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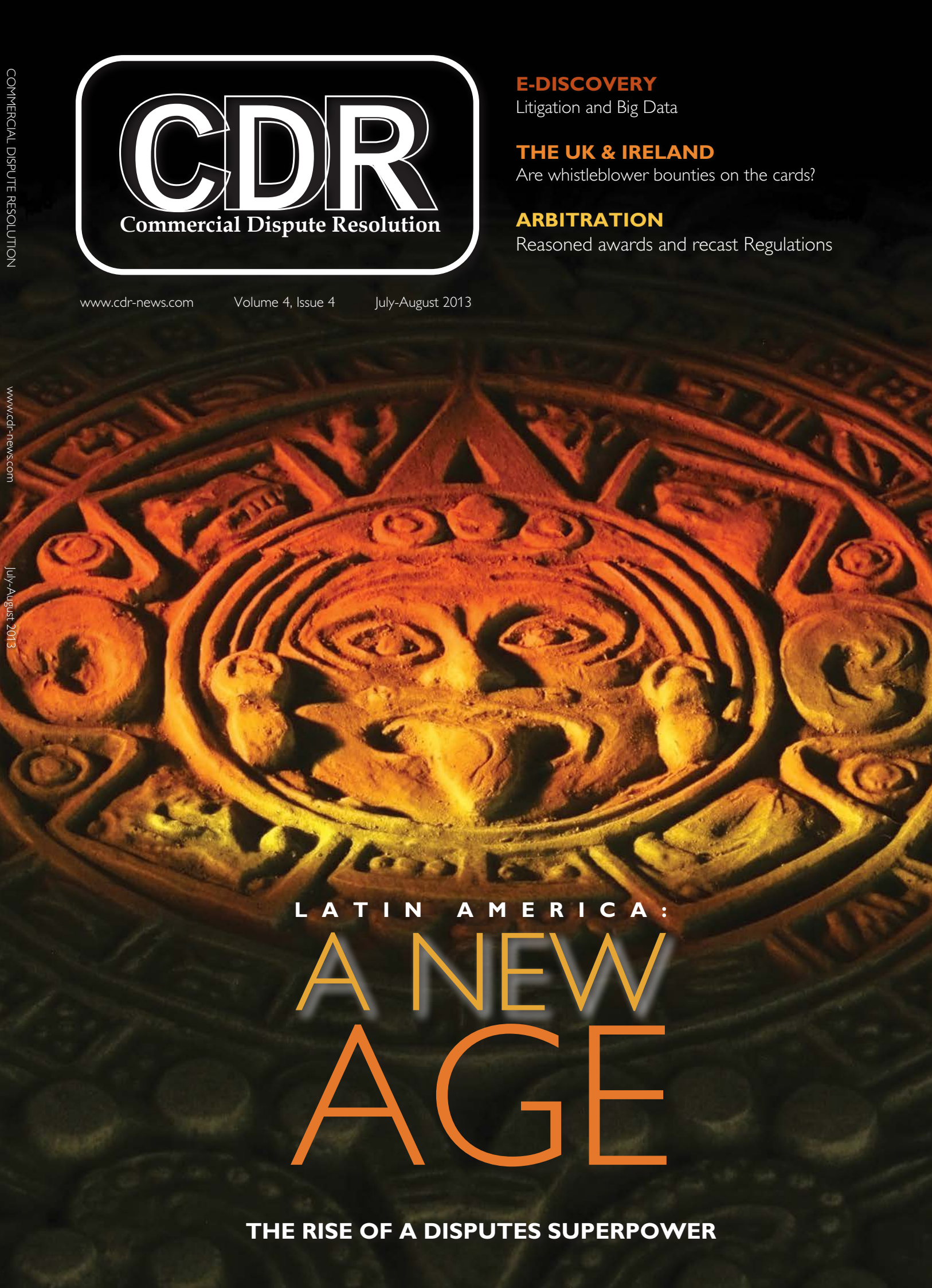

LATIN AMERICA: A NEW AGE

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BRIC WALLS

Do recent demonstrations in Brazil, the biggest there for more than two decades, point to a wider malaise in the country once seen as the BRICS' wunderkind? Growth, at 3%, is hardly sluggish by Western standards. Yet the spectre of inflation and flagging competitiveness compound foreign investors' concerns over corporate governance and political corruption as Brazil gears up to host the world's two flagship sporting events, the first of which – the 2014 FIFA World Cup – kicks off in less than a year.

When it comes to dispute resolution, though, there's little to protest. The Calvo Doctrine, which at one time permeated the continent's thinking, has largely lost its influence among both jurists and policy-makers in Latin America – save for recent denouncements of the World Bank arbitration system by Bolivia, Ecuador and Venezuela. Indeed, courts in Brazil and Argentina now regularly grapple with complex questions of arbitral law, while Colombia's new statute also provides much-needed provisions on international arbitration.

The continent's influence is similarly to the fore at the World Trade Organization, whose new head, Roberto Azevêdo, is the first Latin American to lead the body in its 18-year history. Besides dragging the Doha Round of trade talks from the long grass, Azevêdo wants the WTO's developing country members to have a greater say in its future policy direction – no easy task, given that the US and EU continue to dictate much of the agenda, including the filing of disputes, at the Geneva-headquartered institution. An in-depth look into the challenges facing Azevêdo can be found on page 23.

Your feedback continues to prove invaluable. Is there something you'd like to see us covering more? Do get in touch; we'd be delighted to hear from you.

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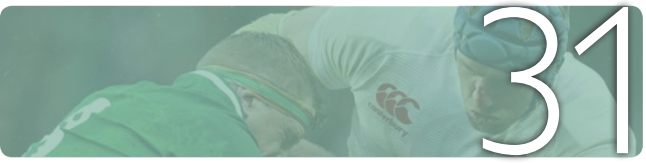


EUROPE

UNITED KINGDOM

The case for class-actions

While a recent survey shows that more than half of UK consumers are against US-style class-actions, American lawyers say their costly system gives access to justice where regulators have been soft

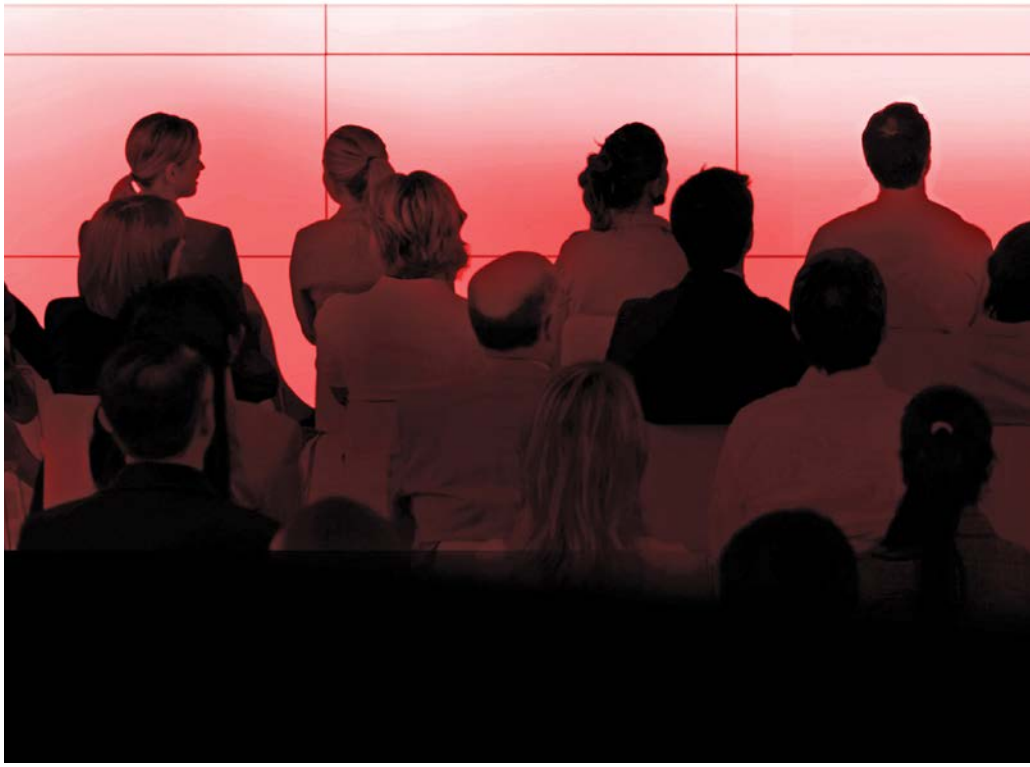
The US Chamber Institute for Legal Reform, a business body aggrieved by frivolous and excessive lawsuits in the US, found that Britons are against adopting American-style legal reforms.

The UK government revealed its draft Consumer Rights Bill in the Queen's Speech on 8 May 2013. The Bill, which will enable opt-out collective actions where breaches of consumer or competition law are said to have taken place, is seen as a cultural pivot towards the billion-dollar cases that are commonplace in the US.

Although the Bill focuses on compensation for low-value products and services while disentangling eight overlapping laws for the digital age, CBI director-general John Cridland warned: "We will resist any efforts to introduce US-style class-actions into consumer redress, which risks fuelling a litigation culture and making the UK a worse place to do business."

Almost 60% of British businesses were concerned that lawyers received too big a share of the damages in the US, and that a change in the law could cost billions of pounds in lawsuits, the ILR, which is affiliated with the US Chamber of Commerce, found.

"The introduction of opt-out class-actions in the UK could open the floodgates to US-style collective action law suits, and the possibility of a burgeoning market in spurious litigation in Britain, driven by a fast-expanding legal sector allied to a litigation funding industry that is reaching maturity," said Lisa Rickard, president of the ILR.



However, despite the general public's fear of a compensation culture, legal services firm **Goal** predicts non-US securities class-actions settlements to rise to USD 8.3 billion a year by 2020, up from the USD 18 billion agreed between 2000 and 2012.

Goal's CEO **Stephen Everard** says these financial fraud cases are "increasing rapidly" and believes "class-action growth outside of the US will mirror the growth of the US class-action scene in the early part of the 21st century."

This international diversification follows the ruling in the *NAB v Morrison* US Supreme Court case in June 2010, which barred all federal securities fraud suits in the US for securities traded on a foreign stock exchange. "Investors have sought redress outside of the US in a number of different jurisdictions," **Pat Bingham-Peters**, sales director at Goal, tells *CDR*. "It was only a matter of time given the nature of a global marketplace."

In April alone, **Bank of America** agreed to settle a consolidated securities class-action for USD 2.4 billion and insurance giant **AIG** was ordered to pay USD 1.1 billion. Although USD 73 million of the AIG settlement is still to be confirmed, with a decision due later this year, accountancy fraud and the insurer's manipulation of share prices was met with two remedies: compensation for defrauded shareholders and corporate governance reform.

Thomas Dubbs, a New York-based partner at class-action litigation firm **Labaton Sucharow**, tells *CDR* that "notwithstanding substantial settlements, the level of deterrent [not to mislead investors] is still not high enough," making class-actions a necessary recourse to reclaim losses, particularly when settlements force corporate governance improvements. "The government and the US Securities and Exchange Commission have to get more aggressive and the private bar has to renew its effort to vigorously pursue these changes," he adds. ■

EUROPEAN UNION

EU loses fraud fight

OLAF, the European Anti-Fraud Office, remains under pressure to prevent fraud eating away at the European economy

Despite processing more cases than ever before – concluding 465 cases in 2012 compared to the 208 it closed in 2011 – the Brussels-headquartered agency, which is part of the European Commission, is struggling to keep up with a flood of incoming information relating to corruption in the EU.

