mindful that their obligations to agree, complete and update the DRD are ongoing. The parties’ legal representatives also have duties to liaise and cooperate with one another. Based on our experience, practical considerations for the parties in agreeing the DRD have so far included the following:
- In factually complex matters where the issues are likely to be numerous and highly contentious, protracted negotiations regarding the issues and models sought are likely. It is therefore important to start the process of seeking to agree the DRD as quickly as possible after final statements of case have been served.
- Where the formulation of the Issues or the scope of disclosure sought cannot be
agreed at an early stage, this may impact the parties’ ability to consider and agree other sections of the DRD (eg, search terms and date parameters in section 2). Parties may therefore wish to consider agreeing a timetable setting longstop dates by which the parties should aim to seek agreement on the Issues or Model C requests so as not to prejudice the completion of remaining sections of the DRD.

• Parties should factor in the impact of wider case management issues. For example, where later amendments to statements of case are required, this may impact on the DRD. In cases where the costs budgeting regime applies, budgeting for disclosure costs at a stage when the DRD is still under discussion between the parties is likely to prove difficult, and parties may wish to consider postponing completion of the disclosure section of the costs budget under paragraph 22.2 of PD51U.

Resolving disclosure issues

In the event that parties are unable to resolve disputes regarding disclosure prior to the CMC, these will usually be dealt with at the CMC. There are concerns about whether the Court will have sufficient time to deal with such disputes at the CMC. In practice, parties may have a number of outstanding areas of disagreement on disclosure by the CMC and negotiations regarding the DRD may continue right up to and even following the CMC.

In our experience, the Court has been willing to grant an order permitting the parties to continue discussions on the DRD after the CMC and to re-file the DRD for the Court’s subsequent approval post-CMC. If this route is inevitable then parties should seek to agree a timetable by which to re-file the DRD. However, our view is that the preferred course is to seek agreement on the DRD as early as possible, so that the parties do not waste valuable Court time available at the CMC and subsequently risk delays to the timetable for directions usually set at the CMC. It is also advantageous to the parties that the judge deals with all relevant issues that may affect the timetabling (including disclosure) at the CMC.

One solution offered under the Pilot Scheme to deal with unresolved disputes on disclosure is the introduction of ‘disclosure guidance hearings’, available before or after the CMC. However, such hearings are only available for disputes concerning the scope of extended disclosure or the implementation of an order for extended disclosure. The parties must also confirm that they have made real efforts to resolve disputes and that the absence of guidance from the Court is likely to have a ‘material effect’ on effective case management. Hearings are also restricted to 30 minutes in length, with a maximum of 30 minutes pre-reading time.

Comment

Concerns have been raised in relation to the Pilot Scheme’s impact on front-loading costs. In our experience, the parties’ obligations to agree the DRD give rise to a substantial amount of work and negotiation of the Issues and models for disclosure. While the introduction of extended disclosure may, to some extent, have achieved the purpose of deterring parties from seeking standard disclosure on all issues, substantial negotiation of this process, particularly for more complex disputes, arguably negates any benefit gained, displacing time and cost wastage from the document review phase to earlier phases of the disclosure process.

It remains to be seen whether the Pilot Scheme’s purposes will be achieved in the long term. However, we welcome the Court’s encouragement that the parties consider the use of technology, such as technology-assisted review, to ensure that the disclosure process is completed in a cost-effective and time-efficient manner.
Ten top tips for crisis management

When an issue first arises, how a company responds in the early stages can be critical in protecting both its liability position and its reputation. It is important to be prepared, so that managing an unfolding crisis is not a purely reactive process and the correct first steps can be taken.

Immediate actions
Assess the situation to understand the key issues, materiality of the risks and potential liability in all relevant jurisdictions. Identify any immediate steps required to contain or mitigate damage. It is important not to prioritise speed over a thorough and robust approach, but actions to restrict further fall-out or isolate an issue should be taken where possible.

Formulate a team with expertise in the relevant jurisdictions and with knowledge of the business areas affected: this may include internal and external lawyers, forensic accountants and IT personnel. An investigation plan should be formulated in consultation with that team to ensure a robust process which upholds confidentiality and privilege, preserves key evidence and complies with applicable laws.

Clear procedure
The investigation plan must take into account timescales: are there any immediate reporting obligations or is there an imminent court deadline, or a need to respond to information in the public domain? Consider which employees within the business hold key information and take steps to secure their cooperation. Use discretion to maintain confidentiality: deal with sensitive information on a need-to-know basis outside of the team.

The plan should cover preserving and capturing data, reviewing evidence, conducting interviews with key custodians where necessary and producing an interim report so that further decisions can be made on any additional work or expert input required for the purpose of producing a final report.

Contemporaneous evidence can be crucial for establishing a claim to privilege, so retain a record of the client group in respect of the issue at hand, together with instruction letters and terms of reference for any legal advice obtained. Ensure that all personnel within the client group are aware of how to protect and preserve privilege so they do not inadvertently waive it.

It is also important to keep under regular review the potential outcomes of the investigation and consequences that would flow from those, together with any remediation steps or loss recovery action.

The investigation plan should set out clear reporting lines so that the decision makers within the business are appraised of ongoing developments to minimise surprises. Be flexible: as the matter evolves it may not be possible to stick rigidly to the investigation plan, so be prepared to update it.

Managing stakeholders
Think about the different stakeholders who have an interest in the unfolding issue and how to manage relations with each of them. In addition to regulatory authorities, is immediate engagement with the company’s insurers or auditors required? In terms of shareholders, if the company is listed, the crisis may trigger disclosure obligations. Suppliers and customers may also need reassurance (see ‘PR strategy’ below).

Data preservation
Consider what data and documents are relevant to the matter at hand and issue document-preservation notices to relevant stakeholders. Put auto-deletion processes of central data servers and individual devices on hold. Where it is necessary to image devices or hard drives, it is crucial to ensure the process followed is forensically sound and conducted to an evidential standard which is acceptable in the relevant jurisdictions (external experts are usually required) and that there is a record of the process. Failure to follow a robust process may be costly if...
the veracity of material which supports your case is later questioned and the supporting paper trail does not exist. Assess relevant data privacy and employment laws before accessing, capturing or transferring data.

**Exercise caution before producing new documents**

The wider team should not create unnecessary documents, given that all documents relevant to the matter (whether historic or newly created) may later be disclosed. Be mindful of sensitive issues and the language used.

**Cross-border considerations**

When dealing with different jurisdictions, keep in mind that the privilege and data protection regimes will not necessarily operate in the same way as in the United Kingdom. Where multiple jurisdictions’ laws are relevant to the matter and it is unclear which jurisdiction (or jurisdictions) proceedings may be brought in, it may be necessary to meet the highest watermark in order to maintain privilege. Local advice should be sought at an early stage and incorporated into privilege and data protection protocols.

**Third-party advisers**

Privilege may apply to the work product of third parties, depending on the circumstances. For example, in the recent ENRC litigation, the Court of Appeal held that privilege applied to materials generated by external accountants as part of a ‘books and records’ review carried out to identify systems and controls weaknesses and potential improvements, as the review was undertaken for the dominant purpose of resisting prosecution. Instructions to third-party advisers should preserve arguments about privilege by clearly describing why they are instructed and the purpose of the work to be carried out. Consider whether advice from non-lawyers should be communicated verbally in the first instance and ask that they avoid any speculation regarding possible legal implications.

**Correspondence**

Decide who will correspond with any counter-parties and avoid multiple channels of communication to prevent inconsistent messaging from different areas of the business. Obtain full instructions as to business objectives and factor that into correspondence, in addition to the relevant legal issues. For example, a continuing business relationship will necessitate a different tone of correspondence from one where relations are hostile. Focus on your best points and resist a scatter-gun approach by putting your case theory simply and consistently. Take care not to pre-empt any other party’s arguments or motivations. Correspond in a manner that keeps possible settlement opportunities open, and refer to the applicable pre-action protocol and practice direction on pre-action conduct where appropriate.

**PR strategy**

Consider whether you need to engage a specialist public relations agency to manage any reputational concerns, for example through assisting with drafting an external statement or fielding press enquiries. Pause before making external communications to ensure that the immediate PR and the medium/long-term legal and business strategies are aligned.

**Have a plan**

Processes for dealing with a crisis should be established and tested. Implementing an escalation process and appointing a designated internal core crisis team (and substitutes) can help to focus responses and allow for quick decision-making in an evolving and time-critical matter. Putting protocols in place in advance, familiarising team members with them through training, and reviewing and improving them based on test scenarios and real experiences enable effective and efficient crisis management when an issue arises.
The Commercial Court no. 3 of Valencia (‘The Court’) issued a recent decision on the international jurisdiction of the Spanish courts on damages due to competition law infringement. Previously, on 19 July 2016, the European Commission (EC) announced that it had fined some manufacturers of medium and heavy-duty trucks for their participation in a price-fixing trucks cartel covering the entire European Economic Area (EEA), from 1997 to 2011.1 Affected purchasers are entitled to claim against the truck cartel to obtain compensation for the damages suffered. In its Order of 4 October 2018, the Court ruled on a plea based on an alleged lack of international jurisdiction raised by ‘AB Volvo’ against the plaintiff, a Spanish company.

Position defended by AB Volvo in its plea

Volvo pointed out that the EC Decision of 19 July 2016 (the basis for the follow-up action brought before the Court), precisely delimits the territorial, temporal and subjective scope and perimeter of the cartel. Thus, in accordance with the nature of the action, the jurisdiction provided for in Article 7(2) of Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Recast), which provides for jurisdiction ‘in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur’, would apply.

In support of this assertion, Volvo raised that, in the Hydrogen Peroxide SA case,2 the Court of Justice of the European Union (CJEU) stated that, in cases where injury is caused by the application of additional costs per cartel action, that location must be identified in the abstract, as the place of the conclusion of the cartel. Volvo further argued that the interpretation of the competent forum cannot be so extensive as to include any place where harmful patrimonial consequences may be experienced by the action of the cartel,3 as reiterated in the recent judgement by the Lithuanian Airlines case.4

According to Volvo, the EC’s decision in the case considered was clear and the acts sanctioned did not take place in Spain. In turn, the place of production of the damage could not be identified with the domicile of the plaintiff, in accordance with a correct differentiation between direct and indirect damage arising from the cartelised commercial action.

Position adopted by the plaintiff

On the other hand, the plaintiff indicated that the correct interpretation of the EU rules and jurisprudence applicable to the case should allow the plaintiff’s domicile forum, since it is the place where the plaintiff is based to bring his/her action before the courts corresponding to the place of his/her registered office, which is also the place where the damage caused by the defendants materialised. As a result, the sale at an extra cost took place in Spain and, according to the place of production of the harmful event, the Spanish courts should be the best placed to hear this lawsuit (as they have the closest connection). The same conclusion would result from a broader Spanish constitutional perspective, in accordance with the principle of effective judicial protection.

The legal grounds for the decision

The Court first examined the content and meaning of the rule established in Article 7(2) of Brussels Recast, to the exclusion of other rules:

‘The Regulation, although it is a Community law, is a rule of discrimination of international competence between States with a nature assimilated to the private international law solutions that have preceded it. And these solutions between States are not offered by highlighting the pre-eminence of one jurisdiction over another, nor by privileging subjective criteria of any of the parties by reason of their apparent weakness or any other similar inspiration, but by identifying elements

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of connection between the object of the process in question, the vicissitudes of the action brought in each case and the accommodation that all this may merit in one or another national jurisdictional system and juxtaposed between those that may apparently be competent.’

The decision clarifies that, as an exception to the rule of conferring general jurisdiction on the defendant’s domicile (recital 15 and Article 5(1) of Brussels Recast), Brussels Recast provides for the possibility that nationals of one Member State may be sued before the courts of another Member State, in accordance with the rules of special jurisdiction for certain matters provided for by Article 7, although the case law of the CJEU has constantly pointed out that these special rules are to be strictly interpreted:

‘How have been solved the problems of identifying the competent court in actions arising from concurrent tort so far? The determining factor is to consider that it is not possible to use a biased citation of specific jurisprudential and doctrinal materials because the solution of interpretation of what is to be understood by the place of commission of the harmful act starts from the concrete analysis on a case by case basis. The idea is to measure that the place where the action is taken counts with full guarantees in an effective manner. Thus, the harmful consequences of the infraction can be recreated in the process on the allegedly injured plaintiff. This necessarily would require a recreation of the economic ties the plaintiff has maintained with the defendant or defendants, even though the action is typically tortious and non-contractual. Also, other circumstances such as accounting, market position, cost structure or the eventual extension to third parties of the damage done. On the basis of this, the places where the harmful event occurred are usually identified alternatively as those where the agreement or concerted practice restricting competition has been adopted, those where the damage or practice has developed in the market in the most visible manner or those where the damage has materialised directly. To opt for one or the other criterion demands, I will insist on it, to consider the circumstances of each case.’

This decision clarifies that to locate the place where the harmful event occurred or may occur, the following questions must be answered:

1. **Which market is affected by the anti-competitive practice?**

For the Valencian Court, in accordance with the EC decision of July 2016, it is clear that the affected market is the EU Community market. It is therefore irrelevant to consider where the meetings between the cartelists could have taken place, or where the decision-making of each of the companies that formed part of the cartel was resident, or where its registered office is, as Volvo claimed.

2. **Which Member State presents a closer connection with the specific case?**

In the present case, the answer is quite clear for the Court:

‘insofar as the sale with alleged extra costs was carried out in Valencia, through a distributor based in Valencia and being plaintiff based in Valencia, these links presented with Spain, and the Valencian courts are apparently the best placed to review the case, with all possible procedural guarantees and in an efficient manner, including the particularities of the case, the economic characteristics of the transaction or the damage allegedly suffered by the plaintiff, together with the rest of the circumstances that may be relevant to analyses this type of proceedings (pass-on defence).’

