DISPUTE RESOLUTION GUIDE 2014
Cooperation and conflict

It’s fair to say that market sentiment is on the up. Boardroom confidence is back, which means that companies want to expand. And investors are looking to new asset classes in their hunt for yield. The thorn in the side this growth story, however, is commercial disputes.

As market participants enter new and unfamiliar sectors – and sometimes far from home – the scope for misunderstandings and disagreements increases. Local laws and regulatory systems are common pitfalls, and court systems can be impossible to navigate.

Thankfully, global initiatives and international dialogue are encouraging the sharing of knowledge among dispute resolution professionals.

The Choice of Court Convention, which will facilitate the use of forum selection clauses, is one of the most promising developments in this area. As explained on page 4 by Christophe Bernasconi, secretary general of the Hague Conference on Private International Law, progress is being made on its introduction, and the treaty could take effect as early as next year.

Country-specific chapters also provide valuable updates on issues ranging from the enforcement of foreign rulings, allocating jurisdiction over cross-border disputes, the growth of arbitration, and the impact of recent case law.

This year’s Dispute Resolution Guide provides a wealth of information on some of the world’s most promising markets. I hope it proves useful to companies, investors – and their advisors – as they pursue their new strategies.

Danielle Myles
Editor
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A global agreement on the recognition and enforcement of court rulings makes so much sense, it's difficult to understand why it isn't already in place. After all, a similar agreement regarding arbitration has been in effect since the 1950s.

But cross-border cooperation among courts has been a problem for some time. Judges in different countries can disagree on who has jurisdiction to hear cases, and whether foreign rulings should be enforced.

The Convention of Choice on Court Agreements, better known as the Choice of Court Convention (Convention), fills an important gap in this regard. Today it has just one party – Mexico – and two signatories – the EU and US – but if all goes to plan, it should take effect as early as next year.

Christophe Bernasconi, secretary general of the Hague Conference on Private International Law, is heading the initiative. He spoke to IFLR about its underlying principles, the advantages to flow from its adoption, and the difficulties in reconciling its provisions with local law.

Can you briefly explain the fundamental principles underpinning the Choice of Court Convention?
The Convention aims to ensure the effectiveness of choice of court agreements – also known as forum selection clauses – between parties to international transactions. It only applies to business-to-business (B2B) contracts in an international context. There are three basic rules which, subject to a short list of narrow exceptions, must be followed. First, the court chosen by the parties must hear the case (article 5). Second, any court not chosen must decline to hear the case (article 6). Third, any judgment rendered by the chosen court must be recognised and enforced in other contracting states (articles 8 and 9).

So in effect, the courts are required to respect and give effect to forum selection clauses in B2B contracts. The primary objective is to give legal certainty and predictability to the contacting parties regarding where to litigate a dispute that arises under their contract. It reduces the time and expense that both courts and businesses face when dealing with international jurisdictional issues and the enforcement of foreign rulings. And this, in turn, creates a legal environment that is amenable to international trade and foreign direct investment.

We don't expect the Convention to create a vast amount of case law

When did work on the Convention begin, and what must happen for it to take effect?
Work formally started in April 2002 when the political decision was made to develop a convention in this field. And the actual negotiations lasted until 2005 when the 20th session of the Hague Conference approved the final text of the Convention. But strictly speaking, the negotiations go back further than that. The Convention is actually a spin-off of a broader project – known as the judgments project. This was started in the early
1990s with a view to developing a global instrument on jurisdiction as well as recognition and enforcement of judgments in civil and commercial matters. But this massive project proved too ambitious, and the members of the Hague Conference wisely decided to scale down its scope, and do something more manageable and which was more likely to achieve consensus: the Choice of Court Convention.

The Convention creates a clear and predictable regime

Looking ahead, the Convention will enter into force after the deposit of a second instrument of ratification or accession. Today, only Mexico has acceded to the Convention. But on January 30 this year the European Commission issued a proposal for approval of the Convention. That means that after the proposal is approved by the European Parliament and European Council, and the necessary formalities have occurred, there will be a second contracting party (the EU) and the Convention will enter into force. It will bind Mexico and 27 of the EU’s 28 member states (Denmark will not be bound). I’m very hopeful that this will occur in early 2015, as this is the time the revised Brussels I regulation will enter into force. So the EU authorities are, rather wisely, planning for the two instruments to enter into force on the same day.

The Convention is often described as the litigation counterpart to the New York Arbitration Convention. Is this an accurate description?

Absolutely. Commercial arbitration is, of course, widely used. But good commercial arbitration has also become very expensive, and so it is not always an option – in particular for small and mid-sized companies (SME). When these companies consider the court avenue, their first question of course is: which court has jurisdiction to hear the dispute? If the parties have agreed on the court in their contract, the Convention provides a very clear and predictable answer to this question. So the Convention will ensure that parties can expect what they have bargained for – to have any disputes arising from their contract heard exclusively by the court they have chosen – and have the judgment recognised and enforced elsewhere.

That really demonstrates the similarity between the conventions; both of which promote certainty, efficiency and predictability in international dispute settlement. At a comparable level, the New York Convention will continue to be the basic legal instrument for international commercial arbitration, but the choice of court convention will make the litigation path more attractive, in particular for SMEs that cannot always afford commercial arbitration.

Today, how common are choice of court agreements in contracts to which the Convention would apply, and how readily do courts respect them?

To my knowledge there is no comprehensive and updated data on this. There are, however, some sectoral or regional surveys that suggest that these agreements are indeed very common in B2B contracts. The problem is that choice of court agreements are not always respected under divergent national rules. Especially when cases are brought to a court other than the one designated by the parties; courts often don’t regard these agreements as binding. In the common law context, for example, you often hear courts saying ‘you may have chosen me as the court, but I declare myself forum non conveniens because a given court elsewhere is better placed to hear the dispute’ (or words to that effect). The Choice of Court Convention would change that.

Other than the EU, the only other party to sign but not ratify the Convention is the US. Has it taken any steps to ratifying it?

Yes the ratification of the convention is much very being discussed by the relevant authorities in the US. The challenge is that they are still deciding whether to implement it at the federal level or state level. So the delay has nothing to do with the merits of the convention, which is clear to the US, but rather they are still assessing the best model for implementing the Convention into domestic law.

Which other countries have shown the greatest interest in signing?

We know that the Convention is being assessed in Argentina, Australia, Canada, New Zealand, the Russian Federation, Paraguay, Singapore, and to some extent Turkey. In some of these jurisdictions, the Convention has already left a clear mark. Australia and New Zealand, for example, underscored the importance of the Convention via the Trans-Tasman Proceedings Regime, which implements essential elements of the Convention and entered into force in October 2013. And Hong Kong and Mainland China have concluded a bilateral treaty for the recognition and enforcement of judgments in civil and commercial matters. Again, that takes the Choice of Court Convention as a model to the extent it deals with choice of court clauses.

Some very senior people have also put their weight behind the Convention. Last year, Australia’s chief justice and solicitor general called for the country to sign and ratify the Convention. And the chief justice of Singapore has really championed the country’s accession. He was one of the first high ranking officials to recognise the Convention would be a very important alternative to arbitration which clearly has become too expensive to many players. There is also express support from the International Chamber of Commerce, German Bar Association and the Inter-American bar association. And in February 2014 the Council of Bars and Law Societies of Europe also strongly encouraged the EU to ratify.

What feedback are you receiving on why the countries that have shown interest haven’t signed yet?

As with every other convention, domestic implementation sometimes raises delicate questions, because the country’s laws need to be adapted to align to the international framework. The Convention is no exception to this.

Take the example of common law jurisdictions. As I mentioned before, judges are very much used to applying forum non conveniens. The Convention does away with that when faced with an international contract containing a forum selection clause. So judges will have to be convinced that this is no longer a relevant tool for them to apply. The Convention also reverses the common law presumption that forum selection clauses are not exclusive.

Today, courts do not always regard these agreements as binding

In civil law jurisdictions, the Convention will do away with the principle of lis pendens – a theory under which the first court seized has jurisdiction over the second court seized –provided there is a court chosen by the parties. Again, the Convention does away with this principle which, for many countries, is a long-established part of domestic law.

Overcoming these challenges and making the changes acceptable will take some time, but it is precisely these types of changes that will bring about the desired legal certainty and predictability. Forum non conveniens
introduces an element of uncertainty, as does *lis pendens* which may lead to a race to the courthouse. The Convention is an improvement in that it creates a clear and predictable regime by operation of the parties’ choice but it comes with the cost of doing away with some deeply rooted principles.

**Once the Convention does take effect, what do you expect to be any other challenges in its implementation by courts?**

We actually don’t expect the Convention to create a vast amount of case law. Its provisions are clear and straightforward, which is important for an instrument that is designed to provide certainty and predictability. So it should make life easier for courts and businesses, rather than create arguments about the rules. One thing we do expect once it enters into force is a real spike in interest from states interested in becoming a party.

**The New York Convention has around 150 members. Do you think the Convention could reach the same level?**

Why not? We have a number of conventions with more or close to 100 contracting states. Given the Choice of Court Convention’s obvious merits – including the fact that it is fairly short and straightforward – it has great potential to become a very successful instrument. And in light of the strong support shown by the countries and authorities mentioned above, I’m confident it could reach a very high level of acceptance by courts globally. Of course the support for the New York Convention is exceptional, so if we can come even close to that figure, it would be fantastic.

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**About the contributor**


He holds a law degree from Fribourg University in Switzerland (magna cum laude; bilingual German and French), an LLM degree from McGill University in Montreal (Canada) in comparative law (with a Master’s Thesis on Oligopolies in unfair competition law), and a doctoral degree from Fribourg University (summa cum laude).

Prior to assuming his function as secretary general, he had primary responsibility for all work relating to the legal and administrative cooperation Conventions (Apostille, Service, Evidence, Access to Justice) and the finance law Convention (Securities), and was also closely involved in the work relating to the family law and commercial law Conventions. He has been responsible for numerous special commission, experts and working group meetings. He is also the designer and principal administrator of the groundbreaking and successful electronic Apostille Program (e-APP).
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Only a matter of time

Warranty and indemnity insurance is gaining traction in Asia. It promises to become an important tool in preventing post-deal disputes

While European and US M&A deals frequently use warranty and indemnity (W&I) insurance, the product hasn’t yet taken off in Asia – even in riskier emerging jurisdictions.

The insurance policies have proved popular elsewhere because they can protect either a buyer or seller from losses caused by inaccuracies in representations and warranties included in deal documentation.

It is available in Hong Kong, Singapore and Japan, as well as more emerging markets like China, Korea, Indonesia, Thailand and Malaysia. But it is not yet common across the region.

Lee Suet-Fern, senior director at Stamford Law, has recently seen W&I insurance being pushed quite hard by various insurance brokers. But she doesn’t see a large take-up in Asean [Association of Southeast Asian Nations]. “At this stage it is not a product that buyers or sellers in our markets embrace naturally,” she says.

Rod Brown, partner at Latham & Watkins, hopes that will change. He describes it as a useful tool for getting deals done, especially those that might not get done without a W&I policy, adding that it’s helpful when there’s a contingent risk that neither side wants to take.

“We’ve seen it used to save deals in Europe and I expect it is only a matter of time before we see these products being increasingly used in Asia,” he adds.

Deal documentation

It’s a frequent misconception that deal documents have to change when W&I insurance is involved, says Brown.

Broadly speaking, documentation does not change: in fact, insurers want to know that the buyer and seller engaged in a robust arms’ length negotiation. From the underwriting perspective, Brown said insurers are keen to avoid a situation where seller and buyer know that a W&I policy is available at the deal’s outset, in case that encourages buyers to seek and sellers to grant unusual warranties.

As W&I evolves, however, he expects more scrutiny on deal documents. Brokers are hiring M&A lawyers in-house to go through sale and purchase agreement (SPA) to ensure they look similar to those in other deals, and may respond to policy requests by refusing to insure certain warranties.

“That may impact the transaction documents more than what we’ve seen before,” Brown says.

Other changes may be needed, depending on the product. The seller may propose a so-called sell/buy flip to the buyer as its only recourse mechanism for a breach of warranty, says Josh Roach, head of transactional risk Asia-Pacific at risk management and insurance broking firm Marsh. If that structure is used, the SPA is written on a non-recourse basis with the insurance policy referenced in the document.

W&I insurance might also help buyers offer a more competitive liability structure when it’s used to top up either the warranty cap or warranty survival period. “Responsibility for the premium is often tightly negotiated and often we see the amount discounted off the purchase price if the buyer is paying,” says Roach.

What’s next

It’s unclear whether insurers are ready to expand their coverage to Asia’s frontier markets. “We are aware of examples where W&I has been considered on transactions in Vietnam and are confident that with time Myanmar will become a jurisdiction of interest for insurers, although this won’t be in the immediate future,” Roach says.

Instead Brown predicts that growth in Asia – and globally – will likely come from sponsors using W&I insurance as a tool to make bids more competitive in auctions.

In a typical auction, the seller is in a position of strength and will probably offer few typical deal protections. Without W&I, buyers would be forced to mark up the transaction documents or live without customary protections. But marked up documents would be less competitive.

Now, Brown says, buyers are self-insuring by mitigating risk with a buy-side policy: “We’re seeing increasing use of insurance in auctions because it’s a relatively inexpensive way for private equity sponsors to remain competitive in an auction and protect themselves.”

But for W&I products to become more popular in strategic M&A, insurance brokers must convince Asian businessmen and corporates that their products actually provide benefits.

Lee believes it may be a while before there is traction. “The typical Asian businessman may consider insurance but may believe that he has assessed and is ready to accept the W&I risks, or has factored this into the pricing,” she adds.
Turf wars

Standard Chartered’s recent settlement with New York authorities highlights foreign regulators’ difficulties with US extraterritorial rules

Hong Kong and United Arab Emirates (UAE) regulators’ response to Standard Chartered Bank’s (SCB) $300 million settlement with the New York Department of Financial Services (DFS) in August show how local regulators are reacting to US extraterritorial enforcement.

The Hong Kong Monetary Authority (HKMA) and the UAE’s central bank both reacted quickly to the NY DFS’s announcement of Standard Chartered’s settlement, which was in relation to high-risk transactions originating from the bank’s branches in both jurisdictions.

The settlement follows transaction monitoring issues discovered by DFS’s independent monitor, in which the bank failed to detect potentially high-risk transactions originating from its Hong Kong and UAE subsidiaries. Lawyers believe that regulators are working more closely than ever following the global financial crisis. But regulators have also had to contend with the increasing activity of US regulators.

Immediately after the DFS announcement – in the middle of the night Hong Kong time – the HKMA released a brief statement about the settlement. ‘The HKMA has been monitoring closely SCB HK’s AML/CFT [anti-money laundering/counter-terrorism financing] controls,’ it read. ‘Although we have identified areas for improvement, they are not issues that cause significant supervisory concerns.’ The regulator asked SCB Hong Kong to render whatever assistance necessary to SCB New York in this matter.

The settlement

The settlement follows the DFS’s enforcement action against Standard Chartered in 2012, where it paid $627 million for helping Iranian clients launder $250 billion in violation of US sanctions. The bank entered a deferred prosecution agreement with the US Department of Justice in which it installed a monitor, who was paid by the bank but reported to the DFS.

The monitor this year discovered high-risk transactions from the bank’s Hong Kong and Dubai branches, which resulted in more remedial steps from the DFS.

Aside from the $300 million settlement, SCB must suspend dollar clearing through its New York branch for high-risk business clients at its Hong Kong subsidiary and exit high-risk client relationships within certain business lines at its UAE branches. It also cannot accept new dollar-clearing clients or accounts cross its operations without approval from DFS.

HK reaction

Sources say reports that the HKMA had disagreed with the DFS’s actions were exaggerated. A Hong Kong lawyer instead believes that the HKMA’s statement emphasises that AML regulations in Hong Kong are generally of a high standard. ‘They’re distancing themselves from SCB, and are possibly trying to say that this is really an individual case, and has nothing to do with Hong Kong’s regulatory strength,’ he says.

It might also highlight different regulatory standards globally. FTI Consulting managing director David Holloway believes that the HKMA announcement is a timely reminder that banks must not only look at regulations in their home country or where the funds are from, but also intermediary and beneficiary countries.

“HKMA is saying that banks should have strong AML processes that meet Hong Kong requirements, but that it’s also a bank’s responsibility to determine whether it’s fully compliant with slightly different requirements in other countries in which it does business,” he says. The lawyer emphasises that Hong Kong has strong AML requirements that comply with global requirements, and that the HKMA is active in investigating financial institutions. “I think it takes a fairly hard line,” he adds.

What’s next

The UAE central bank has taken a much more adversarial stance against the US settlement. It announced that it will commence legal actions against Standard Chartered if it closes small and medium-sized business accounts deemed high-risk by the New York regulator.

It has been reported that the bank will likely divest its UAE operations instead. Other regulators have also argued that US regulators have gone too far. France in particular has encouraged the G20 to discuss extraterritorial enforcement. But that is unlikely to stop US regulators from commencing actions against financial institutions.

Instead Holloway expects to see more of these actions, comparing AML to the Foreign Corrupt Practices Act (FCPA), which was passed in 1997. The FCPA has only become an important weapon in the US armoury in the last 10 years, he says. “It has now turned FCPA into a profit centre as opposed to a cost centre,” he adds. “DFS is clearly following that path in New York.”

He observed that all financial institutions are going to look at this and say that they don’t want to be next, and that they should be more robust in their checks. “But the truth of the matter is that there’s often very insufficient KYC [know-your-client] at the front end.”

Declining to comment on a specific action or institution, the lawyer questions whether these fines actually affect behaviour at banks. Instead, he observes that there’s some pressure building for prosecution of senior executives rather than reaching a settlement.

“Getting off by paying a few hundred million dollars means that the burden falls on shareholders and customers,” he says. “Ultimately those costs are only going to be passed on.”

Standard Chartered did not respond to IFLR’s request for comment.
ADR in its infancy

Soteris Costa and Eve Karaviotou of Stelios Americanos & Co describe how, in light of new legislation, alternative dispute resolution in Cyprus is taking over from lengthy court proceedings.

Most disputes in Cyprus are resolved by the courts through lengthy litigation proceedings. However, alternative dispute resolution (ADR) has become an increasingly attractive concept and is more prominent now than ever.

A commercial dispute that results in court action falls under the jurisdiction of the district courts. However, litigation proceedings do not prevent the parties from achieving a settlement at any stage of the proceedings. When civil proceedings have commenced before the court, the court is obliged in cases where an arbitration clause is included in the agreement of the parties in dispute, to refer the matter to arbitration following an application of any of the parties involved. This must be done before proceeding with any further court actions, unless the judge concludes that the arbitration agreement is in fact invalid, but the court cannot refer any matter to arbitration on its own volition.

ADR options

In Cyprus, there are three main alternatives to litigation which are most commonly used. These are: (i) arbitration; (ii) conciliation; and (iii) mediation. Any dispute, apart from criminal and administrative law matters, can be resolved by alternative dispute resolution. With the cooperation of the parties, all these dispute resolution mechanisms are capable of providing binding and enforceable solutions.