While the speed of investigation increased following a bureaucracy purge, **OLAF** received 1,264 cases in 2012, some 21% more than in 2011. "It is opening more cases than it is closing," **Mark Surguy**, a partner at **Eversheds** in London, tells *CDR*. While the increase in information demonstrates a rise in the organisation's reputation, Surguy says OLAF "has a long way to go to improve its credibility despite the reorganisation."

Building that credibility will come from recovering money lost to fraud and corruption, with OLAF reporting that just EUR 95 million of the EUR 284 million it recommended had been recovered in 2012.

National judicial authorities are responsible for acting on OLAF's recommendations; this is largely where part of the problem lies. "To achieve the full impact in our fight against fraud, the cooperation of our partners and member states is essential," OLAF's director-general **Giovanni Kessler** said in a statement. "Swift and decisive actions are crucial in recovering misused EU money and in bringing perpetrators to justice."

Despite the criticism, improvements have been made. OLAF has prioritised cases where positive results are expected, slashing investigation time from 29 months in 2011 to 22 in 2012. The selection phase of new cases, which took an average of 6.8 months in 2011, has now been reduced to 1.4 months.

Jim Gee, director of counter fraud services at **BDO**, tells *CDR* that with fraud on the increase since the start of the recession "it is likely that EUR 7.35 billion of the EU's EUR 129 billion budget in 2012 was lost."

He adds: "Taking an average of more than 22 months to complete investigations is still woefully slow, even though some of these investigations were international. The reality is that investigators will take as long as they are allowed to take. OLAF should benchmark its investigative work against other private and public sector organisations undertaking similar work." ■

AMERICAS

UNITED STATES

Nintendo bashes US patent troll

US appeals court toughens its stance towards patent trolls by throwing out Motiva's IP claim against Nintendo's Wii platform

In an effort to force **Nintendo** into a multi-million dollar licence, Ohio-based **Motiva** filed a case at the International Trade Commission, a US federal agency armed with exclusion order powers that would have halted the import of Wii consoles at US borders. But Movita succumbed to a heavy defeat in those proceedings.

On 14 May 2013, federal judge **Sharon Prost** rejected Motiva's appeal at the US Federal Circuit Court of Appeals in Washington, DC. She accepted the administrative law judge's conclusion in February 2011 that the company had failed to commercialise its movement technology patent and was only interested in "extracting a monetary award either through damages or a financial settlement."

Under the Tariff Act of 1930, it is unlawful to import products that infringe a valid and enforceable US patent if "an industry in the United States, relating to the articles protected by the patent...exists or is in the process of being established."

Nintendo, which was instructed by **Orrick** partner **Mark Davies**, based in Washington, DC, argued that Motiva hadn't made a significant investment in a plant, equipment, labour, research and development or licensing, the three requirements needed to demonstrate commercialisation.

The administrative law judge found that Motiva's funding of the litigation, on a conditional fee agreement known as "no win no fee" with **Lanier Law Firm**, could not count as an investment in the patent. It has spent just USD 17,000 on the long-running case.

California-based **Christopher Banys** led the case for the firm, which represents so-called patent trolls – otherwise known as

non-practising entities, or NPEs. (Lanier filed patent infringement suits against **Apple**, **Sony**, **Google** and **Yahoo!** in March 2013 alone.)

Kevin Meek, who leads **Baker Botts'** IP group in Austin, Texas, tells *CDR* that Lanier will be "very sorry they started an appeal at the ITC as this decision is a change of position."

US NPEs have been running below, over and around the bridge in recent years, and Meek says the Nintendo win is "not a good day for patent trolls in the ITC, and a lot of people are very happy about that."

Richard Medway, Nintendo of America's deputy general counsel, described Motiva's "sole activity" as "litigation against Nintendo" in a statement released on 15 May. "We vigorously defend patent lawsuits when we firmly believe that we have not infringed another party's patent," he added. ■

CANADA

ICC signs up to Toronto arbitration centre

International Chamber of Commerce increases its presence in the Americas by signing a memorandum of understanding with an arbitration hearing centre in Canada

Established ahead of the ICC Court's opening of a permanent office in New York, scheduled to take place by the end of 2013, the agreement with **Arbitration Place** in Toronto is the latest measure designed to bolster the ICC's presence in North America, where its influence has historically been more instructive than anything else.

Andrea Carlevaris, secretary general of the International Court of Arbitration, said in a statement on 21 May that "the agreement substantiates our commitment to North America and will be an excellent platform for the Court's activity in Canada."

The latter has seen a surge in demand for arbitration, with conflicts at Big Law firms driving senior practitioners to go it alone at organisations such as **Vancouver Arbitration Chambers** and Arbitration Place, among others.

North American parties made up 8.4% of the 759 cases filed at the Paris-headquartered ICC in 2012. Many of the arbitration agreements in those contracts stipulate London, Paris or Geneva as the seat. That means disputes aren't often settled on American soil or by US law – although New York's newest arbitral institution, launched in spring 2013, hopes to change that.

The agreement will bring arbitration cases to Toronto in exchange for administrative services and facilities, and is in line with ICC's objective to make it more accessible to parties, their counsel and arbitrators in the region.

While New York and Washington, DC tussle for status as North America's premier arbitral destination, Miami has become an increasingly popular venue, given its geographical ties with Latin America – and the large number of disputes that arise from its countries.

Law firms including **K&L Gates**, **Jones Day** and **Edwards Wildman** have boosted their presence in the Magic City this year, while mediation and arbitration provider **JAMS** expanded its services by opening a dispute resolution centre in Miami in spring 2012. "Miami is the gateway for business in Latin America and was a natural choice for our next resolution centre opening," JAMS' president **Chris Poole** said at the time.

While Canada isn't a gateway to an economically accelerating continent, the volume of cases emanating from North America nonetheless provide sufficient opportunity for expansion.

ICC Canada chairman **Barry Leon**, who is head of international arbitration at **Perley-Robertson, Hill & McDougall**, said in a statement that "parties and arbitration practitioners are increasingly considering Canada as a seat and venue for their arbitrations."

Yet there's institutional competition across the border: the **American Arbitration Association's International Centre for Dispute Resolution** remains the most influential dispute resolution provider in North America, and accounts for many of the US' domestic arbitration cases.

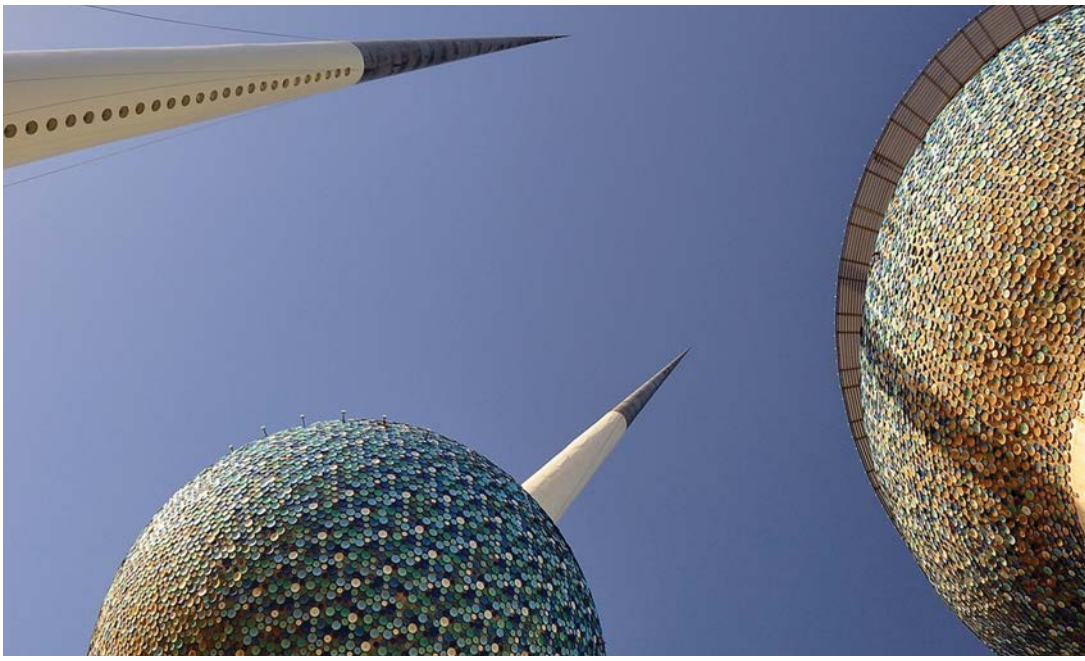
However, the ICC, which is already associated with the United States Council for International Business, has expanded its reach in the Americas without the physical presence of a court or hearing facilities.

The tie-up "is consistent with the ICC's growth, as well as the evolution of international arbitration across the Americas, not just the US," says **Daniel Gonzalez**, co-head of **Hogan Lovells'** international arbitration practice in Miami.

He tells *CDR*: "All the centres have seen growth, which is why we've seen a rise in administration services in the Americas. The ICC would like to see more consistency in its administration by having another location, not just trying to manage everything out of one time zone – Paris. It is not just a boost in North America but Latin America, too, because it counters current time zone differentials."

While the deal will no doubt expand the ICC's reach, whether Canada becomes an attractive option for parties and their counsel remains to be seen.

Miami had the long-straw in terms of location, but its popularity was also down to being cheaper than New York. However, parties are looking for seats that are both efficient and arbitration-friendly. Canada might just fit the bill. ■



KUWAIT
UNITED STATES

Nothing ventured; USD 2.2 billion gained

State-owned Kuwaiti firm pays the Dow Chemical Company USD 2.2 billion, one of the largest arbitral awards to date

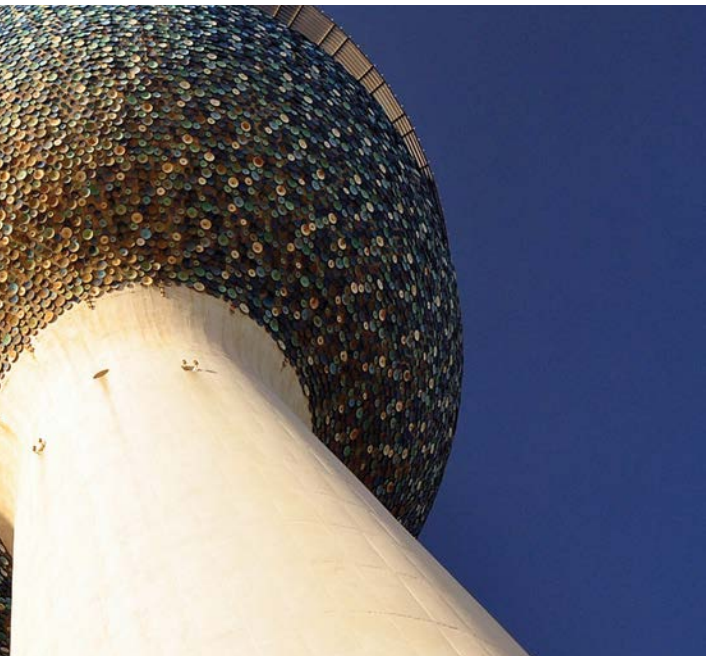
The fallout from a joint venture between **Dow** and **Petrochemical Industries Company** (PIC), a subsidiary of **Kuwait Petroleum Corporation**, resulted in the largest arbitration award handed down by the International Chamber of Commerce's international court.

An arbitration clause in the USD 17.4 billion joint-venture penned in July 2008, which then collapsed six months later, referred the dispute to the ICC in Paris. The deal fell through after members of the Kuwaiti government argued that the USD 7.5 billion payment for a 50% stake in petrochemical assets owned by Dow was a bad move in the midst of a global recession.

The heavyweight tribunal – led by British independent arbitrator **Kenneth Rokison QC**, alongside Dow-appointed **Judge Charles N Brower** and PIC-appointed **Lord Hoffmann** – found that PIC had breached its contract and ordered the company to pay USD 2.2 billion, USD 2 billion of which derived from lost opportunity costs.

