the global voice of the legal profession

European Regional Forum News

Newsletter of the International Bar Association Legal Practice Division

NO 3 MAY 2013



UP TO 6 CPD HOURS AVAILABLE

The IBA Arbitration Committee's 'White Nights' Conference

International arbitration at a crossroads: is there a coming backlash?

28 June 2013 **Taleon Imperial Hotel, St Petersburg, Russia**

A conference presented by the IBA Arbitration Committee, supported by the IBA European Regional Forum

Topics will include:

- Is there a need to regulate ethical standards in international arbitration?
- Public policy: old new challenges
- State courts and arbitration: hand in hand forever?

Who should attend?

Lawyers in private practice, lawyers in government and public bodies, in-house counsels, SME executives involved in international business activities, and academics.

the global voice of the legal profession

London São Paulo Seoul

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

IN THIS ISSUE

Contributions to this newsletter are always welcome and should be sent to the Newsletter Editor, Andreea Poenaru, at andreea.poenaru@wolftheiss.com.

Terms and Conditions for submission of articles

1. Articles for inclusion in the newsletter should be sent to the Newsletter Editor.
2. The article must be the original work of the author, must not have been previously published, and must not currently be under consideration by another journal. If it contains material which is someone else's copyright, the unrestricted permission of the copyright owner must be obtained and evidence of this submitted with the article and the material should be clearly identified and acknowledged within the text. The article shall not, to the best of the author's knowledge, contain anything which is libellous, illegal, or infringes anyone's copyright or other rights.
3. Copyright shall be assigned to the IBA and the IBA will have the exclusive right to first publication, both to reproduce and/or distribute an article (including the abstract) ourselves throughout the world in printed, electronic or any other medium, and to authorise others (including Reproduction Rights Organisations such as the Copyright Licensing Agency and the Copyright Clearance Center) to do the same. Following first publication, such publishing rights shall be non-exclusive, except that publication in another journal will require permission from and acknowledgment of the IBA. Such permission may be obtained from the Director of Content at editor@int-bar.org.
4. The rights of the author will be respected, the name of the author will always be clearly associated with the article and, except for necessary editorial changes, no substantial alteration to the article will be made without consulting the author.

International Bar Association

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

Looking forward to an eventful year

Dovile Burgiene
Lawin, Vilnius
dovile.burgiene@lawin.lt

Freek Jonkhart
Loyens & Loeff, Rotterdam
freek.jonkhart@loyensloeff.com

Welcome to the 2013 spring edition of the IBA European Regional Forum's newsletter. For this edition we received a great number of contributions and our editors have selected the ones which we believe will be most interesting to our broad audience. We thank all the contributors and hope the readers will find these materials useful.

Recent events

Last year was a record one with a number of European Regional Forum events. We have organised six large conferences and six local or bilateral events. All of the events were well attended and this sets a very high standard for 2013. We are incredibly proud and grateful to all of our officers and council members who have spent so many hours putting together such an ambitious programme.

Upcoming events

This year we have already contributed to two major events – the European Corporate and Private M&A Conference in Paris (February 2013) and the Investments in BRICS conference in London (February 2013). We are now focusing on the upcoming local and bilateral events taking place in a number of cities across Europe, as well as our annually recurring conferences focused on CIS in Moscow.

Our planning of the 2014 conferences is also well underway. We are preparing a regional Nordic conference in Oslo, the Mediterranean conference in Istanbul, and some more repetitive and new events. We will keep you posted on all the planned events.

The highlight for many of us this year will be the IBA Annual Conference in Boston. The Forum will be hosting a lunch on Monday with a fantastic programme – Chief Justice Myron Steele of the Delaware Supreme Court has accepted to be our guest and keynote speaker.

The European Forum sponsored two sessions in Boston will be the following:

The Nobel for Europe – a Prize for Peace and Reconstruction or a Recipe for Economic Meltdown and Disintegration?

This will be a continuation of our discussion on the euro and European economy, which we aim to present at the highest level at every IBA Annual Conference. The session will be chaired by Hendrik Haag (Hengeler Mueller) and Claudia Santos Cruz (AVM Advogados).

You can do what? Issues in Transatlantic disputes.

The session chaired by Jonathan Wood (Reynolds Porter Chamberlain) and Angelo Anglani (NCTM) will focus on juridical nightmares or advantages faced when litigating across the Pond.

Further details of these sessions can be found on page 7 of the newsletter.

We at the European Regional Forum are very happy about the growing membership. We are focused on reaching out to the countries with fewer members, to the young lawyers and, naturally, to our existing members. If you have any ideas for an event or activity of a different format, please contact us directly and we will establish the necessary framework for implementation.

We look forward to seeing you soon at our events!

Andreea Poenaru
Wolf Theiss, Bucharest
andreea.poenaru@wolftheiss.com

First newsletter of 2013

Dear readers welcome to the first 2013 edition of the European Regional Forum's newsletter. I am proud to serve as Editor this year. For this Edition we received a wealth of contributions and I would like to avail myself of this opportunity to extend my gratitude to all those who took the time and effort into sharing with us the legal news across various jurisdictions. The selection was difficult given that all articles received were brightly drafted and I am sure each and one of them would be of interest.

The articles in this newsletter focus on a variety of subjects from labour to taxation issues, forum shopping and a synopsis of the case-law on recognition of arbitral awards in Spain. My overall goal was to tackle on a range of topics aimed at providing an overview of the legal changes in various jurisdictions of our IBA members against the current shifty economic background.

Given that the objective of this newsletter is twofold, ie, to keep the European Forum members informed about activities of the Forum as well as about the legal developments around us, you will find details on the day to day events organised by the Forum all over Europe by accessing **www.ibanet.org**, laying out an interesting material of the eventful, engaging year ahead of us.

We at the European Regional Forum are pleased that we have seen growth in our membership numbers and a large number of relevant and professionally organised events offering a wide range of topics for discussion and networking opportunities for members. There is always room for improvement and we hope that 2013 will continue with an uprising trend.

Committee officers

Co-Chairs

Dovile Burgiene
Lawin, Vilnius
Tel: +370 (5) 268 1805
Fax: +370 (5) 212 5591
dovile.burgiene@lawin.it

Freek Jonkhart
Loyens & Loeff, Rotterdam
Tel: +31 (10) 224 6699
Fax: +31 (10) 224 6183
freek.jonkhart@loyensloeff.com

Senior Vice-Chairs

Claudia Santos Cruz
AVM Advogados, Lisbon
Tel: +351 (21) 304 501 010
Fax: +351 (21) 304 501 009
claudia.cruz@avm-advogados.com

Jörg Menzer
SPRL Menzer & Bachmann – Noerr, Bucharest
Tel: +40 (21) 312 5888
Fax: +40 (21) 312 5889
joerg.menzer@noerr.com

Vice-Chairs

Alexander Schwarz
Gleiss Lutz Law Office, Düsseldorf
Tel: +49 (69) 6551 4336
Fax: +49 (69) 9551 4198
alexander.schwarz@gleisslutz.com

Szymon Kubiak
Wardyński & Partners, Warsaw
Tel: +48 2 2437 8200
szymon.kubiak@wardynski.com.pl

Membership Officer

Patricia Gannon
Karanovic & Nikolic Accounting Department, Belgrade
Tel: +381 (11) 3094 200
Fax: +381 (11) 309 4223
patricia.gannon@karanovic-nikolic.com

Newsletter Editor

Andreea Poenaru
Wolf Theiss, Bucharest
andreea.poenaru@wolftheiss.com

Programme Officer

Claudio Doria
J&A Garrigues, Barcelona
Tel: +34 (93) 253 3700
Fax: +34 (93) 369 3001
claudio.doria@garrigues.com

Treasurer

Jarle Kvam
Wiersholm, Mellbye & Bech, advokatfirma, Oslo
Tel: +47 (2) 102 1000
Fax: +47 (2) 102 1001
jkv@wiersholm.no

Young Lawyers Liaison Officer

Sidika Baysal Hatipoglu
B+B Law Office, Istanbul
Tel: +90 (212) 219 1630
Fax: +90 (212) 219 1632
sbaysal@bb-legal.com

LPD Administrator

Charlotte Evans
charlotte.evans@int-bar.org

ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

European Regional Forum's sessions

Monday 0930 – 1230

The Boston Tea Party revisited: is it time for the United States to place greater limits on free expression? Or should other nations revisit their limitations?

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

As far back as the Boston Tea Party, the United States has had a history of very broadly protecting the free expression of ideas. In a rapidly changing world where communications instantly cross borders and can offend the citizens of other countries, even inciting them to violence, is it appropriate for the United States to reconsider its broad protection of free speech? For example, Canada, its neighbour to the North, doesn't permit a citizen the 'free speech' to deny the existence of the Holocaust. France does not permit eBay to sell Nazi paraphernalia. Google substantially altered its search engine capability in its Chinese version, ostensibly to address China's national security concerns. Russia recently jailed pop stars who were critical of Vladimir Putin and has since amended its definition of high treason to include moves against Russia's territorial and state integrity and includes consultative assistance to a foreign state or an international organisation.

This session, supported by all of the IBA Regional Fora, will address 'expression' regimes globally to address how countries in other fora approach 'free speech' with limitations deemed appropriate for their regions.

The session will approach the subject in two formats. The first half will have leaders in the subject matter in the different regions discuss the varying approaches of jurisdictions within their region to limit 'free speech' based on concerns which include the need to protect the reputation and privacy of citizens, to protect against speech which is contrary to accepted 'truth' and to protect against threats to national security. This portion of the session is expected to make full use of video examples, email and Twitter posts, and search engine results, ranging from the 'Pussy Riot' videos that led Russia to bring charges against band members, to the rogue video produced in the US that mocked Mohamed and led to riots against US interests in the Middle East.

After concluding the first part of the session, after the break, the last third of the session will follow on from a very successful North American Regional Forum session in Dublin, in which the attendees broke up into separate tables, with panellists joining different tables to lead discussions of topics addressed by the session in order to attempt to find consensus on what attendees believe should be the appropriate level of 'free speech' limits globally. Young lawyers will be the rapporteurs for each table and will report at the end of the session on what each of the tables had concluded in that regard.

Tuesday 0930 – 1230

The Nobel for Europe – a prize for peace and reconstruction or a recipe for economic meltdown and disintegration?

Presented by the European Regional Forum

The European Union is going through its most difficult phase since inception. The introduction of the euro was meant to propel the EU into the next phase of integration but has developed into its biggest problem. Budgets and economies of Member States, which assimilated with the introduction of the common currency, are now drifting further apart than ever and creating fundamental tensions. On the other hand, there is a strong conviction that there is no way back and that the EU must move into the next phase of deeper integration and less nationalism. The instruments going forward, such as the European Stability Mechanism, the bank union and stronger control of national budgets, will present great challenges, politically and legally. Economic and legal experts from inside and outside the European Union will present their views of what lies ahead for Europe.

European Regional Forum's sessions – continued

Wednesday 0930 – 1230

What's past is prologue: new rights and obligations in transatlantic trade and sales with Europe

Presented by the European Regional Forum, the International Sales Committee and the Trade and Customs Law Committee

This session will focus on issues unique to trading with European countries, addressing particular EU sales issues, CISG matters, anti-corruption and consumer issues, and disappearing currency issues.

Thursday 0930 – 1230

You can do what? Issues in transatlantic disputes

Presented by the Corporate Counsel Forum, the European Regional Forum, the Litigation Committee and the North American Regional Forum

A review of the juridical nightmares or advantages faced when litigating across the Pond:

- Long-arm jurisdiction;
- discovery and data protection;
- super injunctions and interim measures;
- class actions;
- punitive damages ;
- enforcement;

and much more besides… !