Arbitration in Cyprus is a procedure most commonly used in large building contracts. Since arbitration is voluntary, the parties voluntarily include in their agreements that any dispute that may arise between the parties, will be resolved in arbitration proceedings. This is a highly effective and speedy procedure and a great alternative to litigation proceedings that can be really time consuming, costly and lengthy. An arbitral award is binding and can have the effect (in terms of enforceability) of a court judgment once it is registered as one by submitting an application to the court. The court order for the registration and enforceability of the arbitral award can only be challenged on grounds of impropriety.

Mediation is fast and inexpensive, and it is catching up with other forms of ADR

Litigation used to be the only way to resolve disputes; only recently have the parties been turning to alternative resolutions

Directive 52/2008 EC of the European Parliament has effectively led to the adoption of Cyprus Law 159(I)/2012 which relates to Mediation Matters in Civil Disputes, signalling the beginning of a new era in Cyprus in the area of dispute resolution. Directive 52/2008 EC relates to mediation in civil and commercial disputes and its main objective is ‘to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings’. In particular, article 5.1 of the Directive provides that ‘a court before which an action is brought may, when it considers it appropriate, to encourage the parties to use mediation to settle their dispute’.

In accordance with article 16 of Law 159(I)/2012, the parties agree, in consultation with the mediator, the conduct of the procedure, its duration, the confidentiality of the process, how to determine the remuneration of the mediator and the terms of payment of any other expenses that are deemed necessary. The parties, however, have the discretion to terminate the mediation process at any time they wish. The mediation process is confidential and this confidentiality binds all the parties that take part in it. The ombudsman may communicate and carry out separate meetings with the parties and such information received is confidential and will not be communicated to the other party or a third person without the consent of the individual concerned. The mediator provides the venue for the mediation, after consulting with the parties. The mediator in agreement with the parties, determine the language or languages in which the mediation procedure will be conducted. The parties appear before the ombudsman in person or with a representative (such as a lawyer). Experts may testify in the mediation procedure if asked by the ombudsman, with the consent of the parties, taking into account the complexity of the dispute; the cost of the expert will be borne by the party that called the expert. A statement made before a mediator is not admissible as evidence against any person the court other than the exceptions mentioned above.

The mediation procedure is completed when an agreement is reached between the parties. At this point, the mediation process is finalized and the
ombudsman automatically terminates himself. As opposed to arbitral awards, an agreed settlement following a mediation process needs to be expressed in an agreement between the parties or sanctioned by the court in order to be binding and enforceable. An application for the enforcement of a plea agreement may be filed with the court either jointly by all the parties or by one of the parties with the express consent of the other, except if the explicit consent of the others for that purpose is provided under the plea agreement. If the settlement is drafted in a language other than Greek, the court may require the production of a duly authenticated translation.

Beyond litigation
In Cyprus, litigation is considered to be the most efficient and integral system of dispute resolution. ADR in Cyprus is still in its early stages. However, most legal practitioners recognise that litigation is an extremely lengthy procedure, and it can take years for the court to reach a final judgment. With the adoption of Directive 52/2008 EC on mediation in civil and commercial matters, a new era in dispute resolution has come into force. It is developing rapidly, and being followed with great enthusiasm by the legal profession.

About the author
Soteris Costa is a senior associate at Stelios Americanos & Co and head of the office’s corporate litigation department.

Soteris has advised on the set up and completion of complex joint ventures and cross-border structures through the use of Cyprus vehicles, and regularly offers advice on corporate, M&A, and banking and finance issues.

He has acted as the leading counsel in multinational transactions, advising on aspects of Cyprus law pertaining to various court and arbitration proceedings. He was also the leading counsel in the performance of legal due diligence on behalf of large real-estate investment companies with global activities, and in transactions involving the acquisition of large building complexes in Europe and in the Russian Federation.

Soteris received his LLM in European Legal Studies and his LLM (with Honours) from the University of Exeter.

Eve Karaviotou is an associate at the law firm Stelios Americanos & Co, in charge of the legal department. She has extensive experience in commercial and criminal litigation as well as dispute resolution. She specialises in family and labour law, as well as construction, insurance and accident Law.

She gained her LLB from the University of East Anglia, UK. She has a postgraduate diploma in legal studies from City University, London, and has worked as a barrister at law at Gray’s Inn, London.

She is a member of the Cyprus Bar Association and Honourable Society of Gray’s Inn.
Post-crisis litigation trends

Caoimhe Clarkin and Liam Kennedy of A&L Goodbody discuss how Ireland has responded to the surge in cross-border litigation since the financial crisis.

There are many mechanisms in place to facilitate cross-border litigation. However, it is always important to appreciate the nuances of local laws before commencing litigation in a particular jurisdiction (or in deciding whether to accept the jurisdiction of a particular country or to challenge jurisdiction of the choice of law).

Globalisation, particularly in the financial services sector, gives rise to particular challenges when disputes or problems arise. The global Madoff fraud is a typical example, where the collapse led to litigation between a range of different parties directly or indirectly affected by the issue, in jurisdictions including the US, the UK, Italy, and Ireland.

Such complex cross-border litigation is a challenge (and a potentially significant exposure) for businesses operating in a global economy. Legal advice may be simultaneously required in respect of a range of jurisdictions. Such issues require a coordinated international strategy attuned to the different strategic, procedural and substantive legal advice from the various jurisdictions.

Although restrictions still exist in Ireland, it appears that third party funding is becoming more acceptable in certain situations. For example, recent case law confirms that if the third party has a legitimate interest in the outcome of the litigation, then third party funding is permissible.

In one of the many Irish cases arising out of the Madoff collapse in the United States, *Theona International Fund v HSBC Institutional Trust Services (Ireland)* 2011, the High Court confirmed that third party funding of litigation is only permissible when such funding is provided by parties with a legitimate interest in the litigation. For example, shareholders or creditors of an impoverished company may provide funding for litigation, as they have a legitimate interest in the company and such funding may indirectly benefit them. The Court held that the shareholders funding the litigation would not be guilty of champerty or maintenance. However, the Court emphasised that the prohibition of maintenance and champerty remains in force in Ireland and that it would not be permissible for an unconnected third party to essentially invest in litigation on the basis of some type of financial incentive or profit. The Court also held that even where parties funding the litigation have a legitimate interest in doing so (and are therefore not committing maintenance or champerty), such litigation funders could be exposed to orders for costs if the claim is ultimately unsuccessful.

This costs exposure was also addressed in *Moorview Developments & Others v First Active & Others* 2011. This case also involved an exceptional case of permissible third party funding because the funder was a director and an interested party. However, the Court held that the director would be liable to pay all costs of a failed claim, as he would have been the main financial beneficiary had the proceedings succeeded.

More recently, in *Greenclean Waste Management v Leahy* 2014, the High Court trial judge upheld the validity of a plaintiff’s after-the-event (ATE) insurance, concluding that such cover did not amount to maintenance or champerty. While reiterating that the rule against champerty still exists in Ireland and has a ‘practical vibrancy’, he stated that the law of maintenance and champerty must develop and should not be frozen by reference to historic social and policy conditions.

These comments may indicate a judicial willingness to (cautiously) reconsider its approach to date in light of changing circumstances, international trends, and above all, a judicial awareness of the need to ensure that the costs of commercial litigation (including the costs of discovery) do not become a barrier to accessing justice. Accordingly, although contingency fees remain prohibited, and the rule against champerty and maintenance still applies in Ireland, it appears that forms of litigation funding will become more common in Ireland in the future and that the courts may adopt a more liberal approach to such developments. Watch this space.

**The Commercial Court**

Almost all major commercial litigation in Ireland is conducted before a dedicated Irish Commercial Court. This was introduced in 2004, offering specialist judges and an effective case management regime. The Commercial Court is designed to expeditiously and effectively resolve large-scale disputes.
commercial litigation. The range of cases going through the Irish Commercial Court reflects the nature of commercial activity and disputes in the world economy generally; funds litigation, banking disputes, insolvencies, judgments for loan defaults and investment disputes have featured heavily in the past three years.

The Commercial Court’s more effective procedures make it harder for businesses to use litigation as a delaying tactic

Cases admitted to the Irish Commercial Court list have to be of a commercial nature and generally, the value of the claim or counterclaim must exceed €1 million ($1.3 million), although there is discretion to admit cases which fall outside the specified categories. Certain classes of actions such as employment, landlord and tenant and personal injuries actions are specifically excluded.

The Irish Commercial Court is designed to expeditiously and appropriately resolve complex commercial disputes. Its procedures include regular directions and case management hearings. The Madoff litigation, and other funds-related litigation, was and still is a good example of the type of international litigation which, since 2008, has been case managed by the Commercial Court.

Accordingly, Commercial Court litigants need to be prepared and sourced to meet the demanding timetables and pleading requirements, which ensure that Commercial Court cases tend to be resolved far more quickly than in other courts in Ireland (and, indeed, in many other jurisdictions). In 2013, the completion time for Commercial Court proceedings was 20 weeks from start to finish. During that period, 90% of all Commercial Court cases were completed in less than a year. The Commercial Court’s more effective procedures make it harder now for businesses to use litigation as a delaying tactic (and indeed entry into the Commercial Court list may be refused on grounds of delay).

The Commercial Court is supportive of mediation, and, if appropriate, will adjourn proceedings to allow the parties to consider mediation or to explore other ways of resolving the matter.

Predictably, the global financial crisis in 2008 and 2009 led to a surge in litigation. The types of cases seen in the Irish Commercial Court reflected developments in the general commercial sector following the crisis. Over the last few years, many cases have involved insolvency proceedings or proceedings for the disqualification of company directors. There were a range of more positive Companies Acts applications, such as applications for court approval of complex schemes of arrangement, frequently as part of takeover or restructuring processes.

Another example of a standout international trend from the crisis was that in Ireland, as in many other jurisdictions, regulators became far more active after the crisis, with a surge in the number of investigations or enforcement proceedings. In Ireland, the crisis led to numerous recovery or enforcement actions, many substantial claims over failed developments, and a wave of professional negligence actions. However, more significant litigation work streams following the financial crisis involved large restructuring assignments, along with big-ticket litigation work driven by the financial crisis. Such cases involved financial services litigation in particular, including multi-party misselling and mispricing claims in the banking sector.

A change in this pattern is appearing as the Irish economy continues to improve. In 2013, 169 new cases were admitted to the Irish Commercial Court; the most active plaintiffs in the Commercial Court at present are banks and other financial institutions. Other litigation work streams are flourishing in the Irish Commercial Court, including financial services disputes; pension disputes; intellectual property litigation; and securities and M&A litigation. The M&A litigation in Dublin and New York in 2013 in which Elan successfully resisted a €6.8 billion hostile takeover (paving the way for a higher value transaction with another party) is an example of such litigation resulting from economic activity. Large securities transactions tend to beget large securities disputes and such cases are likely to occur in a growth period where the number of corporate transactions increases.

Class actions

In terms of the complex international cases coming before the Irish courts, it is worth noting that there is no formal class action procedure. However, there has been plenty of multi-party litigation in Ireland in recent years, including tobacco and other product liability litigation and Madoff-related litigation. Irish courts (and, in particular, the Commercial Court) have developed mechanisms to manage such group litigation, and to deal with common issues by representative actions or on a test case basis. Although individual claims still need to be proved by each claimant, the test case mechanism has been developed as a work-around to address a proliferation of related cases. In 2008, the Irish Commercial Court was faced with more than 50 Madoff-related claims. The Court decided at the outset to manage four of the actions so that two shareholder actions and two actions by affected funds would be heard sequentially. The Court stayed the other claims, pending the resolution of the four test cases. A similar approach has been adopted in other financial services litigation in Ireland, such as a large group of misselling claims against an Irish bank, ACC.

Discovery

Irish discovery procedures are different to those in other jurisdictions. Pretrial discovery in Ireland is limited to documentary discovery, there is no procedure for oral discovery or deposition, and the discovery obligation is not simply based on an obligation to disclose all relevant documents. Instead, the party making the discovery must disclose in response to specified categories of discovery. The discovery obligation extends to email, other computer records and information held in other media.

The discovery process typically represents a great deal of the effort and expense involved in Irish litigation, often involving a significant proportion of the costs of litigation. The discovery of email and other non-paper records can pose particular challenges in cost and technical terms and careful planning and project management is essential to address such issues.

The Irish Courts have increasingly commented on the need to explore alternatives to wide ranging and expensive discovery, including the provision of information by other means. The use of interrogatories (formal written questions which a specified deponent must answer in writing, on oath) is encouraged in the Commercial Court and can be a less expensive and less time consuming alternative to discovery in some cases.

The Irish Courts have shown themselves to be flexible with regard to the use of technology to deal with the challenges of discovering electronic records. For example, the use of technology assisted review (TAR), rather than the traditional analysis of documents, was recently raised in the Commercial Court. The Irish Bank Resolution Corporation sought the Court’s approval for the use of TAR to rely on software to analyse the relevance of almost 1.75 million documents for international commercial litigation with the Quinn family. The TAR process involves a computer program essentially learning which documents are, or are not, relevant to expert practitioners; these practitioners code randomly selected documents for relevance, to then analyse the relevance of other documents for discovery. While used in the US, the TAR process has not been used in Irish litigation before. The Commercial Court is considering whether TAR complies with court rules on discovery and if so, the appropriate methodology. As TAR is regarded as more efficient and cost-effective than traditional methods, this case will have important implications for discovery in Ireland.
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Evidence

Although the primary form in which evidence is received at trial in Ireland is through oral testimony, factual and expert witness statements are exchanged before trial in commercial litigation proceedings.

The general principle is that witnesses give evidence in person in open court at the trial of the proceedings. The Commercial Court can facilitate testimony by video link if necessary. In appropriate cases, the Court can also provide for alternative modes of testimony, including evidence on affidavit, by response to interrogatories or by evidence before a commissioner or examiner. However, the Court will not authorise evidence on affidavit where there is a bona fide requirement for the particular witness to be cross-examined.

Ireland has not adopted the 1970 Hague Convention and accordingly, if overseas witnesses are unwilling to co-operate, it would not be possible to compel them to do so by way of subpoena. However, an application can be made for letters rogatory to be issued to the courts of the appropriate jurisdiction, to seek their assistance in compelling the attendance of an individual to give testimony. In practice, the procedures are similar to those which would be applicable under the Hague Convention. The letters rogatory is a formal request from the overseas court to the Irish Court to compel witnesses to give oral evidence for use in overseas litigation, in addition to the production of documents touching on the witness testimony.

Alternatively, if the witness is located in an EU state, then the procedure under Council Regulation 1206/2001 is available. Council Regulation (EC) 1206/2001 of May 28 2001 on cooperation between the courts of the member states in the taking of evidence in civil or commercial matters, allows the taking of evidence from one member state to another without recourse to consular and diplomatic channels.

Evidence of foreign law is provided when necessary by means of a report by an appropriately qualified lawyer from the jurisdiction concerned. The parties will generally agree that such evidence will be given in a written report or by affidavit, avoiding the necessity for such foreign lawyers to travel to Ireland to testify. Without such agreement, or alternative orders, the normal rules would apply and the foreign lawyers could be required to testify in person to resolve questions of foreign law.

Monetary jurisdiction

To address the huge volume of cases being referred to the Supreme Court compared with other similar common law jurisdictions, Ireland recently introduced legislation to establish a new Court of Appeal, offering an intermediate tier of appeal between the Supreme Court (Ireland’s highest court) and the High Court. The new Court of Appeal, expected to be open in 2014, will improve efficiency and speed up the hearing of appeals in civil cases.

Ireland has also recently introduced new monetary jurisdiction limits for the lower courts. While most major commercial litigation will still be heard in the High Court, parties do need to consider their choice of court and the value of the claim.

The High Court still has an unlimited monetary jurisdiction (while the value of a claim in the Commercial Court must generally exceed €1 million). The new limits for the other courts are: (i) district court – €15,000 (previously €6,384); circuit court, other than personal injury actions – €75,000 (previously €38,092); and circuit court, for personal injury actions – €60,000 (previously €38,092).

A constant challenge

Complex cross-border litigation is fast becoming a constant challenge for businesses operating in a global economy. Familiarity with the substantive laws of countries in which businesses operate is essential to overcome these challenges, as is a grasp of the different procedural rules in force in various jurisdictions. A coordinated international plan, incorporating the different strategic, procedural and substantive legal advice from the various jurisdictions is key. The issues raised in this article are only examples of the factors which should be taken into account when considering litigating in Ireland. However, what should be clear is that although differences exist between jurisdictions, there are mechanisms in place to accommodate cross-border litigation. The Irish courts have adopted efficient and practical solutions to ensure that Ireland is an appropriate and sometimes preferable forum within which to litigate.

About the author

Liam Kennedy is the head of commercial dispute resolution at A&L Goodbody. He specialises in international and domestic commercial disputes, including product liability, mergers and acquisitions, securities and auditors’ litigation (including international class actions), EU and competition law, and constitutional litigation. His practice includes dealing with regulators, such as the financial regulator, commissions of enquiry, the Securities Exchange Commission, and the Chartered Accountants Regulatory Board (CARB). Kennedy also regularly advises auditors and other professionals on liability and regulatory issues, and public procurement litigation in major development disputes.

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Difficulties in deciding jurisdiction

Junichi Tobimatsu and Kana Manabe of Mori Hamada & Matsumoto explain the processes, factors and controversy involved in allocating jurisdiction over disputes with international elements

Until April 2012, there had been no provisions in the Japanese Code of Civil Procedure (Code) prescribing which cases with international elements the Japanese courts should have jurisdiction over. For many years, it has been left to the court to decide on a case-by-case basis. Proponents of the nationalistic view argued that if the requirements establishing (domestic) territorial jurisdiction in Japan according to the Code were met, the Japanese court should in principle exercise jurisdiction over the case (so-called reverse presumption theory). Proponents of the universalistic view argued that jurisdiction should be determined based on fairness among the parties, with the aim of achieving proper and prompt adjudication (so-called allocation jurisdiction theory).

In the landmark Malaysian Airlines case in October 1981, the Supreme Court of Japan adopted the reverse presumption theory. It held that the determination of international jurisdiction should be made in accordance with the principle of reason, which requires fairness among the parties and proper and prompt adjudication. It went on to state that when the requirements establishing the territorial jurisdiction in Japan according to the Code were met, it is in accordance with that principle of reason to adjudicate such cases in Japan. Subsequent lower court cases followed the Malaysian Airlines case, but they also added one more test. Even if territorial jurisdiction in Japan is established, if there are exceptional circumstances which would contradict the fairness among the parties and proper and prompt adjudication, then the jurisdiction of the Japanese court should be declined. This additional test has been confirmed by the Supreme Court decision in November 1997. Following these two Supreme Court decisions, the jurisprudence regarding international jurisdiction has been understood as (i) if the requirements are met for the territorial jurisdiction of Japan, then the Japanese court should in principle exercise jurisdiction over. For many years, it has been left to the court to decide on a case-by-case basis. Proponents of the nationalistic view argued that if the requirements establishing (domestic) territorial jurisdiction in Japan according to the Code were met, the Japanese court should in principle exercise jurisdiction over the case (so-called reverse presumption theory). Proponents of the universalistic view argued that jurisdiction should be determined based on fairness among the parties, with the aim of achieving proper and prompt adjudication (so-called allocation jurisdiction theory).