The award represents another high-profile victory for Dow's legal team, led by New York-based **Shearman & Sterling** partner **Henry Weisburg**, which negotiated the original joint venture and subsequent dispute after political pressure forced PIC to withdraw from the agreement.

Weisberg was supported by Shearman's Paris-based head of international arbitration **Emmanuel Gaillard**, Washington, DC, partners **Jonathan Greenblatt** and **Christopher Ryan** and London partner **Richard Kelly**.



The disputes team worked closely with Shearman M&A partners **George Casey** and **James Comyn**, based in New York and Abu Dhabi respectively. A source close to the case tells *CDR* that "the seamless working between the two practices supported Dow's argument that PIC had to close, when they were saying they didn't have to." PIC's defence was handled by **Lord Grabiner QC** of **One Essex Court**, who was instructed by **Edward Sparrow**, a partner at City firm **Ashurst**.

The May 2012 ICC award led to political embarrassment for Kuwait, and drove a year-long enforcement battle during which the state sought to avoid paying damages for the consequential losses. This resulted in an additional USD 318 million interest charge to be paid by PIC, which Dow decided to drop in order to push the damages payment through and maintain goodwill between the companies, which are still engaged in other joint-ventures.

Before **Justice Andrew Smith** in the English High Court, Grabiner argued that PIC should not be responsible for Dow's increased costs after it needed to refinance loans to complete the purchase of chemicals manufacturer **Rohm and Haas**.

It also reasserted claims that the joint-venture had not been closed, with a source close to the case saying: "PIC argued it did not have approval to proceed with the transaction as it did not have regulatory approval." The application was rejected.

After PIC exhausted all legal avenues and paid-up, Dow's chairman **Andrew Liveris** said in a statement that the financial injection "will allow Dow to accelerate its priority uses for cash by further strengthening our balance sheet." ■

LIBYA

Gaddafi cancellation costs Libya dear

Rare application of an Arab League investment protection treaty sees Libya ordered to pay USD 930 million

The dispute arose after former Libyan leader Muammar Gaddafi, who was killed in October 2011 during the Arab Uprising, cancelled a contract to build a hotel and shopping complex with Kuwaiti company **MA Kharafi and Sons**, which has an annual turnover of over USD 5 billion.

While Egypt, which signed up to the Washington Convention in 1972, is currently defending 11 cases at ICSID, damages against Libya have been hard to come by, given that it is not a signatory to that treaty.

Kharafi was therefore left with few options after Gaddafi's government scrapped the deal to build a Tripoli resort in 2010.

The Kuwaiti company claimed it had invested in feasibility studies as well as design and management contracts since signing the contract in 2006. It also argued that it has lost future revenues spanning 90 years, with the resort set to be run by hotel chain **Holiday Inn**.

MA Kharafi and Sons pursued the damages through the Arab League's Joint Investment Protection Agreement, which was signed in 1980 and ratified by 19 countries. Recognised by international law, the regional trade treaty states that members "shall undertake to protect the investor and safeguard his investment."

"There have not been many disputes using this agreement," says **James Abbott**, a partner at **Clifford Chance** in Dubai, "but the Kharafi decision will no doubt raise awareness of this option, particularly where there is no other alternative bilateral investment treaty that could be relied on."

CDR understands that Kharafi's dispute with Libya is the first case to go the distance under the treaty, which **Craig Tevendale**, a London-based arbitration practitioner at **Herbert Smith Freehills** and *CDR* Editorial Board member, says "has been taken off the shelf a lot since the Arab Spring."

Indeed, the absence of bilateral investment treaties in the region could lead to greater use of the Arab League treaty. Investors want to be able to obtain damages when deals go sour. "Although the clarity of the treaty leaves something to be desired by modern treaty standards it is, however, an interesting option to have in mind for investment treaty cases within the Arab world," says Tevendale.

That is certainly true for investments in Libya, given that the country is signatory to only nine BITs, of which only one is with an Arab state (Morocco). Countries in the Middle East have traditionally signed BITs as a prerequisite for inward investment. ■

ASIA-PACIFIC

CHINA
PHILIPPINES

Arbitrators chosen in Asian sea spat

The International Tribunal for the Law of the Sea constitutes panel to hear the Philippines' maritime boundary dispute with China, despite Beijing's refusal to play ball

The tribunal, formed in April, is being led by **Chris Pinto** of Sri Lanka, who will hear the case alongside Dutch public international law and maritime specialist **Alfred Soons**; **Jean-Pierre Cot**, a French international law professor and former member of the European Parliament; German jurist **Rüdiger Wolfrum**; and **Stanislaw Pawlak**, a Polish diplomat and academic.

The latter three men currently sit as ITLOS judges; Pawlak was appointed by the ITLOS to represent China in the proceedings, while Wolfrum was chosen by the Philippines.

They will hear Manila's claim concerning the Spratly Islands and Scarborough Shoal in – depending on who you ask – the West Philippine/South China Sea, in which significant gas deposits have recently been discovered. The nations have been "exchanging views" since 1995; Manila filed for arbitration at the Hamburg-based court on 22 January 2013.

Beijing has resisted international arbitration to settle the dispute, claiming that tensions would be better worked out behind closed doors, in line with China's Confucian-based approach to settling conflicts. "The Philippine side is trying to use this to negate China's territorial sovereignty and attach a veneer of 'legality' to its illegal occupation of Chinese islands and reefs," China's Foreign Ministry said in a statement.

But the EU, through its Parliament, and Manila claim international arbitration will help resolve once and for all the thorny of delimiting sovereign maritime rights in the South China Sea. US secretary of state John Kerry has similarly expressed the desire for resolution by arbitration.

"[We are] alarmed at the escalating tension and therefore urgently appeal to all parties involved to refrain from unilateral political and military actions, to tone down statements and to settle their conflicting territorial claims in the South China Sea by means of international arbitration in accordance with international law, in particular the UN Convention on the Law of the Sea, in order to ensure regional stability," the Strasbourg-headquartered Parliament said in a report.

"The recourse to arbitration is firmly rooted in the tradition of good global citizenship," said Albert del Rosario, the Philippine secretary of foreign affairs. "We are strongly committed to seeing this arbitration through and there should be no doubts about our resolve to clarify our maritime entitlements in the West Philippine Sea peacefully and in accordance with the rule of law."

Sovereign land and maritime disputes have traditionally been litigated before the International Court of Justice, the UN's principal judicial organ. Indeed, only this week Bolivia filed a claim against Chile at the ICJ in an attempt to redraw the countries' borders. Territorial disputes between Colombia and Nicaragua, and Korea and Japan, have also been taken to the court, which sits at The Peace Palace in The Hague, in the last year.

Yet the once-sleepy ITLOS has itself kicked into life in recent months, having been called to adjudicate a number of high-profile international conflicts. In March 2012, the court issued a landmark ruling in the maritime boundary dispute between Myanmar and Bangladesh over rights to the resource-rich Bay of Bengal, the world's largest. The ruling was the first to delineate a maritime area beyond 200 miles – the continental shelf – in a ruling that saw the court praised for its speed to decision and brevity of award.

The tribunal was called into action six months later, when US hedge fund **Elliott Capital Management** seized an Argentine training frigate, the Libertad, docked in Ghana's largest port. Decrying the move as an "act of hostility" and a "flagrant attack on Argentine sovereignty," Buenos Aires turned to the ITLOS, which ordered a Ghanaian court to immediately release the vessel.

Elliott's gambit represented the last episode in a high-stakes stand-off between the Argentine government and a group of so-called holdout creditors looking to recoup billions of dollars for losses they suffered as a result of the 2001 Argentine sovereign debt crisis. ■

AUSTRALIA

Australian mining dynasties extract award

Australia's two richest women become richer after winning royalties battle with mining titan Rio Tinto

Gina Rinehart's Hancock Prospecting and **Angela Bennett's Wright Prospecting** united to claim royalties on a deal signed by Bennett's father, Peter Wright, and Rinehart's father, Lang Hancock, who co-founded Hancock Prospecting and Wright Prospecting.

In the New South Wales Supreme Court, **Justice David Hammerschlag** ruled that the 1970 agreement entitled the two companies to a 2.5% royalty on iron ore mined at two sites in the metals abundant region of Pilbara, in Western Australia. "Wright Prospecting and Hancock Prospecting are entitled to be paid," he said in the judgment.

Hammerschlag J had been "informed that quantum is agreed," with a figure of AUD 200 million given in court by the legal teams representing the mining dynasties. However, in a twist of events, *CDR* understands that **Rio Tinto** will dispute the royalties owed and may appeal.

"The parties will now be working through issues associated with the quantum," said a spokesperson for Rio Tinto. "We are reviewing the decision in detail, and will consider any next steps, including the possibility of an appeal to the NSW Court of Appeal," he added.

Rio Tinto owns the Eastern Range and Channar mines, which have capacity to produce 950,000 tonnes of iron ore per month, through fully-owned subsidiary **Hamersley Iron** after a deal was struck with discoverers Hancock and Wright.

Not knowing the full potential of the mines, and with heavy drilling investment needed, the duo inserted a royalties agreement into the deal. Rio Tinto argued that the area designated in the agreement "had a more restricted meaning" than the claimants had pressed in court.

However, Justice Hammerschlag ruled: "Far from being perverse, an outcome which requires [Rio Tinto subsidiary] **Mount Bruce Mining** to pay an amount based on the amount of ore won from any part of the area… is commercially rational and sensible."

The mining magnates continue to keep Australian lawyers in work, with **Clayton Utz** representing Wright Prospecting and Australian boutique **Horton Rhodes** acting on behalf of Hancock Prospecting.

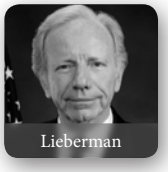
The decision also comes as a blow for Rio Tinto's top-tier legal team. **Allens Linklaters** instructed **Neil Young QC** from **Ninian Stephen Chambers** in addition to **Michael Darke** and **Joseph Garas** from **Tenth Floor Chambers** and **Francis Burt Chambers** respectively. ■

UNITED STATES

Senate duo take **private practice brief**

Boston-headquartered **WilmerHale** on 6 June announced the hire of **Ken Salazar**, who most recently served as US Secretary of the Interior for four years, while former US senator **Joseph Lieberman** the same day joined litigation boutique **Kasowitz Benson Torres & Friedman** in Manhattan.

As Secretary of the Interior, Salazar oversaw the Department of Homeland Security and the DoJ. He joins the firm as a partner in its regulatory and government affairs and litigation practices, focusing on energy, environmental and natural resources. Having arrived on 10 June, he will anchor WilmerHale's newly-planned office in Denver, Colorado.


Lieberman


Salazar

Pushing the firm into the resource-rich region, which is linked to the US' runaway shale gas phenomenon, Salazar said in a statement: "I look forward to leading WilmerHale's entry into the Rocky Mountain region, which is integral to the growing national and global economy."

He will join former colleague **Thomas Strickland**, who was chief of staff to Salazar in the Obama Administration until he joined WilmerHale in 2011.

For his part, Lieberman joins Kasowitz Benson Torres & Friedman as senior counsel. His regulatory practice will focus on independent and internal investigations, currently a hot-button area for US law firms, and he is expected to play a role in client development globally.

Lieberman, the Democratic Vice-Presidential candidate in 2000, served 24 years in the US Senate before retiring in January 2013. **Marc Kasowitz**, the firm's founding and managing partner who volunteered for Lieberman's first political campaign in 1970, said in a statement that "[Lieberman's] incredible breadth of knowledge and experience will be a powerful resource."