3. **Which courts have been chosen by the allegedly affected plaintiff?**

It is clear that the plaintiff had chosen the court corresponding to the place where its registered office was based and which was also closely connected to the case. According to the Court, despite Volvo’s allegations, the choice of the plaintiff did not imply an extensive interpretation of the applicable rules, since the plaintiff did not distort any of the criteria indicated to match with the place of his/her registered office.

Therefore, the Court considered that Valencia was where all the places to consider overlapped: the location of the market affected by the anti-competitive practice; the place where the harmful event occurred; and the place to which the rest of the circumstances had a close connection. For all these reasons, the Court concludes
that, in this specific case, Valencia ‘is the one corresponding to the place where the damages that the plaintiff aims to see compensated have occurred, in terms of Article 7(2) of Brussels Recast.’ The Court also contemplated the following criteria for the attribution of territorial jurisdiction to the Courts of Valencia:

• The interpretation of the rule of attribution of jurisdiction must be based on the prior assumption of a notion of the ‘EU judicial system’, which cannot be used to ineffectively regulate claims between nationals of Member States. Accordingly, ‘[t]his vocation presupposes a qualification of the precepts of the Regulation, to the point of turning them into more than just mere rules of private international law.’

• The interpretations offered by the EU legal system, intended to regulate the European judicial area, must be harmonious and in accordance with each other. In doing so, the Court noted that: ‘[t]his is why it is interesting to point out that the solution given here can be assimilated to the provisions which, for typical non-contractual matters, are still provided for in Article 4(1) of 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).’

• The applicable substantive regulation begins from the assumption of a rule of indemnity that is expressly recognised for those harmed by an anti-competitive conduct, contained in Article 72 of the Law No 15/2007 of 3 July 2007, on the protection of competition,7 and established in a procedural manner in the principle of effectiveness, which is also recognised in Article 4 of the Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance.

• Finally, the order concludes that it shall also be considered that the plaintiff acquired some products through an establishment open to the public located in a place close to his/her centre of interests and connected, at least commerc ially, to the cartel companies. Thus, the vicissitudes of these companies, that is, their corporate configuration or development of their economic turn in each region of the Union through the different distribution channels they may have established, cannot be presented as an obstacle to the plaintiff. In this way and by means of this resolution, the Court established its own international competence to hear this type of proceeding, according to the EU Regulation and its interpretation by the CJEU. However, at the time of writing, the Supreme Court, by Order dated 26 February 2019 (the ‘OSC’), has promptly indicated the criterion of Spanish territorial jurisdiction in follow-on actions in Spain, sensibly differing from the Valencian Court no. 3.

According to the OSC, as EU Regulation 1215/2012 does not attribute internal territorial jurisdiction within a member state, Spanish internal legislation should then be applied. Thus, the Supreme Court considers that the competent forums of Article 52.1.12 of the Law No 1/2000 of 7 January 2000 on Civil Procedure are applicable. This states the following:

‘In cases concerning unfair competition, the competent court shall be that of the place where the defendants have their establishments; and failing such establishment, their registered office or place of residence; and should they not have such registered office or place of residence on Spanish territory, the court of the place where the act of unfair competition was committed, or where its effects are occurring, at the choice of the plaintiff.’

Notwithstanding this, the Supreme Court surprisingly does not consider a vehicle dealership to be an ‘establishment’, in contradiction with other previous decisions.9 Therefore, the OSC has serious implications for private enforcement claims brought exclusively against Spanish subsidiaries of truck cartel manufacturers, which will concentrate in the courts of their registered office, essentially based in Madrid.

Notes
1 Case COMP/39824 – Trucks.
3 C-12/15 Universal Music (EU:C:2016:449); C-375/13 Harald Kolassa (EU:C:2015:37).
7 Ley 15/2007, de 5 de julio de 2007, de Defensa de la Competencia.
8 Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil.
NEW FRENCH LAW EXPANDS PROTECTIONS COVERING TRADE SECRETS

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New French law expands protections covering trade secrets

On 30 July 2018, the French legislature enacted Law No. 2018-670 on the protection of trade secrets (the ‘Law’), transposing the European Union Directive 2016/943 of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

Reaching beyond the current protection of intellectual property rights, the Law seeks to protect businesses against the unlawful acquisition, use and disclosure of undisclosed know-how and other valuable business and technological information. On 11 December 2018, the French Government published Decree No. 2018-1126, clarifying the conditions for the implementation of the Law. In brief, the Law provides the following:

Defining ‘trade secret’
The Law protects trade secrets, which it defines as information that: (1) is not generally known among, or readily accessible to, persons within the circles that normally deal with the kind of information in question; (2) has commercial value, either actual or potential; and (3) has been subject (by its holder) to reasonable measures, given the circumstances, to keep it secret.

The broad terms of this definition leave plenty of room for interpretation by both parties and the courts. One aspect likely to generate debate is the standard claimants will have to meet to prove that they have taken ‘reasonable’ steps to protect their trade secrets. Because trade secret holders must take reasonable steps ‘given the circumstances’, French courts will likely take into account the sector, size, financial resources and human resources of companies.

Unlawful acquisition, use and disclosure of trade secrets
The unlawful acquisition of a trade secret includes, in the absence of consent by its legitimate holder, unauthorised access to the trade secret and any other conduct which is considered to be contrary to fair commercial practices. The use or disclosure of a trade secret by a person who has acquired it unlawfully, and/or by a person in breach of a duty not to disclose or to limit its use, will also be considered unlawful. In addition, the acquisition, use or disclosure of a trade secret by a person who knew or ‘ought to have known’ that it had been obtained from another person using or disclosing it unlawfully will be regarded as unlawful.

Lawful acquisition, use and disclosure of trade secrets
In some circumstances, trade secrets may be lawfully acquired, used and disclosed. Notably, the protection of trade secrets does not apply whenever the information is acquired, used or disclosed to exercise the right to freedom of expression and information, including the freedom and pluralism of the media, or to reveal misconduct, wrongdoing or illegal activity, provided that the respondent acted for the purpose of protecting the general public interest.

Remedies
Anyone found to have unlawfully acquired, used or disclosed a trade secret may be held civilly liable. When setting the amount of damages, French courts will look at the damage actually suffered by the plaintiff, including lost profits, any unfair profit made by the infringing party and non-economic factors, such as the moral damage suffered by the holder of the trade secret. Alternatively, upon request of the injured party, French courts may award lump-sum damages amounting to the royalties or fees which would have been due had the infringer requested authorisation to use the information. Punitive damages remain unavailable under French law.

The Law empowers French courts to take any reasonable step to prevent or obtain
NEW FRENCH LAW EXPANDS PROTECTIONS COVERING TRADE SECRETS

redress for the unlawful acquisition, use or disclosure of trade secrets, including order the cessation of the use or disclosure of the trade secret; the prohibition of the production, marketing or importation/exportation of infringing goods; and the destruction or recall of infringing goods.

Courts may also grant provisional and protective measures through ex parte or summary proceedings, including the prohibition of any use or disclosure of trade secrets, provided the claimant brings the matter before a court within 20 working days, or 31 calendar days if the latter period is longer, from the date of the order.

The statute of limitations is five years from the facts relevant to the cause of action.

Bath faith claims

The Law also provides for penalties to be imposed on parties that undertake so-called ‘strategic lawsuits against public participation’ (procédure bâillon), in which legal proceedings concerning the unlawful acquisition, use or disclosure of a trade secret are initiated abusively or in bad faith — usually with the aim of intimidating or harassing respondents. Responsible parties can face a civil fine equal to twenty percent of the damages claimed in the lawsuit or, in absence of a claim, up to €60,000.

Protection of trade secrets during the litigation process

The Law provides that French courts may, either at the court’s initiative or the request of a party or a third party, restrict, without prejudice to the rights of defendants, the use or disclosure of a trade secret (or alleged trade secret) during the litigation process. Courts may, for example, restrict the production of particular documents, limit access to hearings and/or adapt the reasoning and publication of the ruling. In addition, any person who has access to documents and whose content is identified by courts as a trade secret is prohibited from using and disclosing it after the legal proceedings have ended. In the specific context of French-style pre-trial discovery, when a disclosure is likely to breach a trade secret, the court may escrow these documents during the time available to challenge the disclosure order.

Criminal liability

While the Law does not provide for specific criminal liability, the misappropriation or misuse of a trade secret may amount to a criminal offence such as theft, breach of trust, breach of professional secrecy or breach of manufacturing information secrecy.

No reform of the French Blocking Statute – yet

During the legislative process that led to creation of the Law, the bill’s authors considered amending the 1968 French Blocking Statute No 68-678, which also covers the protection of business information. This statute prohibits the communication of economic, commercial, industrial, financial or technical documents or information to be used as evidence in legal proceedings outside of France, subject to mechanisms provided for in international agreements or treaties such as the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. The Blocking Statute is notorious for creating a host of difficulties in, for example, the discovery process of cross-border investigations involving parties based in France.

The legislator ultimately decided to leave the Blocking Statute untouched for now, but the long-awaited reform of this legislation remains in simmering mode. Two members of the French Parliament have recently been asked by the Prime Minister to make recommendations for the protection of French companies against extraterritorial legislation.
Over the last decade, Switzerland has hosted several United States monitorships involving large international banks. With other countries adopting comparable enforcement mechanisms in cases of corporate wrongdoing, the number of foreign monitors conducting investigations in Switzerland could increase in the coming years and expand to other industries beyond the banking sector. While the high costs and extended duration commonly associated with US monitorships are often criticised, monitorships can result in positive shifts in corporate compliance culture and management systems after the associated fines have been settled.

As the Swiss legal landscape evolves, foreign monitors should understand the current framework and recent changes when performing their duties in Switzerland.

General framework of US monitorships

Monitors are usually imposed as part of settlements with the US federal or state agencies or regulators and the entity involved in corporate misconduct. These settlements may take the form of deferred prosecution agreements (DPAs), non-prosecution agreements (NPAs) or consent orders, and involve suspended proceedings subject to certain conditions. In the case of DPAs, the prosecutor has the discretion to file the charges or offer the agreement, which must be filed with the court for final approval by the judge. By contrast, NPAs do not involve formal charges and are only concluded between the company and the responsible agency. In addition to the disgorgement of ill-gotten gains and penalties, these agreements stipulate a review period during which the company must demonstrate good conduct and remediation of its compliance-management systems.

Monitors are not a compulsory element of DPAs or NPAs, but may be imposed depending on the specific circumstances and extent of the wrongdoing. Prosecutors should consider a number of factors, such as whether the company possesses a sufficient compliance management system, the potential benefits and whether the entity can bear the substantial costs often associated with corporate monitorships.1

A monitor will be tasked with the oversight of the company’s compliance and remediation measures. The regulatory authorities will ensure that the remediation requirements imposed under the agreement are followed by granting broad authority to the monitor appointed as the company’s ‘watchdog’, who will provide periodic reports on the company’s progress.

In the US, the federal entities most active in imposing monitorships with an international reach have been the US Department of Justice (DOJ) and Securities and Exchange Commission (SEC). State regulatory agencies are also empowered to appoint monitors in some cases, for example the New York State Department of Financial Services (DFS) for financial institutions regulated in New York.

Depending on the terms of the agreement, the company may propose potential candidates to the DOJ, who will appoint the monitor. By contrast, the New York DFS selects the monitor, with the company having limited input in the selection process. Critics of monitorships frequently cite the high costs and the lack of transparency and clarity to the selection process, including around the qualifications required, and the repetition of the same firms/individuals appointed, including former employees of the supervisory bodies. While the monitor is formally appointed by the company who pays the associated costs, the monitor is also mandated to periodically report to the supervisory authority.

Starting in 2008 with the Morford Memorandum, the DOJ has issued several memoranda over the last decade, providing guidance on tailoring the selection criteria and considerations of the potential benefits of imposing monitors in relation to the associated costs. The most recent Benczkowski Memorandum, issued in October 2018, outlines the measures companies can take to avoid monitorships. In a speech following...
the release of the memorandum, Assistant Attorney General Benczkowski noted that, in the previous five years, only about one third of corporate resolutions involving the DOJ’s Fraud Section included monitorships.2 As a result, mandated monitorships may decline under the Trump Administration and beyond.

DPAs and monitorships in other countries
Other countries have recently adopted DPAs and the accompanying possibility of corporate monitorships. For example, the United Kingdom has instituted DPAs under the provisions of Schedule 17 of the Crime and Courts Act 2013 and France introduced both DPAs and accompanying monitorships with the adoption of Sapin II. Singapore and Canada have also recently included the concept of DPAs in their law, which may allow for the appointment of monitors. Australia is currently considering the implementation of its own DPA scheme.

Monitorships in Switzerland
Although the concept of DPAs (and monitorships) does not currently exist under Swiss criminal law, a monitor as defined under US law is arguably comparable to audit or investigative agents (or mandataries, as designated by the Swiss Financial Market Supervisory Authority, or FINMA) provided for by Articles 24a and 36 of the Swiss Financial Market Supervision Act (FINMASA). FINMA may appoint such mandataries as financial intermediaries, to monitor the implementation of supervisory requirements as part of enforcement proceedings against institutions. This took place, for instance, in the cases of Coutts & Co.,3 J.P. Morgan (Suisse)4 and Rothschild Bank in connection with the 1MDB scandal and PKB Privat Bank SA, following the corruption probe into Petrobras and Odebrecht.5 The selection process for these so-called mandataries is conducted by FINMA unilaterally and would benefit from more transparency and input from the institution concerned.