The 2012 amendment
The 2012 amendment to the Code provided articles stipulating which kind of cases with international aspects the Japanese court should have jurisdiction over, with the intention of providing much more predictability and clarity. First, general jurisdiction is exercised by the Japanese courts when the defendant’s domicile or, in case of a legal entity, its main office is located in Japan. Second, as to the special jurisdiction, the Code provides various instances where the Japanese court can exercise its jurisdiction. For example, in disputes over contractual obligations, the Japanese court has jurisdiction if the place of performing the contract is in Japan. For claims relating to property rights, if the subject matter of the claim is in Japan or (in a case of a claim demanding payment of money) if any seizable property is located in Japan (unless value of such property is extremely low), the Japanese court has jurisdiction. For claims relating to tort, if the tortious act took place in Japan (this includes when the result of such act occurred in Japan, unless such occurrence is ordinarily unforeseeable), the Japanese court has jurisdiction. On the other hand, the Code also provides exceptions where the Japanese court can decline its jurisdiction. Article 3-9 of the Code provides that even when the court has jurisdiction, it may dismiss the whole or part of the action when it finds that there are special circumstances. Special circumstances exist if the Japanese court conducts a trial and makes a judicial decision, and would not achieve equity between the parties or would impede the well-organised progress of court proceedings. In this situation, the court must take into consideration: (i) the nature of the case; (ii) the degree of burden that the defendant would bear by making an appearance; (iii) the location of evidence; and (iv) other circumstances. This exception has been drafted taking into consideration precedents; according to the wording, the factors considered by this exception seems quite similar to the court precedents. More than two years have passed since the amendment took effect and there have been some lower court cases where this exception has been considered. Below we examine these cases to see what kinds of specific facts have been considered by the Japanese court, how easily or strictly it has limited its jurisdiction, and whether there have been any changes in attitude after the amendment.

Tokyo District Court February 22 2013
In this case, the plaintiff sued the defendants, demanding the division of an apartment located in China which had been agreed to be co-owned by the plaintiff and the defendants upon their divorce (the plaintiff and one of the defendants used to be spouses and the other defendant was their child). All the parties resided in Japan, and so general jurisdiction of the Japanese court existed. The defendants argued that the Japanese court should dismiss the action under Article 3-9 of the Code.

Since the website could be viewed in Japan, the defamation therefore occurred in Japan

The court accepted the defendants’ argument and dismissed the action. It first provided its interpretation of the factors to be considered, which are enumerated in the Article. Namely, (i) the nature of the case means the objective circumstances regarding the dispute such as content of the claim, (ii) the degree of burden that the defendant is to bear means the circumstances regarding the parties such as the burden on the defendant and predictability of the parties, and (iii) the location of the evidence includes the location of the physical evidence and how easily the court can examine evidence. The court then considered these factors in the case in question.

With regard to (i), the court determined that since the real property was located in China, according to the Act on General Rules for Application of Laws, the governing law of the matter would be Chinese law. The court emphasised the difficulty for the Japanese court to interpret and apply Chinese real property law and stated that their capacity to conduct a proper trial and render proper judgment was limited. It also noted that
if they made a decision ordering that the registration of the real property be changed or ordered compulsory auction instead of solving the case by monetary payment, then the recognition and enforcement of the Japanese court’s decision in China would be an issue. As there is no international agreement between China and Japan about the recognition of judgments, it was unclear if the Japanese court judgment would be recognised and enforced in China. Therefore, a Japanese court judgment may not resolve the dispute. With regard to (ii), the court found that it was not significant, since the defendants lived in Japan. With regard to (iii), if the court were to order division of the property by way of making monetary payment, the court would need assistance from an expert in assessing the value of the property located in China. The court stated that it was not certain how they could retain a proper expert and if the court could judge whether the appropriateness of the assessment by the expert was reliable. In conclusion, the court found that special circumstances existed, so that if the Japanese court conducted a trial and made a judicial decision on the action, it would harm equity between the parties or impede the well-organised progress of court proceedings, especially considering the difficulty relating to the interpretation and application of the Chinese real property law. It further noted that even if the Japanese court declined jurisdiction, the plaintiff could still find a way to realise its rights, as usually the court where the real property is located would have jurisdiction over the case.

Tokyo District Court October 21 2013

Here, the plaintiffs were Japan-based corporations, and the chairman of one of the corporations sued the defendants, a corporation established under the laws of Nevada in the US and its directors and general counsel. The corporate plaintiffs sued some of the corporate defendant’s shares. The corporate defendant was engaged in the gaming industry and as such, if it had a relationship with inappropriate persons, it could be deprived of its licence. The corporate defendant conducted an investigation on the corporate plaintiffs and concluded that the plaintiffs had violated the United States Foreign Corrupt Practices Act. With such result, the defendant bought back the shares from the plaintiffs and it also posted the result of its investigation on their website. The plaintiffs claimed that such posting constituted defamation and sought damages.

The consideration of exceptional circumstances became the norm rather than exception

In terms of certain claims against the corporate defendant, the court concluded that the Japanese court had jurisdiction, since the website could be viewed in Japan and the defamation therefore occurred in Japan. However, the court dismissed the action because it found that special circumstances under Article 3-9 existed. With regard to the (i) nature of the case, the court stated that the plaintiffs must have foreseen that the dispute arising from the business of the defendant would be negotiated or tried in the United States, considering that the various agreements (such as the shareholders agreement) with one of the individual defendants were drafted in English, with the governing law being the law of the State of Nevada and exclusive jurisdiction granted to the Nevada state court. With regard to (ii) the degree of burden that the defendant is to bear, the court found it to be substantial, considering that most of the documentary evidence was located and many witnesses resided in the United States. With regard to (iii) location of evidence, since most of it was in the United States, documentary evidence needed to be translated and interpretation would be required for witness examination. In addition, with regard to (iv) other circumstances, the court considered the prejudice to the plaintiffs if the Japanese court declined jurisdiction. The court concluded that because some plaintiffs had been dealing with the litigation in the United States in the relevant case, declining the Japanese court's jurisdiction would not deprive the right of the plaintiff for trial. It also took into account that the plaintiffs must commence a litigation against the individual defendants in a US court, because the Japanese court does not in any event have general or special jurisdiction over the plaintiffs’ claims against those individuals.

The court also made general remarks about the application of Article 3-9, stating that all the factors stipulated in the Article should be considered in their entirety, and that it should refrain from dismissing the action easily, because that may deprive the right of the plaintiff to the trial. On the other hand, it stated that the court does not take the view that the special circumstances should only be found in very limited circumstances.

Criticism of exceptional circumstances requirement

Before the 2012 amendment, the Japanese courts considered various factors in determining exceptional circumstances, such as location of the evidence, how easily the court could examine the evidence, whether the defendant predicted the possibility of a lawsuit in Japan, the primary business operations of the defendant, and if the foreign court had jurisdiction and governing law.

However, there was some criticism of the abusive use of exceptional circumstances as a means to decline jurisdiction. Some criticised the fact that it depended too much on the discretion of the court and thus lacked predictability. In fact, there have been court cases where the defendant did not consider whether the requirements for the territorial jurisdiction were met, but first considered if exceptional circumstances existed. In that sense, one could argue that the consideration of exceptional circumstances became the norm rather than exception. Other opponents also pointed out that since such jurisprudence allowed too much discretion to the court, the court analysed factors which should not have been considered. In research published in 2009, among the 42 cases which mentioned exceptional circumstances, 22 cases approved the Japanese court’s jurisdiction whereas 20 cases denied it. Eighteen cases mentioned governing law and nine out of 10 cases where Japanese law was found to be the governing law, approved jurisdiction. In contrast, five out of eight cases where the foreign law was found to be the governing law, denied jurisdiction (the other three cases approved the Japanese court’s jurisdiction; however, they were cases where the jurisdiction had been agreed upon by parties or by the defendant’s appearance). This shows the high correlation between the governing law and the determination of the jurisdiction, although in theory, it has been said that governing law and jurisdiction are two separate matters and governing law should not play a big role in determining jurisdiction. However, such an ambiguous requirement as exceptional circumstances allowed the court to consider a factor which should not be have been considered.

Changes in the 2012 amendment

Looking at the application of the special circumstances requirement under the 2012 amendment, it seems that the same criticism may apply. It seems that the factors established for determining exceptional circumstances have also been similarly considered when determining the existence of special circumstances under Article 9-3 after the amendment. If the court easily declines its jurisdiction under the special circumstances requirement, it may similarly result in unpredictability and allow the court to consider factors which should not be considered. The February 22 2013 case would be subject to this criticism, as it placed much emphasis on the governing law. The October 21 2013 case is mindful of this issue when stating that it should refrain from dismissing the action easily because that may deprive the right of the plaintiff to the trial. However, to what extent the court will find special circumstances is yet to be seen.
Historically, the exceptional circumstances requirement was established to deal with situations where the determination according to the so-called reverse presumption theory resulted in an inappropriate conclusion. However, the 2012 amendment adopted the allocation jurisdiction theory and stipulated allocated jurisdiction in each case. Considering this fundamental difference, it seems inappropriate to find special circumstances as easily as exceptional circumstances. It is, however, yet to be seen to what extent that the Japanese court will find special circumstances and we need to wait for more cases to accumulate. Until they do, predicting whether a Japanese court will accept international jurisdiction is difficult. It is therefore important to consult with experienced Japanese lawyers when the potential for dispute arises.

About the author
Junichi Tobimatsu is a partner at Mori Hamada & Matsumoto. He has over 15 years’ experience and is admitted to the bar in both Japan and New York. He handles various types of litigation in Japan, but also acts as counsel and arbitrator in international arbitrations, including ICC (International Chamber of Commerce), JCAA (Japan Commercial Arbitration Association), and SIAC (Singapore International Arbitration Centre) arbitrations, and serves as a Japanese law expert in foreign court proceedings. Tobimatsu has been chosen as one of Japan’s leading lawyers in dispute resolution by publications including Legal 500, Best Lawyers, and Asialaw Profiles. From April 2010 to March 2013, he served as an associate professor at the Graduate Schools for Law and Politics, the University of Tokyo, where he taught civil procedure code, civil code, and legal practice. Since January 2014, he has been a board member of the Japan Association of Arbitrators (JAA).

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Steppeing up its game

João Nuno Riquito and Carlos Eduardo Coelho of Riquito Advogados explain the role of judicial cooperation between Macau, Hong Kong and China, particularly regarding money laundering

The rapid and exponential growth of Macau’s economy – driven by the gaming industry – has filled the region with world players from gaming and gaming-related businesses, alongside an exponential growth in tourists.

According to the Macau Special Administrative Region (MSAR) Statistics and Census Bureau, Macau received 18 million visitors from January to July 2014. In this seven-month period, visitor arrivals in Macau were, mostly, from mainland China (over 12 million people), Hong Kong (3.7 million) and Taiwan (over half a million).

With this growing number of people, goods and business flowing to and from Macau, this SAR has had to step up its game in terms of judiciary cooperation. In particular, it needs to be able to work efficiently with the Hong Kong SAR (HKSAR) and with the Peoples’ Republic of China (PRC), in order to cope with the challenges it faces by virtue of the frequent and inevitable private law relations (and potential litigation) held between their respective citizens.

Besides the growth of potential transnational litigation, and as a result of increasing globalisation of trade and business, which leads to constant changes in the economy, there are consequences in terms of the criminal practices a state must now deal with. All these reasons demand that national states establish a new set of specific rules and procedures that allow and expedite access to justice beyond its borders, underpinned by judicial cooperation between the states.

An example of the importance of judicial cooperation, with particular relevance to Macau as an gaming hub, can be found in the FATF Recommendations (International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation), in particular Recommendations 30 to 40, that deal with the role of judicial cooperation in the fight against money laundering.

In fact, with about seven times the revenue of Las Vegas (360.75 billion Patacas, approximately $45.2 billion during 2013), the casino industry is the driving force behind Macau’s economy. This overwhelming growth has attracted a great deal of attention from Beijing and American authorities, regarding money laundering practices normally associated with the gaming industry. Several renowned publications have focused on the fact that Macau gaming revenues rely heavily on the so-called VIP market, controlled by gaming promoters, which operation and activity is helping Chinese wealth, whether or not originating from illegal practices, to reach Macau and circumvent strict PRC limits for carrying cash abroad.

According to PwC’s 2014 Global Economic Crime Survey issued on the March 5, 2014, the proportion of respondents who reported suffering money laundering was three times higher than regional and global averages.

The US Government Congressional-Executive Commission on China 2013 Annual Report dedicates some attention to the role the Macau gaming industry plays in the ‘laundering of large amounts of money out of the mainland China’.

Macau’s legislator has focused on the enactment of a broader judicial cooperation with its neighbours, in particular with the HKSAR and the PRC. This may be a very important step in the fight against money laundering practices that have been usually been associated with the MSAR.

**MSAR legal framework**

Under the principle of one country, two systems, Macau, in accordance with the Basic Law, exercises a high degree of autonomy and enjoys executive, legislative and independent judicial power, including that of final adjudication. This means that the PRC, Macau and the HKSAR are territories with their own juridical systems, necessarily implying that special effort in creating fruitful judicial cooperation between all should be put in place. A different approach would certainly be detrimental to the interests of each of the three systems.

The effort in pursuing judicial cooperation between the three systems is enshrined in Macau Basic Law, under section 93, which states ‘The Macau Special Administrative Region may, through consultations and in accordance with the law, maintain judicial relations with the judicial organs of other parts of the country, and they may render assistance to each other’. Section 93 therefore sets out the general ideas and principles which should guide the judicial cooperation between these parties.

Such cooperation is particularly important in matters such as: (i) service of court documents; (ii) gathering of evidence; (iii) enforcement of judgments; (iv) enforcement of arbitral awards; and, (v) granting of interim relief.

The general regime in matters of enforcement of foreign judgments is defined under section 1199, and the sections immediately following, of the Civil Procedure Code. Without prejudice to international conventions applicable to Macau and to bilateral agreements on the recognition and enforcement of foreign judgments, the Civil Procedure Code generally provides for expedited proceedings in the enforcement of foreign judgments.

Normally, a foreign court decision will be recognised and enforced in Macau, provided it qualifies as a final decision (res iudicata) supported by authentic documentation. To be enforceable, the foreign judgment must also be issued by a court of proper jurisdiction, not affected by any lis pendens and it must be clear that its enforcement will not breach any fundamental procedural and substantive public policy principles of Macau law.

The Court of Appeal (Tribunal de Segunda Instância) has jurisdiction over the recognition and enforcement of foreign judgments and it is possible to appeal against its decisions in the Court of Last Appeal (Tribunal de Última Instância).

Under the principle of one country, two systems, Macau exercises a high degree of autonomy
This is the general rule applicable to all foreign judgments where no international conventions or bilateral agreements on the recognition and enforcement of foreign judgments applicable to Macau can be put in place. However, the development of judicial cooperation between Macau and its closest neighbours, within its space of almost full autonomy in judicial matters, has been at its most fruitful over recent years.

Cooperation with PRC

Not forgetting the fact that Macau is party to some international conventions regarding the enforcement of judicial and arbitral decisions (including the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, although with the same limitations applicable to PRC – Chief Executive Notice Aviso do Chefe do Executivo 3/2007), there are two agreements regarding the enforcement of foreign decisions, and another one regarding the Service of Court Documents between Macau and the PRC.

First, the Agreement regarding the Mutual Confirmation and Enforcement of Judicial Decisions on Civil and Commercial Matters (Acordo sobre a Confirmação e Execução Recíprocas de Decisões Judiciais em Matéria Civil e Comercial entre o Interior da China e a Região Administrativa Especial de Macau), published under Chief Executive Notice 12/2006, and in force since April 1 2006.

Second, the Agreement regarding the Mutual Confirmation and Enforcement of Arbitral Awards (Acordo sobre a Confirmação e Execução Recíprocas de Decisões Arbitrais entre o Interior da China e a Região Administrativa Especial de Macau), published under Chief Executive Notice 22/2007, and in force since January 1 2008.


Both agreements regarding the enforcement of foreign judgments: (i) apply only to civil and commercial matters (even though the Agreement regarding the Mutual Confirmation and Enforcement of Judicial Decisions is also applicable to labour matters and to compensation arising from criminal proceedings); (ii) set the rules and procedures necessary for the confirmation and enforcement of the judgments there included; (iii) do not work automatically neither ex officio – it is always dependent on the request of the interested party; (iv) do not lead to a revision of the substance of the foreign decision, that is, both jurisdictions cannot refuse enforcement simply because the decision violates their own substantive law; (v) from the Macau side, it attributes competence for the Court of Appeal for the admission of the request for confirmation of foreign awards, and to the Judicial Base Court (Tribunal Judicial de Base) for its enforcement.

However, if the decision to be enforced in the PRC is against the fundamental principles of law or the public interest of society (or, in case of Macau, against the fundamental principles of law or the public order) the request is not allowed.

The idea of not enforcing a decision against the public order or the general principles of law is globally accepted. However, certain countries may have particular specificities which may represent obstacles to judicial cooperation. In particular, we are referring to the fact that mainland Chinese courts do not recognize or enforce payments on casino debts, as gambling is illegal in the PRC. This means that, on the one side, any gaming debt incurred in Macau by a Chinese national cannot be enforced in the PRC, irrespective of whether it has the means to proceed with payment, and, on the other side, alternative methods for the collection of such debt ought to be found by the casino concessionaires (please note that gaming accounts for circa 50% of MSAR GDP and 84% of fiscal revenues). This limitation also means that casino operators are extremely reluctant to directly lend money to mainland gamblers. One solution is for gaming promoters to assume the collection (or procure the collection) of gaming debts.

On this matter, it is important not to forget the following: Macau is no different to any other jurisdiction where gambling is allowed. Here, gaming in a casino is also said to be used as a way to clean money from an illicit origin, creating the appearance that it has been obtained by lawful means.

The particularity of Macau resides in the importance given to the activity of so-called junket operators (or gaming promoters as they are referred in the gaming law) and the risks such activity purportedly entails. Due to strict PRC limits for carrying cash abroad, gaming promoters help mainland gamblers bypass this restriction by collecting the money in the PRC and granting credit in Macau.

Gaming promoters therefore contribute to the high levels of capital into Macau, mainly from the PRC, which invites worldwide concern as to the origin of the capital and identity of its owner. According to the FATF/OECD report, 'a vulnerability of junket programs is that they involve the movement of large amounts of money across borders and through multiple casinos by third parties. Junket participants generally rely on the junket operators to move their funds to and from the casino. This creates layers of obscurity around the source and ownership of the money and the identities of the players.'

Their role is all the more significant given that PRC courts do not recognise or enforce payments on casino debts, letting the gaming promoters assume the role of collecting (or procuring the collection) gaming debts.