UAE

Three Kings arrive **in the Middle East**

Building on its transactional practice in the Middle East, US firm **King & Spalding** in June snatched three arbitration lawyers from **Simmons & Simmons** to launch a disputes practice in the region.

The team is headed up by partner **Adrian Cole**, the head of Simmons & Simmons' dispute resolution and construction practices in the region, with **Mohammed Raza Mithani** as counsel and associate **John Packer** also making the switch.

Cole and Packer are resident in the firm's Abu Dhabi office, while Mithani is based in Dubai; the trio joined King & Spalding on 3 June. Their arrival brings the number of lawyers in King & Spalding's offices in the Middle East to 26, including eight partners.


Cole


Mithani


Packer

Jawad Ali, managing partner of King & Spalding's Middle East offices, said in a statement that Cole's "arbitrations involving the construction, infrastructure and energy sectors provides synergies with our energy and global transactions practices."

Cole, who was responsible for building the construction disputes practice at Simmons & Simmons, will carry the same responsibility at King & Spalding, as the only arbitration partner in the region. Mithani led Simmons' commercial disputes practice in Dubai, a role he will also undertake at King & Spalding.

Cole, who is licensed to practise in Dubai International Financial Center proceedings, tells *CDR* he sees "a commitment from King & Spalding in the region that I didn't see at Simmons & Simmons," with the US firm also ramping up its disputes offerings across the globe.

CHINA

Sheppard flocks **to China**

Sheppard Mullin in May launched an IP practice in Beijing, as one of a number of firms hoping to capitalise on China's growing awareness of patent protection.

Sheppard Mullin's latest hire sees **Scott Palmer**, the head of **Baker & McKenzie's** IP practice in Beijing, join its office in the Chinese capital. Palmer is Sheppard Mullin's first IP partner in the region and will work with two of counsel and one associate in Shanghai.

Palmer manages Chinese IP portfolios for multinational companies, and advises on IP litigation, trademark and copyright registration and enforcement strategies. He also works on IP licencing, trade secrets and IP registration and maintenance.


Palmer

Guy Halgren, chairman of Sheppard Mullin, said in a statement: "Scott's broad-based IP and brand protection practice dovetails well with the firm's existing expertise and expands our IP capabilities in China."

China's disputes market has been particularly active of late, with EU-Sino trade spats, maritime delimitation arbitrations and fiercer regulators keeping the region's lawyers in business. Yet it is the growth in Chinese intellectual property and patent work that has law firms competing to offer clients the manpower to handle their mandates. And whether by luck or judgment, many of those firms chose May 2013 to launch in the region.

Clyde & Co announced the opening of a Beijing office in mid-May and **Simmons & Simmons** opened in Singapore the same week. **Hogan Lovells** hired **Frederick Ch'en** in Tokyo in early May 2013, while **Locke Lord** snatched senior litigator **Adrian Taylor** from **Squire Sanders** to head its litigation practice in Hong Kong, also in May.

FRANCE

Bryan Cave taps Paris disputes head

Dentons in June lost its Paris head of litigation and dispute resolution to **Bryan Cave**.

Constantin Achillas became Bryan Cave's fourth partner in Paris – one of whom, **Brian Recor**, specialises in international arbitration, as does counsel **Jean de Hauteclocque**. Three of the office's five associates also practise dispute resolution.

Achillas has two decades' experience representing clients before the French courts in complex civil and commercial cases, as well as in international and domestic arbitration and mediation. "The strength of the firm's dispute resolution platform presents clients with a core team of experienced professionals dealing with international disputes," Achillas said in a statement.


Achillas

Achillas' loss will sting, given the fierce competition among Paris' dispute practices. Firms including **Orrick**, **Quinn Emanuel** and **Hogan Lovells** have poached senior practitioners from their rivals in the last year: **Charles Kaplan**, **Philippe Pinsolle** and **Carmen Núñez-Lagos** respectively.

"The synergies between Constantin and Jean-Norbert will well serve the firm's client needs and expectations in Europe and around the world, as well as the cross-practice strategy within the firm," said **Joseph Smallhoover**, Bryan Cave's Paris managing partner.

UNITED STATES

Keeping up with the Joneses

Global oil companies remain under regulators' scrutiny, with much of that activity focused on Houston. **Jones Day** in May became the latest firm to hire in the city, recruiting IP litigator **David Burgert** from Houston firm **Porter Hedges**. Burgert joins two other partners in Jones Day's IP disputes practice in the city, which includes energy litigator **Joseph Beauchamp**.


Burgert

A patent specialist, Burgert has tried more than 50 cases to jury verdict. He has represented clients in state and federal courts, as well as before arbitration panels of the American Arbitration Association, **JAMS** and the NASD (now **FINRA**).

Nancy MacKimm, Jones Day's Houston managing partner, said in a statement: "David's reputation as a top patent trial attorney is well deserved, and his background in oil and gas matters is particularly welcome here."

Burgert's move came weeks after Jones Day hired in its Mexico City office, with **Antonio Gonzalez** joining the firm from Lopez Melih, Gonzalez, Facha y Estrada, where he was a name partner (now **Lopez Melih, Facha y Estrada**).

Gonzalez focuses on civil and commercial litigation, as well as domestic and international arbitration, with experience in contractual disputes, corporate and shareholder litigation and bankruptcy. Prior to joining Jones Day, he represented a client in an arbitration relating to the distribution of Mexican beer brands in the US.

UNITED KINGDOM

JAMS International recruits insurance heavyweight

Ince & Co insurance specialist **Peter Rogan** joined London-headquartered ADR provider **JAMS International** on 12 June, following his retirement from the UK shipping and insurance firm. Having served as Ince's senior partner between 2000 and 2008, during which time it opened five new offices, Rogan will continue to work with the firm on a limited consultancy basis.

Such arrangements are not uncommon, given the strategic advice and client relationship management senior retiring lawyers can offer their firms. Yet other paths are available: **Freshfields Bruckhaus Deringer's** recently-retired arbitration supremo **Jan Paulsson** cut ties with the firm to pursue a full-time career as an arbitrator.

And one-time Herbert Smith senior partner **David Gold** has carved out a varied post-private practice career which has seen him appointed by the US Department of Justice as **BAE Systems'** corporate monitor and take a directorship at UK litigation support firm **Proven**, among other things.


Rogan

Rogan's new venture lies somewhere in the middle. An insurance and reinsurance specialist, he will serve as a JAMS International mediator and arbitrator primarily in those areas, as well as settling professional negligence, partnership and general commercial disputes. That focus tallies with his practice at Ince, where he litigated and arbitrated a wide range of insurance matters, including professional indemnity, political risk and marine cases.

"Peter's achievements at Ince & Co both in his problem-solving approach as a lawyer and in management are a testament to his diplomacy and mediation skills. He is a popular and widely respected figure in insurance in London and internationally," **Chris Poole**, CEO of JAMS, said in a statement.

Rogan said: "Among the challenges I greatly enjoyed as senior partner of a consensus-driven partnership was bringing different and sometimes opposing voices to agreement, and doing so without parties feeling that they have had to sacrifice points." He added: "I am looking forward to bringing this kind of experience and skill to bear in my mediation practice, while at the same time remaining current with the law while continuing to sit as an arbitrator."

CONFERENCE DIARY

July

Mon 15
DCAA Americas
Arlington, USA
momentumevents.co

August

Mon 12 – Fri 16
EU Competition Law Summer School 2013
Cambridge, UK
www.ibclegal.com

Mon 19 – Sat 31
European Mediation Training for Practitioners of Justice
Brussels, Belgium
www.emtpj.eu

Mon 19 – Fri 23
Intellectual Property Law Summer School 2013
Cambridge, UK
www.ibclegal.com

September

Tue 3 – Thu 5
Construction Law Summer School 2013
Cambridge, UK
www.ibclegal.com

Sun 8 – Tue 10
IP Law Summit
Colorado Springs, USA
www.iplawsummit.com

Sun 8 – Tue 10
Chief Litigation Officer Summit
Florida, USA
www.chieflitigationofficersummit.com

Mon 9 – Tue 10
Corporate Legal Risk Management and Compliance
Kuala Lumpur, Malaysia
www.marcusevans-conferences-panasian.com

Tue 10
Dispute Resolution in Financial Services
London, UK
www.cdr-news.com/conferences

Sat 14 – Sun 15
16th IBA Annual Competition Conference
Florence, Italy
www.ibanet.org

Wed 18 – Thu 19
8th EU Pharma Regulatory Law
London, UK
www.c5-online.com

Mon 23 – Tue 24
The Oil & Gas Anti-Corruption & Compliance Congress
Houston, USA
momentumevents.co

Tue 24
Antitrust Forum
London, UK
mergermarketgroup.com

FEATURED EVENT

Thu 26
ECLA's 30th Anniversary Conference and Awards
Brussels, Belgium
www.ecla.eu

October

Sun 6 – Fri 11
Annual Conference of the International Bar Association
Boston, USA
www.ibanet.org

Mon 28
The Global Anti-Corruption Congress: New York Edition
New York, USA
momentumevents.co

Tue 26 – Wed 27
Advanced EU Competition Law
Brussels, Belgium
www.ibclegal.com

November

Tue 12 – Wed 13
CDR Conference
London, UK
www.cdr-news.com/conferences

LATIN AMERICA

- COLOMBIA'S NEW ARBITRATION LAW
- WTO: NEW LEADER, NEW DIRECTION?
- ARBITRATION: REGIONAL ROUND-UP

A new arbitration law, the Hinestrosa Act, aims to strengthen the framework for international arbitration in Colombia. **Jorge Perez Vera** of **Total Raffinage Marketing** considers its most important provisions

THE ROAD LESS TRAVELLED

On 12 October 2012, Colombia enacted its new Arbitration Act (Law 1563 of 12 July 2012). The new legislation was christened the Hinestrosa Act in honour of the prominent civil law professor, scholar, lawyer and former minister of justice and education, the late Fernando Hinestrosa Forero, who chaired the drafting commission.

The Hinestrosa Act is a comprehensive and ambitious law. The previous arbitration regime, adopted in 1996 (Law No. 315/96) and 1998 (Decree 1818/98), became too intricate and the amalgamation of the judicial and arbitration proceedings made the arbitration lengthy in practice.

The Hinestrosa Act is, by all accounts, an important step, and offers a positive message for the domestic and international business community, regardless of the size of the parties or the transactions – domestic or international – involved. One of its main messages is the reinforcement of transparency of the arbitration proceedings. Publicity, speed and equality are also among the leading principles of the new law.

According to the Columbian government, the main goal of the Hinestrosa Act is to relieve congestion of local courts – not only civil, but also administrative courts. Judicial congestion has long been an issue in Colombia, one which impacts both business and citizens.

The Hinestrosa Act establishes a general regime for arbitration, applicable to any matter which the parties are legally entitled to settle, i.e. commercial, civil or administrative. However, the Act doesn't govern arbitration related to labour matters, which are regulated by the Colombian labour law code (mandatory in some cases, before unions may go on strike), nor arbitration with public bodies.

Colombia's arbitration practice

Arbitration has existed in Colombia since 1890, and the country's practice of domestic arbitration is strong. Many local practitioners work both in judicial and arbitration proceedings, despite the fact that Colombian law schools largely focus their studies on judicial proceedings, and often don't teach the tools and techniques of arbitration.

Moreover, Colombian entrepreneurs and companies trust domestic arbitration, and are familiar with its operation. Around 30 arbitration institutions are active in the country, among them the **Arbitration and Mediation Center of the Bogotá Chamber of Commerce** (Centro de Arbitraje y Conciliación de la Cámara de Comercio de Bogotá), which is the most active and by far the highest professionally ranked. This centre administrated 271 arbitrations in 2012.