While not explicitly regulated under Swiss law, foreign monitors operating in Switzerland must comply with local law. Thus far, the Swiss authorities and courts have only dealt with this issue in passing and seemingly consider monitorships to be a private matter between the foreign regulator and the Swiss company.

Swiss blocking statute (Article 271 SCC)
Foreign monitors will inevitably be privy to extensive amounts of data and sensitive information pertaining to the company and individuals, which will be reported to a foreign authority party to the agreement. Article 271 of the Swiss Criminal Code (SCC) preserves Swiss sovereignty by forbidding acts on behalf of a foreign state on Swiss territory without authorisation, if such acts are: (1) committed by a foreign authority or an official; or (2) encouraged by a foreign state. This provision applies to monitors operating in Switzerland and reporting to foreign regulators.

In the US Tax Program for Swiss Banks, Swiss financial institutions were required to disclose extensive client data (including names and account details) to US authorities, outside of legal and administrative assistance channels. In part to avoid issues in connection with Article 271 of the SCC, the Federal Council and the Federal Department of Finance granted specific authorisations to the banks to transfer information to the US authorities. While this has been criticised in practice, the courts have not provided guidance on this issue and it is unclear whether the Federal Council would approve future authorisations.

Thus, monitors reporting to a foreign supervisory authority should carefully consider any possible Article 271 SCC issues and obtain the proper authorisations before carrying out any activities on Swiss soil.

Monitorships of FINMA supervised institutions
While FINMA has not expressly clarified its characterisation of foreign monitors, in FINMA’s view the activities of monitors appointed by a foreign financial market supervisory authority may arguably qualify as on-site supervisory reviews, as defined in the Article 43 of FINMASA. Prior to 1 January 2016, foreign financial market supervisory authorities could only obtain information about supervised banks (including Swiss
branches of foreign banks regulated by FINMA) domiciled in Switzerland via administrative assistance from FINMA, pursuant to Article 42 of FINMASA.

Currently, under Article 43 of FINMASA, FINMA has a legal basis to authorise foreign supervisory authorities to carry out direct audits at supervised Swiss banks. According to recent FINMA guidelines, on-site supervisory reviews involving auditing activities would include reviews conducted by third parties, appointed by or at the request of foreign financial market supervisors. Most importantly for monitors, who FINMA may argue fall under this category, all non-public information provided by the supervised institution could not be taken away or transferred to the foreign authority by the monitor.

In our view, it is arguable whether a monitor could be considered a foreign regulator within the meaning of Article 43 of FINMASA, which expressly defines financial market supervisory authorities as ‘authorities responsible for the supervision of the audited bank’, such as the New York DFS and the SEC. Given the scope of authority, duration and investigative nature of monitorships, even those imposed by a foreign financial market supervisory authority, classifying monitors as auditors with a limited scope of review seems tenuous. The monitor is independent of any authority, is mandated and paid by the company and performs its duties autonomously, meaning that it should not be considered a foreign financial market supervisory authority. Indeed, while monitors are obligated to report to the appointing regulator, they remain independent of the authorities and are both commissioned and paid for by the company.

Should FINMA choose to view monitors as third parties appointed by foreign supervisory authorities to perform on-site reviews on its behalf, future monitoring of Swiss financial institutions would only be permissible under the framework of administrative assistance under Article 42(2) of FINMASA.

Confidentiality, data protection and banking secrecy

While independent monitors, who are nonetheless formally commissioned by the company, are not subject to attorney-client privilege, they must observe the strict confidentiality requirements under Swiss law. As the company’s agent, the monitor can inspect personal and bank client data and must adhere to the same provisions on the protection of employee, customer and bank data as well as business secrets of the company. Article 271 authorisations do not exempt the monitor from compliance with these laws, in particular Article 47 of the Swiss Banking Act and Article 6 of the Swiss Federal Data Protection Act (FDPA).

Since Switzerland does not consider the data protection laws of the US be equivalent to Swiss standards, transfers of personal or bank client data are only permissible when meeting certain requirements. Under Article 6 of the FDPA, personal data may only be transferred outside of Switzerland in limited cases, for instance when such protections are voluntarily waived by the data subject. Such waivers should be signed before the data is processed and must be in written form and expressly state the purpose and use of the data. Otherwise the monitor cannot disclose the data to the foreign authority and must redact this information accordingly.

Monitors engaged by foreign supervisory authorities to conduct investigations of financial institutions in Switzerland should bear in mind that entities, individuals and agents are prohibited from disclosing bank client data to third parties under Article 47 of the Swiss Federal Banking Act. Bank client data can only be transferred abroad to third parties if sufficiently anonymised or with proper legal justification.

Employment law considerations

Technically a third party, the monitor lacks a direct contractual duty of loyalty towards the employees of the monitored entity. Nonetheless, monitors operating in Switzerland should comply with local employee protection laws and best practice standards during their reviews, including properly informing employees of the reason for and scope of their engagement and activities before interviews. In addition, employees should be advised of the purpose, use and method of data collection as well as of their right to legal representation. Prior to conducting the interview, monitors should obtain voluntary waivers in writing that advise the interviewee of the purpose of the interview as well as of how the interview notes will be used and transferred of the outside of Switzerland. While existing employees may be obligated to cooperate with the monitor, former employees are not required to do so.
US MONITORSHIPS: THE SWISS PERSPECTIVE

Outlook: Swiss criminal law monitorships?

From experience, many trends from the US, including DPAs and monitors, will be eventually adopted in Switzerland. In March 2018, the Swiss Office of the Attorney General (OAG) published a proposal for the introduction of deferred prosecution agreements in criminal proceedings against companies pursuant to Article 102 of the SCC, modelled after the DPAs available in common law systems. Under this proposal, such agreements would include: (1) an acknowledgement of the facts; (2) the amount of fines and disgorgement to be paid; (3) measures to remediate organisational failures; (4) the appointment of an independent auditor to periodically review and report to the OAG on these measures; (5) a probationary period of two to five years; and (6) the payment of all associated costs and compensation.

Such DPAs would offer Swiss companies who self-declare and fully cooperate in the investigation an opportunity to mitigate the negative consequences following criminal convictions. Companies would still be forced to disgorge profits and pay damages resulting from the wrongdoing.

In addition to monetary restoration, the OAG has emphasised the importance of sustained remediation of organisational deficiencies in order to prevent future criminal offences. To that end, monitorships can help ensure that the company remediates its compliance processes and demonstrates the implementation of sustainable, effective compliance programs.

According to the OAG, the company convicted of the underlying misconduct would be responsible for paying the associated costs of the independent auditor. Thus, Swiss monitors would be a consideration for companies (and their counsel) who conclude DPAs with the OAG in the future. Whether or not such monitorships could be extended to American companies operating in Switzerland remains to be seen, but the Swiss Government is expected to have considered this proposal by mid-2019.

Notes
1 Memorandum from Craig Morford, Deputy Attorney General, to All Component Heads and US Attorneys, Selection and Use of Monitors in Deferred Prosecution Agreements (7 March 2008).
7 Specifically, the OAG proposed the concept of DPAs under a new Article 318bis SCPC for companies pursuant to Article 102(4) SCC. The subject of such a DPA are criminal offences according to Article 102(2), subsidiary Article 102(1) SCC.
In December 2017, a complete modification of the Ukrainian judicial system took place, bringing in an entire relaunch of the Ukrainian Supreme Court, with a fully reshaped judiciary. This ambitious step was greatly anticipated both in Ukraine and outside the country, as the new Supreme Court judges, at the outset of their work, promised to bring absolutely new standards of justice and to break away from overly formalistic approaches to law, while advancing the principles of justice and adopting the best international practices. With this approach, 2018 was expected to be the formative year for a new judicial practice in Ukraine.

When analysing the outcomes of 2018, one may be impressed with the myriad of brilliant legal stances that the new Supreme Court delivered within just one year of its operation and that Ukrainian judiciary lacked for such a long time. In this article, we have briefly examined some of the prominent judgments delivered by the Supreme Court in 2018, whereby the new court adopted genuinely new legal stances that are worth sharing with international legal community.

Mortgage-related disputes are deemed arbitrable

For quite some time, Ukrainian courts tended to refuse to consider any mortgage-related disputes to be arbitrable, but this seems to be changing. The newly-adopted Commercial Procedure Code to some extent clarified the issue of non-arbitrability, introducing a general rule: the commercial part of a dispute shall be arbitrable. The application of this rule was put to the test before the Supreme Court in April 2018.

A dispute arose between Expobank CZ and Vilnohirske Sklo over the validity of a mortgage agreement, providing for resolution of any disputes thereunder by means of arbitration in Czech Republic. One of the arguments raised by the claimant against the dispute being referred to arbitration was the alleged non-arbitrability of mortgage-related disputes, since immovable property are subject to the exclusive jurisdiction of Ukrainian courts.

The Supreme Court, in its ruling of 17 April 2018, dismissed the above-mentioned position of Expobank CZ, stating that parties had the right to submit the dispute to arbitration and that their will shall be honoured. The Court noted that exclusive jurisdiction may not extend to the case at hand, since it did not concern the immovable property per se. Namely, the dispute at hand arose over the validity of the agreement. This type of dispute, irrespective of the agreement’s subject matter, is deemed arbitrable.

Therefore, with such a new interpretation brought by the Supreme Court, opting for international arbitration in mortgage-related disputes became a safe harbour for business.

New rules for interpretation of ambiguous contracts

In April 2018, the Supreme Court held that, when contractual provisions are ambiguous, the preferred meaning should be the one that applies against the position of the party who provided the wording, that is, the contra proferentem rule. The Court acknowledged that, while the contra proferentem is absent directly in the legislation, it still may be applied for interpretation of contractual provisions.

The case concerned a dispute between FF Darnitsa PJSC and Lyudmila Zinchenko, which arose out of the purchase agreement in Ukraine’s hryvnia currency. The agreement also contained indication of the equivalent in US dollars due to the 15-fold increase in currency rate since the date of the contract. The claimant stated that the contract’s amount was fixed in US dollars and that the final amount to be paid was to be established under the current currency rate. The respondent insisted that the amount stipulated by the contract was in Ukrainian hryvnia and that all the indebtedness was already paid.

The Supreme Court noted that the wording of the contract was ambiguous...
and interpretation of parties’ will at the time of conclusion was required. The Court ultimately opined that interpretation of contract under the ordinary means established by the law was not possible and applied the contra proferentem rule, dismissing the claims so that the claimant bore the consequences of the ambiguity in the contract’s wording.

**State courts or arbitration: enforcement of defective arbitration agreements**

Defective dispute resolution clauses have been, on many occasions, considered in Ukrainian courts, often with a prevailing view of strict formality regarding their workings. With the new Commercial Procedure Code in place, a pro-arbitration stance was embedded into the law, maintaining that any irregularities in the arbitration clause or doubts as to its enforceability shall be interpreted in favour of such enforceability.

Such interpretation was carried out by the Supreme Court in the already-mentioned case *Expanbank CZ v Vilnohirske Sklo*. The Supreme Court analysed the arguments of the parties and ruled that the arbitration clause, despite certain irregularities, was enforceable. In reaching its conclusions the Court considered that nothing in the existing arbitration clause makes it impossible to establish the true will of the parties in order to refer their disputes to the Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic, as there is no other arbitral institution in favour of which the existing clause might be interpreted. Furthermore, in its reasoning the Supreme Court referred to the provisions of Article 2 of the 1958 New York Convention and concluded that ‘[o]bligation to recognise arbitral agreement requires the court to interpret any irregularities in the text of the arbitration agreement and to consider doubts as to its existence, validity, and enforceability in favour of its existence, validity, and enforceability’.

The enforcement of defective dispute resolution clauses was also at heart of the Supreme Court’s ruling of 28 August 2018 in the case *Tenachem v Prosper*. The dispute arose out of the delivery contract providing for resolution of disputes thereunder by the ‘Arbitration Court of International Commerce and Industry’. The Russian version of the contract indicated the ‘International Commercial Arbitration Court’. None of the versions was prevailing. The respondent claimed that the dispute should be referred for arbitration by the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry.

The Supreme Court dismissed the respondent’s arguments and ruled that the dispute should be settled by Ukrainian courts. In particular, the Court allowed, upon analysis of the English and Russian versions of the arbitration clause, interpretation in favour of at least Riga International Commercial Arbitration Court, Court of Arbitration of the Latvian Chamber of Commerce and Industry and International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry. None of the materials in the case file allowed for the interpretation of the unequivocal will of the parties to subject their dispute to any of the named institutions.

The Supreme Court concluded that: ‘the arbitral agreement may be recognised unenforceable due to significant error in the name of arbitral institution, to which the dispute is being subjected, (reference to non-existing institution) in case the arbitral agreement contains no indications of the seat of arbitration or any other provisions, which allow to establish the true intentions of the parties to choose a particular arbitral institution or rules, according to which the arbitral proceedings shall be carried out.’

Therefore, with the new jurisprudence brought by the Ukrainian Supreme Court towards interpretation of arbitration agreements containing some irregularities, business would gain more confidence while choosing international arbitration as a dispute resolution method.

**Abuse of right to judicial protection**

In one of the most recent cases, the Supreme Court considered whether a person may be entitled to a judicial protection of a right, which the person has abused in the first place.

The case in substance concerned two related companies, one (claimant) having sold a piece of immovable property to the other (respondent). The sole purpose of the sale of property was to prevent the claimant’s creditors from coercive debt recovery against claimant’s immovable property.