Judicial cooperation is indispensable in the combat against money laundering: both jurisdictions could further deepen their cooperation in order to find a solution for the enforcement of Macau-enforceable judgments regarding the payment of gaming related debts. This would undoubtedly be a step forward in Macau’s fight against money laundering, as it would limit the activity of junket operators which, rightly or wrongly, are often linked to the practice of money laundering activities. One cannot suggest a definite solution to this matter, mainly because this will be solely a PRC decision. However, we suggest it here as food for thought.

Cooperation with the HKSAR

Despite the proximity (not only geographical) between the two SARs, only recently was the first cooperation agreement executed regarding the enforcement of arbitral awards between Macau and the HKSAR (an agreement for the transfer of criminal convicts in jail is also in force, as per Chief Executive Notice 13/2005).

This was the Agreement regarding the Mutual Confirmation and Enforcement of Arbitral Awards (Acordo sobre a Confirmação e Execução Recíprocas de Decisões Arbitrais entre a Região Administrativa Especial de Macau e a Região Administrativa Especial de Hong Kong), published under Chief Executive Notice 2/2013, and in force, according to Chief Executive Notice 41/2013, since December 16 2013.

This Agreement: (i) applies to all arbitration awards (its application is not limited to civil and commercial matters as with the agreement executed between Macau and the PRC); (ii) sets out the rules and procedures necessary for the confirmation and enforcement of arbitral awards; (iii) does not work automatically neither ex officio – it is always dependent on the request of the interested party; (iv) do not lead to a revision of the substance of the arbitral award, that is, both jurisdictions cannot refuse enforcement simply because the decision violates their own substantive law; (v) from the Macau side, it attributes competence to the Court of Appeal for the admission of the request for confirmation of foreign awards, and to the Judicial Base Court for its enforcement.
This agreement also states that the arbitral award cannot be either confirmed or executed when the competent court recognises the object of the dispute is not subject to arbitration according to the law of the place where the confirmation and execution should take place (the same provision is in force regarding the agreements between the PRC and Macau).

At present, no further cooperation agreements are in place between Macau and the HKSAR, namely on important matters like the service of court documents, the gathering of evidence and enforcement of judicial decisions judgments (which means that the general regime for the enforcement of foreign judgments defined in the Civil Procedure Code is applicable).

However, according to the latest news conveyed by Macau and HKSAR media, a judicial cooperation agreement on criminal matters (and, in particular, a bilateral extradition agreement) is under discussion and preparation by the Department of Justice of both SARs. This development follows the sentencing to jail, in Macau, of two Hong Kong business tycoons, who will not be imprisoned unless they enter Macau, as there is no extradition agreement in place between the SARs.

If this particular case has brought attention to the necessity of a broader discussion on judicial cooperation agreements on criminal matters between both SARs, more ponderous reasons were already being considered by both Departments of Justice to justify such discussion. In fact, the increase of cross-border crime, especially white-collar crime, the increasing volume of people crossing between both SARs on a daily basis (which will continue to increase as soon as the new bridge linking this territories opens), and the overall proximity between the two territories (as with the PRC) indicates that a judicial cooperation agreement on criminal matters should be put in place.

It is hoped that the agreement will not be limited to a mere bilateral extradition agreement, but that it will also bring new solutions to cope, for instance, with the longstanding issue of money laundering in Macau.

Final suggestions
The necessity of judicial cooperation, in particular between both SARs and the PRC, is a matter that has been widely discussed since the handover of these territories. Despite not being a new subject, it does not mean that progress should not be sought in order to create, improve and mature new or the existing formal agreements.

Huge progress has been made in this area in recent years, first between Macau and the PRC and more recently between Macau and HKSAR. However, there are still many loopholes to be considered. Here, we briefly offer some suggestions for the relevant authorities.

The enactment of a broader judicial cooperation with its neighbours, in particular with the HKSAR and the PRC, may be a very important step in the fight against money laundering practices. In particular, Macau and the PRC could further enhance their cooperation in order find a solution for the enforcement of Macau-enforceable judgments regarding the payment of gaming related debts. Second, Macau and HKSAR should prioritise the fight against money laundering as one of the grounds underlying the ongoing discussions on a formal agreement for judicial cooperation on criminal matters.

Regarding judicial decisions, a mechanism similar to the one used in the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which sets out that a judgment given in any contracting state should be recognised in another contracting state, without any special procedure being required (automatically), should be sought.

The increased development of the economic integration between the SARs and the PRC, along with the high degree of autonomy Macau enjoys, will undoubtedly pave the way to full judicial cooperation. This in turn will assist Macau in the fight against some of its problems, including the fight against money laundering practices as usually associated with a gaming hub.

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The realities of foreign judgments

Festus Onyia and Uzoma Azikiwe of Udo Udoma & Belo-Osagie explain the legal framework that governs enforcement in Nigeria.

Nigeria is not party to any bilateral or multilateral convention on the recognition and enforcement of foreign judgments. The enforcement of such judgments in Nigeria is governed by two statutes: the Reciprocal Enforcement of Judgments Ordinance (now chapter 175, Laws of the Federation of Nigeria and Lagos, 1958) (Ordinance) and the Foreign Judgment (Reciprocal Enforcement) Act, chapter C35, Laws of the Federation of Nigeria, 2004 (Act). The 1922 Ordinance was enacted during the colonial era and was not repealed when the Act was enacted in 1961. The Act preserves the Ordinance and provides that it will only cease to apply when the Nigerian minister of justice, exercising powers conferred on him by its section 3(1), makes an order extending part 1 of the Act to Nigeria.

Enforcement under the Ordinance

The Ordinance was enacted to facilitate the reciprocal enforcement of judgments obtained in Nigeria and in the UK and ‘other parts of Her Majesty’s Dominions and Territories under Her Majesty’s protection.’ The Ordinance has been extended by proclamation to various judgments, including those of the Supreme Courts of the ‘Gold Coast Colony and of the Colony and Protectorate of Sierra Leone’, the ‘State of Victoria’ and the Gambia, respectively, and to judgments of a superior court in Barbados, Bermuda, British Guiana, Gibraltar, Grenada, Jamaica, Leeward Island, St Lucia, St Vincent and Trinidad and Tobago. The applicability of the very specific language of the Ordinance to judgments of courts, dominions and territories that have subsequently undergone titular and constitutional changes, such as the ‘Gold Coast Colony’ (which has been succeeded by Ghana), is open to debate.

Section 3(1) of the Ordinance provides that where a judgment has been obtained in the High Court in England or Ireland, or in the Court of Session in Scotland, the judgment creditor may apply to a High Court in the enforcement territory at any time within 12 months of the date of the judgment, or such longer period as is allowed by the court, to have the judgment registered. On this basis, Nigerian courts have, in a long line of cases, held that applications for registration in Nigeria of judgments obtained in a High Court in England must be registered within 12 months of the date on which the judgment was made, or would otherwise be held to be time-barred, and refused. For example, Marine & General Assurance Company Plc v. Overseas Union Insurance limited & 7 others (2006) and Andrew Mark Macaulay v. RZB of Austria (2003).

Ordinance applicable to money judgments only

The Ordinance applies to any judgment or order given or made by a court in any civil proceedings. This applies to all judgments and orders before or after the commencement of the Ordinance, whereby any sum of money is made payable, and includes an award in proceedings or in an arbitration, if the award has, under the prevailing law where it was made, become enforceable in the same manner as a judgment given by the court in that place.

If an arbitral award is to be elevated to the status of a judgment that can be registered and enforced under the Ordinance, the award debtor must apply for and obtain the leave of the court in the country where the award was made to enforce the award in the same manner as a judgment of that court. Tulip (Nigeria) Ltd v. NTMSAS (2011).

Grounds for refusing registration of judgment under the Ordinance

Section 3(2) of the Ordinance provides that no judgment can be ordered to be registered if any of the following grounds exist:

(a) the original court acted without jurisdiction;
(b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit to the jurisdiction of that court;
(c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court, and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court;
(d) the judgment was obtained by fraud;
(e) the judgment debtor satisfies the registering court either that an appeal is pending, or that he is entitled and intends to appeal against the judgment; or,
(f) the judgment was in respect of a cause of action which for reasons of public policy or similar reason, could not have been entertained by the registering court.

Nigeria has a fairly robust legal regime for enforcing foreign judgments

The unfortunate consequence of section 3(2) (b) is that if the defendant is not ordinarily resident or carrying on business within the jurisdiction of the original court, and did not previously agree to submit to the jurisdiction of the foreign court, he could simply ignore the proceedings against him, even if duly served with the court documents. In such a case, any judgment entered against him would be unenforceable on the grounds that he did not submit to the jurisdiction of the court. This occurred in Grosvenor Casinos Ltd v. Ghassan Haloui (2009). The judgment debtor, who was not ordinarily resident in the UK, was duly served with court processes in Nigeria but ignored them and never submitted to the jurisdiction of the English court. The judgment debtor successfully set aside the registration of the judgment against him based on this provision. However, the Supreme Court criticised the provision and called for its amendment on the grounds that it was an open invitation to fraud and improper conduct.
Enforcement of foreign judgments under the Act

Section 3(1) of the Act empowers the minister of justice to make an order extending part 1 of the Act to any foreign country, specifying in that order the courts of the country that will be deemed to be superior courts for the purposes of enforcing their judgments in Nigeria. Before exercising this power, the minister is required to satisfy himself that judgments of superior courts in Nigeria will be accorded substantial reciprocity of treatment as regards enforcement in that foreign country.

Registration of judgments under the Act – timing considerations

Section 4(1) of the Act provides that:

’a person being a judgment creditor under a judgment to which this Part of this Act applies, may apply to a superior court in Nigeria at any time within six years after the date of the judgment, or, where there have been proceedings by way of appeal against the judgment, after the date of the last judgment given in those proceedings, to have the judgment registered in such court, and on any such application the court shall, subject to proof of the prescribed matters and to the provisions of this Act, order the judgment to be registered.’

There is no evidence that the minister of justice has exercised his powers under section 3 of the Act to extend part 1 of the Act to any country; Nigerian courts have confirmed that no such order has been issued by the minister. See Macaulay v. RZB Austria, page 297, para. H. Consequently, section 4 of the Act is inchoate. Section 10(a) of the Act, however, provides:

‘Notwithstanding any other provision of this Act:

(a) A judgment given before the commencement of an order under section 3 of this Act applying Part 1 of this Act to the foreign country where the judgment was given may be registered within twelve months from the date of the judgment or such longer period as may be allowed by a superior court in Nigeria; and

In Macaulay v. RZB Austria, page 298, para. H, and page 299, para. A, the issue was the required timing for the registration of an English judgment. The Supreme Court held that the applicable law was the Ordinance and that judgment ought to have been registered within 12 months. The court, however, considering the effect of section 10(a) of the Act, determined that ‘…since the Minister of Justice has not yet exercised his power under section 3 of the [Act] … to the United Kingdom where the judgment in question was given, then section 10(a) of the Act can also apply.’ The court explained that the effect of section 10(a) was that, regardless of any other provision in the 1990 Act, any judgment of a foreign country, including the UK could only be registered within 12 months of the date of the judgment or any longer period allowed by the court registering the judgment, since the provisions of part 1 of the Act had not been extended to that foreign country by the minister.

In Telegloba America Inc. v. 21st Century Tech.(2008), the Nigerian court of appeal, relying on section 10(a) of the Act, held that a judgment of Fairfax County, Virginia, US was registrable in Nigeria within a period of 12 months from the date of the judgment, since the Ordinance did not apply to US judgments and the minister had not made any order extending part 1 of the Act to the US.

Registered judgments required to be set aside

The Act prescribes circumstances in which registered judgments may or must be set aside. Where the registering court is satisfied that the matter in dispute in proceedings is the subject of a final and conclusive judgment by a court having jurisdiction in the matter, a registered judgment may be set aside. A registered judgment must, however, be set aside if the registering court is satisfied that:

i) the judgment is not one to which part 1 of the Act applies, or was registered in contravention of the Act;

ii) the courts of the country of the original court had no jurisdiction in the circumstances of the case;

iii) the judgment debtor, being the defendant in the proceedings in the original court, did not receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear, notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court;

iv) the judgment was obtained by fraud;

v) the enforcement of the judgment would be contrary to Nigerian public policy; or,

vi) the rights under the judgment are not vested in the person by whom the application for registration was made.

Recovering judgment sums in foreign currency

Section 4(3) of the Act provides that where the sum payable under a judgment is expressed in a currency other than that of Nigeria, the judgment will be registered as if it were a judgment for that sum in Nigerian currency on the basis of the prevailing exchange rate on the original court judgment date as is equivalent to the sum payable. Note that the Ordinance does not contain a similar provision and so judgments registrable under the Ordinance can be registered and recovered in the currency of the judgment.

The process of registering a foreign judgment could take six months to one year

It is to be noted, however, that section 4(3) of the Act is inchoate as it falls under part 1 of the Act. The minister has yet to issue an order extending part 1 to any country. This means that until the minister makes the requisite section 3 order, any judgment registered under section 10(a) of the Act can be recovered in the currency of the judgment.

Effect of a registered judgment

Once a judgment is registered, it has, for purposes of execution, the same force and effect as the judgment of the registering court, and the registering court has the same control over execution of the judgment as it does over one of its own.

Applications for enforcement of foreign judgment – appropriate court

Where the judgment that is to be enforced relates to matters such as maritime, admiralty, trademarks, patents, aviation or any of the matters in respect of which the Federal High Court has been conferred with exclusive jurisdiction (as enumerated in section 251 of the 1999 Constitution, as amended), the Federal High Court would be the appropriate court to approach for registration and enforcement of the judgment. In any matters that do not fall under the exclusive jurisdiction of the Federal High Court, the State High Court in the jurisdiction where the judgment is to be enforced would have jurisdiction. In the recent decision of the Lagos State High Court in Access Bank Plc v. Dr Erasmus Akinyiobola (an unreported judgment of Lagos High Court, 2014), the registration of a judgment of the High Court of Justice Queens Bench Division, London, was successfully set aside on the grounds that it was the Federal High Court and not the Lagos State High Court that had jurisdiction over the matter, as the subject matter of the action that gave rise to the judgment related to the operation of the Nigerian Companies and Allied Matters Act, in respect of which the Federal High Court has exclusive jurisdiction.
Timing of process for the registration of a foreign judgment

We believe that the process of registering a foreign judgment could take six months to one year. The process could, however, take longer where the judgment debtor applies to have the registration set aside. Given the low threshold for exercising the right of appeal against decisions of Nigerian courts, a judgment debtor who wishes to truncate or frustrate the process could, if his application to set aside the court order is refused, and irrespective of the merits of his application, appeal against the refusal and possibly obtain an order for stay of the judgment while the appeal is pending.

Outlook

Nigeria has a fairly robust legal regime for enforcing foreign judgments. Judgments that are not enforceable under the Ordinance can, under section 10(a) of the Act, be enforced within 12 months of the date of the judgment. The judgment of any foreign country may therefore be registered and enforced in Nigeria, either on the basis of the Ordinance (for judgements of the UK) or of section 10(a) of the Act for other jurisdictions. The fact that section 4 of the Act which permits foreign judgments to be registered within six years is inchoate means that all applications to a Nigerian court for the registration and enforcement of a foreign judgement must be made within 12 months of the date on which that judgment was given by the foreign court. It is hoped, however, that the minister of justice will exercise his power to extend part 1 of the Act, at least to those judgments emanating from the courts of Nigeria’s major trade partners and the commercial centres of the world.

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Portugal has been facing severe changes in its judicial system. Due to impositions of the Troika intervention in Portugal, the judicial system was one of the target sectors to be reformed.

However, the changes had already begun before the new reforms were implemented. It is worth mentioning that Portugal is the only European country with a unique online platform which connects the courts to the lawyers. This means that every application, document and judicial act must be filed using this online system, called Citius. This innovative system allows lawyers to be permanently connected to the courts and and able to obtain information on the status of the proceeding with a mere mouse-click.

In brief terms, Citius is a platform to which lawyers use to send their applications to court and to notify the counterpart parties. This is undoubtedly one of the most relevant and useful tools that have been implemented in the Portuguese court system. It reduces the communication time between lawyer, court and counterpart lawyers, who are now permanently in contact.

The efficiency of this tool has had an impact not only on a lawyer’s communication with the courts, but also on court officials, who can now focus on important procedural issues, rather than having to spend 80% of their time preparing notifications to be sent to lawyers and analysing the notifications received from the parties.

Aside from software innovation, the Portuguese civil court system has also seen severe changes in the Portuguese Procedural Code. This brand new Procedural Code entered into force recently, and its driving principle appears to be a focus on speed.

Although there have been changes in the proceeding itself and its connected rules, the purpose of this reform was to shorten the average time a proceeding takes in a first instance court. The judges have been given a higher level of discretion in their procedural decisions.

The role of the judge within the Portuguese legal system is to actively conduct the proceeding and to ensure its swift conclusion. The judge may generate any diligences they find relevant to the proceeding (such as ordering evidence-finding procedures), and refuse those that seem unnecessary.

However, in civil proceedings, this active inquisitorial role is moderated, since the parties play an important role as well. It is up to them to instigate the proceeding and they may terminate it at any time, subject to procedural rules. Further, the judge may only decide on issues raised by the parties and the decision may only condemn the defendant to the extent requested by the claimant. How the proceeding is conducted depends on the judge. However, the judge always tries to schedule the important steps of the proceeding by discussing it with the parties.

On September 1 2014, new rules on jurisdiction and judicial organisation came into force in Portugal. The government’s purpose was to simplify the jurisdiction structure and also to bring more specialisation to each court.

The first level of jurisdiction was composed of 311 county courts which would normally be divided into specialised courts, depending on specific matters (commercial, family or labour courts, for example) and on the amount of the dispute.

Now that the new law has come into force, there are 23 county courts in the country – generally one per county – and each of those courts is divided into sections depending on specific matters and on the amount of the dispute.

Therefore, instead of having 311 courts, there only will be 23 divided into sections, where the territorial jurisdiction of each court is extended. Also, a few of the former courts have been closed and some of them converted into so-called proximity sections; that is, divisions of the county court intended only to provide information, receive documents, pleadings and applications, and conduct trial hearings whenever the judge deems necessary.

The structure of the appeal courts did not change. In Portugal, there are five appeal courts which, other than in exceptional circumstances, only decide as higher-instance courts. There is one Supreme Court, and this is the court of last appeal.

Outside this structure, there is a Constitutional Court, which oversees the constitutionality of legislation to which parties may appeal in the event they consider the rules applied by the judge to be unconstitutional.

Judicial courts represent the most used dispute resolution method in Portugal, even though alternative dispute resolutions, such as arbitration, are becoming more popular, particularly among the largest companies.

As a result of the large number of disputes resolved within the state legal system, Portugal has frequently changed and improved the system by, for instance, building new courts and adopting new technologies. Additionally, the power to deal with simple matters (divorce, for example) has been transferred to other state or private entities. This has helped the legal system to function more effectively and expeditiously.
Civil court organisation

In Portugal, the civil court system deals with private law issues, and particularly commercial, family or employment issues.

This system is organised into a hierarchical three-tier pyramid structure as follows: (i) first instance court (decisions taken by one judge); (ii) appeal court (decisions taken by three judges); and, (iii) Supreme Court (decisions taken by three judges, as a general rule).