In practice, Colombian public bodies frequently use domestic arbitration. In the last 30 years, most of the major legal commercial disputes raised in the country – including those involving public bodies – have been settled through domestic arbitration. However, they remain reluctant to use international arbitration. They cite the high costs of international arbitration, as well as the lack of knowledge and expertise required to deal with international courts. As a result, the number of international arbitrations seated in the country is quite low. The Hinestrosa Act will hopefully encourage companies and public bodies to propose Colombia as a seat of arbitration.

Most of the contracts executed in the 1990s by the Colombian state or public bodies, in the frame of divestments and privatisation programmes, provided for the application of the Colombian law and domestic arbitration. The majority of the disputes which resulted from the enforcement of this type of contracts were referred to domestic arbitration tribunals, and properly settled by them. Indeed, the number of awards cancelled by the Council of State is relatively low compared to the number of awards rendered in arbitration with public bodies.

Such annulments were due to excess of powers and non-arbitrability of specific administrative acts, and not necessarily for breach of public policy of the forum. Today, many disputes with public entities in the fields of telecommunications, public infrastructure, oil and gas, and mining, including those where the other party is a foreign company or is controlled by a foreign company, are settled by domestic arbitration.

Reducing cross-references with judicial proceedings

Until 1989, the Colombian arbitration law followed a clear jurisdictional approach which was consistent with the predominance given to statutory procedural law in civil law countries such as Colombia. Arbitration was simply a judicial proceeding conducted by judges who were chosen by the parties.

As far as domestic arbitration is concerned, the Hinestrosa Act doesn't depart from this judicial influence – and couldn't do so, either. Under the Colombian constitution, adjudication of disputes is a public function and arbitrators therefore perform a service of public interest. However, this judicial tropism doesn't appear to jeopardise the contractual source of the arbitration, which is crystalline in the Hinestrosa Act.

Under the new law, arbitral tribunals seated in Colombia are now clearly empowered to order interim and preventive measures (Article 32) and to seek evidence (Article 31), with the same powers as ordinary courts. Moreover, the courts cannot intervene in the arbitral proceedings unless in cases stipulated by the Act (Article 67). The courts nonetheless remain by default the ultimate authority to appoint arbitrators, and to rule on certain cases of conflicts of interest or challenges to arbitrators (Article 15).

Transparency

The Hinestrosa Act lays down new rules on the management of conflicts of interests of arbitrators and secretaries of arbitration tribunals, notably the obligation to disclose at the acceptance of these functions whether they have acted – themselves or their law firms – during the last two years; in other proceedings or administrative or professional dealings, as arbitrator, agent, counsel, consultant, advisor, secretary or clerk of any party; as well as any family or personal ties with the parties or the agents and counsels acting in the arbitration (Article 15). Similar rules apply to judges in charge of ruling appeals for revision or annulment of awards (Article 18).

Furthermore, the Hinestrosa Act puts arbitrators, secretaries of arbitration tribunals and clerks under the same disciplinary rules of the judges and judicial servants (Article 19). This law fixes limits to the fees to arbitrators and secretaries (Article 26). Regarding arbitration with public bodies or entities which perform administrative functions, arbitrators and secretaries are prevented to act simultaneously in more than five arbitration tribunals.

Harmonisation with international standards

Similar to the 2003 Spanish arbitration reform, the 2012 Colombian Act looks at the harmonisation of national law with the international standards of commercial arbitration. The Hinestrosa Act creates a single legislative framework which governs all arbitrations seated in Colombia, following a similar approach to the French Arbitration Act (Decree 2011-48 of 13 January 2011).

The section related to international arbitration is clearly modeled on the UNCITRAL Model Law. It is likely that the drafting commission of the Hinestrosa Act took into account the recent reforms to arbitration in Latin America and other jurisdictions, and the works of the commission that prepared the new arbitration rules that the International Chamber of Commerce (ICC) adopted in 2012. On the other hand, the Republic of Colombia is already party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral, ratified in 1990, and to the Inter-American Convention on International Commercial Arbitration, ratified in 1986.

In connection with international arbitration, Article 79 set forth the cornerstone principle of *competence-competence*, a leading principle of modern international arbitration.

The Act also strengthens the rule of the joinder of third parties, which is well established in Colombian civil procedural law. The arbitral tribunals must call all non-

Regarding arbitration with public bodies or entities which perform administrative functions, arbitrators and secretaries are prevented to act simultaneously in more than five arbitration tribunals

signatories to the arbitration agreement which can be impacted by the award to adhere to it and join the proceedings (Article 36).

E-arbitration

Another significant principle of the Hinestrosa Act is the authorisation given to arbitration tribunals to use electronic means – video and conference calls, for example – to conduct all proceedings, including notifications and audiences. This was a matter of judicial debate under the previous arbitration statutes, while from the business prospective it is designed to make the arbitration cheaper and faster.

E-arbitration is a clear trend within arbitration practice in Colombia, and precedes the Hinestrosa Act. The Arbitration and Mediation Center of the Bogotá Chamber of Commerce had previously implemented a leading program of e-arbitration, oriented to all arbitrations including those between small businesses.

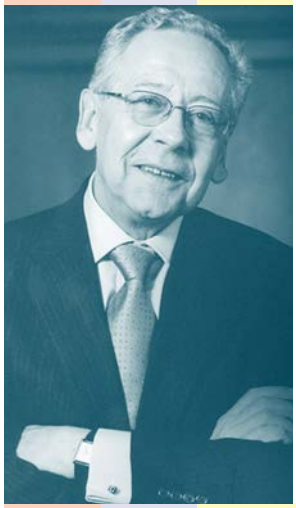
Arbitration with public bodies

The Hinestrosa Act clearly intends to expand the scope of domestic and international arbitration with Colombian public bodies. For example, Article 68 explicitly refers to recognition and enforcement of awards rendered abroad involving Colombian public bodies, and therefore anticipates awards rendered outside Colombia against Colombian public bodies. Additionally, Article 29 requires that decisions by a domestic arbitration tribunal about its own competence prevail over any contrary decision taken by ordinary and administrative courts.

Relating to international arbitration, Article 62 makes inefficient the invocation by public bodies of their national law to challenge capacity to act as party to arbitration or to refer to arbitration the subject matter of the dispute. The Hinestrosa Act offers a broad definition of international arbitration, with a very precise criteria test – e.g. the impact of the transaction on the international commerce, per Article 62 – and sets that the violation of international public order in the Colombian law is a ground to annul the award or to refuse its enforcement, per Article 108 and Article 112.

The Act contains a number of cross-references to special rules applicable to arbitration with public bodies contained in the statute of government contracts; the latter are mainly contained in Law No 80 of 1993. In this type of arbitration: all the awards must be based in law (Article 1); the arbitrators can be challenged based on the Code of Administrative Procedure (Article 16); the information to the Agency of legal defense of the State (Agencia Nacional de Defensa Jurídica del Estado) and intervention of the Office of the Attorney General (Procuraduría General de la Nación) is mandatory (Article 12 and Article 49); and, only the highest administrative court – the Council of State – is competent to rule on appeals for annulment and modification of awards involving state contracts (Article 46). ▶

The new legislation was christened the Hinestrosa Act in honour of the prominent civil law professor, scholar, lawyer and former minister of justice and education, the late Fernando Hinestrosa Forero, who chaired the drafting commission



However, it's not clear whether the Hinestrosa Act supersedes the national *lex specialis* of the Colombian law regarding government contracts, which contain specific public law rules to arbitration involving public bodies. Such special rules may restrain the scope of matters to be settled through domestic and international arbitration with public bodies. Among such rules, one can refer to: Article 70 of Law No 80 of 1993, i.e. arbitration tribunals cannot rule on matters such as unilateral contractual powers given to the administration and mandatory application of the national law to some categories of government contracts; Article 1 of Law No 315 of 1996, relating to the protection of the domestic public order; and Article 7 of Law No 963 of 2005, i.e. in stabilisation contracts signed by the Colombian state, only domestic arbitration is authorised.

In Colombian law, except in relation to specific categories of government contracts, there is no clear general rule on the restrictions to public bodies to enter into international arbitration agreements. International arbitration can be used by public bodies in contracts *"providing for long-term financing and payment thereof through the exploitation of the object that has been built or the operation of goods for carrying out a public service,"* (Article 70 of Law No 80 of 1993), in loan contracts and in some cooperation contracts with foreign public entities and international organisations, as well as contracts related to insurance and research and development, per Article 14 of Law No 80 of 1993. International arbitration is forbidden in contracts for the exploration and exploitation of hydrocarbons entered into with the Colombian Hydrocarbons Agency (Decree No 1056/53 and Decree No 1760 of 2003). Instead, domestic arbitration can be used by public bodies without restriction to settle almost any purely commercial issues; certain specific administrative matters remain, however, the exclusive competence of the administrative courts.

International law and arbitration in Colombia

Article 114 of the Hinestrosa Act bars the application of the Colombian Civil Procedural Code to the recognition of foreign awards, and provides for the application of arbitration treaties and conventions ratified by the Republic of Colombia. This provision may make those recognitions more fluid.

Article 114 follows a monistic approach of the interaction between the international law – mainly treaties – and the national law by which international treaties can supersede national law. This approach might be in contradiction with the dualistic paradigm set down by the Colombian constitutional court in 1998 in relation to the interpretation of the treaties by the Colombian judges. According to that decision, Columbian courts must interpret national law with a view to harmonising it with the obligations arising from the treaties ratified by the Republic of Colombia. Treaties, however, cannot prevail over the Constitution.

This possible constitutional issue aside, Article 114 of the Hinestrosa Act will definitively facilitate the enforcement of foreign awards in Colombia, whether resulting from commercial, investment or another type of arbitration, or at least instill confidence in foreign parties when entering into an arbitration agreements with a Colombian party, regardless of whether the arbitration is seated in Colombia or in another country. Article 111(2) complements Article 114 in stating that an award rendered by an international arbitration seated in Colombia will be considered as a national award. As a result, there is no need to request recognition of it in Colombia.

As a general trend, Colombian courts and Colombian law – civil, commercial and administrative law – are supportive of domestic arbitration. The Supreme Court and the Council of State, which are the competent bodies for recognising foreign awards or international awards of international tribunals seated in Colombia, as well as middle level courts, are increasingly becoming familiar with international arbitration and arbitration treaties.

A recent example is the decision taken by the Colombian Supreme Court of Justice on 27 July 2011, granting the exequatur to an award rendered in New York in 2006 by a CIDR arbitration tribunal against a non-Colombian party. The parties to the dispute were two members of a consortium formed in Russia against the third member. The consortium had executed a Production Sharing Agreement with **Ecopetrol**, the Colombian state-owned oil company. The Supreme Court of Justice of Colombia conducted an in-depth analysis of the concept of public order under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral and the Inter-American Convention on International Commercial Arbitration, and recognised the award in Colombia.

In conclusion, adjudication by courts and arbitration tribunals in Columbia remain two sides of the same coin – the public function of rendering justice – and arbitrators are on an equal footing with judges. This will certainly help to standardise the enforcement of the Hinestrosa Act. ■

About the author

Jorge Perez Vera is senior in-house counsel at **Total Raffinage Marketing** (new business and development, legal department) in Paris. In this capacity he is involved in cross-border M&A transactions and joint venture projects in downstream and associated disputes. As corporate counsel he has supervised international arbitration proceedings under the rules of the ICC, NAI, SIAC and IACAC, in disputes over joint ventures, corporate, oil & gas and general commercial matters.

LATIN AMERICA: WTO LEADERSHIP CHANGE

TRADE OFF

While a new leader brings new opportunities for the World Trade Organization, long-running tensions between the group's members remain a source of concern. **Tom Moore** reports

Consensus can be hard to come by at the World Trade Organization. The Doha Round of its trade talks, for example, has dragged on for more than a decade. Yet the appointment of Brazilian **Roberto Azevêdo** as the WTO's director-general looks set to breathe new life into the Geneva-headquartered organisation, which is dedicated to supporting free trade and opening new global markets.