Later on, when the relations with creditors were settled, the claimant addressed the court
MANDATORY MEDIATION FOR COMMERCIAL CASES IN TURKEY: REGULATION AND RELATED CONCERNS

Takeaways
Leaving 2018 behind, one may conclude that the Ukrainian Supreme Court carried out an immense task, enhancing the rule of law in Ukraine. The Supreme Court started to increasingly examine parties’ behaviour in contractual disputes over fairness and expression of will; applied the doctrinal rules (for example, the contra proferentem rule) to the interpretation of contracts; and established a more pro-arbitration approach to mortgage related disputes, etc. With this trend now set by the Supreme Court, it is expected that 2019 will see similar and ever more progressive legal stances taken towards new matters of Ukrainian law.

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Mandatory mediation for commercial cases in Turkey: regulation and related concerns

The Turkish commercial litigation system was recently introduced to a significant change, with a new law published on 19 December 2018 in the Official Gazette. The Law on Execution Proceedings for the Collection of Monetary Receivables Arising out of Subscription Agreements no. 7155 promulgated a mandatory mediation process in respect of commercial disputes with money and compensation claims, before their litigation in the national courts.

The amendment fundamentally provides for the resolution of monetary and compensation claims, following 1 January 2019, through mediation within six weeks. This period can only be extended for a further two weeks and due to a reasonable cause. Unless the parties mutually agree on one, the mediator will be appointed by the mediation office. In the final stage, the mediator will issue a report stating whether the parties were present and reached a settlement, or whether the mediation meeting was terminated by both or either of the parties failing to attend the meeting. The claimant should attach this original and final mediation report, or a copy authenticated by the mediator, to their statement of claim. Otherwise, the court will grant the claimant a week to fulfil this requirement.

Mandatory mediation, in this sense, is shaped as a procedural prerequisite for the commencement of commercial litigation claims, the lack of which will lead to the dismissal of the case by national courts. In addition, the court will order any party failing to attend the mandatory mediation to pay all of the trial costs, irrespective of whether or not such party prevails in the merits of the case.

It is important to note that some Turkish scholars expressed their concerns regarding the mandatory mediation by contending that it can potentially breach the constitutional right of access to justice. This is because mediation, by nature, is a consensual way of resolving disputes. Even though the primary goal is to settle the dispute, parties are not required to settle. The latter innately renders the mechanism optional. Therefore, if a party is not willing to settle from the outset, mandatory mediation constitutes an impediment for access to justice.

The new amendment is mainly criticised for being too broad in substance. This is because, with the new amendment, mandatory mediation is now required for
every commercial matter relating to monetary and compensation claims. However, as stated by many practitioners in Turkey, the nature of the dispute in question can sometimes be unclear and can need to be clarified by the courts first hand. Hence, the test for ‘commercial disputes’ is hard to determine for the parties before going to mediation. There are some types of action in which the substance of the claim is initially uncertain, such as negative declaratory actions and the actions for the annulment of objection raised against an enforcement order, but which still relate to monetary conflicts. In such situations, the requirement for mediation is once again disputable and can potentially give rise to a loss of right.

To conclude, mandatory mediation for commercial cases can theoretically be useful in the sense that it makes the parties think twice before going to court, thereby potentially reducing the heavy work load of the national courts. However, the broad application of Law no. 7155, combined with ambiguity whether certain types of actions fall within the scope of this prerequisite, will arguably raise concerns and problems in the application of the new amendment.

Turkey was in a state of emergency from 21 July 2016 to 19 July 2018. The state of emergency had been declared in the wake of the failed military coup attempt of 15 July 2016. Pursuant to the former version of Article 121 of the Turkish Constitution, which was then in force, the Council of Ministers could issue decrees having the force of law, which are immediately effective but still submitted to the parliament for confirmation. Many laws were amended as a result of these state-of-emergency decrees having the force of law, including the Turkish Criminal Procedure Law no 5271 (CPL).

As the force of law for state-of-emergency decrees would expire at the end of the state of emergency, these amendments were later codified into laws (being slightly amended in some instances) and enacted as laws by the Turkish parliament. Furthermore, the parliament also directly passed some additional laws regarding the CPL during the state-of-emergency period. All these laws amended the CPL multiple times, namely with laws dated 10 November 2016, 24 November 2016, 20 July 2017, 1 February 2018 and 25 July 2018.

Criminal complaints

In Turkish criminal law practice, criminal complaints are almost always investigated by the public prosecutors and dismissed only if the collected evidence is considered insufficient to file a criminal lawsuit. This usually leads to the investigation of almost all sorts of criminal complaints, including frivolous ones. Therefore, an amendment was made to reduce the workload of public prosecutors for such cases.

Pursuant to the amendment to Article 158 of the CPL, the public prosecutor may decide not to initiate a criminal investigation if: (1) it is clearly understood without any further research that the complained act does not constitute any crime; or (2) the complaint is of an abstract and general nature. In such cases, the complained persons shall not be named as suspects and such files shall be separately recorded in a system that can only be viewed by public prosecutors or judges. It is possible to appeal the public prosecutor’s decision not to initiate a criminal investigation.

Amendments to Turkish criminal procedure code, post state of emergency

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Hearings

Pursuant to the former version of Article 19 of CPL, a criminal court could decide to transfer a criminal hearing to another city only if the court could not possibly perform its duties. If the taking place of a criminal hearing at the relevant jurisdiction was in breach of the public order, only the Ministry of Justice could request from the Court of Appeal a transfer of the hearing. This Article 19 was amended to also grant the criminal court judges the discretion to transfer the place of hearing, provided that there are ‘actual reasons or security issues’. It is possible to appeal the criminal court’s decision to transfer the hearing.

As a means of avoiding arbitrary decisions by criminal courts, Article 178 of the CPL sets forth that, if the suspect’s request for the hearing of a witness or expert is dismissed by the court, the suspect may bring the witness or expert to the hearing, in which case the court must hear such person. However, an exception was introduced to this rule with an amendment to the same Article 178 of the CPL, stating that such requests can be dismissed by the court if they are understood to be aimed at extending the duration of the lawsuit.

As a similar precaution, an amendment to Article 188 of the CPL also set forth that if the attorney fails to appear before the court in the absence of an excuse or simply leaves the hearing, even if the presence of the attorney is mandatory under the law, the court may nevertheless proceed with the hearing. Similarly, as a precaution against a commonly-practiced delay tactic, whereby attorneys fail to show up at the final hearing, the amended Article 216 of the CPL sets forth that the absence of the mandatory attorney during the suspect’s final words shall not prejudice the rendering of the judgment by the criminal court.

Arrest

A person can be arrested only based on the rules provided in Article 100 of CPL. The rule that a person cannot be arrested for any crimes with a maximum sentence of two years of imprisonment was amended to exclude crimes relating to bodily injuries.

Pursuant to Article 105 of CPL, upon the due objection against the arrest decision, a decision must be made latest within three days. By an amendment to this article, an exception was provided to cases of organised crime, which extended the decision period to seven days in these instances.

If a suspect is released due to serving the maximum period under arrest as prescribed in CPL, the court may order other precautionary measures for the pending criminal case, such as appearing before the police at regular intervals. An amendment was made in Article 112 of CPL to clarify that breach of such precautionary measures may result in arrest, but that such arrest cannot be longer than two months or, if the case is a matter tried by high criminal courts, nine months.

Furthermore, the rules on the maximum period of arrest were also amended. Pursuant to Article 102 of the CPL, the maximum arrest period, that is, arrest as a precaution before a final judgment is rendered, is one year, unless the crime is a matter tried by the high criminal courts. This period can be extended for a maximum of six months, based on solid reasoning and only in case of mandatory circumstances. The maximum arrest period for crimes tried by the high criminal courts is two years and can be extended for a maximum of three years, based on solid reasoning and only in case of mandatory circumstances. An amendment was made to Article 102 of the CPL to extend this arrest period by high criminal courts to a maximum of five years for certain crimes such as terrorism and forceful breach of the constitutional order.

Attorney-client interviews

Article 154 of the CPL secures the rights of the suspects to interview with their attorneys at any time, in an environment where they cannot be heard talking. The written correspondence between the suspect and the attorney must also not be inspected.

However, due to the increase of arrests in the failed-coup aftermath, and as a result of the authorities’ failure to fully surveil the organisational communication between the arrested coup plotters, an amendment was made to this legal privilege. Accordingly, in cases of organised crime, the courts may decide, upon the public prosecutor’s application, to restrict the right of the suspect taken into custody to interview with his/her attorney, for a maximum period of 24 hours. In such cases, the suspect may not be interrogated during this period.
AMENDMENTS TO TURKISH CRIMINAL PROCEDURE CODE, POST STATE OF EMERGENCY

Confiscation of property

As the crackdown on the coup attempt extended to the plotters’ financial schemes (and thus suspicious transactions by various Turkish companies), the courts also considered it important to seize such companies to prevent further funding and also concealment of any assets. The CPL’s provisions on seizure or confiscation of assets gained as a result of criminal acts had been aimed at confiscation of basic assets, rather than companies, and thus became insufficient for the judicial system to be able to manage some large Turkish conglomerates.

An amendment was therefore made to Article 128 of the CPL, which set forth that the courts may appoint trustees to manage the assets of seized companies. Previously, such measures were only limited to instances where the public prosecution or court aimed to investigate crimes or collect evidence. However, the amendment to Article 128 of the CPL clarified that confiscation of a company and the ensuing appointment of trustees can only be decided by courts.

In terms of the companies whose assets were confiscated as a result of the failed coup, the state-of-emergency decrees and the following statutes set forth that the Savings Deposit Insurance Fund of Turkey (SDIF), which is normally an autonomous governmental entity that monitors the financial status of Turkish banks (and affiliates/subsidiaries), is to be appointed as trustee to the confiscated companies. SDIF is authorised to sell these companies’ assets either in the form of share purchase or asset purchase.

Appeals

Criminal court judgments can be appealed before district appellate courts, which can then be appealed before the Court of Appeal. The period to appeal a judgment before the Court of Appeal was extended from seven days to fifteen days.

Another amendment to the CPL relates to judicial monetary fines. Pursuant to Article 286 of the CPL, criminal court judgments convicting the suspect of a judicial monetary fine can only be appealed before the district appellate court. Article 286 of the CPL was amended to also clarify that imprisonment sentences that are converted to judicial monetary fines can only be appealed before the district appellate court and cannot be appealed before the Court of Appeal. However, such final decisions of district appellate courts can be subject to the objection of the district public prosecution office for reconsideration of the judgment by the same appellate division, as per Article 308/A of the CPL.

Conclusion

The amendments to the CPL were mostly reactionary measures to tackle the issues identified while dealing with the mass criminal indictments that followed the failed coup attempt. Nonetheless, the amendments were introduced into Turkish legal system on a permanent basis and it therefore remains to be seen whether they will increase overall efficiency in criminal proceedings, or will be subject to further amendments in the near future to comply with the standards of the rule of law.

Notes
1 Official Gazette dated 21 July 2016 no 29777.
2 Official Gazette dated 18 April 2018 no 30955bis.
3 Law no 6758, Official Gazette dated 24 November 2016 no 29898.
4 Law no 6763, Official Gazette dated 2 December 2016 no 29906.
5 Law no 7035, Official Gazette dated 5 August 2017 no 30145bis.
6 Laws no 7070, 7072, 7078, 7079, Official Gazette dated 8 March 2018 no 30354bis.
7 Law no 7145, Official Gazette dated 31 July 2018 no 30495.
A description of the United Arab Emirates (UAE) as the preferred seat of arbitration in the Middle East and North Africa (MENA) region is unlikely to be contradicted. The past ten years in particular have seen significant developments in arbitration and dispute resolution overall in the UAE – for example, the establishment of the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM) (the two financial free zones in the UAE which have their own laws and English-language common law courts), as well as the DIFC-LCIA Arbitration Centre and a representative office of the International Chamber of Commerce (ICC) in Abu Dhabi.

Notwithstanding these developments, the UAE’s growth as a global arbitration hub was held back by its archaic law on arbitration (comprising a handful of provisions in the UAE Civil Procedures Law). This fetter was removed in June 2018, with the enactment of Federal Law no. 6 of 2018, the UAE’s first stand-alone arbitration law (the ‘Arbitration Law’). Over ten years in the making, the Arbitration Law is modelled after the United Nations Commission on International Trade Law (UNCITRAL) Model Law.

Application and important changes

The Arbitration Law is applicable to all new and pending arbitrations seated in the UAE, unless the parties agree otherwise. The Arbitration Law does not have any applicability in any arbitrations seated in the DIFC and the ADGM, since each of these free zones has its own separate arbitration laws.

An important change is that the Arbitration Law recognises that an arbitral award is binding on the parties and shall constitute res judicata with respect to the underlying dispute and also clarifies that ratification proceedings are required for the purposes of enforcement. Article 52 provides that: ‘an arbitral award made in accordance with this Law shall be binding on the Parties, shall constitute res judicata, and shall be as enforceable as a judicial ruling, although to be enforced a decision confirming the award must be obtained from the Court.’ This is a welcome development which puts to rest the debate in the UAE over whether an arbitral award is binding until it is ratified by a competent court, thereby making it easier for a UAE-seated arbitral award to be enforced under the New York Convention.

The UAE, for the first time, also recognises a tribunal’s power to issue interim awards and supporting orders. The Arbitration Law provides that tribunals may issue the following types of interim orders on its own accord or on the application of a party and thereafter be enforced via the courts:

• orders preserving evidence that is likely to be essential to the dispute;
• orders to take the necessary measures to protect the goods that constitute part of the disputed subject matter (for example, to deposit goods with a third party, to sell perishable goods);
• orders to preserve the assets out of which a subsequent award may be satisfied;
• orders to maintain the status quo; and
• orders to take appropriate measures to prevent a current or imminent damage or a prejudice to the arbitration proceedings, or abstention from any act that may cause damage or prejudice to the arbitration.