Thursday 1430 – 1730

Revision of EC Regulation 261 on passenger rights

Presented by the Aviation Law Committee, the European Regional Forum and the Leisure Industries Section

Regulation 261, 2004 introduced important new rights for air passengers in the event of being denied boarding, long delays and cancellations. The Regulation took effect in 2005 and sets a minimum level of quality standards which the airlines have to live up to, in order to protect passengers.

Ever since the Regulation came into force, airlines have been seeking juridical redress to avoid it's application with the effect that the European Court of Justice delivered interpretations which were not always considered to be in line with pre-existing law.

The revision process of Regulation 261/2004 began in 2012. Will the EU take the concerns of the industry into consideration and what are these concerns? Will the new Regulation foresee provisions for better enforcement, and why would this be necessary? The panel will try to seek a compromise on these and other questions, or is a compromise just not feasible? Regulation 261/2004 and its revision is not only applicable to EU airlines and passengers but to all airlines and passengers departing from an EU airport regardless of their nationality. Hence, although this is EU legislation, it will have an effect on the industry worldwide and is thus a reason for worldwide opposition.

Ramon Mullerat, OBE

President of the Association for the Promotion of Arbitration, Spain

ramon.mullerat@iurisvalls.com

Some lessons on the recognition of foreign arbitration awards in Spain*

It was probably Henry V of England who in the 16th century invented the first passport to facilitate his subjects' travels. This situation has barely changed as even today moving from one country to another requires a passport. Something similar happens to judicial decisions. In a globalised world, it would make sense for judicial decisions to travel unhindered but this is not the case. The world is still fragmented into the 193 member states, each with well-defined borders with their own state powers, including courts, confined in them, so that unless there is some special treaty a judgment of a state cannot be recognised in another, unless with the 'exequatur' or approval of the judgment by the other.

However, it is the arbitration world that has attained a highly efficient system consisting of the New York Convention on the Recognition and Enforcement of Foreign Judgments (Awards) 1958 ('NYC'). The NYC's main effects are twofold: the first is the recognition and enforcement by the contracting states of foreign awards (those made in the territory of another state); and the second is that the courts of a contracting state before which a lawsuit is filed in a case with an arbitration agreement must, at the request of either party, refer to arbitration.

Recognition and enforcement of foreign awards can only be refused if the party requesting the refusal proves:

- incapacity of any party or invalidity of the arbitration agreement under the law to which the parties have subjected it or under the law of the country where the award was rendered;
- lack of notice of the appointment of the arbitrator or of the arbitration proceedings or inability to present the defence;
- the award is different or exceeds the arbitration agreement;
- the composition of the tribunal or the arbitral procedure does not conform to the agreement; or
- the award is not yet binding or has been set aside in the country of origin.

The courts can also deny recognition if they find that, according to the law of the country where recognition is sought, non-arbitrability of the dispute or the award is contrary to public policy (Article V 1).

With the aim to obtain more uniformity, Act 11/2011 of 20 May 2011, which amended the Arbitration Act 60/2003 of 23 December 2003, attributes jurisdiction for the 'exequatur' of foreign awards to the Civil and Penal Chambers of the Supreme Courts of Justice of the Autonomous Communities.

I have examined the following judgments that the Supreme Courts of Catalonia and Valencia have rendered since the promulgation of such reform law with the purpose of taking the temperature on how these courts deal with the request of recognition:

- Superior Court of Justice of Catalonia No 127/2011 of 17 November 2011.
- Superior Court of Justice of Catalonia No 37/2012 of 15 March 2012.
- Superior Court of Justice of Catalonia No 51/2012 of 29 March 2012.
- Superior Court of Justice of Catalonia No 97/2012 of 30 May 2012.
- Superior Court of Justice of Valencia No 13/2012 of 8 June 2012.

All these judgments confirm that the recognition of foreign awards shall be governed by the NYC, discuss the reasons for refusal of Article V NYC, and confirm the jurisdiction of the Civil and Criminal Chambers of the Supreme Courts. Some lessons we can glean from their recitals are:

- Decision13/2012 distinguishes between the approval process (recognition), of a declaratory nature, from the enforcement process once the effectiveness of the foreign award is recognised. In addition, between the two models to determine the effects that a foreign award can be deployed in the host country: the model of equality (similar effects to a national judgment) and the model of extension (foreign judgment only displaying the effects of its home state), Spain takes the second approach.

- Decision 97/2012 echoes a fundamental principle of the 'exequatur'. The NYC subjects obtaining 'exequatur' to the verification of compliance of the awards to a number of formal requirements, but examination of the merits and revision of the substance of the award remains outside such verification.
- Article V NYC, which contains the reasons for opposition to the recognition of foreign awards, distinguishes between the five reasons that can be invoked by the opposing party and the two reasons that the court must apply ex officio. Some of the decisions (37/2012, 97/2012 and 13/2012) confirmed that provision and rejected the opposition pleas because the opponent did not prove the existence of facts substantiating the opposition grounds.
- In decision 13/2012, the opponents challenged the application for recognition on the grounds that the Supreme Court of Valencia had no jurisdiction to deal with such an application given that the defendant company was domiciled in the island of Malta. The Court rejected the opposition stating that even if the party against whom the recognition was sought was not resident, the directors thereof were resident in Valencia, the possible enforcement of the credit would be on a ship in Valencia and the guarantees had been constituted with the Valencia courts and therefore the jurisdiction of the Valencia court was undisputable.
- In the case of decision 37/2012, it was alleged that the 'exequatur' would violate the public policy, in particular, the principle of effective judicial protection enshrined in Article 24 of the Constitution excluding the jurisdiction of the courts, since there was no written arbitration agreement. The Court invoked case law where an anti-formalist attitude predominates, so that even if the NYC requires a written form, the agreement can be effective through the exchange of letters, telegrams, telex, fax or other modern telecommunications means leaving the necessary record. Therefore the existence of an email in which the parties referred to conditions in previous business relationships with the terms of the charter vessel accepted by the charterers, the alleged ignorance of the arbitration clause could not be considered.
- Also decision 13/2012 refused the grounds for opposition to the 'exequatur' for an alleged lack of personal notification or through certified mail of the appointment of the arbitrators and the arbitration procedure in its domicile instead of by fax addressed to a place not previously designated to receive notifications. The Court, having verified that 'the opponent does not deny the reception of the letters communicating the appointment of arbitrators and the subsequent proceedings... that were communicated by fax to two phone numbers in Barcelona. And that he neither denies that such phones did not pertain to the businesses' declared since 'the fax is a usual way to send and receive documents, admitted by art. 155, 5 of the Civil Procedural Law for communications between judicial organs and the parties, the Court cannot endorse allegations based on mere formalities, which do not match with the rapidity and swiftness of commercial traffic'.
- The NYC (Article IV) requires the party applying for recognition and enforcement to supply at the time of application the original arbitration agreement or a duly certified copy thereof. In decision 127/2011, the opponent claimed that this rule had been breached because the party applying for recognition had not supplied the original arbitration agreement or a duly certified copy thereof and provided only a simple copy and did not supply such original until later during the audience. The Court, with laudable flexibility, dismissed the opposition stating that such initial defect could be rectified and did not cause any lack of proper defence to the counterpart since 'the lack of authenticity requirements should be considered rectifiable pursuant to art. 231 of the Civil Procedural Law which allows requirements incompletely or imperfectly fulfilled to be subsequently rectified'.
- In decision 217/2011, the opposing party, who had failed to appear before the arbitral tribunal, alleged that the foreign award affected his right to an impartial judge and a due process of equality of arms since the appointment of arbitrators was imposed on him. The Court, having verified that 'the opponent always had knowledge of the arbitration proceedings and of its development and that he had been convened, not only for the arbitrators' appointment, but also for the development of the audience through different communications', and the fact that the opponent did not make any denunciation

during the arbitration procedure nor did he use any annulment means under French law, refused the complaints because the Court concluded that the arbitration proceedings had been adequately substantiated since the opponent had the opportunity to appear and his failure to do so was totally voluntary.

- Another interesting issue was raised in decision 97/ 2012 on the grounds of an alleged 'extra petitum' based on Article V 2 (b) NYC in relation with Article 24 of the Constitution. The Court confirmed the distinction between 'extra petitum' or excess of the award with respect to the arbitration agreement and the 'extra petitum' or excess of the award with respect to the statement of claim. Finally, the Court accepted the application and granted the recognition because it considered that the award had granted even less than what was claimed.

We can conclude that the Superior Courts' activity is plausible because the different grounds for the opposition to the recognition of foreign awards have been dealt with exquisite rigor at the light of the LA, the NYC and the jurisprudence, showing admirable competence and practical and flexible criteria.

Note

* This is a summary of a longer article to appear at Anuario de Justicia Alternativa.

Antonia Verna
Portolano Cavallo Studio Legale, Milan
averna@portolano.it

Luca Gambini
Portolano Cavallo Studio Legale, Rome
lgambini@portolano.it

The new regulation on 'innovative' start-ups in Italy

The Italian government has recently enacted a new regulation[1] (the 'Regulation') aimed at encouraging innovation through the creation and development of new companies qualified as 'innovative start-ups'.

Several incentives as well as exceptions to the general rules applicable to enterprises are provided by the Regulation to stimulate investments in innovative start-ups.

The key provisions concern:

- the assignment of equity participations or other work for equity instruments to employees, directors and consultants as their remuneration;
- tax incentives for the start-ups, the investors and the employees and consultants who subscribe equity participations or other work for equity instruments;
- public offerings of quotas of start-ups incorporated under the form of limited liabilities companies, also through crowdfunding online portals;
- corporate benefits and exceptions to bankruptcy law provisions;
- cost reduction for the setting up of a new company; and
- the definition of a fixed-term employment contract departing from general labour law.

The provisions on crowdfunding and investors' tax benefits are still not effective as they are subject to the issuance of specific decrees from the Italian public authorities and, with respect to the tax provisions, the authorisation of the EU Commission.

Definition of 'innovative' start-up

To be 'innovative', a start-up shall:

- develop, produce and trade innovative goods or services having a high technological value and such activities should represent its exclusive or prevailing core business; and
- meet at least one of the following alternate requirements:
  - the costs allocated to research and development must be equal to or higher than 20 per cent of the higher value between (i) the company's production costs and (ii) the company's production value;
  - at least one-third of its work force shall be represented by individuals having a PHD or carrying out a PHD or having a degree and having completed a research programme of three years at public or private research entities in Italy or abroad; or

– the start-up shall be the owner or assignee, or have applied for the registration with the relevant authorities, of an industrial property right (eg, a patent) related to its core business.

In addition to the above, the innovative start-up shall also satisfy the following requirements:

- it has to be a private stock company (such as a joint-stock company or a limited liability company[2] or a cooperative) or a societas europaea, not listed and with fiscal residence in Italy;
- it shall have existed for no more than 48 months;
- the majority of the corporate capital and voting rights shall be owned by individuals for the first 24 months following its incorporation;
- the main place of business shall be in Italy;
- it cannot distribute profits;
- starting from its second year, the total value of its activity shall not exceed €5m resulting from its last yearly approved balance sheets; and
- it shall not result from a merger, de-merger or transfer of business or a part thereof.

Generally speaking, the age, nationality or residence or domicile of the founders and investors is not relevant. A start-up will be qualified as 'innovative' upon its enrolment with the special sector of the companies' register of the place where it has its registered office.

On the assumption that all the above law requirements remain unchanged, a start-up is considered 'innovative' only for the first four years following its incorporation. A different term, not exceeding six years, will apply in case the start-up has been incorporated before the enactment of the Regulation.