Votes were cast by 153 of the WTO's 159 member states, leading Brazil's foreign minister Antonio Patriota to claim that Azevêdo had achieved "an unequivocal victory." Set to take the WTO's reins on 1 September 2013, Azevêdo will become the first Latin American to lead the organisation since its creation in 1995. He will replace Frenchman Pascal Lamy, who held the post for eight, largely successful, years. Patriota said the election result "shows a global order in transformation" in which "emerging markets show leadership."

Beating eight other candidates to the job, Azevêdo gained support from the rest of the BRICS including Russia, which joined the WTO in August 2012 after nearly two decades of stop-start negotiations. But he wasn't the preferred choice for the UK or the US, which both backed Mexico's ambassador Herminio Blanco. While Azevêdo has reminded Brazilians that he is not working for the interests of his home nation, saying "I'm representing 159 members and one of them happens to be Brazil," his appointment renews emerging and developing nations' faith in an organisation that has often been used as a disputes battleground for first-world states.

The Doha delays are also in part down to a divide between developed and developing nations over agricultural policies and tariffs. Although the majority of WTO members are developing countries from Africa, Asia and Latin America, many of them have had little say in decisions that are taken at WTO meetings. As part of a campaign video available on YouTube, Azevêdo said:

"Brazil believes the time has come for Africa, Latin America or the Caribbean to lead the WTO. Alternating between regions and representatives from developed and developing countries can only strengthen and democratise the system."

Azevêdo's focus on consensus-building in Geneva, which he has described as being in a "state of paralysis," gained him much support. But fuelled by rivalry between fast-growing nations and the developed economies with high wages in the West, the WTO has turned into a forum for disputes; some 461 have been brought before the organisation since it was established in 1995.

The US alone has lodged 105 complaints, while China has been defendant in half of the 30 complaints launched in the last decade. The EU has been similarly active, filing 25 complaints in that period, the majority of which have been against the US, China and India.

With tensions at home, the playground is hostile

Rising protectionism increases the possibility for clashes. When times get tough, the snail retreats into its shell, and nations are no different. Some 80% of protectionist trade measures created in 2008 are still active.

In the *Reports On G20 Trade And Investment Measures* (mid-October 2012 to mid-May 2013), jointly issued by the WTO director-general, the secretary-general of the OECD and the secretary-general of UNCTAD, Pascal Lamy warned that the protectionist threat may be greater now than at any time since the onset of the global economic crisis. "Some G20 economies have continued to implement trade restrictive measures over the past seven months," he said, noting that more than 100 trade restrictions were recorded over the review period, covering around 0.4% of world imports. Lamy said that while "a few G20 economies also adopted measures aimed at facilitating trade, this time, the share of facilitating measures is smaller than during the previous review period."

These new trade measures make for a gradual accumulation of restrictions, while the trade-distorting policies in agriculture and tariff peaks that existed before the global crisis struck are still in place. Moreover, traditional forms of protectionism such as trade tariffs and defence measures were imposed less often during the last year – together with more subtle forms of beggar-thy-neighbour policies being adopted by governments eager to side-step established WTO disciplines and the litigation that ensues.

Frank Schweitzer, a partner at **K&L Gates** in Washington, DC, says "certain types of protectionist measures are increasingly being used, such as with the growing use of localisation measures (measures designed to protect, favour or stimulate domestic industries), domestic content requirements and other types of domestic sourcing initiatives that significantly distort competition."

From June 2012 to May 2013, more than three times as many protectionist measures were imposed by governments around the world than liberalising measures, according to Global Trade Alert, which forms part of London-based think-tank the Centre for Economic Policy Research. G8 nations were collectively responsible for 30% of protectionist measures imposed during that year; the percentage rises to 65% if the G20 countries are included.

"The WTO dispute settlement system will continue to be very important and relevant to global commerce, with WTO litigation preferable to unilateral measures or other retaliatory conduct to deal with a trade dispute"

Arthur Appleton, Appleton Luff

Like a G20

"Azevêdo is well liked in Geneva and since Brazil will need to make concessions if the [Doha] Round is ever to be completed, he is a very good choice," says **Arthur Appleton**, name partner at international law boutique **Appleton Luff** in Geneva.

As the ambassador for the seventh largest economy in the world, and Brazil's chief-negotiator for the Doha Round, the new director-general will have gained insights into issues that divide the membership and which have frustrated the organisation's ability to carry out one of its core functions: being a forum for multilateral negotiations. Indeed, Brazil has been an influential member of the WTO since its inception, both in terms of its impact on the negotiating dynamic and through its participation in WTO litigation.

Azevêdo has presided over several panels at the dispute settlement body, and Schweitzer believes "the WTO dispute settlement system will continue to be very important and relevant to global commerce, with WTO litigation preferable to unilateral measures or other retaliatory conduct to deal with a trade dispute."

While multilateral negotiations ground to a halt under Lamy's tenure, the WTO dispute settlement system has continued to enjoy a generally favourable view. This is unlikely to change under Azevêdo, who in his previous capacity as Brazil's vice-minister for economic and technological affairs, a post he held between 2006 and 2008, was chief-litigator in many important disputes at the WTO. He has also served on, and chaired, WTO dispute settlement panels.

Sliding doors

If the Doha negotiations remain stalled, Schweitzer – who as associate general counsel in the Office of the United States Trade Representative served as lead counsel for the US in its successful WTO challenge to China's discriminatory measures affecting electronic payment services for card transactions in the country – says "there may be an increase in WTO disputes as member states try to resolve more difficult issues through litigation rather than negotiation."

Trade remedy proceedings can be, and often are, pursued solely for the purpose of protection, and such an increase would run counter to the WTO's goal of liberalising trade.

"Lamy's biggest failure was the inability to complete the Uruguay Round, but the blame does not lie primarily with him but with the [WTO] members," says Appleton. "The US and the EU have been distracted by the on-going financial crisis, and Brazil and India have shown little interest in making the concessions required to maintain US and EU interest. Perhaps Lamy's biggest success was to get the EU and the US to put substantial agricultural proposals on the table, which were significant offers."

Appleton expects Azevêdo's appointment to cast a spotlight on Brazilian and Argentinean trade policy. Indeed, the 55-year old has represented a country with increasingly protectionist policies since becoming Brazil's permanent representative to the WTO in 2008. Brazil's finance minister Guido Mantega announced in October 2012 that Brazilian automotive companies could avoid a 30% tax increase by improving fuel efficiency using Brazilian-made parts and investing in Brazilian research and development. Meanwhile, foreign auto firms will be subject to the tax hike if they don't have a manufacturing plant in Brazil.

There has been a war of words between Brazil, which also put limits on the purchase and lease of agricultural land by foreigners, and the US, which it accuses of using protectionist fiscal policies such as quantitative easing. Azevêdo's links across the region, and the ability to show himself as 'one of them,' may break such tensions. He would also be wise to ride on the full support shown to him from countries around the world, a tide that can soon turn with time in office.

Indeed, UK business secretary Vince Cable, who recently met Azevêdo in London to discuss his bid, said in a statement: "It's vital we maintain momentum around ongoing trade negotiations and I welcome the energy Ambassador Azevêdo will bring to the immediate priority of securing a deal on the important elements of the Doha Round at the next WTO Ministerial Conference in December in Bali.

Pascal Lamy has pledged to work closely with Ambassador Azevêdo in ensuring a smooth transition. Yet if the Frenchman's back-to-back terms are anything to go by, the next four years are likely to prove a bumpy ride. ■

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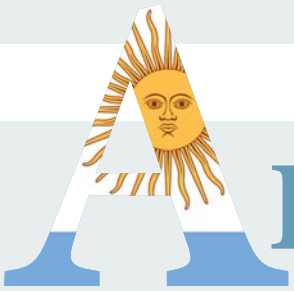
ARBITRATION: REGIONAL ROUND-UP

Lawyers at **Baker & McKenzie** and **Trench Rossi e Watanabe Advogados** consider recent arbitration developments in Latin America, where national courts are increasingly being asked to grapple with key arbitral questions

Latin America continues to be a burgeoning market for arbitration. Emblematic of this growth in the region are Argentina, Brazil, and Colombia, all of which have considered – or adopted, in the case of Colombia – significant legislative changes affecting arbitration over the past year. In addition to legislative efforts, courts in Argentina and Brazil are shaping arbitration trends in the region, handing down landmark decisions on arbitration issues such as jurisdiction to hear public policy disputes, arbitrability, anti-suit injunctions and consumer rights. Several of these important developments are summarised in this article.



ARGENTINA

Despite repeated attempts to adopt the UNCITRAL Model Law into national law, Argentina still lacks federal legislation on arbitration. This may soon change, as drafts for both domestic and international arbitration legislation are currently under consideration in the National Congress. Additionally, the Argentine legislature is about to replace the existing Civil Code and Commercial Code with a joint code containing provisions on arbitration agreements (§§ 1649-1665). However, these provisions have been heavily criticised for their contractual, rather than jurisdictional, approach to arbitration.

As for the existing Argentine arbitration law, two recent decisions are notable. The first is the 14 March 2012 opinion of the Superior Court of Justice of the Province of Córdoba in the case *Oliva, Oscar v. Disco S.A.* by the Tribunal Superior de Justicia de la Provincia de Córdoba [Sup. Trib. Córdoba] 14/3/2012. The plaintiff tried to bring a contractual claim before a state court, challenging the constitutionality of the underlying arbitration legislation and arguing that the claim exceeded the scope of the arbitrator's jurisdiction. The Superior Court of Córdoba disagreed, ruling that an arbitrator has inherent jurisdiction to rule on the constitutionality of the legal framework on which the decision is based. The only restriction on the arbitrability of a claim would apply when the controversy at hand is not subject to resolution.

Additionally, the court commented on several key aspects of arbitration, holding that jurisdictional powers are conferred on arbitrators as well as on courts, and that "public policy" disputes can be subject to arbitration. Finally, the court highlighted the fact that arbitration is not a rival to the national judiciary, but rather an important tool to complement and assist it. In sum, this ruling is a landmark decision on several key arbitration issues: scope of arbitrability, arbitrator's jurisdiction on constitutional or public policy issues, and the role of arbitration as a complementary tool to the judiciary.

The second notable decision is a 25 October 2011 ruling of the Federal Court ▶

- of Appeals in Administrative Matters in Buenos Aires in *Cámara Nacional de Apelaciones en lo Contencioso Administrativo Federal [CNac. Cont. Adm. Fed.]* [Federal Court of Appeals in Administrative Contentious Matters] Section II, 10/25/2011 *Procuración del Tesoro de la Nación c/ Tribunal Arbitral (Arbitraje 12.364 CCI-Exp 111-195270/95).* The state attorney (*Procuración del Tesoro de la Nación*) had filed an annulment request against the jurisdictional award rendered in ICC case No. 12634/KGA/CCA/JRF, *Papel de Tucuman SA (en quiebra) (Argentina) v. Estado Nacional (República Argentina) (Argentina).* The Court of Appeals rejected this annulment request, holding that the relevant law, Section 760 of the National Code of Civil and Commercial Procedure, only applied to annulment requests against final awards and not to other types of awards, such as partial or provisional awards on jurisdiction. However, noting that it had the power to "re-convert" and "re-shape" the jurisdictional challenge through the appropriate court and procedure, the Court of Appeals remanded the case to a lower court to entertain the annulment request through full evidentiary litigation (*juicio ordinario*).

  The latter part of the decision is especially problematic because it is not clear whether the "re-conversion" ordered by the court would have legal support in Argentine law. In the absence of an Argentine legal provision such as Section 16.3 of the UNCITRAL Model Law, the court does not have any binding legislative tool with which to maintain or re-shape the annulment request.