The foregoing is important in the UAE for a number of reasons. First, while most institutional rules of arbitration in the UAE recognise the power of tribunals to issue interim awards and orders, they were rarely utilised as there was no mechanism to enforce interim orders issued by a tribunal. Following legislative recognition of enforceable interim relief (and the mechanism for such enforcement) in the Arbitration Law, it is now expected that parties in the UAE will apply for enforcement.
for interim relief more frequently. Second, the UAE courts (save for the courts in the DIFC and ADGM) do not generally award injunctive relief. The possibility of obtaining enforceable interim relief is likely to add to the popularity of arbitration as a means of dispute resolution in the UAE. A drawback, however, that is likely to persist is the time it will take for the enforcement of an interim order by a UAE court.3

The Arbitration Law also seeks to address a long-standing issue under UAE law relating to authority to enter into an arbitration agreement. Arbitration is considered an exceptional means of dispute resolution under UAE law, and consequently the agreement of the parties to divest the jurisdiction of the court must be established in unequivocal terms. Prior to the Arbitration Law, it was unclear whether a party entering into an arbitration agreement required 'specific authority' to do so, or whether 'apparent authority' was sufficient.4 The Arbitration Law now requires that a party entering into the arbitration agreement has 'specific authority' to enter into an arbitration agreement, which was confirmed recently by a judgment of the Dubai Court. Specific authority will be determined under the laws governing capacity as applicable to the party entering into the arbitration agreement. Consequently, apparent or implied authority (eg, perceived authority of a manager of a company to enter into an agreement to arbitrate) no longer appears to be sufficient. It is therefore important to verify the authority of the parties at the time of entering into an agreement which contains an arbitration clause.

While the Arbitration Law is largely based on the UNCITRAL Model Law, there are some differences. Notable provisions of the UNCITRAL Model Law which are missing in the Arbitration Law include an express provision preventing local courts from interfering in arbitrations5 and provisions encouraging global uniformity in principles of arbitration,6 rather than the application of country-specific principles and customs. Other points of divergence include:

• the Arbitration Law expressly requires a signatory to an arbitration agreement to be specifically authorised to agree to arbitration;
• the Arbitration Law expressly confirms and protects the confidentiality of arbitration proceedings and awards;
• the Arbitration Law requires a party seeking to set aside an award to institute proceedings within 30 days of notification of the award, whereas the time limit under the Model Law is three months;
• the Arbitration Law caters to the use of technology in arbitrations by making provision for conducting hearings through modern technological means; and
• the Arbitration Law makes express provision with respect to the joinder of third parties to arbitration proceedings.

The most significant and welcome changes are seen with respect to the enforcement of arbitral awards. A common complaint before the enactment of the Arbitration Law was the time-consuming ratification and enforcement process in the UAE. Under the Arbitration Law, an application to ratify and enforce an arbitral award is made to the Court of Appeal (thereby bypassing the Court of First Instance level altogether).

The Arbitration Law requires the Court of Appeal to render its judgment within sixty days of the date the application is made. In the handful of cases heard under the new law thus far, this deadline has been complied with. An application to set aside an award must be made within thirty days from the date of notification of the award or during the pendency of enforcement proceedings. An application to set aside an award does not automatically stay its enforcement, although a party may, with 'good cause', apply for a stay of execution. The court is to make a determination on granting such a stay within fifteen days from the date of the first scheduled hearing.

Setting aside an arbitration award

Article 53 of the Arbitration Law provides that an arbitration award may be set aside only on the following grounds:

• where no arbitration agreement exists, or if the arbitration agreement is void, or the time limit for rendering the award has expired;
• where a party at the time of entering into the arbitral agreement was a minor or lacked capacity pursuant to the law governing his/her capacity;
• if a party to the arbitration was unable to present its case because such party was not properly notified of the appointment of an arbitrator or of the arbitral proceedings;
• if the arbitral award excludes the application of the parties’ choice of governing law of the dispute;
• if the composition of the arbitral tribunal or the appointment of the arbitrators has occurred in a manner contrary to the law or the agreement of the parties;
• if the arbitral proceedings ‘are tainted by nullity’ affecting the arbitral award;
• if the award contains decisions on matters not included in the arbitration agreement or beyond the scope of such agreement (any portion of the award separable from the rest which comes within the scope of the agreement may be held valid).

These provisions mirror the grounds for refusal to enforce an arbitral award set out in the New York Convention.

The new law requires that a court execute a ratified arbitral award, unless it finds a cause for nullity as set out above.

**Enforcement of a foreign arbitral award**

A notable lacuna in the Arbitration Law was its silence on the enforcement of foreign arbitral awards. For a time, it was mooted that the provisions on the enforcement of domestic awards under the Arbitration Law would also apply to the enforcement of awards issued in New York Convention signatory-seated arbitrations in light of Article III of the New York Convention, which requires that each contracting state does not impose ‘substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic awards’.

The foregoing has been rendered moot since the UAE recently promulgated regulations under the UAE Civil Procedures Law, which sets out an efficient process to enforce foreign judgments and arbitral awards. Pursuant to the regulations, an application to enforce a foreign judgment or arbitral award may be made directly to a judge in the execution department of the UAE courts, who is required to issue a decision in three days. The execution judge is required to verify the following prior to issuing the decision:

• the UAE courts do not have exclusive jurisdiction over the matter;

**Conclusion**

Despite a few residual issues (such as the requirement for specific authority to enter into arbitration agreements), the Arbitration Law is unquestionably an important step in the right direction towards making the UAE a global arbitration hub. While it is too early to make a statement on the efficacy of all its various provisions, the approach of the UAE courts has thus far been positive.

**Notes**

1 Legislation in the UAE is promulgated only in the Arabic language, without any official translations.
2 Art 5(1)(e) of the New York Convention allows a state to refuse recognition of a foreign arbitral award if ‘the award has not yet become binding on the parties’.
3 A party is required to first obtain written approval from the tribunal prior to a request being made to a UAE court to order the enforcement of the interim order and the court is required to make its order within 15 days from the request for enforcement.
4 This is to some extent exacerbated by the fact that there is no system of binding precedent in the UAE.
5 Art 5 of the UNCITRAL Model Law states that ‘in matters governed by this Law, no court shall intervene except where so provided in this Law.’
6 Art 2A(1) of the UNCITRAL Model Law states that ‘In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.’
A special committee was established within the United Arab Emirates (UAE) Ministry of Economy, under the Commercial Agency Law (Federal Law No. 18 of 1981), called the Commercial Agencies Committee. The Committee was designated to look into disputes related to commercial agencies that took place between the agent and the principal. However, an amendment to the law in 2010 altered its Article 28, stating the Committee was competent to look into any dispute related to a commercial agency.

Although the Article defines the capacity of the Commercial Agencies Committee, the interpretation of such capacity was the subject of conflict between the UAE courts. Some UAE courts found that the capacity of the Committee was limited to merely covering the disputes arising between the parties of the commercial agency itself. However, other courts found that the Committee could look into any dispute related to commercial agencies prior to proceeding to the courts, no matter the parties or the subject of the dispute.

Supreme Federal Court

Accordingly, a commercial agent filed a ‘Conflict of Jurisdiction’ case before the Union Supreme Court, in Case No. 5 of 2018 (Conflict of Jurisdiction), after obtaining conflicting judgments. The commercial agent cited the Union Supreme Court as the appropriate forum, in accordance with Article 99 of the UAE Constitution and Article 35 (10) of Federal Law No. 10 of 1973, which established the Supreme Federal Court. The said articles provide the Union Supreme Court the authority to decide on a matter when there are conflicting judgments issued by different courts.

The Supreme Court issued a judgment cancelling the judgment that restricted the capacity of the Commercial Agencies Committee and found the same has the capacity to look into any dispute arising from a commercial agency.

Conclusion

This judgment by the Supreme Federal Court provides a new UAE principle that irrefutably confirms the capacity of the Commercial Agencies Committee. Moreover, the judgment provides that any party having any dispute related to a registered commercial agency must proceed to the Commercial Agencies Committee, prior to proceeding to the courts. It is believed that the court took this approach, giving the Committee wider powers as it is specialised in matters of commercial agency and is better equipped to deal with such disputes.

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Class actions have become very common in Israel in the past decade. This phenomenon is mainly due to the enactment of the Class Action law of 2006 (the ‘Law’), which governs the filing and adjudication of class actions in Israel.

Indeed, the number of class actions filed each year has increased dramatically since the Law was enacted. While some 150 class actions were filed in 2007, about 1,500 were filed in 2016 and 1,441 in 2017. On average, approximately 5.8 class actions are filed every day.

The vast majority (over 60 per cent) of class actions are in the fields of product liability and consumer rights; six per cent are in the field of insurance; 3.5 per cent are in securities; and 3.5 per cent are in banking.

The following may submit a class action on behalf of the class:
• a person having a personal cause of action that raises material questions of fact or law that are shared by all members of the class;
• a public authority with respect to a claim within the scope of one of its public goals, that raises material questions of fact or law that are shared by all members of the class; and
• an organisation (typically a non-governmental organisation) with respect to a claim within the scope of one of its public goals, that raises material questions of fact or law that are shared by all members of the class, and, in the case of an organisation other than the Israeli Consumer Council, provided that under the circumstances there would be difficulty in filing the action by a plaintiff with a cause of action.

The Law does not require a minimum threshold/number of class members. However, case law provides that the court may exercise its discretion to refuse approval of a class action in the event that the number of class members is too small.

In the event that there are several class actions on the same matter, the Law gives priority to the first plaintiff, although the court has discretion to decide otherwise.

The filing of a class action is subject to the court’s approval and discretion, and requires that several conditions be met:
• the action must raise material questions of fact and law that are shared by the members of the class;
• there must be a reasonable possibility that those legal or factual questions will be decided in favour of the class;
• a class action will be the efficient and fair way of resolving the dispute under the circumstances of the case; and
• there must be a reasonable basis to assume that the interest of all members of the class will be represented and managed properly and in good faith.

These requirements are examined by the court at the preliminary stage of the motion to approve the claim as a class action (a ‘Motion for Class Action Approval’).

The Law provides that no class action will be filed other than in a claim set forth in the Second Schedule (see below), or in a matter set forth in an explicit provision of law permitting a class action to be filed. The Second Schedule of the Law sets forth a closed list of issues and subjects with respect to which a class action may be filed. These include, inter alia:
• a claim against a ‘deal’ (as defined in the Consumer Protection Law 1982: a person selling products or providing services as a profession, including a manufacturer) with regard to a matter between the dealer and a client;
• a claim against an insurer, an insurance agent or a provident fund management company, regarding a matter between them and a client;
• a claim against a banking corporation, regarding a matter between it and a client;
• a claim based on a cause of action pursuant to the Antitrust Law 1988;
• a claim based on a cause of action deriving from the ownership, possession, purchase or sale of share capital or investment units;
• a claim regarding an environmental hazard (as defined in the Prevention of Environmental Hazard Law 1992);
• a claim based on a cause of action under the Prohibition of Discrimination in Products, Service and Entrance to Entertainment and Public Places Law 2000;
• a claim with respect to various labour law issues;
• a claim against a public authority for restitution of payment unlawfully collected as a tax, toll or other mandatory; and
• a claim against an ‘advertiser’, as defined in Section 30A of the Communications Law (Telecommunications and Broadcast) 1982, which is the Israeli anti-spam legislation.

The Law provides, as a default, an ‘opt-out’ mechanism, according to which class members must take affirmative action to remove themselves from the class. However, the court is allowed, under special circumstances, to apply an ‘opt-in’ mechanism.

One of the requirements for class certification is that the action raises material questions of fact or law that are shared by all members of the class and there is a reasonable possibility that these will be decided in favour of the class.

The court may award any appropriate remedy applicable, pursuant to the law governing the cause of action on which the class action is based, including monetary compensation (individual or class compensation), declaratory relief and injunctive relief, with the exception of punitive or statutory damages, which may only be awarded in class actions concerning the Equal Right to the Disabled Act 1998 and the Television Broadcast (Subtitles and Sign Language) Law 2005.

The Israeli legal system is based on professional judges. No juries are used in Israel. All questions of fact and law, including with respect to class actions, are determined by professional judges.

There are no document discovery or disclosure obligations prior to the filing of a class action, but parties (especially the plaintiff) are allowed to submit to the court a petition for discovery of specific relevant documents by the other party.

As part of hearing the Motion for Class Action Approval, the court is allowed to permit document discovery in the event that: (1) the documents requested to be disclosed are relevant to the requirements for class certification; and (2) the plaintiff provided prima facie evidence with respect to such requirements. In the event that the motion is accepted, pre-trial procedures are conducted in adjudicating the class action in a manner similar to any civil action, including document discovery.

In Israel, the ‘loser pays’ rule applies. However, the amount of the costs awarded is subject to the court’s discretion and there is a distinction between a case in which the plaintiff loses (that is, the Motion for Class Action Approval is denied/dismissed) and a case in which the defendant loses (that is, the Motion for Class Action Approval is accepted).

In the former case (the plaintiff losing), the costs awarded to the defendant are almost always substantially lower than the actual costs incurred in defending the case (and in some cases the court may not award such costs at all).

In 2018, the Law was amended so that each filing of a class action would require payment of court fees. Under Israeli procedure, filling civil actions is subject to payment of court fees in the amount of NIS8,000 in the Magistrates Court and NIS16,000 in the District Court (approximately US$2,200 and US$4,300, respectively), to be paid in two instalments, the first payment at the time of filing and the second before testimonies.