Main corporate benefits

Special advantages are provided for start-ups incorporated under the form of limited liability companies. Such companies will be entitled to:

- create and issue categories of quotas granting special patrimonial and management rights to its quota-holders;
- offer its quotas to the public, also through crowdfunding online portals;
- issue financial instruments ('*strumenti finanziari partecipativi*') also against the contribution of work and services from its quota-holders or third parties;
- perform transactions on its own quotas (eg, purchase its own quotas or accept them as guarantee, etc) provided that such transactions are aimed at implementing incentive plans in favour of employees, directors and consultants.

Regardless of the type of company, any innovative start-up will have:

- in case of losses, the company will have longer to adopt the necessary remedies departing from the general corporate law;
- the possibility to raise funds by using crowdfunding portals under a specific and simplified procedure that the public authority responsible for the Italian securities market will implement in the next few months;
- the possibility to remunerate its directors, employees or consultants by assigning work for equity instruments which shall not be taken into account in determining the taxable income of the assignees; and
- the opportunity to save some costs, such as the stamp duty ('*imposta di bollo*'), the administration fees ('*diritti di segreteria*') and the annual fee for the enrolment with the relevant chamber of commerce ('*diritto annuale*').

Main tax incentives

Individuals or legal entities investing in innovative start-ups in the years 2013–2015 will be entitled to get some tax relief under certain terms and conditions.

Individuals subject to personal tax ('IRPEF') may benefit from a tax credit ('*detrazione d'imposta*') equal to 19 per cent of the amount they have invested (either directly or indirectly, for example through an investment fund) in the corporate capital of innovative start-ups. The tax credit may not exceed €500,000 for each fiscal year. The amount in excess may be carried forward in the subsequent three fiscal years.

Companies and other entities subject to corporate tax ('IRES'), other than innovative start-ups, are entitled to a deduction ('*deduzione*') from the corporate taxable base equal to 20 per cent of the amount they have invested (either directly or indirectly, for example through an investment fund or other companies investing mainly in innovative start-ups) in the corporate capital of innovative start-ups. The tax deduction may not exceed €1.8m for each fiscal year.

Investors shall keep their equity participation in the innovative start-up for at least for two consecutive fiscal years, otherwise they will lose any tax benefit.

As already said, such incentives are not currently effective since they are subject to (i) the authorisation of the EU Commission aimed at ascertaining that they are not 'state aids' in breach of the EU law and (ii) the issuance of a decree by the Ministry of Economy and Finance. We hope that such a decree will also clarify several doubts that have been raised regarding the scope and perimeter of the above tax incentives, absent any official interpretation of the Regulation.[3]

In addition to the above, under certain terms and conditions, innovative start-ups might benefit from a tax credit equal to 35 per cent of the costs incurred in case of hiring highly qualified employees through open-ended employment contracts.[4]

Finally, innovative start-ups will not be subject to the tax treatment provided for the so-called 'shell and dormant companies' which have to pay taxes on a minimum taxable income which is determined on a presumptive basis without taking into account the income or losses effectively reported by the company.[5]

Notes

1 Legislative Decree No 179 of 18 October 2012, converted in Law No 221 of 13 December 2012.

2 The category of the limited liability company also includes the simplified limited liability company ('*società a responsabilità limitata semplificata*') and the limited liability company with reduced share capital ('*società a responsabilità limitata a capitale ridotto*') which could be set up with a symbolic corporate capital of €1.

3 By way of example, according to a literal interpretation of the Regulation, tax incentives should apply only to investment made by cash contributions. It seems that contributions in kind ('*conferimenti in natura*') and contribution of work or services ('*conferimento di opera e servizio*') would not be eligible for tax incentives. It is also doubtful whether cash payments made by investors as share/quota premium ('*versamenti a titolo di sovrapprezzo*') or allocated to any other capital reserve, as well as credits waived by share/quota-holders ('*rinuncia dei soci ai crediti*') vis-à-vis the start-up would entitle investors to obtain the relevant tax reliefs. It remains also unclear whether investments made in innovative start-ups by third parties other than share/quota-holders through the subscription of financial instruments could benefit from tax incentives on the assumption that such instruments are recorded as equity.

4 Reference is made to Article 27-bis of Law Decree No 179 of 18 October 2012 (converted into Law No 221 of 17 December 2012), Article 24 of Law Decree No 83 of 22 June 2012 (converted into Law No 134 of 7 August 2012) and the Ministerial Decree issues on 22 February 2013.

5 Reference is made to the provisions under Law No 724 of 23 December 1994 and Law No 148 of 14 September 2011.

Shie Yee Au Yeung
Sajet Telting & Partners BV in Amsterdam
shie.auyeung@stp.nl

Sarig Shalhav
Sajet Telting & Partners BV in Amsterdam
sarig.shalhav@stp.nl

Tax considerations of the new Dutch company law rules on private companies ('Flex BV Act')

Introduction

As per 1 October 2012, new Dutch Company Law on limited liability companies ('*Besloten Vennootschap*' or 'BV') has entered into force (the so-called 'Flex BV Act'). Under these new rules, the incorporation process of Dutch limited liability companies is simplified and many of the existing restrictions and formalities in respect of voting rights, capital contributions, distribution, issuances, repurchases of shares, capital reductions and financial assistance will no longer apply.

Although the introduction of the new Flex BV Act has not led to a direct change in Dutch tax law, the new Flex BV Act has various implications for the existing Dutch tax rules. From a tax perspective, the most significant change is the possibility of creating different types of shares. More specifically, the Flex BV rules now make it possible to create shares to which only voting or profit rights are attached, and the articles of association may provide for multiple votes on specific shares. These changes may be of particular interest for joint venture structures, business successions and employee participation schemes.

In this article, we will discuss the key aspects of the new Flex BV Act from a Dutch tax perspective. Furthermore, we will discuss the tax opportunities that may arise under these new rules.

Dutch tax law aspects of the Flex BV Act

Many provisions under Dutch tax law are linked to the relationship between individuals and legal entities among themselves in the form of a qualifying share ownership or, more generally, an 'interest' in the legal entity. Hereafter we shall discuss the consequences of the Flex BV Act for matters such as:

- the concept of a 'related entity';
- the concept of 'participating interest', which is used for the purpose of the participation exemption; and
- the concept of 'ownership requirement' for the formation of a fiscal unity for corporate income tax purposes.

The new Flex BV rules also have an impact on the concept of 'substantial interest' as included in the Personal Income Tax Act 2001, the 'requirement of an adequate consideration' when applying various merger facilities and the concept of 'substantial interest' for real estate transfer tax purposes. However, in this article we will not discuss these matters.

For tax purposes, the most important change is the possibility of creating different kinds of shares, that is, it is permitted to issue shares with different types of rights. Accordingly, the following options should be possible:

- shares with both voting rights and profit rights;
- shares with only profit rights; and
- shares with only voting rights.

Given that Dutch tax law refers to Dutch civil law on various aspects, the changes under the Dutch Flex BV Act will also have an impact on the existing Dutch tax rules. Hereafter we will discuss some of the Dutch tax rules that may change as a result of the Flex BV Act.

Fiscal unity

Based on Dutch tax law, taxpayers can – upon request – form a fiscal unity in the Netherlands for Dutch corporate income tax purposes if certain conditions are met. In this respect, one of the conditions is that a taxpayer ('parent company') must hold the legal and beneficial title of at least 95 per cent of the shares in the par value of the paid-up shares of another taxpayer ('subsidiary'). After the entry into effect of the new Flex BV rules, it will now be possible for a parent company to hold 95 per cent of the shares without voting rights and thus not have control. Consequently, the legislator has already amended the rules regarding fiscal unities in such a way that the parent company must also hold 95 per cent of the voting rights in the relevant subsidiary.

Dutch participation exemption

Based on Dutch tax law, the Dutch participation exemption may apply if a company holds an interest in another company of at least five per cent of the nominal paid-up share capital, and certain other conditions are met. With the implementation of the new Flex BV Act, it is now possible to create shares with voting rights and profit rights that can exceed an interest of 100 per cent. However, for the participation exemption rules, it does not matter whether an entity holds shares with solely voting rights or profit rights since both types should count for the five per cent limit. Consequently, it should be possible – for tax purposes – to create a qualifying participation (for a third party) without actually changing the profit or voting interests of the existing shareholders.

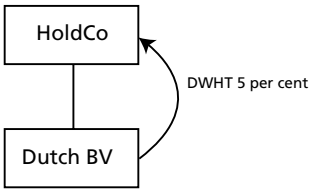
Related entities

Whether or not entities are related is important for various tax regulations in the Netherlands. For example, various interest deduction limitations apply to interest payments made to related entities. Whether there is a 'relation' must be measured from the interest that a company, directly or indirectly, holds in another entity. If such interest is – directly or indirectly – at least one-third, there is a relation for Dutch tax purposes. In this context, the interest of one company in another company is determined by reference not only to shares, but also to voting rights. The interpretation of this interest criterion is fairly simple when control and financial interest are divided proportionally among the outstanding shares. However, more difficulties arise if this is not the case, for example, for shares without voting rights and/or profit sharing rights under the new Flex BV Act. The interpretation of this criterion then depends on the facts and circumstances of each specific case and the mere value of the respective shares is then not decisive.

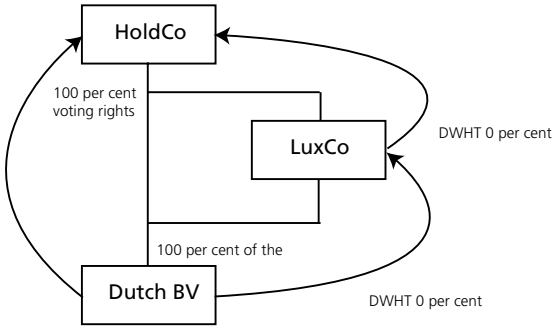
Opportunities

The new Flex BV Act provides for various tax planning opportunities, since it is now possible under the Flex BV Act to create

different types of shares (eg, shares to which only voting rights are attached and/or profit shares without voting rights and the articles of association may provide for multiple votes on specific shares). The changes may be of particular interest for joint venture structures, business successions and employee participation schemes. Furthermore, the new Flex BV Act could provide for new Dutch dividend withholding tax structuring opportunities. This could be further illustrated by the below example.



Structure 1: In this situation a Dutch BV distributes dividends to its 100 per cent shareholder. Based on the bilateral tax treaty concluded between the Netherlands and HoldCo, the Dutch dividend withholding tax rate could – under certain conditions – be lowered to a divident withholding tax rate of 5 per cent.



Structure 1: In this structure, the voting rights and the profit rights in the Dutch BV are separated, whereby HoldCo holds 100 per cent of the voting rights, and a Luxembourg limited liability company holds 100 per cent of the profit rights. Since LuxCo will be the beneficiary of the dividends, the Dutch dividend withholding tax rate could generally be lowered to 0 per cent based on the EU Parent-Subsidiary Directive. Further dividend distributions from LuxCo to HoldCo is – under conditions – exempt from Luxembourg.

The above example illustrates the tax efficient use of a Dutch BV under the new Flex BV Act. In structure 1, the dividend distributions from a Dutch BV to a non-EU entity ('HoldCo') would in principle be subject to a reduced Dutch dividend withholding tax rate of five per cent based on the bilateral tax treaty concluded between the Netherlands and the other jurisdiction. In order to further mitigate this taxation, a new Luxembourg entity could be interposed whereby the Luxembourg entity will obtain all of the profit rights in the Dutch BV. HoldCo will remain to hold all the voting rights in the Dutch BV. By separating the voting rights and profit rights of the shares in the Dutch BV, dividend distributions should in principle not be subject to dividend withholding tax and also dividend stripping rules should in principle not apply – provided that certain conditions are met.