In order to start a civil proceeding, the claimant presents a petition in court (by using the Citius system), setting out the alleged right, with the amount requested.

The court receives the petition and notifies the defendant, providing them with the petition and all the documents presented by the claimant, and the civil proceeding is initiated at that time.

After being served by the court of the initial claim, the defendant usually has 30 days to reply with a counter claim. In the event the defendant presents a counter claim within the defence, the claimant has 30 days to reply.

All these written applications are sent to the judge, who will analyse the formal issues arising.

The judge has the power to refuse the petition without any other diligences if the formal requirements are not followed (for example, if one of the parties is considered illegitimate).

After formally analysing the documents, the judge schedules a preliminary hearing where a conciliation process takes place and the parties, together with the judge, discuss the relevant facts and issues which will be taken to the final hearing. The judge decides which facts are relevant to the case and which facts the parties will have to prove by providing evidence.

After the above-mentioned proceeding, the judge will schedule the final hearing where the witnesses will be heard and other relevant evidence taken. During the final hearing, the judge has inquisitorial power – that is, even if the questioning of the witness is subject to the facts chosen, the judge may pose questions he deems necessary to form an opinion on the case. Once the hearing is concluded, the judge has 30 days to decide the matter.

All documents that support the parties’ position must be filed within the written applications, or until 20 days before the final hearing, subject to a fine that the court may apply if it considers that such documents could have been presented before. The parties must present the evidence they find relevant to support their position.

Nevertheless, in the event that one party has relevant documents which are not filed, the other party may request such filing and the judge may order the presentation of the documents in their possession.

As for client and lawyer privilege, according to Portuguese law, the documents exchanged between lawyers or between lawyer and client are privileged.

In order to be able to file such documents, the lawyer in question must request the Bar Association to allow such filing. All other documents, if requested by the judge, should be presented.

All evidence provided must be presented in the petition (claimant) or in the defence (defendant).

The witnesses give oral evidence during the final hearing, while the experts elaborate a written report and may also be called to the hearing, in the event the parties or the judge request their clarifications.

In general terms, within civil proceedings, court hearings are public. All documents such as pleadings, witness statements and court orders, are available to the lawyers in the respective court section. However, when the proceeding is an injunction (of any kind), this rule is changed and neither the hearings nor the documents are available to the public.

According to Portuguese law, the general time limit for bringing civil claims is 20 years. However, this time limit may be shortened according to the nature of the right claimed. Namely, there is a three-year limit for compensation for damages not arising from contractual liability; a three-year limit for unjust enrichment; a five-year limit for proceedings regarding debts periodically renewed; and, moreover, there is a specific time limit for consumer rights, according to which there may be a two-year limit for a trader to claim credits resulting from a supply of goods or six months to claim accommodation establishments, food and beverage credits, within the relationship between the consumer and the provider of goods.

The government’s purpose was to simplify the jurisdiction structure and bring more specialisation to each court

The creditor’s intention to exercise its right will interrupt the time limit (by means of a written notification), which will then start again.

It is not possible for parties to agree to suspend time limits for bringing civil claims.

Remedies

The Portuguese Procedural Code establishes a wide range of interim remedies, by allowing a party to file for injunction proceedings to protect their alleged right.

In order to protect a parties’ rights, it is also possible to obtain a freezing order or a search order.

There is the possibility to file for an injunction in support of foreign proceedings.

Under Portuguese Law, the available remedies include: (i) injunctions: an order that restrains or obliges the defendant to do something; (ii) declaration proceedings: a statement by the court of the plaintiff’s legal rights, a statement by the court convicting the defendant (to fulfill contractual obligations, for example) or a statement by the court authorising a legal reality exchange (divorce or annulment of a contract, for example); (iii) enforcement proceedings.

Regarding declaration proceedings, Portuguese law does not provide for punitive damages, as the creditor is only entitled to compensatory damages. When restitution of the original situation is not possible, compensation will be determined in money, which includes direct losses and loss of profits. Portuguese law also foresee compensation for moral damages.

Enforcement

According to Portuguese Law, there is a specific enforcement proceeding that may be used either to obtain a payment of a debt or to force the accomplishment of a court decision (to force the delivery of a certain object or the counterparty to carry out a certain action).

If a court order is disobeyed, the creditor, besides initiating an enforcement proceeding, may claim a penalty payment (sanção pecuniária compulsória).

The enforcement proceeding is carried out by an enforcement agent, who is designated by the creditor. There have been dramatic changes in the enforcement proceeding regime. Previously the courts had responsibility for enforcement proceedings, which has recently been transferred to the enforcement
agent who now conducts the works under supervision of the court.

Under the new enforcement proceeding regime, it is quicker to seize debtor’s assets and recover the amounts due to the creditor. The fact that the tax authorities, social security services and land registry offices are now fully connected to the same system, makes it is easier to track the debtor’s assets in order to seize.

After seizure, the assets are sold with the purpose of paying the proceeding costs and the creditor’s debt.

Costs
The costs claimed by the court may be the general cost of a civil proceeding (which is determined at the end, apart from the judicial tax paid with the filing of the applications) or may also include possible fines applied to the party, for example, for late filing of documents. A party who does not pay the court fees will be immediately served for an enforcement proceeding.

No win no fee agreements between lawyers and their clients (quota litis) are not allowed by the Portuguese legal system. However, a complementary success fee is common procedure.

Appeals
The parties can appeal decisions involving an amount above €30,001 ($38,879). The parties’ appeal may be related to facts (whether the judge considered them proven or not proven) in the event parties believe the decision (which is determined at the end, apart from the judicial tax paid with the filing of the applications) or may include possible fines applied to the party, for example, for late filing of documents. A party who does not pay the court fees will be immediately served for an enforcement proceeding.

In general terms, there is a right to a further appeal, to the Supreme Court, unless the appeal court decision confirms the first instance decision on the same exact terms.

In general terms, the Portuguese appeal courts are quick in taking decisions. The average time for an appeal court, or the Supreme Court, to issue a decision in a normal case is just six to eight months.

Foreign judgements
It is possible to recognise foreign judgments, as the law foresees a special confirmation procedure, after which the decision may be enforced.

In order to be granted a confirmation, certain general and formal conditions must be met, such as: (i) there must be no doubts regarding the authenticity of the document containing the decision; (ii) the decision must be final according to the country in which it was given; (iii) the jurisdiction of the foreign court must not have been determined fraudulently and the object of the decision must not fall within exclusive international jurisdiction of Portuguese courts; (iv) the same case must not be pending in other courts; (v) the defendant must have been properly notified, according to the rules of the foreign court law, and the principle of an adversarial proceeding must have been followed; (vi) the confirmation must not lead to a result incompatible with the Portuguese state international public policy.

Additionally, there are international conventions and treaties in force that set out the conditions under which a judgment issued in one state is enforceable in another.

Within the EU, there are specific regulations (such as Regulation 44/2011 and 2201/2003) which set out such conditions. The Portuguese courts may request or be requested for (by means of a letter rogatory) any type of judicial assistance, such as to obtain oral or documentary evidence.

Further, there is a specific EU regulation (Regulation 1206/2001) which sets out the rules that must be followed.
Recouping renewables losses

Gabriel Sidere of CMS discusses the challenges for renewables under the new energy law and how investors can go about recovering their losses in its wake

The Romanian Government’s support scheme for renewable energy has attracted billions of euros in new investment in the sector since 2011. Inevitably, this has increased financial pressures on Romania’s large industrial producers. Since July 1 2013, in response to these pressures, government support for renewable energy has waned, leading to a series of restrictions being placed on renewable energy sources. Law 23/2014 (New Law) expressly authorises changes in the prior law on which investors in green energy had relied in return for contributing new capital to Romania’s growing energy economy. This change in government policy effectively cancels a regime intended to attract investment in the renewable energy sector in Romania. The New Law is not just an obstacle to new investment. The true extent of its damaging consequences will be felt as existing investors seek to recoup current and future losses by exercising rights under Romanian, EU and international law. The investment-protection provisions of a number of treaties to which Romania is a party afford foreign investors a right to seek compensation by commencing arbitration against Romania at the International Centre for Settlement of Investment Disputes (ICSID) and other international arbitration venues specified in Romania’s treaties.

A safe haven prematurely withdrawn

The Renewable Energy Law (REL) was introduced to support investors in the renewable energy source sector. It responded to the EU’s directive on renewable energy (Directive 2009/28/EC) and Romanian’s own Energy Strategy. The REL was passed in 2008 and the supporting scheme became applicable as of 2011.

Since 2011, Romania has been an attractive destination for investors in renewable energy. With the prospect of high returns and an encouraging support scheme offered by the Government, companies from not only Europe, but also from Asia and the US, poured money into green energy projects in Romania. Romania was looking to be the top runner for energy investment in Eastern Europe and this was poised to increase on the back of the allocation of green certificates from the Romanian Government.

So why did this attract so much investment in Romania? Any amendments to the REL required approval from the EC and the law stipulated that no revisions of the REL would be considered before January 1 2014. Consequently, the scheme was considered a safe option by investors. These investors had a legitimate expectation that the incentive scheme provided by the REL would remain applicable for the renewable energy projects authorised by the Romanian Energy Regulator (ANRE) before January 1 2014. Conversely, a series of measures changing the incentive scheme was implemented by Romania before January 1 2014, with a complete disregard for those investors who were guaranteed that their safe haven would not be withdrawn prematurely and a breach of their expectations.

Impact on existing renewables investments

Support for the production of electricity from renewable energy sources has been reduced by the Government in Romania. It is anticipated that the new legislation will significantly reduce revenues, and harm the property rights of investors in the renewable energy sector. The most prominent effects of the New Law concern green certificates. Key changes include: (i) the deferral of a number of green certificates granted to wind energy producers; (ii) restrictions on the trading of green certificates; (iii) a cap on accreditation of new renewable plants benefiting from green certificates; (iv) an abrogation of the annual mandatory quota of renewable electricity that can benefit from green certificates between 2014 and 2020, which was replaced by an obligation on ANRE to establish annual quotas of renewable energy to be injected into the grid and has the effect of reducing the quantity of renewable electricity that can benefit from green certificates; and (v) the introduction of exemptions to electro-intensive end consumers from the payment for green certificates, which in turn would create an exemption for the supplier to acquire a certain number of green certificates based on the quantity of energy delivered to its client.

This change in government policy effectively cancels a regime intended to attract investment in the renewable energy sector

The green certificates play a key role in allowing investors to gain access to the energy market. Without green certificates, the price of energy would be much higher than the regular price; consequently, renewable energy producers would not be able to sustain this type of energy production on their own. In order to maintain a healthy relationship between producers and end consumers, there must be an even balance in pricing. The transaction value of green certificates should be determined by factors such as competition in the market and demand from end consumers. Imposing certain extremes in value would favour the end consumer while causing a certain level of prejudice against the producer and vice versa. It is clear therefore that green certificates are important to producers, consumers and investors.

From January 1 2014, there was a reduction in the number of green certificates for new investors in the market. Hydropower plants receive 2.3 green certificates per MWH instead of three, and new solar power plants will receive three instead of six. The same reduction has been applied to new wind plants whose primary reduction from two to 1.5 will apply until the end of 2017, to then be reduced further to 0.75 from January 2018. Additionally, new green certificates will only be valid for one year from the date of issue.

Not only will new entrants in the market have to accommodate for these reduced numbers, but each year ANRE will report and propose a further reduction if they ascertain that hydro, solar or wind technologies are receiving more compensation than is necessary. Upon publication of their findings, ANRE can propose measures to make these subsequent reductions. The Romanian Government is then entitled (within 60 days of receiving
the proposal from ANRE) to either approve ANRE’s recommendations or reject it. If the proposal is accepted, the reduction applies to all new entrants from January 1 of the next year. In terms of timeframes therefore, potential investors have a matter of months to decide whether or not to invest, knowing that it is a potential risk to wait and face a potential further reduction the next year.

In addition to the reduction in number of green certificates being distributed, there will also be a cap on the number of MW from renewable energy sources accredited by the ANRE. Without the accreditation, companies cannot benefit from the support scheme. This cap will be determined by the Government each year and once reached, there will be no further accreditations until the next year. This issue is twofold. It not only limits the number of companies who are able to benefit from the scheme, but it deters companies from entering a market which appears so heavily (and to some extent unnecessarily) regulated.

Since 2011, Romania has been an attractive destination for investors in renewable energy

Green certificates and electricity are traded on the regulated electricity and green certificates markets only, with a ban on freely negotiated sale and purchase agreements outside the regulated markets. The market ensures transparency and fair prices for producers and consumers. However, the renewable energy producers can enter the markets only when they become operational, which means that they cannot secure project finance for the construction of the project.

Recently-enacted legislation on state aid for energe-intensive consumers (which comes into force on October 1 2014) will exempt some qualified engero-intensive consumers from covering a significant percentage of the cost of green certificates (40% to 85%). This development will have further negative impact on existing operational projects, given that the mandatory quota for the acquisition of green certificates will be significantly reduced, resulting in an excess of green certificates on the market. Investors (owners of operational projects) may find themselves having difficulties selling their green certificates during their (16 month) validity period.

As a consequence of the restrictions being placed on renewable energy sources, large companies are inadvertently being excluded from trading on the green certificates market. Not only does this reduce the value of the green certificates, but it casts doubt on the minds of smaller investors perhaps looking for the stability of trading with more established companies.

Recovering damages and investment losses

Investors in the renewable energy sector are now assessing the possibility of taking legal actions against Romania in order to recoup expected financial losses in relation to investments made in operating wind farms. In addition to rights that could be asserted under the Romanian Constitution and EU Law, affected investors could bring treaty claims against Romania in order to recoup expected financial losses. For investor entities not registered in Romania, such claims could be submitted to arbitration in accordance with the terms of a bilateral investment treaty between Romania and the country in which the Investor is registered (BIT), where such a BIT exists. Alternatively, investors could commence arbitral proceedings for breach of the Energy Charter Treaty (ECT), which Romania ratified, subject to it also being ratified by the state where the investor is registered.

Potential claims

Under either the BIT or ECT, there are various claims which the investor can assert against the Government. These could include violations of Romania’s obligations to provide: (i) fair and equitable treatment; (ii) protection from arbitrary and discriminatory measures; (iii) full protection and security treatment; and (iv) protection form expropriation measures.

Fair and equitable treatment

First, it may be argued that the investor had a legitimate and reasonable expectation that the green certificates support scheme for renewable electricity producers in Romania would remain. Case law has rightfully shown that a state cannot be expected to ‘freeze its laws and regulations’ (Miculţa v Romania). Nevertheless, investors will have a claim where it can be shown that a commitment was made by the Government and there was a reasonable reliance on that commitment. In the case of renewable energy, the legislative framework post-introduction of EU Directives, instilled in investors a legitimate expectation with regard to monetary support and green certificates from the Government. Although one could argue that companies may have invested regardless of the scheme, thereby alleging that there was in fact no reliance, it is important to consider the timeframe in which investment poured into Romania in these sectors. A report by Ernst & Young (February 2014) highlighted that Romania’s investment levels had decreased on the back of the New Law. Consequently, investors could argue that their investments were made in reliance on the support scheme. Additionally or alternatively, investors could argue that the Government acted unreasonably in its decision to change the law on renewables. Either of these arguments may allow an investor to submit that the change in the law breaches the requirement under the relevant BIT or the ECT for Romania to act fairly and equitably. The case of Miculţa v Romania illustrated that even where Romania’s actions were considered appropriate in pursuit of a rational policy, it may still be considered unfair or inequitable.

Protection from arbitrary and discriminatory measures

Second, investors could claim that the measures imposed by the New Law are arbitrary and discriminatory if, for example, there is grounding in the argument that Romania acted with wilful disregard of due processes and proper procedures, or that the measures inflict damages on the investor without serving any apparent legitimate purpose. This behaviour may also give rise to a breach of the ECT or the BIT (where the BIT provides for such a protection).

Full protection and security

Third, it could be argued that the change in law impacting ongoing projects is in breach of the full protection and security standard imposed on Romania through the ECT and most BITs, which may be interpreted to guarantee against a state infringing the rights of an investor through laws or regulations. This principle is not constrained to physical infringement, and so it could be argued for the protection of investors from an unstable legal framework and for the provision of a secure investment environment.

Indirect and creeping expropriation

Finally, Romania undertook, through the treaties, not to expropriate or take other measures of similar effect against investments. It may be argued that the measures in the New Law constitute such a measure as they significantly reduce revenues for investors and undermine the economic value of projects the investor invested in.

Considering ICSID

Investors wishing to bring a claim under the BIT or ECT may opt to do so through ICSID. ICSID can offer foreign investors in Romania an effective international forum through which to protect their investments. And with 46% of claims (as of December 2013) decided by an Arbitral Tribunal under ICSID being upheld (in part or in full), ICSID could be an effective forum for foreign investors to recover their investment losses. Please note, a further 25% of claims were dismissed for jurisdictional reasons. It is crucial therefore that investors thoroughly assess whether they meet the necessary (jurisdictional) requirements before attempting to bring a claim under
ICSID. In disputes involving a state party from the EU, only 19% of claims were dismissed for jurisdictional reasons, while 31% were upheld (in part or in full), as of March 2014.

For investors looking to bring a claim to ICSID, there is also the option of bringing multi party claims (where the parties are represented by an association). There have been several ICSID cases where tribunals have allowed for multiple parties to bring investment claims in a single case, including cases concerning multiple BITs. Joint claims can be efficient, cost effective and avoid the risk of inconsistent decisions.

If an investor decides to commence proceedings, they will need to first send what is known as a trigger letter to Romania, including details of the claim. This triggers the commencement of a cooling-off period (of three months under the ECT or three to six months dependant on the relevant BIT) during which the investor and Romania should endeavour to settle the dispute through amicable negotiations. This is a valuable opportunity for serious settlement negotiations and, with over a third of ICSID arbitration proceedings being settled or otherwise discontinued, this can be an integral part of the ICSID process.

Two important further considerations for any investor bringing a claim are time and cost. With regard to time, this includes the time taken to bring the claim to the forum as well as the time taken for the entire arbitration process to conclude. Investors must prepare themselves for a long road. The shortest reported case at ICSID was 1.2 years with the longest being 10.5 years. From inception to award (if applicable) the average duration of an ICSID arbitration is 3.6 years (at the time of writing). Not only will investors have to budget for ongoing legal fees, but they will need to carefully manage and control the effect years of arbitration will have on their reputation. Nonetheless, it is evident that the law will not be changing soon for any investor wishing to bring a claim against Romania.

Let down by the Government
The measures implemented by the Romanian Government, which have changed (and effectively cancelled) a regime intended to attract investment in the renewable energy sector in Romania, have negatively impacted the investments of numerous investors in renewable energy in Romania. As investors look to recoup their current and future losses by exercising rights under Romanian, EU and international law, bringing a claim under ICSID can offer affected foreign investors in Romania an effective international forum to do so. ICSID arbitration may be a lengthy and costly process, it is also however a reliable and specialised one offering investors the opportunity to elevate their dispute to a higher international forum, and allowing the opportunity for valuable settlement negotiations along the way. International investment treaty claims are a real alternative for foreign investors in the Romanian renewable energy production sector who feel as though the Romanian Government has breached its international law obligations towards their investments, as enshrined in bilateral or multilateral investment treaties to which Romania is party.