The purpose of this amendment is to lower the number of class actions filed and to deter the filing of groundless class actions.
The high-water mark in the enforcement of exclusive jurisdiction clauses in Singapore

In a landmark decision, the Singapore Court of Appeal (the ‘CA’) in Vinmar Overseas (Singapore) Pte Ltd (‘Vinmar’) v PTT International Trading Pte Ltd (‘PTT’) [2018] SGCA 65 (‘Vinmar Overseas’) held that the merits of a defence are irrelevant to whether proceedings should be stayed to give effect to an exclusive jurisdiction clause (‘EJC’). The decision overturned a line of prior authorities from the CA and brought the Singapore position in line with those of England and Hong Kong.

The facts

Vinmar and PTT entered into contracts for the purchase of chemical commodities. The contracts included an EJC, under which disputes between the parties were to be heard exclusively by the High Court of England. When relations between the parties broke down, PTT commenced legal action before the Singapore courts against Vinmar on the basis that the latter had wrongfully repudiated the contracts. Vinmar relied on the EJC to seek a stay of the Singapore court proceedings.

In the first instance, an Assistant Registrar (the ‘AR’) refused Vinmar’s application on the basis that it did not have a genuine or bona fide defence to PTT’s claim. In doing this, the AR applied a line of CA authority emanating from The Jian He [1999] 3 SLR(R) 432, which held that the merits of a defence are irrelevant to whether proceedings should be stayed to give effect to an EJC. The decision overturned a line of prior authorities from the CA and brought the Singapore position in line with those of England and Hong Kong.

Court of Appeal decision and reasoning

The CA allowed Vinmar’s appeal, holding that the merits of the defence are irrelevant to an EJC Application. On the facts, as there was no ‘strong cause’ to refuse a stay, Vinmar’s EJC Application was granted.

Given the significance of the issue at hand, the CA devoted a substantial part of its judgment to delving into the history and rationale behind the rule in The Jian He, before deciding that the time had come to depart from its prior decision. It arrived at this determination for a number of reasons.

First, and as matter of background, the CA noted that The Jian He had been decided against the backdrop of a line of English authorities which had interpreted the factor of ‘whether the defendants genuinely desired trial in the foreign country, or are only seeking procedural advantages’ (as laid down in the seminal decision of The Eleftheria [1969] 1 Lloyd’s Rep 237 at 242) as meaning that the merits of the defence would be a relevant inquiry in an EJC Application. However, in recent times, and ever since the House of Lords decision in Donohue v Armeco Inc and others [2002] 1 Lloyd’s Rep 425 (‘Donohue’), the English courts have been reluctant to allow parties to avoid the effects of an EJC on this basis. In this regard, the House of Lords in Donohue held that, unless the interest of other parties will be affected, an EJC will ‘in all probability’ be given effect. This change in perspective culminated in several recent English decisions eschewing any inquiry into the merits of the defence in an EJC Application (see, eg, Euromark Ltd v Smash Enterprises Pty Ltd [2013] EWHC 1627). Without the CA saying so expressly, it was evident that the rule in The Jian He was therefore no longer apace with the jurisprudential developments in other jurisdictions.1

Second, the CA took into account several normative factors which justified a departure from the rule in The Jian He.

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• Dismissing an EJC application on the basis that there is no genuine defence frustrated the principle of party autonomy. By including an EJC, parties intend that all disputes will be heard in the forum of choice, regardless of the merits of those disputes.

• The rule in The Jian He engendered uncertainty over where disputes would be held, thus undermining the ability of commercial parties to manage their risk by selecting an agreed forum in advance.

• The rule in The Jian He led to the proliferation of interlocutory skirmishes, which delayed the resolution of disputes and resulted in parties expending significant costs at the interlocutory stage of proceedings.

• While the rule in The Jian He was sometimes justified on the basis that it saved time and costs because it averted the need for the plaintiff to being fresh proceedings, this should carry little weight as the duplication of resources was attributable to the plaintiff’s choice to bring an action in breach of an EJC in the first place. Furthermore, any perceived differences in the relative convenience of litigation abroad and in Singapore should also carry little weight, as this disparity would likely have already been foreseeable to the parties when the jurisdiction agreement was made.

• Abandoning the rule in The Jian He would lead to coherence in the law. In this respect, prior to the decision in Vinmar Overseas, there was incongruity in that the merits of the defence would be considered in an EJC Application, whereas such an inquiry would be irrelevant in cases where the applicant sought a stay on the basis of forum non conveniens (an ‘FNC Application’) or a stay on the basis of the dispute falling within the ambit of an arbitration clause. The merits of the defence are also irrelevant when an anti-suit injunction is sought to enforce an EJC. It thus begged the question as to why this factor would be anomalously relevant in an EJC Application.

Third, the CA found that the doctrinal bases for the rule in The Jian He were also flawed. From its survey of the earlier authorities, the CA noted that there were two principal doctrinal grounds for the rule in The Jian He:

• The ‘No Desire for Trial Rationale’: that is, the proposition that where there is no genuine defence, the defendant does not genuinely desire trial in the agreed forum.

• The ‘No Dispute Rationale’: that is, the proposition that there is no dispute where there is no genuine defence.

The CA dismissed the legitimacy of both of these rationales. In respect of the ‘No Desire for Trial Rationale’, even if a party had no genuine defence, it might nevertheless desire trial in the agreed forum. One such instance would be where the rules of the forum might be advantageous to that party (eg, regarding costs). The CA noted that it would not be illegitimate for the applicant to seek such procedural advantages at an agreed forum: these advantages are the very fruits of the agreement and, indeed, one or both parties may have chosen the forum precisely for these advantages.

In respect of the No Dispute Rationale, in addition to the normative factors against the rule in The Jian He, the CA also opined that the ordinary meaning of ‘dispute’ did not exclude situations where one party is clearly wrong.

Having comprehensively articulated the flawed bases for the rule in The Jian He, the CA thus authoritatively overruled its previous decision and consigned the relevance of the rule in The Jian He to the past.

Commentary

The decision in Vinmar Overseas is a welcome development in Singapore law. Notably, it corrects the previous oddity that it was in some respects easier to resist a stay in an EJC Application than in an FNC Application (ie, the merits of the defence would be a relevant inquiry in the former but not the latter). Commercial parties will now be assured greater certainty that EJCs in their contracts will be effective. Practically, the ruling can also be expected to reduce delays in the resolution of disputes and costs incurred in the interlocutory stage of proceedings.

While the decision in Vinmar Overseas represents the high-water mark in Singapore jurisprudence in respect of upholding EJCs, this is not to say that ‘strong cause’ to depart from an EJC can never be proven. In its decision, the CA identified two specific circumstances where an EJC would not be given effect: an abuse of process or a denial of justice.

The CA also left open the question of whether a different analysis should apply where the EJC had been foisted upon a party that was in no position to negotiate its terms (for example, standard form contracts and
bills of lading). Arguably, the paramountcy of the principle of party autonomy loses its force in such cases. While the CA was tentatively inclined to the view that the same principles should apply even where the plaintiff was not in a position to negotiate, it expressed no final ruling on this point. The CA further left open the question of whether the risk of fragmentation of proceedings would amount to ‘strong cause’ to refuse a stay.

Vinmar Overseas is unlikely to be the last word on this topic in Singapore, especially given the questions which the CA has left open for determination at a later stage. The message from the CA, however, is unmistakably clear: barring exceptional circumstances, EJCs will be given their full force and effect and litigants should be circumspect before attempting to circumvent their operation before the Singapore courts.

Note
1 A similar change in position had also been adopted in the Hong Kong courts: see, for example, Deloitte Spa v Hong Kong Sports Industrial Development Ltd (formerly known as LeTV Sports Culture Develop (Hong Kong) Co Ltd) [2018] HKCU 2999.

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Singapore Court of Appeal adjudges on the effect of non-exclusive jurisdiction clauses and what constitutes a submission to jurisdiction

On 13 February 2019, in *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] SGCA 11 (‘*Shanghai Turbo*’), the Singapore Court of Appeal decided on two important issues in the field of conflict of laws: (1) the type of conduct by a defendant which would be construed as a submission to the Singapore court’s jurisdiction, notwithstanding jurisdictional objections raised by the defendant; and (2) in what circumstances a non-exclusive jurisdiction clause will be construed as having a similar effect to an exclusive jurisdiction clause. This decision has important implications for how a foreign defendant should conduct his/her case when he/she seeks to raise jurisdictional objections and for how jurisdiction clauses should be drafted henceforth.

The facts
In *Shanghai Turbo*, the plaintiff sued the defendant, Lui Ming, for breach of a service contract (the ‘Main Suit’). Among other things, it was alleged that the defendant, who was the former chief executive officer and a shareholder of the plaintiff, had diverted business away from the plaintiff.

The service contract contained a non-exclusive jurisdiction clause which provided that the parties submit to ‘the non-exclusive jurisdiction of the Courts of Singapore/ or People’s Republic of China’ (the ‘Non-exclusive Jurisdiction Clause’).

As the defendant resided in China, the plaintiff applied for leave to serve the cause papers out of jurisdiction on the defendant. The defendant sought to set aside service of the claim against him outside of jurisdiction on the basis that Singapore was not the natural forum to hear the claim and that China was the more appropriate forum.

However, before filing his application to have such service set aside, the defendant took steps to support an injunction application filed by non-parties in the Main Suit to restrain the plaintiff from, inter alia, diluting the shareholding of any shareholder in the plaintiff (the ‘Injunction Application’). For context, the non-parties were alleged by
the plaintiff to have acted in concert with the defendant in his breach of obligations under the service contract.

The Court of Appeal was therefore tasked with assessing whether the Singapore courts should exercise jurisdiction over the plaintiff’s claim, or whether the claim should more properly be heard before the Chinese courts.

**Court of Appeal decision and reasoning**

The Court of Appeal found against the defendant and held that: (1) the defendant had submitted to the jurisdiction of the Singapore courts by supporting the Injunction Application; and (2) the defendant had failed to show strong cause as to why the Non-exclusive Jurisdiction Clause pointing to the Singapore courts should not be given effect.

**Submission to jurisdiction**

In respect of the question on submission to jurisdiction, the Court of Appeal acknowledged the fact that the defendant’s solicitors had expressly reserved his right to dispute the jurisdiction of the Singapore court on multiple occasions and had made such reservation even prior to him participating in the Injunction Application.

Notwithstanding this, the Court of Appeal concluded that such express reservations would not be sufficient to ‘salvage conduct which was obviously meant to invoke the court’s jurisdiction’. The Court of Appeal took into account two salient factors in concluding that there had been such a submission to/invocation of jurisdiction by the defendant:

1. the defendant was not compelled to respond to or participate in the Injunction Application, but nevertheless voluntarily chose to do so; and
2. the defendant’s participation in the Injunction Application was not simply a ‘neutral procedural’ step meant to safeguard his position in the event that his jurisdictional challenge was dismissed.

The Court of Appeal noted that while, generally speaking, taking a purely defensive step may not amount to a step in the proceedings, this was not a blanket rule and much would turn on the particular context and circumstances of the case.

In terms of the facts, the Court of Appeal found that the defendant was not merely being defensive as he was seeking to obtain injunctive relief from the Singapore courts. In the Court of Appeal’s view, taking such a step would only be necessary or useful if the court actually possessed jurisdiction over the dispute. In other words, the Court of Appeal found that the defendant’s conduct could not be explained, except on the assumption that he had accepted that the Singapore courts should be given jurisdiction.

**Effect of the Non-exclusive Jurisdiction Clause**

As for the effect of the Non-exclusive Jurisdiction Clause, the Court of Appeal held that, as a starting point, the precise obligations imposed by such a clause would depend on its exact content. For the purposes of the Non-exclusive Jurisdiction Clause, it was a straightforward one which provided that parties submitted to the jurisdiction of the Singapore courts (and the Chinese courts).

On the Court of Appeal’s assessment, it was significant that the word ‘submit’ was used in the Non-exclusive Jurisdiction Clause: this indicated that the parties consented to the exercise of jurisdiction by the named courts and that they waived any objections thereto.

The Court of Appeal also drew a distinction between a case where the party sues in a named forum in the jurisdiction clause and where he/she does not. In the former case (as was the situation for the facts of *Shanghai Turbo*), a non-exclusive jurisdiction clause would be of similar effect to an exclusive jurisdiction clause and ‘strong cause’ had to be shown as to why the named forum should not exercise jurisdiction over the matter. In the latter case, as the jurisdiction clause is ‘non-exclusive’ in nature, there would not be a need to show ‘strong cause’ before a party could sue in some other forum not named in the clause.

Interestingly, the Court of Appeal also intimated that even in cases where there is a non-exclusive jurisdiction clause and where the designated forum is not known in advance (eg, where the clause gives one party the option of where to sue), such a clause could have the effect of an exclusive jurisdiction clause, regardless of where that party chooses to bring the action.

**Observations**

The Court of Appeal’s decision in *Shanghai Turbo* gives rise to significant implications both in terms of how a foreign defendant...
should conduct his/her case before the Singapore courts and in terms of how jurisdiction clauses should be drafted.

**Conduct of a foreign defendant’s case**

Should a defendant wish to contest the jurisdiction of the Singapore courts, he/she would be well-advised to refrain from taking any steps in the Singapore court proceedings, save for defensive steps which are necessary to safeguard his/her position in the main suit in the event that his/her jurisdictional challenge is dismissed. It is particularly important for the defendant to refrain from pursuing any application (whether it is his/her own application or another party’s application) as there is significant risk that such actions may be seen as a submission to the jurisdiction of the Singapore courts.

The express reservation of rights through correspondence between solicitors and even to the court would not be regarded as a pivotal factor in the analysis of whether the defendant had submitted to the jurisdiction of the court.