BRAZIL

There are two recent noteworthy developments to Brazil's commercial and arbitration laws. In October 2012, the Brazilian House of Representatives passed a decree – Legislative Decree 538 of 18 October 2012 – ratifying the United Nations Convention on Contracts for the International Sale of Goods (CISG). Drafted under the auspices of UNCITRAL in the late 1970s, the CISG establishes a uniform set of rules governing the international sale of goods. Currently, there are 79 different state parties to the convention. As a result of the ratification decree, the CISG will come into force in Brazil on 1 April 2014.

In November 2012, the Brazilian Senate created a commission to evaluate the need to change the Brazilian Arbitration Act and to draft, if necessary, a law on mediation. Despite the opposition of some who questioned the need for this evaluation, the 19-member commission was established in April 2013.

Additionally, several recent decisions of Brazil's higher courts have addressed key arbitration issues. The first notable case is a decision of the São Paulo Court of Appeals in *Energia Sustentável do Brasil S/A et al. v. Sul América Cia Nacional de Seguros S/A et al.* [São Paulo Court of Appeals, Sixth Chamber of Private

Law. Interlocutory Appeal Number 0304979-49.2011.8.26.0000, decided on 19 April 2012]. The case involved the Jirau hydroelectric power plant currently being built in the Amazon rainforest by a joint venture consisting of electric power companies and construction firms. To cover the risks of the project, the joint venture concluded two all-risk insurance policies. The insurance policies contained both a clause foreseeing the exclusive jurisdiction of Brazilian courts and an arbitration provision referring to the Insurance and Reinsurance Arbitration Society (ARIAS) in London.

When a dispute arose, the insurance companies submitted the claim to arbitration before the ARIAS. The joint venture brought suit before a Brazilian court, also requesting an interim measure to suspend the London arbitral proceedings. The first instance court denied this request. On appeal, the joint venture argued that the insurance policies were a standard "take it or leave it" agreement (*contrato de adesão*). For these types of contracts, Art. 4(2) of the Brazilian Arbitration Act (BAA) provides that reference to arbitration is only deemed enforceable "if the adhering party initiates arbitral proceedings or if it expressly agrees to arbitration by means of an attached written document, or if it signs or initials the corresponding contractual clause, inserted in boldface type." Following this line of argument, the Court of Appeals of São Paulo decided that the dispute should be resolved by Brazilian courts. Although the previous tendency was to deny anti-suit injunctions, this case could set a precedent for disregarding the "Kompetenz-Kompetenz" principle whenever the invalidity or unenforceability of the arbitration clause may be inferred *prima facie*.

In a decision that also involved the above mentioned Art. 4(2) BAA, the Brazilian Superior Court of Justice (STJ) upheld consumer rights in *CZ6 Empreendimentos Comerciais Ltda et al. v. Davidson Roberto de Faria Meira Júnior* [Brazilian Superior Court of Justice, 3rd Chamber, Special Appeal Number 1.169.841 - RJ (2009/0239399-0), 6 November 2012]. The court ruled that arbitration clauses providing for mandatory arbitration in contracts involving consumer relationships are non-enforceable, unless the consumer files for arbitration or otherwise confirms the commitment to arbitrate once the dispute arises.

Critical to the decision was the relationship between Art. 51(7) of the Brazilian Consumer Protection Code and BAA Art. 4(2). The former provides that mandatory arbitration clauses are generally null and void in consumer relations. The latter, however, stipulates that in standard contracts (*contratos de adesão*), the effectiveness of the arbitration agreement depends on the adhering party taking the initiative to commence arbitration or on the clause being set out in an attached document or in bold, with a signature or endorsement made especially for this clause. There was a fierce debate as to whether this provision of the BAA amounted to a derogation from the Brazilian Consumer Protection Code with regard to standard arbitration clauses in consumer agreements.

Ultimately, the court held that the Brazilian Consumer Protection Code also applies to arbitration clauses in consumer agreements. Accordingly, an arbitration clause cannot bind the consumer, even if it is in bold or subject to a specific signature, unless the consumer decides to commence the arbitration proceeding.

In the still-ongoing case of *EDF Internacional S/A v. Endessa Latinoamérica S/A and YPF S/A* [STJ Special Court, Contested Foreign Judgment number 5782/AR] before the STJ, **EDF** seeks to enforce an arbitral award against **Endessa** and **YPF** in Brazil that has been set aside in the country of origin (Argentina). EDF argues that since Article V(1)(e) of the New York Convention provides that an annulled decision "may" not be recognised, the Brazilian court has discretion to grant or to deny the *exequatur*. A final decision has not yet been rendered, but the Brazilian Public Prosecutor's office filed a legal opinion strongly rejecting EDF's arguments and concluding that the annulled award shall not be recognised in Brazil. The enforcement proceeding will likely continue to judgment, but it is not known when a final decision will be rendered. It will be interesting to see how the decision of the STJ fits into the existing case law in France and the United States, where courts have recognised arbitral awards set aside at the seat. ▶

COLOMBIA

In a significant development, Colombia enacted a new Arbitration Statute in July 2012. Colombian arbitration regulations have always differentiated between domestic and international arbitration. Although partially based on the UNCITRAL Model Law, the five articles contained in Law 315 of 1996, which previously governed international arbitration, were very sparse. Colombian legislation was silent on several crucial issues within the specific context of international arbitration, such as the possibility, nature and extent of the support of local courts with respect to interim measures and actions to set aside awards. Law 315 of 1996 did not specify the procedure to be followed for the recognition and enforcement of awards, or the specifics of an arbitral proceeding. As a result, arbitrators had to rely on domestic procedural rules to fill in the gaps, and several aspects of international arbitration were regulated through the case law of the Colombian Supreme Court of Justice (SCJ) and the Constitutional Court (CC).

The new Arbitration Statute sets forth different provisions for domestic and international arbitration. The domestic arbitration rules are close to the Colombian procedural regime, while the international arbitration rules are based on the UNCITRAL Model Law. As a result, the international arbitration rules are rooted in the autonomy of the parties and limit the local courts' power to intervene in international arbitration matters. The new regime has inspired confidence for two reasons: (i) the SCJ took a friendly stance on recognition and enforcement of arbitral awards in its 27 July, 2011 ruling; and (ii) the adoption of the 2006 UNCITRAL Model Law encourages Colombian courts to interpret the Statute's section on international arbitration, taking into account its international character as well as the necessity to promote uniformity in its application.

Under the new law, parties may agree to *ad hoc* or institutional arbitration. The arbitral decision may be legal or *ex aequo et bono*. Arbitral proceedings follow basic principles such as Kompetenz-Kompetenz and autonomy of the agreement. The arbitration clause and the submission agreement are accepted. The tribunal has the power to adopt interim measures. Parties may seek recourse in an action to set aside an award. Private individuals and public entities are free to enter into domestic and international arbitration agreements to resolve their disputes, with the exception of certain restrictions depending on the arbitration subject matter. Interestingly, under the Statute, state entities that are parties to an international arbitration agreement may not resort to their domestic law to challenge their capacity to be a party to an arbitral proceeding or the arbitrability of a certain controversy.

Since the Arbitration Statute was recently enacted, and entered into force in October 2012, there are not yet any reported cases specifically referring to its new international arbitration provisions. It therefore remains to be seen how the Colombian courts will apply the new arbitration law. ■

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THE UNITED KINGDOM AND IRELAND

- NEW REGIONAL ARBITRAL SEATS
- IS WHISTLEBLOWING CAREER SUICIDE?
- UNLOCKING DISPUTES: LONDON STAYS AHEAD

Can recently-launched efforts by Scotland and Ireland hope to displace London's arbitral crown? Highly unlikely as that may be, the practitioners tell **Edward Machin** that there's nothing like healthy competition

PICKING UP THE BALL

While London's streets may not actually be paved with gold, it must sometimes feel like that for the city's international arbitration practitioners. Home to one of the world's leading arbitral institutions, the **London Court of International Arbitration** (LCIA), a feast of multi-million pound briefs keep their diaries block booked for months – and even years – at a time.

The UK government's much-publicised Unlocking Disputes campaign, which is successfully promoting the city as the global dispute resolution forum of choice for rich foreign businesses, has only increased that dominance. So you'd have to be very brave indeed to launch an institution on London's doorstep.

In March 2011, the **Scottish Arbitration Centre** (SAC) did just that. Boasting three suites in Edinburgh's historic city centre and an institutional arbitration clause (its website includes LCIA and ICC clauses, both stipulating Scotland as the seat), the SAC has also been heavily promoting its wares on the international conference circuit, with appearances at events from Brussels to Bogotá.

Dublin opened its own hearing centre, the **Dublin Dispute Resolution Centre** (DDRC), in November 2011. A joint initiative of the Irish Bar Council and the Chartered Institute of Arbitrators, the launch of the facility – consisting of four specifically-designed arbitration hearing rooms, with five additional meeting rooms and ancillary videoconferencing and transcription services – seeks to build on recent efforts by the local Bar to pitch Ireland as a viable, cheaper alternative to London and Paris.

Renewed energy

On its face, Scotland seems the more attractive proposition. A new law, enacted in 2010 and based largely on the English Arbitration Act, albeit with tweaks including a statutory confidentiality provision and restricted appeal mechanisms, was designed to appeal to lawyers and clients familiar with the English statute. Similarly, a hybrid court culture comprising aspects of common and civil law – much like international arbitration itself – and the country's globally-renowned oil and gas industry ought to make Scotland a seat with much to offer.

Yet the practitioners aren't so sure. Like others interviewed for this article, **Louis Flannery**, the London-based head of international arbitration at **Stephenson Harwood**, is quick to commend the efforts of those behind the Scottish initiative as "a laudable attempt to put the country on the map." Indeed, Flannery has publicly sung the centre's praises, and says he will continue to do so.

When it comes to the crunch, though, he's hardly alone in tempering that praise with a large dose of realism. "There isn't any magic about London as a centre, and I say that as someone who's steeped in London arbitration," Flannery explains. "Your clients in this respect are the drafters of the international contracts – the corporate lawyers, in other words. And a corporate lawyer at **Freshfields** or **White & Case** negotiating on a deal with a ▶

Chinese entity is simply not going to choose Ireland or Scotland as a seat above London."

The spectre of costs, currently a hot-button issue among international arbitration users, isn't seen as working against London, either. While Dublin and Edinburgh both offer cheaper hotel rates, for example, corporate clients aren't generally driven by a need to scrimp on sleeping arrangements; as always, the greatest costs are those of the tribunal itself. And the LCIA boasts something that money can't buy: a first-class reputation and pool of arbitrators from which to choose; a widely-praised administration and strong international presence, to boot. For many corporates it is, as Flannery says, "simply the first choice."

Nic Fletcher, who leads **Berwin Leighton Paisner's** international arbitration group, likewise believes Scotland is facing an uphill battle. "Does a Scottish arbitration centre offer anything that isn't already being offered by the LCIA or the ICC? The answer to that is: not really. I certainly commend the initiative, but I think it's going to be a struggle for them to attract business," Fletcher says.

If such sentiments make grim reading for **Brandon Malone**, the SAC's chairman and driving force, he certainly isn't showing it. A partner at **McClure Naismith** in Edinburgh, where he leads the firm's construction and arbitration practice, Malone says his role isn't solely aimed at securing high-value, cross-border work for the institution. "A key objective is to grow, and then embed, a culture of arbitration in Scotland, which we don't have currently as our regime wasn't really fit for purpose until the passing of the Arbitration (Scotland) Act in 2010," he explains.