Conclusion and recommendations

The new Flex BV Act aims to abolish inefficient capital maintenance rules and to facilitate the tailoring of the internal structure and organisation of a BV. Hence, it would now be very efficient and the conditions should be very flexible to create a new Dutch BV. The introduction of the Flex BV legislation is another incentive for multinational enterprises to use the Netherlands for their holding, acquisition, licensing and investment activities. Furthermore, the new Flex BV Act creates various tax structuring opportunities, especially with respect to Dutch dividend withholding taxes, Dutch corporate income taxes and Dutch personal income taxes.

Finally, in spite of the absence of a legal obligation to this effect, we strongly recommend to amend existing articles of association since these often contain provisions strictly based on the old legislation.

Can the transfer of shares in a German GmbH be notarised in Switzerland? An on-going discussion!

Monika Essers
Busch Essers
Rechtsanwälte, Köln
m.essers@busch.pro

The transfer of shares in a German GmbH (as well as pledging of shares and changes to the articles of association) is only valid if it has been recorded by notarial deed. Until 2008, it was accepted by the German Federal Court of Justice – the highest appellate court in Germany for civil and criminal cases – that a notarisation carried out by a Swiss notary public in specific cantons is equivalent to a German notarisation and, therefore, valid. Since the notary fees in Switzerland are freely negotiable whereas in Germany there are mandatory cost regulations mainly based on the value of the transaction, in the past few years parties in large M&A deals often travelled to Switzerland in order to reduce transaction costs.

In 2008, due to legislative changes first in Switzerland and then in Germany, the question came up whether this business conduct could still be valid. According to the changes in Switzerland, shares in a Swiss GmbH can now be transferred without notarisation. In Germany, the new law stipulates a duty for German notary publics to submit an updated list of shareholders to the German commercial register. After these changes, the discussion started whether under these changed regulations a notarisation in Switzerland could still be regarded as equivalent to the notarisation in Germany, the condition to accept such notarisation as valid. One of the decisive questions in that regard is whether the Swiss notary public is entitled to sign and submit the list of shareholders to the commercial register. The opponents of the Swiss notarisation argue that the duty stipulated in the German regulations cannot affect notary publics outside of Germany. The supporters, on the other hand, argue that even if the Swiss notary public may not be bound by German law, they are at least entitled to submit the shareholders' list.

In October 2010, the Regional court in Frankfurt (court decision dated 7 October 2009, file reference 3-13 04/06) raised doubts that a notarisation made in Switzerland is equivalent; in March 2011, the High Regional Court in Düsseldorf (court decision dated 2 March 2011, file reference I-3 WX 236/10) ruled that a transfer of shares notarised in Basel is still valid. In this decision, the High Regional Court in Düsseldorf stated that a Swiss notary public is entitled to submit the list of shareholders to the commercial register.

Recently, the High Regional Court in Munich ruled on 6 February 2013 that a registry court is entitled to reject a list of shareholders which has been signed and submitted by a foreign, here Swiss, notary public. It argued that a foreign notary public is not entitled to sign and submit the list of shareholders. Even if the Court has explicitly not answered the question whether the notarisation of a share transfer agreement in Switzerland is valid, this decision has weakened the position that share transfer agreements can still be notarised in Switzerland. This decision is in line with voices in legal literature (see recently Bauer/Anders in BB 2012, 593) claiming that under the new regulations a notarisation in Switzerland is no longer valid. It should, however, be noted that the decision is not yet final since the Court granted the right to appeal. Therefore, it remains to be seen how this matter will proceed.

Note
As long as there is no final court decision of the German Federal Court of Justice there is still a high risk that a notarisation carried out in Switzerland will not be regarded as valid. Until such a decision is reached, this risk has to be considered in the cost and risk assessment of a transaction.

Josep Maria Sambeat Sastre*
Roca Junyent, Barcelona
jm.sambeat@rocajunyent.com

Spain protects listed companies: recent amendments to takeover bids

The purpose of this article is to point out certain recent amendments introduced in Spain to legal provisions applicable to listed companies and takeover bids which seek to protect Spanish companies against hostile takeovers and takeovers at materially low prices.

Introduction

The Simplification of the documentation and information requirements for mergers and spin-offs of Spanish stock companies Act 1/2012, 22 June 2012 (the 'Act 1/2012') introduced certain amendments applicable to listed companies subject to takeover bids. These amendments seek to protect Spanish companies against hostile and subreptitious takeovers and takeovers at materially low prices.

These amendments:

- allow for the by-laws of Spanish listed companies to include or reinstate provisions limiting the number of votes, and affect also the breakthrough provisions (or neutralisation of preventive measures); and
- protect listed companies whose price has materially decreased due to certain adverse effects from bids at materially low prices.

Preventive measures (limitation upon the number of votes) and neutralisation (breakthrough)

The main and most effective preventive measure against takeovers that can be contemplated in the by-laws is the limitation upon the number of votes that may be cast at the general shareholders meeting. Such preventive measures have been traditionally allowed in Spanish corporate and securities laws,[1] but they had been banned by the former Article 515 of the Spanish Companies Act (*Ley de Sociedades de Capital*, 'LSC'). However, the Act1/2012[3] made possible for a joint stock company's by-laws to establish or reinstate a limitation upon the number of votes that may be cast by a single shareholder, by shareholders belonging to the same group or –and this is new – shareholders acting in concert. The expression 'shareholders acting in concert' can be construed as natural or legal persons who cooperate on the basis of an agreement, either expressly or tacitly, either orally or written, aimed either at acquiring control of the offeree company or at frustrating the successful outcome of a bid (v Article 2 of the Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (the 'Directive') *mutatis mutandis*). In fact, this expression widens the possible scope of this preventive measure, in comparison with the former provision of the LSC, which referred only to a single shareholder and shareholders belonging to the same group. This new and unprecise expression can be very significant in protecting listed companies from hostile action and surreptitious takeovers (that is, effective takeovers by a significant shareholder without exceeding 30 per cent of voting rights or appointing within 24 months following acquisition more than one-half of the directors (which constitute the threshold for mandatory takeover bids) and, therefore, without any obligation to launch a takeover bid for 100 per cent).

On the other hand, the 'Report of the High-Level Group of Company Law Experts on Issues Related to Takeover Bids' of 10 January 2002 (hereinafter referred to as the 'HLG Report')[3] recommended that a successful bidder who has acquired a substantial part of the risk bearing capital in a general bid for all the shares of the company should have the ability to breakthrough any mechanisms which frustrate the exercise of proportionate control.[4] Following this recommendation, the Directive included breakthrough provisions, although such provisions are not mandatory to member states and, thus, the vast majority of them have not established binding breakthrough provisions. This was the case with Spain. However, Act 1/2012 has introduced a new automatic and mandatory breakthrough provision. Article 527 of the LSC sets forth that the voting limit established in the by-laws shall

be null and void when, after a takeover bid, the bidder holds 70 per cent or more of the voting share capital, unless such bidder is not bound by an equivalent breakthough rule or fails to adopt neutralisation measures. Article 60 ter of the LMV has been amended accordingly by Act 1/2012. Thus, under Spanish law, both compulsory and optional breakthrough provisions exist.

Special rules in case the target has suffered certain adverse effects within the previous two years

Protective measures: valuation and consideration

The other amendments aim to protect listed companies that have suffered certain adverse effects from opportunistic bids at abnormally low prices that do not reflect the value of the company (or could even be below book value), and set forth that:

- in the event that (irrespective of whether the takeover bid is mandatory or not), within two years prior to the takeover bid announcement, one of the following circumstances has occured:
  - the market price of the shares to which the offer is addressed presents prima facie evidence of manipulation (market abuse);
  - the market prices in general, or of the target company in particular, have been affected by exceptional events such as natural disasters, war or calamity situations or other force majeure events; or
  - the target company has been subject to expropriation, confiscation or other circumstances of the same kind that may significantly alter the real value of its assets.
- the following shall apply:
  - the offered price shall not be less than the higher of the equitable price referred to in Article 60 of the LMV and the one resulting from a report issued by an independent expert;
  - such report shall describe the valuation methods and assessment criteria; and
  - the bids (mandatory or not) that offer shares as consideration shall include, at least as an alternative, a cash consideration that is at least financially equivalent to the value of the exchange offered.

It should be beared in mind that the Spanish legislature passed this amendment after the government of Argentina expropriated the company YPF from the Spanish oil company Repsol.

Conclusion

The Spanish legislature has reacted to the economic downturn, the risks of expropriations and the decrease in the share prices of listed companies by:

- allowing limits upon the number of votes that can be casted (together with an automatic breakthrough if a bid obtains more than 70 per cent of the voting share capital); and
- limiting the price and consideration when the company has suffered certain adverse effects.

This measures can be an effective protection to listed companies against hostile or surreptitious takeovers but also introduce a regulated takeover/bid price in certain scenarios.

Notes

* Josep Maria Sambeat specialises in corporate law, corporate governance, mergers and acquisitions, capital markets, project finance and contracts. He has extensive experience in advising listed and non-listed companies in designing, structuring and executing their investments and divestitures through M&A, joint ventures and takeover deals (especially in the infrastructure and banking sectors).

1 On April 2010, 13 listed companies of IBEX-35 and the continuous market had limits on the number of votes, most of them ten per cent.

2 According to the Spanish Congress website (**www.congreso.es/portal/page/portal/Congreso/Congreso/SalaPrensa/NotPre?_piref73_7706063_73_1337373_1337373.next_page=/wc/detalleNotaSalaPrensa&idNotaSalaPrensa=6765&anyo=2012&mes=6&pagina=2&mostrarvolver=S&movil=null**) the aim of these amendments is to protect the minority shareholders of listed companies. However, their effect is also to protect listed companies against control takeovers below the theoretical threshold that triggers compulsory takeover bids (30 per cent of capital stock or appointing more than one-half of directors) and at unjustifiably low prices. It can be said that two circumstances lead to those changes in the takeover provisions: (i) first, the recent (and surprising) expropriation by the government of Argentina of the company YPF from the Spanish petrol company Repsol, which caused a plunge in its share price and (ii) secondly, as a consequence of the economic downturn, the price per share in the stock markets of several companies has fallen below their book value – most particularly since the negative ratings that the agencies are giving to Spanish debt. Thus, the main reason for these changes is to prevent Spanish listed companies being acquired at low prices and by means of a purchase below the theoretical control threshold (30 per cent of voting capital or more than one-half of directors according to LMV).

3 Report of the High-Level Group of Company Law Experts on Issues Related to Takeover Bids of 10 January 2002 (hereinafter referred to as 'HLG Report'), download at: **www.europa.eu.int/comm/internal_market/en/company/company/news/hlg01-2002.pdf**.

4 'The concept of a break-through rule is the most recent idea to emerge in the long-standing discussion regarding EU takeover regulation. Broadly understood, the term 'break-through rule' refers to any provision that dispenses

with either of two types of impediments to takeovers. The first of these impediments is legal structures and mechanisms that prevent shareholders from reacting to a takeover bid either by tendering their shares to the bidder or by voting on the authorization (or non-authorization) of defensive measures. The second impediment is legal structures that prevent a bidder from exercising control once he has successfully completed his bid and acquired a nominally controlling position in the firm.' Peter O Mülbert 'Make It or Break It: The Break-Through Rule as a Break-Through for the European Takeover Directive?' ECGI, Law Working Paper No 13/2003, August 2003.

Stanislav Rumyantsev
Castrén & Snellman, Moscow
stanislav.rumyantsev@castren.ru

Sergey Dyachenko
Castrén & Snellman, Moscow
sergey.dyachenko@castren.ru

Russia adopts good faith principle

For the first time in Russian legal history, the Civil Code of the Russian Federation distinctly declares the general principle of good faith effective starting from 1 March 2013. What will it mean 'to act in good faith' and what do people need to be prepared for? The lawyers are deep in thought.