**Drafting of jurisdiction clauses**

Given the observation by the Court of Appeal that the effect of a non-exclusive jurisdiction clause depends on its construction, parties would also be well-advised to draft their jurisdiction clauses precisely in order to set out what their intentions are, instead of simply relying on the labels of ‘exclusive jurisdiction clauses’ and ‘non-exclusive clauses’. While the use of the ‘non-exclusive jurisdiction’ label used to mean that the Singapore courts would generally only take into account the presence of the clause as one of the factors in the *forum non conveniens* analysis, the decision in *Shanghai Turbo* now places the more onerous burden on the defendant to have to show ‘strong cause’ in order to challenge the named forum’s exercise of jurisdiction.

Given this ruling, in a scenario where parties have identified one or more jurisdictions in which proceedings may be commenced but would still want to retain the flexibility of being able to challenge the named forum’s jurisdiction on the grounds of *forum non conveniens*, it may be prudent for the parties to expressly qualify that the jurisdiction clause should not be construed as a waiver of any party’s right to object to jurisdiction on such grounds. In the face of such wording, the court may then be more likely to regard the presence of this clause as but one of the factors in the *forum non conveniens* analysis.

Ultimately, the Court of Appeal’s decision in *Shanghai Turbo* is a further affirmation of the Singapore courts’ overarching desire to give effect to party autonomy in determining the forum for the resolution of disputes. In this regard, the Singapore courts would not hesitate to construe a jurisdiction clause as having an ‘exclusive’ effect if that is the perceived intentions of the parties, even if the clause is not labelled as an ‘exclusive jurisdiction’ clause. Any decision to raise jurisdiction objections before the Singapore courts must henceforth be taken with due consideration of these recent pronouncements by the Court of Appeal.
Foreign sovereign immunity and employment lawsuits brought against foreign states in the United States

In my experience, foreign embassies and consulates operating in the United States are surprised when they get sued by their locally-engaged staff for various employment disputes (eg, breach of contract, wrongful termination and discrimination). They wonder: shouldn’t such suits be brought against their foreign sovereign employers on the sovereign’s home turf? Shouldn’t such disputes be resolved under the laws of the foreign sovereign and not of the US? How can the disputes be litigated when, under the Vienna Conventions for Diplomatic and Consular Relations, any diplomats who were involved cannot be forced to testify and the mission’s archives are inviolable?

The answers to these questions vary according to multiple factors, as seen in the case law that has developed on this subject in the US. Ministries of foreign affairs, diplomats and the international law firms who advise them should be aware of these varying factors.

First, whether a lawsuit against a foreign sovereign employer operating in the US may be brought in a US court depends primarily on whether the foreign state will be found immune from such suit. In the US there is one statute that governs immunity questions in lawsuits against foreign states: the Foreign Sovereign Immunities Act (FSIA). Under this Act, the general presumption is that foreign states, as well as their embassies, consulates, agencies and instrumentalities are immune from the jurisdiction of US courts. There are, however, several exceptions to immunity enumerated in the statute. If one of the exceptions applies to the particular matter, then the foreign state will not be immune and the court will allow the lawsuit to proceed.

The two exceptions most commonly invoked in employment lawsuits are the commercial activity exception and the waiver exception. Simply put, the commercial activity exception permits US court jurisdiction over foreign states engaged in commercial activity undertaken by the foreign state in the US or with direct effects in the US. A foreign state engages in commercial activity in the US when it acts as a private player in – as opposed to a regulator of – the marketplace.

In applying the commercial activity exception to the employment context, courts in Washington, DC – where such suits are often filed – analyse the type of work that the employee plaintiff performed when working for the foreign state. If, for example, the employee was privy to government deliberations, was included in the creation of government policy and/or exercised discretion in carrying out his/her duties, then the employee may well be considered to be part of the state’s sovereign work and could not sue under the FSIA. By contrast, if the employee lacked any involvement with government policy and carried out ministerial duties without discretion – such as a secretarial assistant – then the employee would be considered part of the state’s commercial activity in the US and would be permitted to sue the foreign state under the FSIA.

Determining whether an employee is considered commercial under this rubric can, at times, be a difficult endeavour. In El-Hadad v United Arab Emirates, for example, the US Court of Appeals for the District of Columbia found that the lawsuit brought by an auditor for the cultural attaché’s office of the United Arab Emirates Embassy could proceed under the commercial activity exception because the auditor’s work was not governmental. That is, although the auditor supervised several other employees, he lacked any discretion in carrying out his duties and he was excluded from governmental policy-making deliberations and decisions.

The other common exception invoked in employment cases is the waiver exception. This exception contemplates both explicit
and implicit waivers of immunity. An example of an explicit waiver might be an employment contract that contains a provision in which the embassy promises not to invoke FSIA immunity in the event of a lawsuit. That type of express waiver may appear in certain contracts, such as construction contracts or leases, where a corporate party is involved, but is less common in employment contracts. More often, employment contracts of embassies and consulates contain implicit waivers of immunity. An example of an implicit waiver is a choice-of-law provision that contemplates application of Washington, DC (or other local) law to the employment relationship. Under that scenario, a US court will find that the foreign state has waived its immunity because it voluntarily submitted itself to the application of US law.

Second, whether the employee’s dispute will be resolved under the laws of the foreign sovereign or of the US depends in large part on the terms of the governing contract. That is, if the employee has signed a contract which contains a choice-of-law clause, a court is likely to enforce that clause so long as it does not violate US public policy and so long as the contract was not entered into through fraud or duress.

In the US, however, many employment relationships – at least in the private corporate world – are ‘at will’, meaning that the parties do not enter into a formal contract but instead operate under the understanding that the employer may terminate the relationship for any reason or no reason at all (so long as the reason is not discriminatory) and the employee may quit at any time for any reason. Without a formal contract, it may be ambiguous which body of law will govern a dispute between a foreign sovereign employer and an at-will employee. In such instances, a court may look at which body of law was in fact applied to the relationship (eg, whether the employee received benefits according to the laws of the foreign state) or at any applicable language in the job-offer letter or employee manual.

Third, it is true that, by virtue of the Vienna Conventions, diplomats cannot be forced to testify and consular officials likewise cannot be forced to give evidence concerning matters connected to their official duties. It is also true that mission archives are inviolable. If, however, an embassy or consulate decides not to submit evidence to support its position on the merits of a case in a US court, it is possible that the court will rule against the mission.

Assume, for example, that a former locally-engaged staffer of an embassy sues the embassy alleging that she was fired because she turned 60 years old and that therefore the embassy violated the US Age Discrimination in Employment Act. Suppose the embassy’s position is that it did not terminate the staffer because of her age but rather because the Ministry of Foreign Affairs ordered the position be eliminated due to budgetary constraints. If the embassy stands on its objection that it cannot be forced to submit evidence through documents and/or sworn witness statements, the court is likely to find that the embassy failed to prove its legitimate business-reason defence and may thus rule in favour of the employee. Indeed, in discrimination cases especially, it may become important to offer evidence to substantiate any asserted legitimate business reasons for employment actions.

In sum, although foreign states can be (and often are) sued in US courts for various employment disputes, knowledge of and attention to the guidance set forth above could help reduce exposure to such suits, so international lawyers and diplomats can help foreign state missions continue to focus on their important diplomatic and consular work instead of on time-consuming litigation.

Notes
1. 28 USC s1602 et seq. See also Argentino Republic v Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989).
2. 28 USC s1605(a)(2)
3. 28 USC s1605(a)(1)
5. Although many such suits have been filed in Washington, DC, some employment lawsuits against foreign state subdivisions or entities have been filed in other jurisdictions around the US. Other jurisdictions, such as the U.S. Courts of Appeals for the Second and Fourth Circuits, have interpreted the commercial activity exception in employment cases differently to the US Court of Appeals for the District of Columbia. See, for example, Kato v Ishihara, 560 F.3d 106 (2d Cir. 2004), and Butters v Vance Int’l, Inc., 225 F.3d 462 (4th Cir. 2000).
6. This article focuses on full-time employees but much of the same common law may apply in cases involving agents and consultants working on behalf of foreign states and their entities.
7. See, for example, El-Hadad v United Arab Emirates, 496 F.3d 658, 666-668 (D.C. Cir. 2007) (setting forth test for whether employee is commercial). See also Holden v Canadian Consulat, 92 F.3d 918, 922 (9th Cir. 1996); Segni v Commercial Office of Spain, 835 F.2d 160, 165 (7th Cir. 1987).
10. For example, in one real estate case, a sublease agreement contained an explicit waiver of immunity as follows: “For
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INTERNATIONAL BAR ASSOCIATION LEGAL PRACTICE DIVISION

Can a United States court order discovery outside the US for use in a foreign proceeding?

A German company and an English company are litigating a dispute in an English court. The German company wants to obtain third-party documents warehoused in Mexico for use in the English litigation. The owner of the documents lives in the United States. The German company retains you – a US lawyer – to ask a US court to order the owner to produce the Mexican documents. Will you succeed?

US Code 28 (28 USC) section 1782 authorises US district courts to order discovery for use in certain foreign or international proceedings. The statute serves the related goals of providing an efficient means of assisting participants in such proceedings and of thereby encouraging foreign countries to provide similar means of assistance to US courts. One question that repeatedly arises in the application of section 1782 is: does it permit discovery of documents and items outside the US? Recent district court decisions suggest a trend towards finding that section 1782, at a minimum, does not bar discovery of such documents, but that courts will still consider the location of documents as part of the discretion given to courts by the statute.

Overview of 28 USC section 1782

Section 1782 establishes three requirements for obtaining discovery: (1) the person from whom the discovery is sought must ‘reside’ or be ‘found’ in the US judicial district where the application is made; (2) the discovery sought must be ‘for use in a proceeding in a foreign or international tribunal’; and (3) the application must be made either by a foreign or international tribunal or by an ‘interested person’.

Even if those factors are met, the district court is not required to order the discovery, but has discretion to do so. By default, the Federal Rules of Civil Procedure govern the practice and procedures for conducting the discovery, but the court is expressly authorised to prescribe the practice and procedures on its own.

The US Supreme Court explained the factors that should guide the district court’s exercise of discretion in Intel v Advanced Micro Devices, 542 US 241, 2004 (‘Intel’); (1) whether the person from whom discovery is sought is a participant in the foreign proceeding; (2) the nature of the foreign tribunal, character of the proceedings and receptivity of the foreign government or court to US judicial assistance; (3) whether the request conceals an attempt to circumvent foreign proof-gathering restrictions or other foreign or US policy; and (4) whether the discovery request is unduly intrusive or burdensome.
The problem: what is the geographical scope of discovery under section 1782?

On the surface, the text of section 1782 says nothing about the location of discoverable documents and things. The Federal Rules of Civil Procedure – which govern discovery under section 1782 to the extent the court does not order otherwise – have long been recognised to permit discovery of documents and things located abroad. Nonetheless, district courts have disagreed on the issue, with the weight of authority not clearly falling on one side or the other. In essence, district courts have either focused on the plain language of section 1782 (which contains no geographic limitation and cites the Federal Rules), or on the legislative history of section 1782 (which may suggest Congress intended to only cover discovery within the US).

Undoubtedly, the confusion is in part due to the lack of clear guidance from the US Courts of Appeals and the US Supreme Court. In a 1997 decision, the US Court of Appeals for the Second Circuit noted, in dicta, the absence of a geographical restriction in section 1782, but still opined that ‘there is reason to think that Congress intended to reach only evidence located within the United States’ (in In re Application of Sarrio, 119 F.3d 143, 147, 2d Cir. 1997).

However, it was only in 2016 that a circuit court directly addressed the issue. In Sergeeva v Tripleton Int, 834 F.3d 1194, 11th Cir. 2016 (‘Sergeeva’), the Eleventh Circuit reviewed a district court decision ordering discovery under section 1782 from a third party. The documents sought related to the ownership of a Bahamian corporation and were to be used in litigation in Russia. The third party was a corporation located in the US in Atlanta, Georgia. Some of the documents sought were located outside the US and the third party argued that section 1782 does not reach documents located in foreign countries.

The Eleventh Circuit affirmed the trial court’s order granting discovery, noting that section 1782 permits discovery in accordance with the Federal Rules and that Rule 45 (which governs third-party document subpoenas) sets geographical limits on the location of production, but not on the location of the documents themselves. The court concluded that ‘the location of responsive documents and electronically stored information – to the extent a physical location can be discerned in this digital age – does not establish a per se bar to discovery under §1782’.

Recent decisions addressing the geographical scope of section 1782

Several recent district court decisions suggest two trends going forward: (1) a potentially greater likelihood that courts will order discovery of documents located outside the US, in reliance on Sergeeva; and (2) a shift in analysis of the issue to the application of the Intel factors and the district courts’ exercise of discretion.

In In re Accent Delight International, 2018 WL 2849724, SDNY 11 June 2018, (‘Accent Delight’), the district court acknowledged that ‘many district judges in this Circuit have accepted’ the argument that section 1782 does not authorise discovery of documents located outside the US. But the court further noted the lack of ‘substantive analysis’ in those decisions, rejected the Second Circuit’s dicta in Sarrio and agreed with the Eleventh Circuit’s plain-language analysis in Sergeeva. (The court also noted that section 1782’s legislative history is ‘at best ambiguous’ on this issue.)

The owner of the documents was located in New York and sought to limit any discovery to only those documents located inside the US. The court declined to impose that limitation and ordered discovery of documents located outside the US. The court also suggested, however, that the location of the documents sought could still be a ‘discretionary consideration’ in the court’s analysis of the fourth Intel factor – whether the discovery sought would be unduly intrusive or burdensome. For example, the court suggested that a request for documents located abroad, beyond those relating directly to the petitioners’ claims (which concerned the allegedly fraudulent sale of 38 works of art), would be unduly burdensome.