One final consideration is the new EU regulation on financial responsibility under future investor-to-state disputes. This came into force on September 17 2014, and will be applied to investor-state disputes involving an EU member state, such as Romania. The new rules are a positive development and aim to further develop a ‘transparent, accountable and balanced investor-to state dispute settlement mechanism as part of EU trade and investment policy’. The rules define who is best placed to defend the EU’s and member states’ interests in the event of a claim under investor-to-state dispute in EU trade agreements and the Energy Charter Treaty. The rules also set out the principles for allocating any eventual costs or compensation. Member states will defend any challenges to their own measures and the EU will defend measures taken at EU level. In all cases, there will be close cooperation and transparency within the EU and the EU institutions.

About the author
Gabriel Sidere is a litigation partner and managing partner of CMS Romania. His practice focuses on complex business litigation and international arbitration matters, in particular providing strategic advice on investment related disputes, and representing clients in high-level negotiations involving governmental institutions. He has represented and counselled clients in disputes involving numerous industries, including energy, infrastructure, manufacturing, financial services and consumer products. Sidere is recognised by legal directories such as *Chambers Global* as one of the leading experts in international commercial arbitration and business litigation in Romania. He is also listed as one of just two Romania-based lawyers in *The International Who’s Who of Mediation Directory 2013*. He has extensive experience in dispute resolution and advocacy, both in Romania and beyond, and a significant track record in negotiating with and advising Romanian governmental institutions with respect to EU harmonisation issues and the application of international conventions ratified by Romania. He is well known for ‘his vigorous and energetic advocacy’ and for his ‘effective and efficient resolution of disputes in their early stages. He was recently described as a ‘truly outstanding’ lawyer with ‘a remarkable insight into clients’ needs’ in *Chambers Global* (2012 edition). Sidere is an accredited mediator and certified advanced negotiator with CEDR (Centre for Effective Dispute Resolution).
Preliminary judicial protection

Urs Feller and Bernhard C Lauterburg of Prager Dreifuss discuss interim relief in recent cases, highlighting areas where it pays to be prudent.

In a globalised, highly interdependent economic environment, effective enforcement of legal rights is a key business factor. One aspect of effective enforcement – at least as important as obtaining a final and enforceable decision in reasonable time – is interim relief.

The need for interim relief may arise in various areas of law. For instance, when: (i) parties to an outsourcing agreement are in dispute and the outsourcing provider fails to perform certain services related to the termination of the agreement; (ii) bankruptcy proceedings necessitate avoidance actions which must be secured by an order prohibiting disposition to be successful; (iii) a company importing pharmaceutical products markets a product which infringes the patent rights of another company; or (iv) a company with supposed market dominance ceases to supply products to a particular buyer.

Civil procedure

Under article 261 of the Swiss Civil Procedure Code (CPC), the court will impose a preliminary measure if the applicant shows credibly that a substantive right to which he is entitled has been or is anticipated to be violated. The violation must threaten to cause harm to the applicant which cannot not easily be repaired. Ex parte motions are possible in urgent cases, such as where there is a risk that the enforcement of the measure will be frustrated. If the court is satisfied with the application, it will grant the measure provisionally and summon the parties to a hearing. Only at the hearing will the court decide whether to grant the application for preliminary measures. There is no appeal against an ex parte order on granting or rejecting preliminary measures. Ordinary preliminary measures are granted in a contradictory proceeding and may be appealed.

A party seeking a preliminary measure in domestic matters may do so either with the court that is competent to hear the action on substance or with the court at the place where the measure is to be enforced (even if the matter is already pending before another court). Similarly, the Private International Law Act (PILA) provides two judicial fora for international disputes to bring an application for preliminary measures: either the court that is competent to hear the action on substance, or the court where the measure will be enforced (article 10 PILA). Further, the convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lagano Convention) provides that preliminary measures may be sought from a court located in a state other than that of the court with competence to hear the matter on substance (article 31). Therefore, Swiss state courts may have jurisdiction to hear an application for preliminary measures, even if they are not competent to hear the substantive claim.

Preliminary measures may take various forms, such as an injunction, an order to remedy an unlawful situation, an order to a register authority (for instance to prohibit registration of new board members or registration of a property transfer) or to a third party, performance in kind or the payment of a sum of money in the cases provided by the law. Procedurally, they are aimed at creating a temporary order until the matter is decided on substance, temporarily enforcing a disputed claim or preserving an existing state. The aim of the preliminary measures sought is relevant for the standard of evidence. The former two aims require a higher standard of justification and a balance of the interests of the parties involved, while the standard of justification is lower for the latter aim.

Preliminary measures may be sought before filing the main action, in which case the court will set a deadline within which the applicant must file the action. Failing to do so results in the preliminary measure becoming automatically ineffective (article 263 CPC).

A final note on procedure: creditors seeking an attachment order to secure monetary claims before a trial, or debt enforcement proceedings, must use the procedure provided for in the Federal Debt Enforcement and Bankruptcy Act (DEBA). Creditors must show to the court: (i) that they have outstanding debts against the debtor; (ii) the existence of a statutory ground for attachment; and (iii) the existence of assets and their location. DEBA provides for six grounds based on which the attachment of assets may be sought: (a) the debtor has no permanent residence in Switzerland; (b) the debtor is attempting to conceal assets or is planning to leave Switzerland to evade the fulfilment of its obligations; (c) the debtor is travelling through Switzerland or conducts business on trade fairs, provided that the claim must be settled immediately; (d) the debtor does not reside in Switzerland and no other ground for attachment is available, provided that the claim has sufficient connection with Switzerland or is based on recognition of debt; (e) the debtor holds a provisional or definitive certificate of shortfall against the creditor; or (f) the creditor holds a definitely enforceable title permitting him to have any objection by the debtor set aside (definitiver Rechtausweisittel). Place of jurisdiction for such asset-freezing requests is the place where the assets are located or the place where debt collection proceedings must be initiated.

International commercial arbitration

In international commercial arbitration, the competence of state courts to order preliminary measures derives from article 10 of PILA, while an arbitral tribunal may issue such orders ‘unless the parties have agreed otherwise’ (article 183(1) PILA). Only if the parties validly exclude jurisdiction of the state courts to order preliminary measures will the state court deny jurisdiction. Parties should be aware, however, that urgent, ex parte, applications for preliminary measures may require that a state court be seized. Parallel application for interim relief to both the state court and the arbitral tribunal is not possible and will result in the instance that was later seized rejecting jurisdiction.

The Swiss Rules on International Arbitration (SRIA) expressly state in article 26(5), that it ‘shall not be deemed to be incompatible with the agreement to arbitrate’ to seek an order for preliminary measures before a state court. While the SRIA expressly permit an application to a state court, the ICC Rules, for
instance, only provide that before the constitution of the tribunal, and in subsequent ‘appropriate circumstances’, the parties may apply to a national court for interim relief (article 28(2) ICC Rules).

Administrative procedure
Unlike the CPC, the Federal Act on Administrative Procedure (APA) lacks any provision on preliminary measures in first instance proceedings (that is, proceedings that aim to issue an appealable order such as proceedings before ComCo, the Swiss Competition Commission). The APA expressly provides only that an order for preliminary measures may be issued once an appeal has been filed. It is, however, recognised that preliminary measures may be sought before filing an appeal as well as during first instance proceedings. Federal administrative law contains various provisions on preliminary measures. As in civil law, where the law itself lacks any provision on preliminary measures, such measures may be ordered directly on a substantive provision whose enforcement warrants protection.

The Federal Supreme Court held that not only the respondents but also third parties may be the subject of a preliminary measure

In competition law, neither the applicable procedural statute, the APA, nor the Law on Cartels (LCart), contain a rule on preliminary measures. It is recognised, however, that ComCo may order, during a formal investigation, preliminary measures by virtue of its competence to issue procedural rulings (for instance, the order of the Competition Commission of June 6 2011, preliminary measures against the Swatch Group).

Case law review
Preliminary measures applications
The Supreme Court of Zurich was recently seized with an extensive application for preliminary measures concerning an IT-outsourcing agreement. Various disputes arose under the agreement. The applicant withheld certain payments due under the agreement, and the other party rejected the performance of certain works, in particular those related to the scheduled termination of the agreement. On January 24 2014, the applicant requested the court to order – ex parte – various acts of specific performance, such as adaptations of the firewall to enable migration works or the change of active directory elements. Overall, the applicant requested the order of 23 different measures, each containing a set of works which the other party should perform.

The court stated that the requests were written in highly technical language and that the requests and the documents supplied were not self-explanatory so as to permit the court to draw a logical and conceivable connection to the requested measures. Therefore, the court could not make a determination as to the necessity, reasonableness and appropriateness of the requests. The court concluded that the technical nature of the subject matter would not release the applicant from giving explanations. Therefore, the request lacked conclusiveness, and the court rejected it instantly on January 27 2014.

Payment under performance guarantee
The applicant filed an ex parte motion for preliminary measures and requested the court to prevent the other party from claiming payment under a performance guarantee and to instruct the insurer to make payment under the guarantee. It argued that payment of the sum by the insurer would require it to repay the insurer. Moreover, it would have to file suit against the other party for having wrongfully claimed payment under the guarantee. Given its experience with the other party, lengthy proceedings could be expected, during which time the applicant would be deprived of more than SFr3.6 million ($3.8 million) in assets and limited in its ability to act.

The sole judge at the Commercial Court in Zurich held that one of the largest construction enterprises in Switzerland could not reasonably claim that the temporary lack of disposition over an amount of SFr3.6 million would limit its ability to act. Moreover, the possible necessity to seize a court on substance would not per se constitute not easily reparable harm; the judge considered it likely that the parties would have their dispute decided by a court, so court proceedings were inevitable. Finally, perhaps the applicant’s strongest argument, that the other party may not have sufficient liquidity in a few years, remained unsubstantiated. Thus, the court rejected the application.

Applicants need to be careful in estimating whether harm they may suffer from another party’s violation of the law would constitute not easily reparable harm. Under the given circumstances, the economic strength of the applicant may be detrimental for the application.

Preliminary measures in bankruptcy proceedings
The Federal Supreme Court held that not only the respondents but also third parties may be the subject of a preliminary measure. Since the company that owned the properties was controlled by the individual’s family, the court did not deny a certain risk that the company would sell the properties and as a result become virtually worthless. As the court noted, the value of a real estate company mainly consists of the value of the properties it owns. A sale or encumbrance of the properties would negatively affect the value of the shares at issue in the main proceeding. Therefore, the restrictions on the properties were justified.

Preliminary measures in intellectual property law
On January 1 2012, the Federal Patent Court commenced operations. It adjudicates civil-law disputes concerning patents, with exclusive competence in patent infringement and validity matters and is competent to order preliminary measures. Other civil actions relating to patents can also be brought before the Federal Patent Court, such as disputes pertaining to patent licence agreements or the rights to a patent. All other matters concerning intellectual property rights must be brought before the ordinary civil courts.

Ex parte orders from the Federal Patent Court are rare. This is mainly due to the fact that in cases which require understanding of a technical matter – which will generally be the case – decisions must be made by a panel of three judges (article 23(3) of the Federal Act on the Federal Patent Court). In terms of ex parte preliminary measures, the Federal Patent Court refers to the jurisprudence of the European Court of Justice in the matter Bernard Denilauler v SNC Ciechet Frères (case C-125/79) and declines jurisdiction if the measure is not to be enforced in Switzerland (decision of July 11 2014, case S2013_011).

In terms of timing, applicants should know that the Federal Patent Court will likely deny an ex parte application for provisional measures if the application is not filed promptly within one to two weeks (decision of June 12 2012, case S2012_009).
No declaratory relief from the Federal Patent Court
Under article 262 CPC, the court may order any interim measure suitable to prevent imminent harm. In an application to the Federal Patent Court, the applicant requested the court to declare that it was the lawful owner of a patent EP 111. The applicant was a company active in the purchase, administration and sale of patents. While earlier doctrine tended towards accepting interim declaratory relief, the prevailing doctrine in Switzerland no longer permits orders for declaratory relief as a preliminary measure. It states that a judge may not make any interim declarations on a legal situation, as such measure would take on the character of a final disposition. Referring to the existing doctrine, the Federal Patent Court rejected the application (decision of June 13 2012, case S2012_005). It remains to be seen, however, whether the Federal Patent Court’s holding will also apply to other areas of law (which the authors consider likely).

Preliminary measures in competition law
Preliminary measures are not frequently sought in civil antitrust cases. They are more frequently seen in administrative proceedings before ComCo. This is due to the overall weakness of private enforcement of competition law in Switzerland. The reasons therefore are manifold. Firstly, it seems more appealing for an aggrieved party to file a complaint with the competition authorities, rather than bearing the burden of proof in a civil proceeding. Unlike claimants in civil proceedings who regularly face evidentiary difficulties, the competition authorities may compel the production of evidence. Also, an aggrieved party filing a complaint with the competition authority is not normally subject to costs, unlike in a civil proceeding. Finally, as is shown below, ComCo – upon initiating formal proceedings – may order preliminary measures.

A litigant seeking preliminary measures from a state court will be granted a certain time limit for filing suit. However, proving causality between a violation of competition law, damage and fault is particularly difficult given often complex economic correlations. In such cases, courts must then refer the matter to ComCo for an expert report, which may cause additional costs for the litigant.

On June 6 2011, ComCo opened an investigation against Swatch, ordering preliminary measures for the duration of the investigation. Although ordered authoritatively, the preliminary measures were the result of negotiations between Swatch and ComCo, which eventually resulted in an undertaking by Swatch to continue supplying movements and other parts for watches, although reducing the supply in annual increments. Swatch consented to submit any dispute arising out of its obligations under this order in relation to its customers to an arbitral tribunal established under SRIA and the supplemental rules on the application of the Swiss Rules of International Arbitration in domestic arbitration (existing SRIA expressly apply to domestic arbitrations while the previous version did not so). The measures were eventually terminated as a result of ComCo’s decision of October 21 2013 – which found the Swatch Group to have a dominant position with respect to Swiss made movements and ébauches – and converted into an ordinary supply obligation.

A word of caution
Preliminary measures may take various forms. They can be issued directly against the respondent or – in certain cases – against a third party. Applicants must be careful in formulating their request; courts will likely not consider applications which appear unclear – namely, if they contain a large portion of technical terms and documents which are not self-explanatory. Ex parte applications for provisional measures will be rejected if the application is not filed promptly (within one to two weeks). The harm an applicant may sustain if the measure is not granted by the court must be material – the avoidance of certain payments which appear minor compared to a company’s economic strength will generally not suffice to obtain a preliminary order.

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Litigation: the long road

Beril Yayla and Orçun Çetinkaya of Gün + Partners discuss the effects of lengthy court proceedings in Turkey, and explore possible alternatives and remedies

The excessive length of proceedings is one of the most criticised issues of the Turkish judicial system. The frustratingly long duration of litigation kills the parties’ motivation to raise their rights before courts, as the general perception is that the justice might not be done or it will either be too late or too costly.

This is probably why the European Court of Human Rights (ECHR) has consistently, and the Turkish Constitutional Court (TCC) more recently, insisted on the significance of this point. They propose the state’s responsibility for the length of cases and indemnifications to be granted to parties who suffer damages or losses due to unreasonable length of proceedings.

Even though the Turkish judicial system is based by and large on written submissions in respect of civil litigation, this model has two sub-categories: the written procedure and simple procedure.

**Written procedure**
The written procedure is the main type, whereas the simple procedure, as the name suggests, is a simplified version. In the written procedure, the usual circle of submissions are possible for the parties where pleading, response, rebuttal and rejoinder can be filed. In the simple procedure, however, only pleading and response petitions can be filed by the parties and no further exchange of petitions can be carried out.

While as a rule, written procedure is applied, the simple procedure is solely applied in certain types of cases specified by law, such as the cases seen before civil courts of peace, cases arising out of employment relations or alimony payments.

**First instance courts**
The written procedure starts with the exchange of petitions. At this stage, the claimant submits a petition putting forward its claims and indicating its requests.

Following the evaluation of the plaint petition with respect to the presence of mandatory elements of the petition, the subject matter of the dispute and the type of trial procedure that is applicable to the case, the court issues opening minutes to be served to both parties.

Once the court serves the claimant’s petition to the defendant, a response petition must be submitted to the court by the defendant. The parties then exchange their second petitions in a similar manner.

The claimant submits a response petition rebutting the statements in the defendant’s response and the defendant submits a second petition in response to the claimant’s second petition.

Each response petition should be submitted within two weeks of the notification of the counterparty’s petition. The parties should submit all their claims, legal grounds and evidence within this period of exchange of petitions.

This rule is introduced by the Code of Civil Procedure (6100) of October 1 2011 (CCP) for the purpose of shortening the civil procedure by preventing the submission of additional evidence in latter stages of the examination.

In almost every case, parties demand an extension for the submission of response petitions due to the complexity of the case; courts generally grant extensions of up to one month, which eventually prolongs the procedure.

Once the petitions are exchanged, the preliminary examination starts, which is another stage introduced by the CPP to accelerate the proceedings. This stage aims at maintaining a suitable environment for the parties’ settlement as well as creating room for the judge to evaluate the preconditions of the file and preliminary objections before delving into the dispute any further. The court will determine disputed matters of the case.

If applied accurately, the preliminary examination stage could shorten trial proceedings

If applied accurately, the preliminary examination stage can shorten trial proceedings. Parties may consider making a settlement after the collection of all evidence and determination of disputed matters, as they can make a projection on the outcome of the dispute and this can lead to a decrease of the workload. Equally, preliminary examination can accelerate the proceedings if necessary preparations are duly made at this stage, since the judge could then directly proceed into the merits of the case.

After the preliminary examination stage comes the examination stage. In this stage, the court examines the merits of the case by reviewing the evidence submitted by the parties, summoning witnesses, making discoveries at site and appointing experts on key matters for the resolution of the dispute where specific or technical expertise is required. At the end of this procedure, the court issues its reasoned decision. This decision can be appealed by the parties within 15 days as of the notification date of the reasoned decision.

In matters where technical or specific knowledge is necessary for the resolution of the dispute, experts can be appointed ex officio or upon request of the parties. Expert report had been commonly misused by requests for expert reports on legal matters as well. The CPP made it clear that experts cannot be appointed on legal matters, as such an evaluation should be made the judge. However, this practice has not been entirely
Years, if not decades, would be needed for mediation to take off in Turkey

The CCP provides for a three-tiered court system in Turkey. Accordingly, the Turkish judicial system follows a basic organisation of courts of first instance, regional appellate courts and the Supreme Court. However, the regional appellate courts are not operational, since the judicial infrastructure is yet to be set up.

The Supreme Court can either approve or reverse the decision based on following grounds: (i) incorrect application of the law or agreement between the parties; (ii) non-existence of the preliminary conditions of trial; (iii) unlawful dismissal of any evidence; and (iv) procedural errors effecting the decision.