Before the amendments, the Civil Code merely presumed the legal subjects' fairness and reasonableness and only touched upon the abuse of law concept. The uncertainty of legal provisions led to a situation where contending parties and judges would resort to the application of the good faith doctrine only when no formal legal alternative was available. This situation, in turn, precluded the courts from construing a uniform good faith doctrine. Hence, these latest amendments have been highly anticipated.

The current amendments are viewed to embody a good faith principle that is in line with the doctrine adhered to in countries with more developed legal systems.[1] Nevertheless, the amended Civil Code does not provide a definition of, or general criteria for, good faith. This allows some scholars and legal practitioners to speak of the 'moral law' prescribing the judges to use commonsense when resolving matters based on the good faith principle. Concerns have been voiced, as the tests for fairness are scarce and, therefore, may lead to a vague judicial interpretation.

The essence of the good faith principle is set forth in Article 1(3) of the amended Civil Code. A person must act in good faith in the establishment, performance and protection of civil rights and the fulfilment of civil obligations. Article 10(1) names the deliberately unfair performance of a legal right as the 'abuse of right' and generally prohibits such behaviour. Without limiting the list of cases relating to the abuse of right, Article 10(1) mentions two cases:

- 'Performance of a legal right with the sole purpose to harm another person'. This wording derives from the former concept of the abuse of right and unreasonably narrows the purpose of abuse. Indeed, by acting unfairly, certain persons often strive to obtain unlawful gains and advantages without considering third parties' interests. The courts are sometimes reluctant to consider the purposes criterion: even if harm was caused negligently, they rely on the abuse of right ban when the unlawful benefit is the prevailing aim of the action in question.
- 'Evasion of law with illegal purpose' raises doubts with many experts due to its broad wording.[2] In fact, the evasion of law appears to be more complicated than the abuse of right. For example, banks are subject to disclosure obligations under Russian consumer protection and banking regulations which, however, do not touch upon the font size used in consumer contracts. Given that loophole, some banks use small or badly readable print for important consumer contract clauses. Evidently, such financial institutions are acting in bad faith in the fulfilment of their disclosure obligations but not in execution of their rights. Hence, such practices evade the legal rules but cannot be recognised as an abuse of right.

Despite the absence of the relevant statutes before 1 March 2013, Russian court practice considered evasion of law as unacceptable behaviour. For example, the courts banned:

- indirect accrual of the compound interest (interest accrued on interest) in consumer credit contracts;[3]

- prevention of levying debts by settling the debtor's property in trust;[4] and
- evasion of corporate approval of related-party transactions by acquisition of assets through a straw man with further transfer of the assets to the related company.[5]

The abuse of right in any form may result in the full or partial loss of remedies relating to that right and in the payment of damages (if any). Other sanctions (such as declaring a transaction null and void) may also apply if prescribed by law. The amended Article 10 of the Civil Code now obliges courts to refuse persons who abused their right, in the protection of the rights belonging to such persons (previously, such refusal was at the courts' discretion). This novelty allows the assumption that the courts shall apply the abuse of right test to the matters under their consideration even in the absence of a motion for such application from either party.

It is noteworthy that Article 1(4) of the amended Civil Code prohibits any benefit that a person may receive from unlawful or unfair behaviour committed by this person. However, this provision allows the assumption that: (i) unfair behaviour always connotes a formal observance of law and (ii) a third party may benefit from someone else's unlawful or unfair behaviour. In view of this provision, it must be noted that intentional violation of law cannot be deemed fair in any respect, and a more restrictive wording would have been preferred.

Further amendments to the Civil Code, which are yet to be adopted by the Russian parliament, are expected to set out good faith criteria applying to certain situations. Some of them are addressed below.

General contract law

- When permitted by law or contract, a party can only use the right to unilaterally alter the contract within the limits stated by law or the contact, and if no such limits exist, reasonably and fairly (the draft Article 450(5) of the Civil Code). This draft rule emphasises the legal difference between unlawfulness and unfairness, which also appears in Article 1(4), and contrary to the idea of the supremacy of good faith, gives the letter of the contract priority over the principle. Surprisingly, the amendments do not establish any unfair contract terms doctrine (eg, such as established in EU Council Directive 93/13/EEC on unfair terms in consumer contracts) at all.
- Under draft Article 434.1, pre-contractual negotiations[6] in bad faith may lead to the payment of damages or other sanctions by the party acting unfairly. This article contains a specific good faith test consisting of three non-exceptional criteria:
  - approaching negotiations with no actual intention to come to an agreement;
  - misleading the other party about the nature and contractual terms of the arrangement; and
  - udden and groundless termination of negotiations without prior notice to the other party.
- Under draft Article 166(5), any claim challenging the transaction must have no legal effect when the claimant acts unfairly. In this case, bad faith may include acting in such a manner that gives reasons to the third parties to deem the transaction valid.
- According to Article 179, if a transaction arose out of a fraud it may be challenged by the aggrieved party. The amendments clarify that fraud includes passing over in silence those circumstances that a fair person must disclose in a view of the existing conditions of trade.

Corporate governance

The current legislation sets out a general obligation for officers of a company (the CEO, the directors of the board and the members of the management) to act reasonably and fairly under the threat of payment of damages, but it does not establish a fairness test. The draft wording of Article 53.1 of the Civil Code gives only one criterion for reasonableness and fairness: the officers' actions must conform to the civil law based turnover and associated business risks. Additionally, the good faith requirement may be viewed to apply to any person (individual or company) who can de facto control the activity of a legal entity, including by issuing instructions to its officers. If found guilty, such persons can be subject to payment of damages.

Meanwhile, the state Supreme Arbitration Court shall consider in the course of its plenary session ('Plenum') on 14 March 2013[7] a draft resolution establishing a reasonableness and fairness test for the corporate officers.[8] Contrary to the general presumption of good faith (Article 10(5) of the Civil Code), the resolution directs the courts to declare *post factum* a corporate officer's behaviour unreasonable and unfair when such officer:[9]

- acted in a conflict of interests;
- was or should have been aware that the actions committed by him/her contradicted the company's interests;
- knowingly transacted on disadvantageous conditions (for the his/her company); or
- took a decision either without regard to information he/she was aware of or without taking actions usually undertaken in similar circumstances aimed at obtaining necessary information provided that the officer is not able to prove the contrary.

Conclusions

The reform of the Civil Code is proceeding hastily and requires careful attention by those doing business in Russia. The good faith doctrine has not yet been fully implemented and references to good faith are not always supported by comprehensive legal tests. Consequently, there is room for interpretation of the application of the good faith principle. This may substantially affect the stability and predictability of Russian legal regulation. Even so, the good faith principle now has a place in the Russian legal system, though its application is still to be explored.

Notes

1 See Explanatory Notes to the Draft Law of the Committee of the State Duma on Civil, Criminal, Arbitration and Procedural Legislation (available in Russian at: **http://asozd2.duma.gov.ru/main.nsf/%28Spravka%29?OpenAgent&RN=47538-6**).

2 [illegible] Published at: **www.vedomosti.ru/newspaper/article/ 259421/vasidetvobhod**.

3 Paragraph 3 of the Information Letter of the Presidium of the state Supreme Arbitration Court Nr 146 dated 13 September 2011.

4 Paragraph 10 of the Information Letter of the Presidium of the state Supreme Arbitration Court Nr 127 dated 25 November 2008.

5 Resolution of the state Federal Arbitration Court Nr [illegible]0-4138/09, dated 11 June 2010, case Nr [illegible]4-1864-2009/64/29.

6 Not regulated at all by the current edition of the Civil Code.

7 The draft in Russian is available at: **www.arbitr.ru/vas/presidium/prac/79279.html**.

8 The resolutions of the Plenum of the state Supreme Arbitration Court bind all inferior state arbitration courts.

9 This test evolves the provisions set forth in the bill Nr 394587-5 on the corporate governance liability, which is under consideration in the Russian parliament now. For more information, please see H Paalanen-Koev and V Kemppainen 'Will Amendments in Legislation Speed Up Development of Russian Corporate Governance?' International In-house Counsel Journal: Nordic Edition, 2012, pp 17–24.

Suvi Tervahartiala
Krogerus Attorneys Ltd, Helsinki
suvi.tervahartiala@krogerus.com

M&A Insurance makes headway into the Finnish market: an analysis of market practice and prevailing trends

Introduction

In the last couple of years, it has become increasingly common in Finland that parties mitigate their risks by obtaining M&A insurance covering some or the majority of the loss arising out of the breach of a seller's warranties. In brief, M&A insurance allows buyers and sellers to shift risks arising out of an acquisition partly or wholly to the insurance company.

The purpose of this article is to describe the circumstances where M&A insurance is typically used in Finland and the characteristic features of M&A insurance policies (including their scope, period and exclusions). Finally, typical reasons and the potential impacts of the use of M&A insurance both in a single transaction and in Finland's mergers and acquisitions market, as a whole, are discussed.

What is M&A insurance?

Generally speaking, M&A insurance refers to an insurance policy tailored to fit the needs

of a seller or purchaser involved in a merger or acquisition. An insurance policy under which a party to a transaction insures a loss that may arise out of the other party's breach of contractual warranties given to the insured, in most cases the purchaser, in the sale and purchase agreement ('SPA') constitutes the most common form of M&A insurance. It is also often referred to as warranty & indemnity (or 'W&I') insurance or representations and warranty insurance. Throughout the article, the focus is on this type of M&A insurance.

Coverage of insurance

The terms of an M&A insurance policy vary on a case-by-case basis as the insurance policy is customised to suit the individual circumstances involved and the needs of a policyholder with regard to a particular transaction. Some general features are, however, recognisable. Typically, M&A insurance covers the amount of any actual damages or loss to which the insurance holder is entitled as a result of the other party's breach of warranties in accordance with the SPA. In addition to the loss resulting from breach, an insurance policy often also covers defence costs. These refer to costs, fees and expenses incurred from claims and other legal actions taken by third parties as a result of the breach.

Matters in respect of which the resulting damages are indemnified under an M&A insurance policy are typically determined to correspond to the scope of warranties included in the SPA. Otherwise, the insurance policy coverage would have gaps, as the aim is that only damages and losses that arise out of insured warranties are covered. However, an M&A insurance coverage is subject to negotiations and consequently an insurance policy can be tailored to cover some but not all of the warranties. The most typical exclusions are discussed below.

The maximum limit of liability of the insurer and the minimum threshold of claims to be indemnified under the policy are often determined to correspond to what has been agreed upon in the SPA. Also, an M&A insurance policy period is commonly set out to correspond to the relevant time limitations under the SPA. However, the policy period can be negotiated to extend the claim period under the SPA.

Exclusions of coverage

Damages and losses that result from a breach of warranties and of which the policyholder or its advisors had actual knowledge of prior to entering into the insurance policy are generally excluded from coverage under an M&A insurance policy. Examples of these issues are matters revealed in a disclosure letter or in the purchaser's due diligence report. Further, M&A insurance policies typically exclude coverage for adjustments in the SPA, for example, post-closing adjustments to purchase price. Also, forward-looking warranties that involve estimates or projections are generally excluded.

Why insure?

Both the seller and the purchaser can acquire an M&A insurance policy. From the seller's perspective, M&A insurance can be used as a strategic tool for the purposes of safeguarding the minimum sales proceeds received from the deal. As a result, a private equity seller is, for example, able to distribute its funds to investors immediately after the transaction. Further, the seller may be able to offer a higher warranty cap through a seller-side insurance policy.

For a purchaser, M&A insurance might be used in a competitive sales process (such as an auction) for the purposes of making the bid more attractive to the seller and distinguishing it from competitors. This follows, among other things, from the fact that after purchasing an M&A insurance policy, the purchaser can recover losses from the insurance company instead of pursuing the seller in the event of a breach.