In a second recent decision, In re Effecten-Spiegel, 2018 WL 3812444, SDNY 10 August 2018, (‘Effecten-Spiegel’), the district court declined to change (on reconsideration) its denial of discovery under section 1782 of certain documents located in Ireland. The court stated it had not ‘impose[d] a blanket territorial threshold on the application of Section 1782’, but instead appears to have considered the location of the documents sought as part of its discretionary analysis under Intel.

Other recent decisions have likewise addressed the overseas location of documents sought as part of considering whether production would be unduly burdensome.
This was the case, for example in, *In re Del Valle Ruiz*, 2018 WL 5095672 (SDNY 19 October 2018), which rejected the argument that production of documents located in Europe would be unduly burdensome. However, other courts have taken a slightly different analytical tack, emphasising that the standard for discoverability is whether the documents are in the possession, custody, or control of the producing party, not the location of the documents. For example, the district court in *In re Stati*, 2018 WL 4749999, at *6 (D. Mass. 18 January 2018) declined to take a position on the geographical scope of section 1782 and instead stated it ‘will apply the possession, custody, or control of documents requirements in Rule 45(a)(1)’.

**Conclusion**

Both *Accent Delight* and *Effecten-Spiegel* are currently on appeal to the Second Circuit, as is at least one other district court decision to address the geographical scope of section 1782, *In re Del Valle Ruiz*, 2018 WL 5095672 (SDNY 19 October 2018). Given the now-mainstream appeal of plain language arguments, and the apparent ambiguity of section 1782’s relevant legislative history, it seems unlikely that the Second Circuit would find the statute categorically bars discovery of documents located outside the US. Moreover, as the *Accent Delight* court implied, the prevalence of electronic information and storage calls into question the usefulness of such geographical distinctions.

Besides, a ready solution to the issue is already there: district courts can consider the burden of producing documents located abroad on a case-by-case basis as part of their discretionary analysis under *Intel*. They also can – and should – focus their analysis on the question of control, rather than location.

To return to the opening hypothesis; you are likely to win an argument based solely on the location of the documents in Mexico. But you should also be prepared to justify the breadth of your requests and to make the case that the Mexican documents are in the control of the party from which you are seeking them.

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**Enforcing socioeconomic rights through structural injunctions in Mexico: a proposal in light of the San Fernando case¹**

On 19 April 2017, Aprender Primero, AC,² working alongside Mexican law firm Malpica Iturbe, Iturbe, Buj y Paredes, filed a constitutional trial as part of a strategic litigation against 18 authorities, going from Mexico’s Secretary of Public Education to Mexico City’s Head of the General Directorate of Treatment for Teenagers. In its constitutional action, the association complained about both federal and local authorities’ failure to guarantee the right to education of juveniles deprived of their liberty in the San Fernando penitentiary, as a fundamental part of their right to social reintegration.

This right is enshrined in the Mexican Constitution, as well as in various international treaties to which the Mexican state is a party, like the International Covenant on Economic, Social and Cultural Rights; the American Convention on Human Rights; its Additional Protocol in the area of Economic, Social, and Cultural Rights (‘Protocol of San Salvador’); the United Nations Rules for the Protection of Juveniles Deprived of their Liberty; and the United Nations Convention on the Rights of the Child.

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² Aprender Primero, AC is a non-governmental organisation dedicated to improving education and social rights in Mexico.
Nations Standard Minimum Rules for the Administration of Juvenile Justice, among others. In its claim, Aprender Primero sustains that there is no educational system in the San Fernando penitentiary that complies with the standards set out in the above-mentioned agreements. On the contrary, it is postulated that the existing conditions in said community show an absolute lack of provision of educational service, and a serious case of violation of human rights, since the responsible authorities have totally failed to comply with their obligation to guarantee the right to education and reintegration of the juvenile members of San Fernando. In light of the above, the claim filed by Aprender Primero seeks constitutional protection from a federal court, to compel the responsible authorities to comply with their obligations regarding the right of education of the San Fernando members.

This article deals with the way in which its authors consider constitutional protection should be granted in favour of Aprender Primero, making use of structural injunctions, as a convenient tool to judicially enforce economic, social and cultural rights—such as the right to education—and secure governmental compliance with the courts’ judgments.

Structural injunctions

Economic, social and cultural rights (hereinafter ‘socioeconomic rights’ or ‘ESCR’) have come a long way. From their enshrinement in international human rights treaties to their inclusion in national constitutions, certain socioeconomic rights currently enjoy almost worldwide legal recognition. Accordingly, there is a great deal of case law, in both the national and international arenas, to support the contention that when states fail to secure socioeconomic rights, courts play an important supervisory role by finding breaches of human rights and ordering the legally-available forms of redress.

However, as Rodríguez Garavito and Kauffman point out, ‘the struggle to realize ESCR is not yet over. The challenge now faced by courts, governments, human rights defenders, and international organizations is ensuring that favorable ESCR court decisions are actually implemented’. Failure to comply with judgments is particularly common in cases invoking socioeconomic rights due to, among other excuses, an alleged lack of resources from the government or political reasons.

One strategy that has proven to be particularly effective regarding the enforcement of socioeconomic judgments is structural injunctions. Broadly speaking, an injunction is ‘a judicial command that prohibits or prescribes some discrete act of the defendant, and is enforced by a judge’s power to hold the defendant in contempt for failure to obey.’ Structural injunctions are those implemented ‘to alter broad social conditions by reforming the internal structural relationships of government agencies or public institutions.’

The aim of structural injunctions is to make substantial modifications to the existing legal framework, bureaucratic system and resource allocation schemes in order to put an end to a situation compromising human rights (in many cases, one which affects large groups of individuals). Danielle Elyce Hirsch details the steps that a court will follow when issuing a structural injunction: (1) identifying the constitutional violation, indicating the situation that should be addressed and the objectives to be fulfilled; (2) ordering the responsible authorities to present a plan of reform to comply with their constitutional obligations; (3) listening to all concerned parties and approving a plan of reform, taking into consideration the different submissions made; and (4) issuing an order directing the state to implement the approved plan and to periodically report back to the court on its compliance with the deadlines set for the achievement of the established milestones.

The San Fernando case: a ruling proposal

It is likely that the federal court will declare that the current state of affairs in the San Fernando penitentiary constitutes a breach of its members’ right to education. However, such declaration by itself will provide little to no relief to the members of the San Fernando penitentiary. Likewise, the mere order from the court for the responsible authorities to comply with their constitutional and legal obligations would also be too vague, offering no concrete guidelines to determine if they may be held accountable in the future for contempt of court.

At the same time, there is also a risk that the court will go too far, giving precise orders and instructions to the competent administrative authorities. This could even
constitute a violation of the principle of separation of powers, at it may involve the judiciary making decisions it is ill-equipped to appoint, given the specialised and technical knowledge required to assess the different factors involved, as well as the lack of direct democratic legitimation from judges to issue public policies.

Accordingly, the present article advances that when deciding the San Fernando case, the court should engage in what Rodríguez Garavito has called a ‘dialogic activism’, by setting ‘broad goals and clear implementation paths through deadlines and progress reports, while leaving substantive decisions and detailed outcomes to government agencies’. That is, a moderate version of the structural injunction: adopting a combination of strong rights, moderate remedies and strong monitoring mechanisms.

**Substantive content**

Firstly, it is important that the ruling has strong substantive content, in the sense that the court issues a declaration that there has been a violation of a justiciable human right (the right to education). However, as this article seeks to prove, there is no point in having ‘strong rights’ when there are weak remedies and no monitoring mechanisms. Even though court recognition of human rights violations is important, such recognition alone is insufficient to remediate the breach, especially when the state is either incapable or refuses to comply with its obligations.

Consequently, something more than just declaratory relief is needed to effectively enforce socioeconomic rights, such as the right to education. Therefore, remedies and monitoring mechanisms are vital in this context.

**Remedies**

Given the desperate need of education services from the San Fernando members and the failure of the relevant authorities to act, it could be suggested that, instead of issuing a broad and deferential order, the court could give clear, direct and precise orders to the government, such as ordering the state to build new classrooms within the penitentiary and allocating public resources to equip the penitentiary with computers, along other measures. However, this would not be the best solution, for at least two reasons.

At a theoretical level, such a decision could arguably constitute a violation of the separation of powers principle, in giving detailed – some might say intrusive – orders. Although the authors disagree with the general objection to judicial activism based on the separation of powers principle, there are, admittedly, certain decisions that courts ought not to take in recognition of that principle. Given how state powers are distributed, prioritising one social concern over another, designing public policies and deciding how to allocate public resources, are tasks that correspond to elected representatives. Those individuals are democratically accountable for their actions and they comprise the legislative and executive branches.

Moreover, certain functions are performed better by some branches than by others. Lacking technical knowledge and expertise, the courts are ill-suited to make certain decisions, such as determining how to allocate the state’s limited resources. Even though it is difficult to draw the line between judicial activism and restraint, instructing the government to build new classrooms within the San Fernando penitentiary would constitute a precise, outcome-oriented order, which would resemble more a monologic judgment, rather than the type of dialogic ruling supported by the authors.

One of the most important features of structural injunctions, after declaring that there has been a violation of a justiciable right, is that of forcing the government to present a plan to correct that situation within a distinct period of time granted by the court. While providing the relevant authorities room to design an adequate policy (and thus being respectful of both the separations of powers and institutional capacities principles), this type of injunction forces the state to break its bureaucratic inertia and to promptly address the specific issue.

In light of the above, it is argued that, in the San Fernando case, the federal court should order the responsible authorities to coordinate and collaborate amongst themselves to present a plan to the court within a reasonable period of time after the decision, detailing how they intend to utilise their resources to safeguard the human right to the highest attainable standard of education for the members of the San Fernando penitentiary. In our view, the three-day timeframe provided by Article 192 of the ‘Amparo Statute’ (for the responsible authorities to comply with a constitutional
ruling) is too short; the court should make use of its power – set out in said provision – to extend the compliance term, taking into account the complexity of the case.

While apparently only a slight variation on the orders usually issued by the Mexican courts, these new orders would make a significant difference. Imposing a clear, direct and precise obligation on the state, so that non-compliance is more evident, this type of order is markedly different from a broader one to ‘secure the applicants’ human rights’. It would also foster an inclusive, dialectic process, since for the court to approve the Mexican government’s proposed remedial plan, it would have to listen to the interested parties. In this case, this would include the San Fernando penitentiary members, education experts as well as education authorities. These parties would be given the opportunity to express their opinion on the government’s plan and to suggest alternatives. Once the proposed plan is approved, the implementation stage would begin. Here, monitoring mechanisms would be of enormous importance.

Monitoring mechanisms

Mexican ‘Amparo’ judgments do not typically include any kind of monitoring mechanisms. However, Article 193 of the ‘Amparo Statute’ provides for the possibility of ancillary proceedings related to the execution of the constitutional ruling, which could be used by the court to oversee the implementation of its decision.

This is probably the single most important feature of a structural injunction, since it implies the obligation for the government to report back regularly to the court on the steps taken to comply with the constitutional judgement.6 Some of the participatory follow-up mechanisms that courts can use in a dialogic approach are: ‘public hearings, court-appointed monitoring commissions, and invitations to civil society and government agencies to submit relevant information and participate in court-sponsored discussions, which both deepen democratic deliberation and enhance the impact of court interventions’.17

As a monitoring measure, the court should set deadlines for the achievement of pre-determined milestones. If, for example, the approved plan consisted of constructing new classrooms within the San Fernando penitentiary, the judge should set specific objectives, to be completed by specific dates. This strengthens government accountability, since the failure to meet a specific goal on a given deadline would result in a contempt finding and proceedings on those charges would be initiated. Supervision, however, also provides a space for flexibility. If the government’s reports or depositions in public hearings showed complications or shortfalls in the ordered plan, the court would be able to make amendments to it or issue new follow-up decisions in order to achieve the sought goals.18

Conclusion

Structural injunctions are a useful tool that can and should be used by Mexican courts to enforce socioeconomic rights and secure government compliance with their decisions. Mexican federal courts must rely on progressive jurisprudential creation in order to overcome their shortcomings given that, under Mexican law, there are no sufficient procedural remedies to secure the authorities’ compliance with constitutional rulings.

The San Fernando case should be ideally decided with these considerations in mind, making use of structural injunctions and their ‘dialogic’ potential. When correctly used, structural injunctions increase state accountability, promote an inclusive participatory process and secure government compliance with courts’ orders. All these factors contribute to the effective enforcement of socioeconomic rights. Despite some of the objections that could be raised against the use of structural injunctions by the court in the San Fernando case and, more broadly, against the Mexican courts’ issuance of such structural injunctions in general, if Mexican society wants to take the enforceability of socioeconomic rights seriously, this is a step that, despite its costs and complications, would bring them closer to achieving it.

Notes
1 This article gathers the concerns of its authors regarding the execution of ‘Amparo’ rulings in light of the San Fernando case, building on the notes of coauthor Alejandro Agredano Zermeño in his/her dissertation to obtain the Degree of Masters in Law at the London School of Economics and Political Science.
2 Aprender Primero, AC is a civil association legally constituted under Mexican Law, whose social purpose specifically includes the defence and promotion of human rights, especially the right to education. For this purpose, it has among its objectives, the goal of ensuring the adequate provision of public educational services.
through all possible legal means, including the filing of any kind of lawsuit, either by direct involvement or by legitimate interest in the defence of the right to education.

3 For example, there are currently 169 State Parties to the ICESCR. Source: Office of the United Nations High Commissioner for Human Rights, <http://indicators.ohchr.org/>.


7 Rodríguez Garavito (no 4) 26.


10 Rodríguez Garavito (no 4) 49.


17 Rodríguez Garavito (no 11) 1676.

18 Hirsch (no 10) 22.
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