The decision of the Supreme Court can also be challenged by the parties by way of requesting the revision of the decision. Parties must submit this request within 15 days of the notification of the decision of the Supreme Court. If the decision is reversed at the end of the appeal stage, the whole examination phase recommences within the scope determined by the Supreme Court. It is noteworthy that, after the regional appealed courts are fully operational, such revisions cannot be requested from the Supreme Courts.

Until the regional appellate courts can function, the provisions of the former Code on Civil Procedure (1086) related to the appeal stage will continue to apply; therefore, judicial review is subject to two stages of courts, with the Supreme Court acting as the only appellate court. This creates a heavy workload for the Supreme Court and increases the length of the litigation process. Even though the structure of Supreme Court has been revised along with the addition of new chambers and judges by the enactment of Law 6217 of February 9 2011, this precautionary solution did not have the expected effect.

The motivation underlying the introduction of the regional appellate courts is the satisfaction of the right of fair trial in compliance with the ECHR. The first step for achieving this result was the enactment of the Law 5235 of September 26 2004 on the Foundation, Duty and Power of the First Instance Courts and Regional Appellate Courts. Under this Law, it is designated that Ministry of Justice will install regional appellate courts in every city of Turkey within two years as of April 1 2005, the date of this Law’s entry in force.

The main function of the long-awaited regional appellate courts is the supervision of the first instance courts’ decisions as a court of higher quality. Contrary to the procedure of the current appeal structure, which may be regarded as one biggest obstacles to fair and timely judgments, regional appellate courts may not only reverse the decisions of the first instance courts, but also render a new decision regarding the resolution of the dispute.

The Supreme Court, which is contemplated as the third and final instance of the appeal process, is expected function primarily as the organ of unification and development of jurisprudence.

How long is long?

In theory, civil litigation processes can be completed within two years whereas, in practice, it takes four years on average, with an appeal stage of 1.5 years and a revision of decision phase of approximately six months. In some cases involving multiple appeal examinations, the litigation process can even take up to 10 years.

In today’s business world, cases lasting that long cannot be satisfactory, even for the winning party. The delay creates additional losses and expenses, often exceeding the claim made at the start of the dispute and even exceeding the high amount of interest accrued during the period.

Given the potential duration of procedures and the fact that the conditions in which preliminary injunction or provisional attachment orders can be granted are so limited, plaintiffs may be left with a court order which cannot be enforced: defendants may disappear, go insolvent or dissipate their assets.

This situation usually leads to additional cases with demands of supplemental damages. In this way, long lasting dispute resolution processes becomes highly ineffective, by creating incidental disputes which could be equally complex.

For instance, when the quorum of the case is relatively high and the process takes too long, parties may suffer serious losses or damages which can even lead to bankruptcy. Dispute resolution after that point can no longer satisfy any of the parties, since they both incur excessive losses. In these cases, the winning party generally demands compensation of the losses or damages suffered during the trial which exceeds the amount of interest accrued. In this situation, it is difficult for the judges and experts to make assessments on the causation and link between the duration of the case and the claimed damages and losses.
At issue here is whether the party who lost the case is responsible for all the losses incurred during the proceedings. As far as the recurring decisions of the ECHR and the TCC are concerned, the state is responsible for excessive delays in the judicial proceedings and its outcome, constituting a violation of the right to a fair trial.

Excessive delay in judicial proceedings in Turkey is one of the matters highlighted in the speech given by the president of the ECHR. Turkey was ranked fifth at the end of 2013 in the list of countries with the largest number of human rights violation cases brought before the ECHR. Cases in which applicants complain of excessive delay in judicial proceedings make up a high percentage of the overall number of cases filed against Turkey.

In recent decisions on individual applications, the TCC, within the right of fair trial, draws attention to the obligation of the state to take all proper measures to conduct judiciary activities within a reasonable time, regardless of excessive case load (application 2012/1145).

In a case where the civil proceeding lasted for nine years, the TCC emphasised that the right to have a trial within a reasonable time (under Article 6 of the ECHR) is a component of the right to a fair trial provided by Article 36 and Article 141 of the Turkish Constitution which provides that ‘it is the duty of the judiciary to conclude trials as quickly as possible and at minimum cost’ (application 2013/5890).

In order to decrease the number of cases brought before the ECHR concerning the excessive delay in judicial proceedings, the Compensation Commission was established by Law 6384 on the Settlement of ECHR Applications by Means of Compensation on January 19 2013 on the Ümühban Kaplan judgment of March 20 2012. The court invited Turkey to adopt an effective remedy by which to obtain ‘appropriate and sufficient redress’ where persons are affected by excessive delay in domestic judicial proceedings (the case filed by the applicant’s father in 1970 was still pending at the date of the application).

In the Ümühban Kaplan decision, the court determined that Turkey had already adopted certain measures in order to speed up the judicial proceedings. However, the court remained unsatisfied with the continuing complaints and failure of the government to provide a remedy on the domestic level. In this respect, Law 6384 and subsequent decree of the Council of Ministers dated February 10 2014 (which enlarged the scope of the Law) designate that applications filed before the ECHR from March 23 2013 with regards to excessive delay of the civil, criminal and administrative proceedings and delayed or improper execution of court decisions, must be brought before the Commission within six months of April 16 2014. The Council of Ministers, with its decree dated February 2 2014, designated that applications with regards to the delay of proceedings arising out of expropriation and assignment of servitude should also be evaluated in this context. Following the adoption of this remedy, the Commission has settled 3,737 out of 5,390 applications as of April 1 2014.

Alternative dispute resolution
Despite the long and ineffective trial procedure, alternative dispute resolution methods are ironically not commonly used in Turkey. One would expect in a jurisdiction where commercial courts do not function well enough, that alternative dispute resolution would inevitable develop. However, alternative dispute resolution systems exist in theory with up-to-date regulation; in practice, they do not have a meaningful presence.

Mediation
After long discussions, the Law on Mediation on Civil Disputes (6325) was published in the Official Gazette on June 22 2012 and entered into force a year later. This institution aims to provide an alternative method for the resolution of disputes in a cost- and time-efficient manner. During the period that the parties seek settlement via mediation before initiating a litigation process, the prescription period will be delayed so that the parties can file a lawsuit without facing the risk of losing their right if the mediation does not end with a settlement. If parties declare their intention for mediation during the course of the litigation process, the court will delay the process for three months and if parties jointly request an extension, the court may grant them an extension of up to three months. However, the use and effectiveness of mediation has yet to be seen. Even though there is no statistical data for the use of mediation, it would not be a biased to say that years, if not decades, would be needed for mediation to take off in Turkey.

Arbitration
In order to establish a reliable and fast method for alternative dispute resolution, Turkey has adopted modern laws regulating both national and international arbitration, which have been promulgated in accordance with the Uncitral [United Nations Commission on International Trade Law] model law.

Independence, impartiality and reliability are the three pillars of institutional arbitration

While the rate concerning the use of domestic arbitration is undoubtedly less than a thousand, the cases with international elements are no better placed against the former when it comes to the use of arbitration.

In fact, only the construction industry is a keen supporter of arbitration along with a small portion of joint ventures undertaking large infrastructure projects for the state. The reasons for the low level use of arbitration can be attributed to the lack of willingness and awareness which could be the result of weak (or lack of) local arbitration institutions.

To overcome this problem, a draft law for Istanbul Arbitration Centre has been passed from the Commission of Justice and has entered onto the agenda of the Turkish Grand National Assembly. This project envisages the establishment of an important centre for international arbitration in the area between Europe, the Middle East and Asia. Nevertheless, according to the draft law, the centre will also have a separate arbitration tribunal for national disputes. Institutional arbitration with qualified arbitrators and pre-established rules may encourage parties to choose arbitration as a dispute resolution mechanism since the cost, outcome and timing of the proceedings can be foreseen. However, it seems that the new Istanbul Arbitration Centre is so tied up with the government, it risks being seen as simply another venue for dispute resolution set up by the state. This would be unquestionably the end of the story for the Istanbul Arbitration Centre, as independence, impartiality and reliability are the three pillars of institutional arbitration. The state’s arm’s length from each and every institution, organisation and association is a must. In addition, the Istanbul Arbitration Centre should be supported by civil initiatives, such as the Istanbul Arbitration Association, which is on the verge of formation with the support of local and international academicians, practitioners and arbitrators.

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Accelerating proceedings
The establishment of the regional appellate courts, new fines against experts, judges’ duty to invite parties for settlement, and the introduction of preliminary hearings are all good developments in the way of accelerating proceedings.

However, common practices that cannot be abandoned by judges, experts and parties along with the heavy workload constitute a vicious cycle, which prolongs the judicial procedure, even though the CCP is providing revolutionary institutions and rules to get rid of the obstacles.

The ECHR and the TCC now share the same view that the excessive delay in judicial proceedings falls under the responsibility of the state, which is a violation of the right to a fair trial. The damages or losses arising out of the unreasonable delay of the proceedings should be indemnified.

The uniform approach of the ECHR and the TCC has the potential to push the judiciary to avoid any practices, abuses or manipulations that could delay proceedings, for which the Ministry of Justice can be found responsible.

The efforts towards more efficient court proceedings must be supported by alternative dispute resolution mechanisms, which would reduce the massive case load on the commercial courts. In this regard, the Istanbul Arbitration Centre could be a good starting point, although it needs a great deal of local and international civil support for it not to be seen as just a government initiative. With this aim in mind, the Istanbul Arbitration Association is being formed up by practitioners, academicians, and arbitrators in Istanbul to which all stakeholders should give their support.

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Yayla is experienced in areas where commercial and criminal laws overlap. She has advised several multinational companies in relation to white collar crimes. Her practice also includes labour law issues and she has advised clients in relation to employment contracts, restructuring facilities, loyalty obligations, non-compete and non-disclosure obligations, employment accidents and related litigation.
Legal framework
The law governing arbitration is set out in the arbitration-specific provisions of the UAE Civil Procedures Code (CPC), commonly referred to as the UAE Arbitration Chapter. In turn, arbitration in the DIFC is governed by DIFC Law 1 of 2008, the DIFC Arbitration Law, which is largely modelled on the UNCITRAL Model Law and Egyptian Arbitration Law, or a combination of both. It is not clear at this time whether the new federal arbitration law, which is expected to be adopted later this year or early 2015, will follow the spirit of the UNCITRAL Model Law or be based on tailor-made wording that bears little resemblance to standard international arbitration laws.

A recent amendment to the DIFC Arbitration Law brings the DIFC into line with the New York Convention on the recognition and enforcement of foreign arbitral awards (NYC). DIFC Law 6 of 2013, the Arbitration Law Amendment Law (Amendment Law) which implements the amendment, was adopted on December 15 2013. According to the DIFC Authority’s own coverage, ‘the amendments to the Arbitration Law 2008 have been made to ensure alignment of the DIFC to the New York Convention, which requires a court of a member state to have the obligation to dismiss or stay an action, upon request of a party, in a matter which is the subject of a valid arbitration agreement’. More specifically, the amendments focus on article 7 of the DIFC Arbitration Law and ensure that article 13 of the DIFC Arbitration Law also applies ‘where the Seat of Arbitration is one other than the DIFC’ and ‘where no Seat has been designated or determined’. Article 13 in turn provides that ‘if an action is brought before the DIFC Court in a matter which is the subject of an Arbitration Agreement, the DIFC Court shall, if a party so requests not later than when submitting his first amendment on the substance of the dispute, dismiss or stay such action unless it finds that the Arbitration Agreement is null and void, inoperable or incapable of being performed’.

In this context, it is worth noting the obligation that article II(3) of the NYC imposes upon Convention countries – including the UAE, which joined the Convention in 2006. These countries must recognise arbitration agreements and afford them precedence over pending litigation that has been brought in another Convention country in violation of an existing foreign arbitration clause, unless the latter is ‘null and void, inoperative or incapable of being performed’.

The present amendment to article 7 has the salubrious effect of turning into an express power of the DIFC Court what previously could only be derived by implication from the ‘inherent jurisdiction to stay’ of the DIFC Court as a common law court with English law heritage. Going forward, international investors may rest assured that the DIFC Courts will stay their proceedings in favour of arbitration seated outside the DIFC in compliance with article II(3) of the New York Convention, there remaining little (if any) margin for interpretation.

Institutional framework
Almost every Emirate hosts an arbitration centre of its own, such as the Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC), Dubai International Arbitration Centre (DIAC), Sharjah International Commercial and Arbitration Centre, and the Ras Al Khaimah Centre for Reconciliation and Commercial Arbitration. These have all been established under the auspices of their respective local chamber of commerce. DIAC in particular has emerged as one of the most prominent arbitration organisations in the region and has attracted in excess of 400 cases in 2012 and 2013, many of which are international in the sense that at least one party is based outside the UAE. The DIFC more specifically is serviced by a sister organisation of the London Court of International Arbitration (LCIA), the DIFC-LCIA.

Provisions under the DIAC Rules
In its ruling in case 282/2012, dated February 3 2013, the Dubai Court of Cassation found against the recoverability of counsel fees in arbitrations under the DIAC Rules. In doing so, the court has given a distinctly restrictive interpretation to the wording of the provisions on costs contained in the DIAC Rules. This is particularly so with regard to article 2.1 of the appendix on costs, which provides that:

‘the costs of the arbitration shall include the centre’s administrative fees for the claim and any counterclaim and the fees and expenses of the tribunal fixed by the centre in accordance with the table of fees and costs in force at the time of the commencement of the arbitration, and shall include any expenses incurred by the Tribunal, as well as the fees and expenses of any experts appointed by the Tribunal’.

In the Dubai Court’s view, the cost provisions of the DIAC Rules do not make express reference to the recovery of legal and counsel fees. As a result, these must remain unrecoverable in arbitrations conducted under the Rules unless a specific power to award such costs has been granted to the arbitration tribunal in the original arbitration agreement (which is rarely the case) or in a later submission agreement, such as terms of reference.

In a ruling of January 15 2013, in Middle East Foundations v Meydan Group (formerly Meydan), the Dubai Court of Appeal overturned the ruling of the Dubai Court of First Instance in the same case, which essentially disregarded
the full scope of the powers given to the DIAC executive committee to extend the common time limit of six months that prevails under UAE law. By doing so, the Dubai Court of Appeal lent full force to an arbitration award rendered in DIAC case 151/2009, subject to a presently pending appeal before the Dubai Court of Cassation.

According to article 210(1) CPC ‘if, in the arbitration agreement, the parties have not stipulated a time-limit for the award, the arbitrator must render the award within six months from the date of the first hearing in the arbitration’. Article 210(2) continues that ‘the parties may agree – expressly or impliedly – to extend the time-limit laid down in the agreement or by law’. This usually takes the form of a reference in the parties’ agreement to the conduct of the arbitration process under an institutional set of rules, such as the DIAC, which, in turn, contain express provisions on extension of time, such as those set out in article 36 of the DIAC Rules.

The Dubai Court of Appeal left no doubt that arbitration proceedings may be extended for subsequent periods of six months at a time in reliance on article 36.4 of the DIAC Rules and are not confined to a single, one-off extension of six months only. In doing so, the Court of Appeal reversed the previous nullification of the Court of First Instance, pronounced on the basis that four consecutive extensions of the time-limit for rendering the final award in DIAC Case 151/2009 fell outside the scope of article 36.

According to the Court of Appeal, paragraphs 3 and 4 of article 36 state that the tribunal may, on its own initiative, extend the time-limit for up to an additional six months. The executive committee may extend this time-limit further. This means that the extension in DIAC Case No 151/2009 was valid and the DIAC is authorised to make this extension. The arbitral award was issued within the time-limit specified, which means the arbitration proceedings were valid and in accordance with the rules and the arbitration agreement made between the two parties. The Court of First Instance should have recognised the arbitral award.

This, of course, does not mean that arbitrators under the DIAC Rules are discharged from general obligations of procedural expediency, but they will have reassurance that in complex disputes, extensions of time may be obtained with good measure.

New ADCCAC Regulations
ADCCAC has issued new arbitration rules effective from October 20 2013, which constitute a significant improvement on the previous version of the rules and put ADCCAC’s procedural framework on a par with those of other international arbitration centres, such as DIAC or the ICC. The new ADCCAC Regulations are modelled in part on the UNCITRAL Rules and have been warmly welcomed by the local arbitration community. The new Regulations will undoubtedly help ADCCAC grow its presence locally and compete with the well-established DIAC. This being said, given ADCCAC’s local pedigree, ADCCAC arbitration is often the preferred choice of (semi-) governmental entities or other parties with a government interest.

DIFC Arbitration Institute
A recent amendment to Dubai Law 9 of 2004 Concerning the Dubai International Financial Centre (as previously amended by Dubai Law 14 of 2011), referred to as Dubai Law 7 of 2014 (Amending Law 9 of 2004 Concerning the DIFC) and issued by the Ruler of Dubai on May 21 2014 (Law 7 of 2014), establishes the so-called Dispute Resolution Authority headed by Chief Justice Michael Hwang SC, the president of the DIFC Courts. The Dispute Resolution Authority operates in the DIFC and is essentially made up of the DIFC Courts and a so-called Arbitration Institute.

The Arbitration Institute is vested with a separate legal personality and may sue and be sued in this capacity. It operates on an independent budget and exercises its functions independently from the DIFC Courts and other DIFC bodies. The head of the Dispute Resolution Authority will appoint the members of a board of trustees, which, in turn, will exercise all the powers and duties of the Arbitration Institute.

In essence, these powers and duties will include: (i) the promotion of the Arbitration Institute as a hub for the settlement of domestic and international disputes, and of disputes arising out of treaties, by arbitration, mediation, and other forms of alternative dispute resolution mechanisms (ADR); (ii) the preparation and issuance of rules and procedures required for regulating the administration of arbitration, mediation, and other forms of ADR; (iii) the hosting of conferences, seminars, lectures, and other events relating to arbitration, mediation, and other forms of ADR; (iv) the publication of books, journals, articles, and papers on arbitration, mediation, and other forms of ADR; and (v) entering into co-operation and joint venture agreements with any local, regional, or international centre, society or organisation specialised in arbitration and ADR.

From the wording of the Law, it is not entirely clear to what extent the Arbitration Institute is meant to dispense arbitration services itself and will not be confined to the promotion of the profession and practice of arbitration within the DIFC only. Too little is presently known to allow any meaningful assessment of the true scope of duties and powers of the Arbitration Institute. This being said, the use of the Arbitration Institute for the dispensation of arbitration services in their own right will inevitably raise the question of how the establishment of the Institute will impact the role of the DIFC-LCIA, which – to date at least – has been widely recognised as the dedicated arbitration centre of the DIFC.

Irrespective of these uncertainties, the establishment of the Arbitration Institute in the DIFC has to be welcomed as a further initiative to consolidate and promote the discourse of arbitration throughout the Emirate of Dubai and the UAE more generally.