M&A insurance may also work as a tool for mitigating concerns relating to the seller's liquidity or reluctance to pay in the event of a purchaser's warranty claim. Further, if the purchaser considers that the maximum amount of indemnification payable by the seller under the SPA in the event of a breach of the warranties is not adequate, the purchaser may be motivated to seek an insurance policy with a higher amount of coverage to top-up the level of protection offered by the seller. Hence, having a tailored M&A insurance might make it more attractive for the purchaser to carry out the transaction.

M&A insurance may also assist the purchaser in seeking finance for the

transaction, as the existence of M&A insurance is likely to mitigate transaction-related risks in the eyes of investors, financing institutions and lenders.

Finally, M&A insurance might be a way for both the seller and the purchaser to mitigate concerns with regard to the recovery in cross-border transactions where the counterparty is a foreign company and where concerns over the jurisdiction are involved. In these situations, indemnification from the domestic insurance company might be easier, faster and more readily available than from a foreign company through legal proceedings in a foreign jurisdiction.

Effects and implications in practice

Since the increased use of M&A insurance is still quite a recent trend in Finland and only a few insurance providers are offering these insurance policies, it can, at this point, only be speculated on what kind of implications and effect it will have on M&A deals in the Finnish market.

First, if the level of use of M&A insurance continues to grow and if the number of insurance providers offering policies starts to increase, this may have some impact on the common practice to use escrow accounts as risk mitigation tools in connection with a merger or acquisition process. When using escrows, a part of the purchase price is placed in an escrow account for the purposes of enabling the purchaser to retrieve recovery in the event that the seller fails to meet certain provisions of the SPA. However, the use of M&A insurance may eliminate the need to tie up funds in an escrow account or at least the insurance policyholder may allow smaller sums to be placed in an escrow account because in the event of a breach, recovery can be sought through an M&A insurance policy.

Secondly, the terms of an M&A insurance policy may have an effect on the negotiation of warranties that will be given in the SPA. The prospective policyholder may try to negotiate warranties that match the insurance coverage as closely as possible. This may make it more complex to carryout transaction-related negotiations as the terms of the M&A insurance policy need to be taken into account. At which point an insurance provider gets involved in the transaction varies on a case-by-case basis. Currently, an M&A insurance policy is typically obtained in quite a late phase of the negotiations when the due diligence process has already been completed. Elsewhere in Europe there has been a shift in practice where an insurance provider typically engages in the process at an early stage. This can, to some extent, also be seen in Finland recently.

Thirdly, it can be discussed whether M&A insurance attracts dealmakers to save on transaction costs by setting lighter requirements for a due diligence inspection that will be carried out before entering into a transaction. However, M&A insurance does not replace a thorough and careful due diligence process. Besides, it is more cost effective to try to avoid claims and disputes with regard to inaccuracy and omission in the warranties by carrying out adequate due diligence. If any material findings arise, those should be dealt with in connection with the due diligence process or otherwise in the earliest stage possible, and not afterwards in the form of claims. Besides, insurance providers generally exclude known issues as well as issues that would reasonably lead to a breach from the coverage.

Finally, M&A insurance might increase the level of mergers and acquisitions activity, as it provides incentives to enter into transactions that might not be necessarily carried out in circumstances where there is no M&A insurance that mitigates the related risks.

Time will tell if the M&A insurance business will continue to rise and whether M&A insurance will establish itself in the Finnish market.

Company restructuring in Italy and the *Fornero Reform*

Sharon Reilly
LABLAW, Milan
s.reilly@lablaw.com

Since the bankruptcy of Lehman Brothers in September 2008 and the resulting global economic downturn, there has been a marked upturn in collective redundancy operations throughout Italy. All types of businesses have been affected but those hit hardest have been in the manufacturing and professional services sectors.

In this context, the Italian legislature has recently passed some reforms to alleviate the situation both for businesses and their workforce. With regard to collective redundancies, the so-called *Fornero Reform* is aimed at simplifying the dismissal process and limiting employers' liability in the case of unlawful dismissal. In particular the reform introduces the following changes:

- union agreements reached in the ambit of a collective redundancy process have the effect of curing any defects in the communications given to the unions;
- new remedies for individual employees dismissed as the result of a collective redundancy process:
  - if the dismissal was not intimated in writing then the remedy is one of reinstatement and damages;
  - if there was a breach of the procedure as regards the redundancies then the employment is terminated with an award of damages in the region of between 12 and 24 months' salary (depending on the age, size of company and how the parties behaved during the court case); and
  - in the event that the selection criteria are breached, the remedy is still reinstatement plus an award of damages of up to a maximum of 12 months.
- the list of employees made redundant has to be sent to the competent authorities within seven days of the letter of dismissal, which is done at the end of the procedure (pre-reform it was done at the same time as the letter);
- as regards social measures in place, the main changes concern the introduction of a monthly unemployment payment, as from 1 January 2013 (to be fully operative by January 2017) substituting the present variety of redundancy payments with a single monthly amount; and
- as from 1 January 2013, the state-funded redundancy scheme available to companies in certain sectors is extended to other sectors including: travel and tourism, security services and aviation.

Seppo Havia
Dittmar & Indrenius, Helsinki
seppo.havia@dittmar.fi

Jessica Brander
Dittmar & Indrenius, Helsinki
jessica.brander@dittmar.fi

The era of strikes: industrial action prohibited by threat of fine of €2.8m

Summary

During the past few years, the legality of industrial actions has been actively debated in Finland. Their number has been growing, especially in the industries of aviation, stowing and postal services. The right to industrial action has been acknowledged in preparatory legal works and in legal literature. However, its position, boundaries and protection are still legally unclear.

The acceptability of industrial actions and thereto related threats of fines have been publicly at issue on several occasions. A recent significant case was in 2012, when employee trade unions of the technical services of the Finnish airline company Finnair initiated a strike. After the court's issuance of a temporary precautionary measure by threat of a €2.8m fine, public discussions emerged regarding the decision.

Legislation

A collective agreement binds its parties to refrain from any hostile action directed against the agreement during its validity as a whole or any provisions thereof. Associations bound by the agreement must ensure that their subordinated associations, employers and employees covered by the agreement refrain from any such action and that they do not violate the agreement in any other manner.

The law states that a precautionary measure can be sought, if the applicant demonstrates that it is likely to have an enforceable right by a decision against the opposing party, and that there is a danger that this party hinders or undermines the realisation of this right or essentially decreases its value. In this case, the court may prohibit the deed or action under threat of a fine, empower the applicant to do something or to have something done or order other measures necessary for securing the applicant's right to be undertaken until a final judgment has been given in the matter.

In Finland, disputes relating to collective agreements are handled separately by a special court, the Labour Court. This Court does, however, not grant precautionary measures.

The case of *Finnair*

The abovementioned case, *Finnair*, has gained a lot of visibility and attention, mainly due to its ambiguous procedural aspects.

In its interim report of April 2012, Finnair announced its plans to outsource its engine and component services. At the same time, Finnair also stated that it would soon initiate cooperation negotiations regarding the personnel of its two technical services subsidiaries. A total of 350 employees were subject to the negotiations, with the estimation of 280 employees under the threat of termination.

After having been notified of Finnair's plans, the members of the employee trade unions affected walked out of the place of work for two days. After returning, the unions required detailed information on, inter alia, the financial situation of the Finnair group and its business, considering that Finnair was violating its cooperative obligations. In May 2012, the unions further required that Finnair extend the statutory maximum negotiation period of two weeks in order to avoid a strike. Finnair consented to this but they were then informed by the unions in June 2012 that if they did not meet certain additional requirements, a strike would be initiated the next day. Finnair was not able to meet the additional demands of the employee unions. Consequently, 1,000 employees of the personnel of the technical services of Finnair initiated a strike in June 2012, intended to last for one week.

In order to prevent the strike, Finnair immediately sought an injunction from the District Court of Helsinki, basing its request on legal provisions and the collective agreements applied between the company and the unions. Later that same day, the Court issued a temporary precautionary measure, forcing the strikers back to work under the total threat of a fine of €2.8m. The decision was given as urgent without hearing the employee unions,

as the Court considered that the purpose of the precautionary measure otherwise would have been endangered.

The unions took the matter to the Helsinki Court of Appeal, requesting cancellation of the precautionary measure. However, the Court dismissed the case based on the reasoning that due to the temporary nature of the decision, the matter was still pending at the District Court. The matter was further taken to the Labour Court, which issued its judgment in late June 2012. The Labour Court found the strike undertaken by the employee trade unions illegal and sentenced them to compensatory fines to a total of €19,500. The Court did, however, not speak out on the legal acceptability of the District Court's issuance of the precautionary measure.

Assessment of the case of *Finnair* and industrial actions in general

The judgment of the district court in *Finnair* gave rise to raging public debates regarding industrial actions. One of the main things discussed, with opinions both for and against, was whether the District Court was legally competent to issue a judgment in the matter.

Legally, deciding on the principal claim, that is, the legality of the strike, falls within the jurisdiction of the Labour Court. Some experts consider that as a general tribunal, the District Court was not legally authorised to intervene in the right to industrial action, which is to be done by the Labour Court. Others, however, found the temporary measure acceptable based on the need for urgent legal protection before a final court decision. Also, as the Labour Court does not recognise a precautionary measures procedure, urgent temporary legal protection must be sought from elsewhere.

Also the significant threat of a fine has been criticised, even more strongly since the District Court did not hear the employee unions prior to its ordering. Based on Finnish law, an association violating its commitment to industrial peace may, instead of damages, be sentenced to a compensatory fine to a maximum of €29,500. In the case at hand, the number of employee unions as opposing parties was seven, corresponding to a €400,000 fine for each party. However, compensatory and threats of fines differ from each other. While a compensatory fine relates to breach of legal provisions, the purpose of a threat of fine is, for one, to make the precautionary measure more effective. The amount of the threat of fine is defined by the applicant and ultimately determined by the court.

The right to undertake industrial actions is not expressly safeguarded in law. However, it can be derived from the preparatory works of the Finnish Constitution, according to which participation in trade union activity or an industrial action does not constitute an acceptable ground for dismissal or difference in treatment in working life. As a starting point, industrial actions undertaken outside the obligation to retain industrial peace are allowed (ie, when not bound by a collective agreement), while actions during the time of validity of such an obligation are not.

Illegal strikes undertaken by employee unions may cause significant damage to the employer, both financially and from a goodwill perspective. Especially in the logistics sector, the consequences of illegal strikes affect the business as a whole. Moreover, outside parties, such as consumers and cooperation partners, suffer from the consequences of a strike as well.

Conclusion

Despite a number of recent cases on industrial actions, their assessment and position in Finland is still unclear. The possibility for a general court to issue a precautionary measure in labour disputes has been left open ended. Still, the trend to apply for threats of fines in order to put an end to an initiated or threatening industrial action would seem to be on the increase.

The current system of industrial peace is clearly not effective enough to prevent illegal industrial actions. Cooperative development of a model enabling successful maintenance of industrial peace would therefore benefit all parties involved. At the moment, the amount of the compensatory fine is too small to have a preventive effect on illegal strikes. A preventive effect requires that the sanctions are in correct proportion to the damage caused by the illegal action.

Current debates on problems concerning the regulatory aspects of industrial peace often result in accusations as to the aim to restrict the right to undertake industrial actions. However, one may ask whether the right to industrial action can reasonably entail the right to undertake such actions in situations where they are prohibited based on a provision of law.

A claim regarding annulment of the above judgment of the District Court is currently pending at the Supreme Court, based on a claim for grave procedural error. The decision of the Supreme Court will most likely affect general courts' future possibilities to issue temporary precautionary measures in labour disputes regarding industrial peace.

Sam Bristow
Walker Morris
Solicitors, Leeds
samantha.bristow@
walkermorris.co.uk

UK High Court makes landmark patent ruling which may open the door to 'forum shopping'

The High Court has held that it has the jurisdiction to hear a claim for a declaration of non-infringement of a patent in respect of French, German, Italian and Spanish, as well as UK, designations of a European patent.

The decision in *Actavis Group v Eli Lilly*[1] could have significant ramifications for pan-European patent litigation now giving potential claimants the flexibility to use the English courts to determine proceedings to seek declarations of non-infringement covering all of a European patent's national designations. This will likely save such claimants, who wish to seek certainty as to whether their use of a product/process infringes an existing patent in multiple jurisdictions, substantial time and money.

Background

Actavis is the parent company of a pharmaceutical group. The group intends to market a cancer-treating drug upon the expiry of one of Lilly's patents which covers a similar drug. The patent had been extended by a supplementary protection certificate and will expire in December 2015. Lilly also owns a second related patent which will not expire until June 2021. Actavis asserted that dealings in its own drug would not infringe Lilly's second patent and therefore sought a declaration of non-infringement with respect to the French, German, Italian, Spanish and UK designations of the patent.

A large part of the case was concerned with a procedural dispute as to whether the claim form instigating the proceedings had been validly served and whether Lilly had accordingly consented to the jurisdiction of the High Court to hear the claim; to which the Court found in the affirmative on both points. However, the substantive issue before the High Court for our purposes was: if service had been validly affected but there had been no consent to jurisdiction, whether the court should decline to exercise its jurisdiction on *forum non conveniens* grounds (ie, was there an appropriate and more convenient alternative forum in which to try the action?).

Decision

The judge accepted that the logic that applied to cases regarding justiciability of copyright infringement also applied to patent infringements and, as such, the principles enunciated by the Supreme Court in *Lucasfilm v Ainsworth*[2] on jurisdiction in copyright cases were equally relevant to patents.

Lilly argued that, despite Actavis only seeking a declaration of non-infringement and not seeking to challenge the validity of the patent, validity was still an issue that would need to be considered because it was relevant to the scope of patent protection in some member states when considering the differing approaches by member states that were subject to Article 69 of the European Patent Convention ('EPC'). Nevertheless, the Court was 'unimpressed by the argument that foreign law is difficult and expensive to prove because it is treated as a question of fact'. Further reflecting the sentiments of *Lucasfilm*, the court added that 'it is increasingly common in intellectual property cases for the courts of this country to apply case law from other EU Member States when deciding questions of European Union law or national law based on European conventions [such as the EPC]'.

Under *Spiliada Maritime Corp v Cansulex Ltd*,[3] the burden is on a party to establish that a foreign forum is clearly or distinctly more suitable than the one being proposed for a hearing. In the current case, the Court ultimately found that had there been a finding that Lilly had not consented to service, it would still not have been appropriate to stay the proceedings on *forum non conveniens* grounds as Lilly had not shown that the courts of another jurisdiction were a more appropriate forum. The Court itself noted that such result would improve consistency in decisions given that there will

be a single hearing and single ruling with any appeal also being dealt with by one court rather than the risk of five different courts presenting inconsistent judgments.

Points to consider

Significantly, Actavis had not challenged the validity of the patent and had undertaken not to do so, which meant that Article 22(4) of the Brussels I Regulation did not apply (this Regulation confers exclusive jurisdiction over challenges to the validity of registered intellectual property rights on the courts of the states where they are registered). It is therefore important to remember that should validity be contested, the registration state will always be the appropriate forum.

The extensive debate in this case about the validity of service of the proceedings demonstrates the importance of doing this correctly if such action is taken. If consent for service has not been given by the defendant and the defendant does not have a place of business in the jurisdiction within the meaning of CPR 6.9(2), then it will not be sufficient to simply serve on the address for service given for the UK designation of the patent, in order to effect service upon the non-UK designations of the patent.

Formalities aside, this appears to be an excellent tool for those simply wishing to obtain certainty as to their rights and the scope of a third parties rights, and with the prospect of a single, European Unified Patents Court on the horizon, this decision does demonstrate that, in certain circumstances, a cost-effective and expeditious platform for pan-European cases may already exist in the English courts.

Notes

1 [2012] EWHC 3316 (Pat).
2 [2011] UKSC 39.
3 [1987] AC 460.

Mediation becomes law in Germany

Dr Sarah E Hilmer
Schwenke & Partner, Hamburg
S.Hilmer@schwenkelaw.com

Mediation

Mediation is a process in which the participants voluntarily, with the support of a trained mediator(s), identify and clarify issues in dispute, create and develop options, negotiate those options and reach a full, partial or no agreement. The mediator(s) acts as a third neutral and independent party to assist the participants to reach their agreement.[1]

Mediation becomes law in Germany[2]

During the 1990s mediation was practiced in Germany in the form of an extrajudicial dispute resolution mechanism, mainly in the family arena. In 2002, various pilot projects of '*gerichtsinternen*' mediation (*Güterichterkonzept*, part of an internal court process), better to be called conciliation,[3] have been practiced. The method of '*gerichtsinternen*' conciliation was well perceived and developed further without any fundamental legal framework. The new Mediation Law includes the '*gerichtsinterne*' (conciliation) and '*gerichtsnahe*' mediation methods.[4] '*Gerichtsnahe*' mediation is a mediation process which will be conducted during a court process by external mediators (extrajudicial settlement, not part of a court process).

Mediation has developed into an important instrument of dispute settlement in Germany. In compliance with the EU Directive 2008/52/EG, the German legislator created a '*Mediationsgesetz*' in April 2011 that was introduced on 26 July 2012.[5] The Directive's objective is to set up a general framework in order to support mediation and to ensure that parties who engage in a mediation process can rely on a structured framework (paragraph 7 EU Directive 2008/52/EG).

The main issues of the new mediation law are, for example, two fundamental aspects of mediation: voluntary attendance and empowerment of the parties to terminate the mediation process at any time (sections 2 Abs 2 and 5 MediationsG). In addition,

the neutral and independent character of the mediator must be given according to section 3 Abs 1 MediationsG). Thus, the mediator must disclose any conflict of interest before the mediation process commences (sections 3 Abs 1, 2 and 3 MediationsG). Another fundamental aspect of mediation is confidentiality, which is now regulated in section 4 MediationsG.

The aim of the mediation law is to strengthen alternative dispute settlements and to relieve the court system's case load. Private and business disputes should be settled by means of a speedy and efficient mode based on a structured mediation framework.

The key values of conducting mediation by meeting the parties' needs are:

- confidentiality;
- voluntariness;
- empowerment;
- neutrality; and
- a unique solution.[6]

In addition, mediation can be conducted before or during court proceedings. Based on the new Mediation Law, not only should the legal representatives encourage and advise the client on mediation, but the courts are also very supportive of such a scheme. Courts will ask whether mediation has been attempted before the case proceeds.

All statements of claim should contain details whether an out-of-court settlement has been attempted or why such an attempt has not been approached. Once a complaint is lodged, the court can suggest and encourage mediation (or order conciliation) – or any other mode of an out-of-court settlement – according to section 278(5), section 278a ZPO in conjunction with section 251 ZPO (stay of proceedings).[7]

The parties can generally select their mediator although an exception is the '*Güterichterkonzept*', where the presiding judge generally determines a conciliator.[8]

Resolving disputes out of court by way of mediation appears to be a new legal practice component.

Notes

1 S E Hilmer, *Mediation Theory and Practice*, 2010, p 1; see also Folberg and Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation*, 1984, p 7; Sir L Street, *Mediation, A Practical Outline*, 2003, p 9; Brown and Marriott, *ADR Principles and ADR Practice*, 1999, p 138, paragraph 7-001

2 'Richtlinie 2008/52/EG des Europäischen Parlaments und des Rates über bestimmte Aspekte der Mediation in Zivil-und Handelssachen' v 21 May 2008; ABl. EU L 136, p 3ff, v 24 May 2008.

3 Conciliation: An independent third party assists the parties to settle their differences but may, if necessary, delivery an opinion on the dispute and may suggest an outcome; see also S E Hilmer, *Mediation Theory and Practice*, 2010, pp 8–14.

4 The recommendation of the BTDruckS 17/8058 v 30 November 2011, however, did not include the '*gerichtsinterne*' conciliation, but the Bundestag recommended including the '*gerichtsinterne*' conciliation that should be called `*Güterichter*`, BT-Drs. 17/10102 v 27 June 2012

5 Deutscher Bundestag, Mediationsgesetz, Drucksache 17/5335 v 1 April 2011; Beschlussempfehlung und Bericht BT-Drucksache 17/8058 v 1 December 2012.; however the EU Directive 2008/52/EG had to be enacted by 20 May 2011.

6 S E Hilmer, Mediation Theory and Practice, 2010, pp 39–42.

7 '*Güterichter*' and the established mode of '*Güteverhandlung*' before court proceedings section 278 Abs 2 ZPO, and section 278 Abs 1 ZPO (*gütliche Streitbeilegung in jeder Verfahrenslage*).

8 Section 278(5) ZPO in conjunction with section 251 (stay of proceedings); according to section 278a(2) ZPO, proceedings can be stayed if parties decide to mediate.

An emerging market perspective on the convention on cybercrime: cyber laws and Turkey's progress

Gönenç Gürkaynak
ELIG, Istanbul
gonenc.gurkaynak@elig.com

İlay Yılmaz
ELIG, Istanbul
ilay.yilmaz@elig.com

Derya Durlu
ELIG, Istanbul
derya.durlu@elig.com

The Convention on Cybercrime of the Council of Europe ('Convention')[1] serves as a valuable guidance to many nations whose national legislative framework on cybercrimes require regulatory provisions on legal issues relating to cybercrimes. The Convention's significance has increased over the years, with the internet, as a medium, becoming indispensable, and criminal acts committed online becoming more prevalent.

As of 31 January 2013, 35 member states of the Council of Europe out of the 47 have ratified the Convention, which is a clear indication of the growing need to have effective local regulatory mechanisms to combat online criminal activity. Turkey signed the Convention in 2010, but has not yet ratified it.

The proliferation of computer-related criminal activity requires a transnational, harmonised and technologically acute understanding of implementing local legal rules that are implemented correctly and effectively by local courts as well as enforcement agencies, on the one hand, and aligned with international conventions, on the other.

This article addresses the Convention as it regulates cybercrimes and highlights the current state of play in Turkey on the regulatory architecture of cybercrime.

Cybercrimes and the Convention at a glance

The term 'cybercrime' has been understood as either a computer crime or as a computer-related crime.[2] Against this backdrop, the Convention emerged from the rationale of fighting cybercrime as not only a computer crime but also a computer-related crime, and that criminal laws should be sensitive to technological developments which 'offer highly sophisticated opportunities for misusing facilities of the cyber-space and causing damage to legitimate interests'.[3] This reasoning accepts the cross-border nature of information networks and sets the ground for the Convention to provide rules on questions of substantive and procedural law, as well as matters that are closely connected with the use of information technology.

The Convention is comprised of four main chapters – 'use of terms', 'measures to be taken at domestic level – substantive law and procedural law', 'international cooperation' and 'final clauses' – under which legal rules provide for the criminalisation of action directed against the confidentiality, integrity and availability of computer systems, networks and computer data as well as the misuse of such systems and networks.[4]

The four types of substantive offences regulated in the Convention and that are prevalent on the internet are:

- offences against the confidentiality, integrity and availability of computer data and systems, comprising interference and misuse of devices;
- computer related offences such as forgery and computer fraud;
- content related offences, in particular the production, dissemination and possession of child pornography; and
- offences related to infringement of copyright.