Enforcement of foreign arbitral awards
In the October 18 2012 ruling in Maxtel International v Airmec Dubai, the Dubai Court of Cassation confirmed for the first time the enforcement of foreign arbitration awards in Dubai by reference to the New York Convention. More particularly, the Court confirmed the enforcement of two awards issued by a sole arbitrator under DIFC-LCIA Arbitration Rules in London, involving two Dubai-based companies. Importantly, in doing so, the court disregarded the award debtor’s attempts to argue the case based on provisions of the UAE Arbitration Chapter, which are not applicable to arbitral awards rendered abroad. The Court further clearly stated that the enforcement of foreign awards in Dubai is governed exclusively by the New York Convention. This approach is based on article 238 of the CPC, which stipulates that ‘rules provided for in the preceding articles do not prejudice rules and regulations provided for in conventions signed between the UAE and other countries in this respect’. The Court emphasised that under this provision, the Dubai courts must apply international conventions signed and ratified by the UAE as national laws. Enforcement can be denied only if the defendant submits evidence that circumstances precluding enforcement in the terms of articles IV and V of the NYC are present. This decision confirms previous rulings by other UAE courts in favour of enforcement of foreign awards by reference to the terms of the New York Convention (see in particular the ruling of the Fujairah Federal Court of First Instance of April 27 2010 – LMAA award rendered by a sole arbitrator in London – which remained unappealed).

This being said, in a more recent ruling of August 18 2013 (CFE e Ministry of Irrigation of the Democratic Republic of Sudan), the Dubai Court of Cassation upheld the rulings of the lower courts and refused the enforcement of three awards rendered under the ICC Rules in Paris. In the final award, the arbitral tribunal awarded the claimant, La Compagnie Francaise d’Entreprise (CFE), several million dollars for outstanding payments for works performed in the construction of the Canal de Jonglei in South Sudan. While the Dubai Court of Cassation addressed the applicability of the NYC and the UAE-France Enforcement Convention, it confirmed that the international jurisdiction of the UAE Courts is a matter of public policy and that the national courts have no jurisdiction over claims brought against foreigners that have no domicile or residency to an agreement entered into or executed in the UAE. It has been argued that this decision was politically motivated, and it is therefore hoped to remain an
isolated instance in the UAE Courts’ recent enforcement practice. The at times erratic approach of the UAE courts to enforcement under the NYC has given rise to speculation as to whether the DIFC could serve as a host jurisdiction for the enforcement of foreign awards in the UAE.

In two recent rulings (Case ARB 002/2013 ruling of the DIFC Court of First Instance 2014; and Case ARB 003/2013 – Basyous Tree Corporate PTE LTD v Meydan Group, ruling of the DIFC Court of First Instance of May 27 2014), the DIFC Court of First Instance confirmed its competence to hear applications for the recognition of domestic and foreign arbitration awards within the DIFC without the need for a connection (meaning a geographic nexus) to the DIFC. This essentially means that the DIFC may serve as a host jurisdiction for the recognition of awards rendered (i) in mainland Dubai or elsewhere in the UAE, but outside the DIFC (domestic awards), and (ii) anywhere outside the UAE (foreign awards).

Attachment orders
Further, in an October 2 2013 in Case 519/2013, the Abu Dhabi Court of Cassation confirmed the availability of attachment orders in support of enforcement actions of arbitration awards in the UAE. The applicant, a subcontractor, sought to secure an attachment over the assets of a contractor, the award debtor, pending the enforcement of a favourable arbitration award issued by a sole arbitration in Case 11/2011 under the auspices of the ADCCAC. Both the Abu Dhabi Court of First Instance and the Abu Dhabi Court of Appeal are understood to have confirmed the availability of attachment orders in support of enforcement actions of arbitral awards, pending ratification. The Abu Dhabi Court of Cassation affirmed the lower court’s rulings without reservation. In doing so, the Court essentially relied upon article 254(2) CPC, which provides that ‘the judge for summary proceedings must order an attachment if the judgment creditor holds a judgment, albeit not mandatorily enforceable, awarding a debt in a specified amount’. According to the Court, the meaning of judgment extends to private arbitral awards.

Draft DIFC Practice Direction
In an unprecedented move, the DIFC Courts have recently circulated for public consultation the draft Practice Direction X of 2014. This amends Practice Direction 2 of 2012 the DIFC Courts’ jurisdiction, to essentially provide for the conversion of a DIFC Court judgment into a DIFC-LCIA arbitration award in order to avoid potential difficulties of enforcement of a DIFC judgment in jurisdictions outside the UAE. This is achieved by creating a system of optional referral to DIFC-LCIA arbitration of ‘any dispute arising out of or in connection with the enforcement of any judgment given by the DIFC courts, including any dispute as to the validity or enforcement of the said judgment’. It will be interesting to see the outcome of the consultation process, which completed on August 6 2014. It is anticipated that this most recent initiative of the DIFC Courts will be warmly received by the international arbitral profession, and therefore supported without reservation and contribute to the attractiveness of the DIFC as a stand-alone centre for dispute resolution in the Middle East.

Public order
In a February 3 2012 ruling in Case 282/2012, the Dubai Court of Cassation confirmed, contrary to previous decisions, that the concept of public order in real-estate disputes within the meaning of article 3 of Federal Law 5 of 1985, the UAE Civil Transactions Code, is confined to questions of registration. It confirms that arbitrators are competent to hear claims for breach of off-plan sale and purchase agreements and to draw the civil law consequences from such.

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Kotb’s experience includes a congressional internship in Washington DC at the congressional office of congressman Michael McMahon (representative of the State of New York), where she attended several hearings and staff briefings and was involved in submitting official reports.
Look before you leap

Elizabeth Barrett of Slaughter and May explains how sanction regimes can threaten multilateral development banks’ crucial role in financing emerging market projects

International financial institutions play a crucial and increasingly prominent role in financing projects in emerging markets. In 2013 and 2014, the World Bank Group, African Development Bank, Asian Development Bank, Inter-American Development Bank and European Bank for Reconstruction and Development (commonly referred to as Multilateral Development Banks, or MDBs) committed over $100 billion of funds to development projects worldwide. In July 2014, leaders of the Brics nations (Brazil, Russia, India, China and South Africa) agreed the terms of a new development bank to fund infrastructure projects in developing economies, also backed by $100 billion in commitments by its members. Beyond this, there is a diverse array of regional and national development bodies.

While the scale and scope of development bank-financed work therefore represent a huge opportunity for firms across a range of sectors, undertaking projects without a clear understanding of the liability to which they are exposed or how to manage it is a serious mistake.

Debarments can have a wide and draconian effect on the corporate group of a sanctioned firm

MDB sanctions regimes are a distinct breed, and the approach firms take to domestic compliance, regulatory investigations or private litigation cannot simply be transposed to MDB-financed operations and sanctions proceedings. Focusing on the World Bank Group’s sanctions regime, this article will outline some of the notable features of the MDB sanctions framework and how firms and individuals can best protect themselves in a largely unfamiliar landscape.

What are the sanctions?
The policy aim of the MDBs’ sanctions framework is to help combat fraud and corruption in MDB-financed projects and to ensure that funds provided for development work are properly applied. Sanctions procedures are ostensibly administrative proceedings which the MDBs use to make operational decisions about who they are prepared to do business with in the future. The specific practices which have been deemed sanctionable are corruption, fraud, coercion, collusion and obstruction (see table 1).

When an MDB finds, on the balance of probabilities, that an entity involved in one of its projects has committed a sanctionable practice, it can impose one or more of the following penalties: reprimands; restitution or other financial remedies; conditional non-debarment; fixed-term debarment; debarment with conditional release; and permanent debarment. Debarment means that the sanctioned party is ineligible (either indefinitely or for a fixed period) to be awarded or benefit from bank-financed contracts, or to act as a nominated sub-contractor, consultant, manufacturer, supplier or service provider to a bank-financed project. It will also be ineligible to receive the proceeds of any loan made by the bank or otherwise to participate further in the preparation or implementation of any bank-financed project.

The baseline sanction agreed by the five MDBs is debarment with conditional release. The sanctioned party is debarred for a minimum period, after which they will be released only if they have met certain criteria stipulated by the MDB. The criteria commonly include monitoring periods and independent reviews of compliance systems and controls. The minimum period usually starts at three years but is reduced or extended depending on the mitigating or aggravating factors of the case. Although the World Bank has recognised the need to widen the range of sanctions used (and there is some evidence that is has started to do so, with the Sanctions Board issuing a number of reprimands recently), debarment with conditional release remains by far the most prevalent penalty.

Debarment multiplied
Evidently, debarment from World Bank financing (which totals more than $50 billion in commitments a year) means missing out on potentially important projects. However, the effects of debarment are further amplified under the Agreement for Mutual Enforcement of Debarment Decisions (AMEDD), signed by the MDBs in 2010. Under AMEDD, any published debarment of more than one year’s duration imposed by one MDB will likely be enforced by the others. While there is some discretion under AMEDD for an MDB not to debar, in practice the vast majority of debarments eligible for cross-debarment have been upheld by the other MDBs: in 2013, almost 90% of the entities debarred by the World Bank were debarred by the other four MDBs.

Moreover, the consequences of a debarment decision can be extended even beyond the formal AMEDD framework. For instance, the names of debarred entities are included in global risk and compliance databases, which form part of the standard due diligence process for many corporations and commercial lenders. Anecdotal evidence suggests that non-MDB development organisations also informally follow the MDBs’ published debarment lists. Significant reputational damage is also likely to result from a public finding that a firm has committed sanctionable practices.

MDB investigations can also result in matters being referred to national enforcement agencies and for civil recoveries as well as for prosecution. In July 2012, World Bank investigators notified Oxford University Press (OUP) of possible corrupt practices committed by its Kenyan and Tanzanian subsidiaries in the tendering process for Bank-financed projects. OUP voluntarily disclosed the matter to the UK’s Serious Fraud Office (SFO), eventually leading to a civil recovery order against OUP for almost £1.9 million ($3.1 million), in addition to a settlement reached between OUP and the World Bank. Although OUP’s disclosure to the SFO was voluntary, the World Bank’s sanctions procedures give it wide-ranging powers confidentially to disclose information to other MDBs, international or multina-
tional organisations, and national development, investigative and prosecutorial agencies.

Who’s at risk?
Debarments can also have a wide and draconian effect on the corporate group of a sanctioned firm. In 2012 the MDBs agreed the Harmonized Principles on Treatment of Corporate Groups, which provide that sanctions ‘will generally be applied to all entities controlled by the [sanctioned party]’. In practice, almost all of the debarments imposed in 2014 by the World Bank’s Sanctions Board (the final appeal body in its sanctions process) did indeed flow down to subsidiaries and affiliates of the debarred entity.

Parent companies and entities under common control can also be debarred if the MDB establishes their involvement in the sanctionable practice or responsibility for it through ‘wilful blindness’ or failure to supervise. The Sanctions Board will look to see if a duty of supervision exists between the respondent and the controlling entity, and whether the controlling entity was aware of or wilfully blind to the sanctionable practice and failed to intervene or address the misconduct. It may not be enough for a controlling entity to show that it has met its obligations towards its subsidiary under national law. In May 2014, the sanctions board reiterated that ‘national law cannot be considered as controlling in the Bank’s sanctions proceedings’, and that the scope of a controlling entity’s liability under the sanctions procedures may not be coextensive with its potential liability under national law.

There is also a rebuttable presumption that successors and assigns of a sanctioned entity will continue to be subject to sanctions imposed on their predecessors unless they can demonstrate that to do so would be unreasonable.

Prevention better than cure
Given the drastic consequences of a finding of sanctionable practices, firms need to establish whether they are exposed to MDB-financed projects and if so, will want to ensure that the compliance controls they have in place extend to those projects and are sufficiently robust to manage these risks. Yet in some cases, firms may not even be aware that their activities have fallen within the purview of MDB’s sanctions regime.

The basis asserted by the World Bank for its sanctions regime is its ‘fiduciary duty to protect the use of Bank financing’, stemming from the Bank’s Articles of Agreement, which require it to ‘make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted’. As recently as March 2014, the Sanctions Board interpreted this as meaning that ‘the Bank does not need the consent of or privity with a respondent to assert jurisdiction to sanction’.

The practical implication is that, in the Bank’s view, many more firms and individuals may be within the scope of the Bank’s jurisdiction than are aware. Firms may be acting as consultants, sub-contractors or suppliers to a project unaware of the original source of funding and of their potential exposure to sanctions proceedings. The decision cited above also stated that sanctions proceedings can be initiated against individual employees and directors of firms in receipt of Bank funds, despite not having personally consented to the Bank’s jurisdiction.

In this context, one action that firms operating in the development sphere can take to protect themselves is to identify and monitor any MDB involvement in their existing project participation and enhance their due diligence processes in respect of new matters. When entering new transactions, firms should satisfy themselves regarding the ultimate source of the project funds, even if there is no overt MDB presence. Knowing that they are operating in an MDB-financed project will allow firms to review existing controls to ensure they are suitable for managing that risk.

Due diligence concerning any ongoing MDB investigations is also important when choosing business partners and contractors for a new venture and when recruiting employees. As noted above, successors and assigns to debarred firms may also be debarred. While consulting the MDBs’ published lists of debarred entities, and cross-referencing global compliance and risk databases, is a good starting point in identifying debarred entities, it will not uncover ongoing investigations by the MDBs. Tailoring due diligence questionnaires and incorporating contractual protections in the form of representations and warranties is more likely to highlight and help address existing issues and investigations.

Vicarious liability and controls
The actions of individual employees and agents provide a further risk that employers and principals need to manage. As a general principle, the World Bank’s Sanctions Board has concluded that a firm cannot avoid liability by carrying out through an agent or affiliate any conduct that would be a sanctionable practice if carried out by it directly.

Where the individual who committed the sanctionable conduct was acting as the firm’s authorised representative, the World Bank will usually find the firm liable for that conduct. In other cases, the Sanctions Board has recognised the potential liability of an employer for the acts of its employees under the doctrine of respondeat superior. Whether or not a firm should be held liable under this doctrine will turn on the facts, but the Sanctions Board places particular emphasis on whether the employer, at the time of the alleged misconduct, ‘had supervision or control measures in place that should have been sufficient to prevent or detect that type of misconduct’. Firms

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should already have systems and controls in place addressing compliance issues in the anti-bribery and corruption context. But firms may need to review and augment those systems in order to ensure that they are tailored to the expectations of MDBs and their particular sanctionable practices.

For instance, whereas the US Foreign and Corrupt Practices Act 1977 (FCPA) prohibits bribery of foreign public officials, in the World Bank context from October 2006 the term corrupt practices applies to bribes given to or received by another party, giving it a far wider scope. The definition of corrupt practices also makes no exception for facilitation payments, which are a key exception under the FCPA. The Sanctions Board recently considered a facilitation-type payment (made to expedite the release of project materials from customs), but treated these no differently to other forms of corrupt payment.

With the evolution of extra-jurisdictional legislation such as the FCPA and UK Bribery Act 2010, firms have already begun to re-appraise their compliance controls to take account of the potentially conflicting standards of overlapping regimes. For firms undertaking MDB-financed work, this needs to extend to the standards of the MDBs, both to protect employees from inadvertently engaging in sanctionable practices and also to insulate the firm in the event of misconduct.

Forewarned is forearmed
If firms cannot prevent sanctionable practices from occurring, it is important that they then have an understanding of exactly what sanctions proceedings entail, since a firm’s usual approach to compliance, investigations and litigation is unlikely to suffice.

Although each of the MDBs has adopted slightly different procedures, the overall structures are similar. Each MDB has an investigatory unit; in the case of the World Bank, this is the integrity vice-presidency (INT). If the investigatory unit considers that there is sufficient evidence to support a finding of sanctionable practices, they will make a submission to an adjudicator within the MDB. In the case of the World Bank, the INT will submit a statement of accusations and evidence (SAE) to a suspension and debarment officer (SDO) within the World Bank’s office of suspension and debarment, which is separate to the INT.

If the SDO deems that there is sufficient evidence, they will issue a sanctions notice to the respondent containing the SAE and the recommended sanctions to be applied. The respondent may then submit a response. If the SDO does not withdraw the notice, the respondent may request that the matter be referred to the Sanctions Board. The Sanctions Board comprises four independent, external members and three internal members.

While the basic structure of these proceedings is fairly familiar, the way they operate may be very different to what most firms and individuals are used to. Understanding the terminology of the sanctions procedures is key. For instance, the World Bank will routinely require borrowers to insert an audit clause into project contracts, giving the World Bank the right to audit participants in the project. A request to conduct such an audit should not be regarded as a routine matter to be handled by project staff without notifying the compliance function. They are more akin to forensic audits, and may be a prelude to sanctions proceedings. Failure to appreciate this may prevent firms from mounting an appropriate response (for example, as regards suitable document retention policies). There is then a risk of compounding the firm’s difficulties by inadvertently creating exposure to an allegation of committing obstructive practices.

Firms also need to appreciate the considerable powers accorded to the MDBs under statute and accorded by the MDBs to themselves under their procedures. The most obvious manifestation of this is the MDBs’ broad (though not absolute) immunity from legal review in its members’ domestic courts, making sanctions decisions difficult to challenge outside the sanctions procedures. Similarly, the Sanctions Board has consistently reiterated that national law will not be taken into account when applying the Bank’s sanctions regime, on either procedural or substantive points.

Another distinctive feature of MDB sanctions proceedings is the use of temporary suspensions. Temporary suspension can be imposed by the SDO when they issue the SAE to the respondent, if the SDO recommends a minimum period of debarment exceeding six months. In effect, the respondent is debarred from participating in Bank-financed projects pending the conclusion of the sanctions proceedings. Unlike debarment, suspension is not publicly announced nor does it trigger cross-debarment under AMEDD.

Additionally, in certain circumstances an entity can be temporarily suspended even before the SAE has been issued. If, during the investigatory phase, the INT believes that there is sufficient evidence to support a finding of sanctionable practices and that it is highly likely that the investigation will be successfully concluded and presented to the SDO within one year, the INT may ask the SDO to impose a temporary suspension. If the SDO is satisfied as to the above, and determines that they would have recommended a sanction of debarment of at least two years had the accusations been submitted in an SAE, then they may issue a notice of temporary suspension, even though the INT’s investigation is ongoing.

Careful participation advised
It is clear then that MDB sanctions procedures have a number of distinct features which participants in MDB-financed projects need to understand and ensure are appropriately addressed. As is often the case, prevention is better than cure. Once pulled into sanctions procedures, the broad immunity of MDBs from suit and the idiosyncratic nature of their proceedings can present a significant challenge to unwary respondents. By reviewing their existing project participation, and enhancing due diligence procedures and training and compliance mechanisms to make sure they are fit for purpose in the MDB context, firms engaging in MDB-financed projects can afford themselves useful protection, and can take advantage of the potential that such work has to offer without unnecessarily exposing their businesses to potentially wide-ranging liability.

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About the author
Elizabeth Barrett is a partner in Slaughter and May’s dispute resolution group. Her practice spans a broad range of high-profile commercial litigation, investigations and contentious regulatory matters. She has extensive experience of resolving strategically complex disputes, particularly those involving numerous parties or multiple actions and parallel proceedings in other jurisdictions (notably the US). Barrett has handled many statutory, regulatory and disciplinary investigations in the commercial and financial sectors, and the subsequent related litigation and class actions. She is often asked to provide urgent and discreet risk management advice to clients facing novel corporate-threatening or reputational issues. Her clients include leading financial institutions, major corporates and governmental and regulatory bodies.