As to the procedural elements of the Convention, expedited preservation of stored computer and traffic data, search and seizure of stored computer data and real time collection of traffic data are some of the wide reaching powers that are regulated with respect to enforcement authorities that investigate cybercrime.

A final topic of relevance is international cooperation, as regulated in the Convention, between states for all crimes regulated under the Convention and for gathering data and evidence in electronic form with respect to the relevant criminal offence. Given the cross-border nature of cybercrimes, there is a high potential for more than a single state to be

involved in the commission of a cybercrime. This brings forth the issue of how and to what extent states are required to cooperate in regards to acts that may have originated in other countries but that ultimately require their judicial and even their law enforcement agencies. Article 23 of the Convention sets out the general principles of mutual legal assistance and the obligations imposed upon members states:

> 'to cooperate with each other, and through the application of relevant international instruments on international co-operation in criminal matters, arrangements agreed on the basis of uniform or reciprocal legislation, and domestic laws, to the widest extent possible for the purposes of investigations or proceedings concerning criminal offences related to computer systems and data, or for the collection of evidence in electronic form of a criminal offence.'

Where there is no mutual assistance treaty or arrangement on the basis of uniform or reciprocal legislation in force between the respective states, the Convention, under Article 27, establishes mutual rules under paragraphs 2 through 9 that will be applied when the European Convention on Mutual Assistance in Criminal Matters and its Protocol or other similar international conventions do not otherwise oblige the member states with respect to matters on mutual legal assistance.

Cybercrime legislation in Turkey and Turkey's progress

Turkey has progressed significantly in the past five years in regulating internet law matters in its legislative framework. With the promulgation of Law No 5651 on Regulation of Broadcasts via Internet and Prevention of Crimes Committed through Such Broadcasts ('Law No 5651') in 2007, and Turkey's signature to the Convention in 2010, integration with European and international communities has gained considerable momentum. The Turkish regulatory framework on cybercrimes has been in place since 1991, and these crimes were regulated more specifically when the new Turkish Criminal Law No 5237 ('Turkish Criminal Law') was promulgated as the legal lacuna on cybercrimes was in need of an effective regulation. The regulation of cybercrime, specifically within the Turkish Criminal Law in 2005, was among the first signs of Turkey's progress in this field and efforts in combating cybercrimes.

While Law No 5651 primarily draws the framework for the principles and procedures with respect to the obligations of content, hosting and access providers and removal of content for certain crimes committed on the internet,[5] the Turkish Criminal Law remains the primary law regulating cybercrimes.[6] Needless to say, there are still gaps within the Turkish Criminal Law where the regulation falls short of addressing the four offences as stipulated in the Convention. By ratifying or acceding to the Convention, Turkey will have to ensure that its domestic law (ie, the Turkish criminal law framework) criminalises the conduct described in Article 6 of the Convention (on 'misuse of devices'), as the Turkish Criminal Law does not currently criminalise the intentional commission of illegal behaviour with respect to certain devices that are used to commit offences regulated under the Convention.[7]

Concluding remarks

As soon as Turkey ratifies the Convention and it is duly put into effect, the Convention will carry the force of law and will constitute an integral part of the Turkish legislative landscape.[8] Given the cross-border nature of the internet, and the accessibility of content that is broadcasted on the internet, local regulations, particularly in emerging market economies, may be susceptible and malleable to the volatile nature of cybercrimes. With its transnational characteristic, the Convention's aim of facilitating harmonisation amongst different jurisdictions may have already borne its fruits with respect to Turkey, as Turkey gradually adapts its cyber law architecture to be on par with international standards.

Notes

1 European Council Convention on Cybercrime (CETS No 185) (adopted on 23 November 2001 and entered into force on 1 July 2004).

2 10th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Vienna, 10–17 April 2000, 'Crimes Related to Computer Networks: Background Paper for the Workshop on Crimes Related to Computer Network', p 5, available at **www.uncjin.org/Documents/congr10/10e.pdf** (defining computer crime as 'any illegal behaviour directed by means of electronic operations that targets the security of computer systems and the data processed by them', while defining computer-related crime as 'any illegal behaviour committed by means of, or in relation to, a computer system or network, including such crimes as illegal possession, offering or distributing information by means of a computer system or network';

See also Jonathon Clough, *Principles of Cybercrime* (Cambridge, 2010), p 10 (classifying cybercrimes under three sub-categories as (i) crimes in which a computerised device or network is the target of criminal activity; (ii) crimes where the computer is used to commit a recognised offence; and (iii) crimes in which the computer is incidental to the commission of a crime).

3 Council of Europe, Explanatory Report on Convention on Cybercrime (ETS No. 185) (available at **http://conventions.coe.int/Treaty/en/Reports/Html/185.htm**) (last visited: 30.01.2013)

4 Convention, Preamble, paragraph 9.

5 Article 1 ('Scope'), Law No 5651.

6 Articles 243–246, Turkish Criminal Law.

7 See Article 6 of the Convention

8 Article 90/4, Turkish Constitution ('*International treaties duly put into effect carry the force of law* – No appeal to the Constitutional Court can be made with regard to these treaties on the ground that they are unconstitutional. In case of a conflict between international treaties in the area of fundamental rights and freedoms duly put into effect and the laws due to differences in provisions on the same matter, the provisions of international treaties shall prevail.') (emphasis added).

Labour immigration in Kazakhstan

Yulia Chumachenko
AEQUITAS Law Firm, Almaty
y.chumachenko@aequitas.kz

Kazakhstan, as a young developing country rich in natural resources and pursuing foreign investor-favourable policies, is fairly attractive for business.

According to the World Bank's report, Kazakhstan ranked 49th in the 2012 Doing Business rating, up seven points compared to 2011 and ahead of some of its neighbours, for example, Russia (112th) and Kyrgyzstan (70th). According to the World Economic Forum data, Kazakhstan is ranked 51st in the 2012–2013 Global Competitiveness Index.

Investment activities in Kazakhstan often involve engagement of foreign specialists to supervise and manage foreign investors' business. Still, the local labour immigration policy is designed to protect the domestic labour market and ensure local labour employment, which finds has gained strength (especially over the past five years) in the formation of the qualitatively new directions in the immigration administration.

What one needs to know about foreign labour engagement in Kazakhstan?

The Kazakh legislation on immigrants (foreign nationals entering Kazakhstan to temporarily or permanently reside there), which was significantly changed in 2012 and has already changed in 2013, provides for various regulations, depending on the purpose of entry. The most common is labour immigration (entry for the purpose of carrying out labour activities), therefore, we will further specifically dwell on the status of labour immigrants (there exist other categories of immigrants, including business immigrants, oralmans and others, who have a special status and may be the subject of a separate review).

In order to carry out labour activities in Kazakhstan, it is necessary to perform the following key actions:

- obtain a work permit;
- obtain a visa (working or business); and
- register with the authorised agencies upon arrival into the Kazakhstan territory.

The labour immigrant's activities in Kazakhstan (including travel inside its territory) must strictly conform to the purpose of entry stated when obtaining the visa and specified in the work permit, with no other activities being allowed. Moreover, in the period of stay in the country, it is required to observe the local legislation in order to avoid imposition of sanctions and prohibition on future entries into the country.

General requirements to labour immigrants

As a prerequisite for foreign nationals to enter Kazakhstan for independent job placement or engagement by employers, they must:

- be of age;
- present a confirmation of their solvency required to exit the territory of Kazakhstan (in the amount of at least the economy airfare to the nearest airport of the country of the expat's permanent residence plus approximately US$25 per each day of stay);
- possess education, qualifications and experience necessary to perform their contemplated work;

- present confirmation of the existence or absence of a criminal record;
- present a medical certificate confirming absence of illnesses prohibiting entry into Kazakhstan (drug addiction, mental disorders, tuberculosis, leprosy, sexually transmitted diseases and acute infectious diseases); and
- hold medical insurance.

Labour immigrant quotas

The quantity of foreign labour engaged in Kazakhstan is subject to quotas. The relevant quota is annually established by the government as a percentage to the number of economically active population. Besides, starting in 2012, additionally set are the quotas for priority projects and/or countries of exit, expressed as absolute numbers. The quota is determined separately for each priority project and sets out the maximum number of foreign employees that the companies implementing the priority project may need (including contractor and subcontractor organisations), as well as subject to the project timeframes and location. The quotas by countries of exit are established provided there are international agreements on cooperation in the sphere of labour migration for the engagement of seasonal foreign workers.

Permit system

Foreign employees' labour activities in Kazakhstan are subject to a permitting procedure and the following types of work permits currently exist:

- foreign labour engagement permits, which are issued to employers and constitute the basis for entering into employment agreements (for rendering services/performing work under civil contracts) and which are necessary in order to obtain visas; and
- independent job placement permits, which are issued directly to employees according to the legislatively established list of professions (kinds of work).

Both types of work permits are issued by the local executive authority ('Akimat') within the quota, and an additional criteria for issuing permits to the employer is a lack of opportunity to satisfy the demand for labour from the local labour market resources.

Permits are issued according to employee categories (there are four such categories, from CEOs and their deputies to skilled workers) for a term from one to three years, with or without the extension option, depending on the employee category.

The legislator also establishes a list of persons who do not require permits (these include the heads of representative offices and branches of foreign companies; nationals of the customs union member states; immigrants entering Kazakhstan for a business trip lasting up to 120 days per year; and others).

The issued permits cannot be transferred to other employers and are effective only in the territory of the relevant administrative-territorial unit.

Corporate transfer

The current Kazakh legislation also provides for the so-called 'corporate transfer' which may take place in case an employee is seconded from a foreign legal entity to its branch/representative office or an affiliate company based in the territory of Kazakhstan. The corporate transfer is subject to a permitting procedure, in which case the permit issuance process is simplified.

Visa regime

In order to enter the Kazakhstan territory, foreign employees must obtain an appropriate visa.

Immigrants coming to Kazakhstan to work based on a work permit and immigrants exempt from work permits by legislation are issued a working visa. Immigrants coming to Kazakhstan on business trips or to render services/perform work under a civil contract must obtain a business visa.

The working and business visas are issued by the Kazakh Ministry of Foreign Affairs and its foreign establishments (Kazakhstan's embassies, permanent establishments, diplomatic missions, consulates general and consular offices abroad) for a term not to exceed three years. The working visa is issued for the effective term of the work permit and, under the general rule, the immigrant's period of stay in the country under a business visa cannot exceed 120 days per year.

Registration

According to the general rule, immigrants must register within five calendar days after crossing the Kazakhstan state border.

For this purpose, when passing the border passport control at the point of arrival, each immigrant must fill out the migration card of an established format and have the relevant mark of arrival and registration stamped in his/her passport and migration card.

Registration at the point of arrival is made for the period up to 90 days. If the immigrant intends to stay in Kazakhstan for a longer period, he/she will need to apply to the migration police authorities at the place of residence, presenting the migration card and the passport. If the period of immigrant's actual stay in Kazakhstan exceeds six months, in order to register it is necessary to additionally submit to the migration police authority the application for registration, arrival sheet, one photo 33M3 mm, medical examination certificate (including chest fluorography and HIV certificate) and a copy of employment agreement.

Starting in January 2013, beside the migration card, registration may be marked in a hardcopy text file downloaded from the visa-and-migration website. This form of registration is performed not only at the border control checkpoints or by migration police authorities, but also by legal entities and individuals (for example, the inviting companies and persons in Kazakhstan, the hotels of stay, etc) that have a personal e-signature enabling them to enter the information on the immigrants staying with them on the visa-and-migration website of Berkut Unified Information System.

If an immigrant changes the place of his/her temporary stay in Kazakhstan, the inviting company (employer) must accordingly notify the migration police authorities in writing within three calendar days, and the immigrant must re-register at the new place of temporary residence within five days.