And what of the charge, made by a senior London arbitration figure speaking privately to *CDR*, that those involved in the Dublin and Scottish drives are doing so largely out of self-interest, given the profile boost – and lucrative arbitrator appointments – that are likely to follow? "I'd be amazed if anyone does something like this for *purely* altruistic reasons, but I absolutely believe in the project and I want to see the growth of arbitration in Scotland. I could add that as chairman I'm not eligible to be appointed as an arbitrator by the Centre," counters Malone. He adds: "It's not about competing with London; it's about the potential benefit for businesses, the professions and the wider economy here."

To that end, Westminster's much-trumpeted Plan for Growth of UK Legal Services, launched in March 2013, identified growth in Scottish dispute resolution as a key regional economic driver and expressed its continuing support of the SAC. The institution's pipeline is starting to fill, too. Malone says that anecdotally there has been a "significant growth" in the use of arbitration in Scotland – primarily for domestic matters, but with international parties also increasingly in the mix.

"We know that we are being written in a fairly high number of contracts by government and local authorities, as well as by commercial organisations, particularly in the renewables sector," he adds. "We're only two years off the ground, and it will take time for more people to write us into their contracts, and then for them have formalised disputes. We're under no illusions; these things are slow-burners, but we'll be pushing hard."

> "A key objective is to grow, and then embed, a culture of arbitration in Scotland, which we don't have currently as our regime wasn't really fit for purpose until the passing of the Arbitration (Scotland) Act in 2010"
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> Brandon Malone, McClure Naismith

Dublin down

Dublin's pitch is based largely on the DDRC, given that the city lacks an internationally-recognised arbitral institution. However, the UNCITRAL-based Arbitration Act 2010 – which drastically limits the ability of the country's already arbitration-friendly courts to interfere with the arbitral process – and Dublin's growing presence on the global legal stage mean it is no longer an entirely unknown entity.

Indeed, Fletcher says Ireland's status as a notional halfway point between Europe and the US – more than 1,000 American companies are based in the Emerald Isle, for example – offers perceived neutrality beyond that of Scotland. Yet even that will likely not be enough. "I think Dublin will get some work, and Ireland is regarded as being an arbitration-friendly jurisdiction, but I don't see it mounting a serious challenge to the LCIA," Fletcher explains.

David Herlihy, a partner at **Skadden** in London who specialises in international arbitration and litigation, nonetheless expects the city to make slow but steady strides. "Dublin will never replace London, but it's not seeking to do that," says Herlihy, who was born and raised in Ireland. "But everywhere has to start somewhere, and Ireland has made a very good start."

That has in large part been helped by the fact that, in the DDRC, Ireland can offer a viable alternative to established European hearing centres. Herlihy, for one, believes the DDRC's facilities – a self-described

> "A corporate lawyer at Freshfields or White & Case negotiating on a deal with a Chinese entity is simply not going to choose Ireland or Scotland as a seat above London"
>
>
> Louis Flannery, Stephenson Harwood

"purpose built centre which will operate as a 'one stop shop' for dispute resolution" – are on a par with many of those used in London. "If you look at the growth in arbitration, we are reaching a point where it can prove difficult to book the IDRC in Fleet Street at relatively short notice," he explains. "In that scenario the new Dublin hearing centre, whose facilities are more up-to-date, could prove to be very useful." And it doesn't hurt that, in traditional Irish style, the DDRC offers an on-site pub. Arbitration's thirsty work, after all.

Flannery likewise believes there's something afoot in Dublin. "I think Ireland stands a better chance than Scotland, if only because the Irish have had a lot of money thrown at them by the European Union," he says. Dublin is also being chosen to host some of the industry's flagship events: the International Council for Commercial Arbitration held its 19th conference there in 2008, commemorating the 50th anniversary of the signing of the New York Convention, while the IBA's Annual Conference rolled into town in 2012. According to Flannery, those events – which collectively saw some 5,000 practitioners descend on the city – gave Dublin's arbitral community a "much bigger profile outside the city than they would otherwise have enjoyed."

Still, if neither takes a single dispute from London and the LCIA, the Irish and Scottish efforts won't be in vain. That's because they will undoubtedly help raise the profile of international arbitration among those countries' young practitioners – a culture very much embedded in London, Paris, Stockholm and Geneva. Herlihy expects that in five years "we will see a lot more lawyers coming out of those jurisdictions who are well-versed" in arbitration – notwithstanding that they may have to leave Celtic shores to work on the juiciest cases.

"Part of the reason that counsel can be reluctant to use a 'new' arbitration seat is that they may not know enough well-versed arbitration practitioners in that jurisdiction," he says. "There is, however, a growing body of lawyers in Ireland with excellent arbitration credentials. Hopefully these developments will raise the consciousness outside of Ireland of local practitioners who they can trust with a dispute if an arbitration found its way to the Irish High Court." ■

Ben Rigby examines how the campaign to promote London as a centre for international dispute resolution has fared – and the challenges it faces, both at home and abroad

Grayling's growing PAINS

Being Chris Grayling must be a thankless task. Not just in being roundly criticised for his department's uncertain implementation of Lord Justice Jackson's reforms of civil justice, but also for a sequence of unpopular – and populist – proposals on judicial review and criminal legal aid.

His appearance on a stage in March 2013, at which commercial disputes lawyers were gathered with City grandees, the Bar and the Law Society, must therefore have felt like a welcome relief.

For here was an audience that would surely appreciate what Grayling, as Lord Chancellor, was doing to support what UK Prime Minister David Cameron called "the need for Britain to stay ahead in the global race."

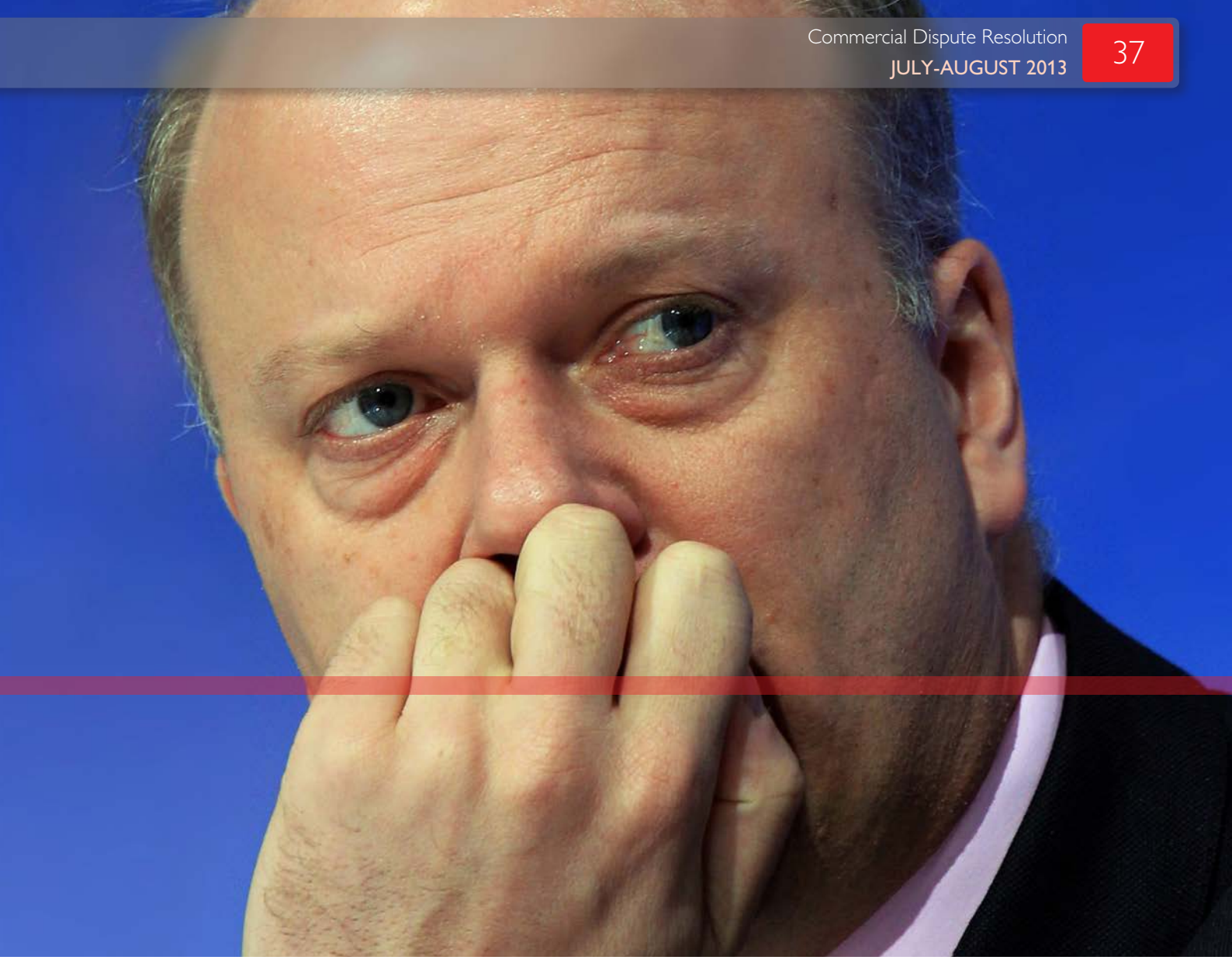
Grayling found himself at **Allen & Overy's** London office for an update to the Ministry of Justice's Plan for Growth. The Plan sets out a blueprint for promoting UK legal services internationally, working with the Ministry of Justice and UK Trade and Investment (UKTI) alongside the professional bodies and law firms to promote international growth and stability.

That plan was in part responsible for the government's contribution to London's campaign to promote itself as a centre for legal dispute resolution, called 'Unlocking Disputes.' Grayling's predecessor, Ken Clarke QC, had vocally supported the campaign. Grayling reiterated the government's commitment, saying that trade could not exist without a strong legal framework that businesses could have confidence in.

He said: "British law has an unrivalled reputation in the world: a decision from a UK court carries a global guarantee of impartiality, integrity and enforceability." These were key reasons, the audience heard, why parties to international contracts chose to resolve their disputes in the High Court in London, alongside English being the main language of international trade.

Britain by the numbers

Grayling praised the judicial resolution of disputes in areas like finance, business and property, highlighting savings to businesses up to GBP 1.4 billion a year. Yet he was not the only minister to do so. UK trade and investment minister, Lord Green, said that legal services



were "an extremely valuable export in their own right as well as underpinning our strong commercial offer across a range of sectors."

TheCityUK's Legal Services Report, which was launched alongside the Action Plan, highlighted that the value of the legal services sector to the UK economy doubled in the last decade, from GBP 10.6 billion in 2001 to GBP 20.9 billion – or 1.6% of GDP – in 2011. Chris Cummings, chief executive of TheCityUK, said that while London was not immune to challenging economic conditions, the legal services market was remarkably resilient, making a significant direct contribution to the UK economy over the last decade.

Gross fees generated by law firms in the UK had increased by 5% in the financial year 2011/2012 to GBP 26.8 billion, with the fee income of the largest 100 law firms in the UK also increasing by 17% in the same period. Legal services had also made a positive contribution to the UK's balance of payments, with a trade surplus of GBP 3,304 million in 2011, up nearly three times from a decade earlier.

There was scope for further growth, said Lord Green, with "real opportunities in emerging economies where there is an increasing need for high quality legal service providers." For his part, Cummings also emphasised that the international dimension was increasingly important, saying "Unlocking Disputes is opening up opportunities in jurisdictions ranging from Brazil to Vietnam."

Grayling himself outlined that making the UK the destination of choice for international legal services, and countries opening their legal sectors to foreign law firms, brought mutual benefits. He said that a fully liberalised Indian legal market could double its value to the Indian economy, as well as providing opportunities for British business.

Cummings said the joint efforts following the Plan for Growth had showcased "the strengths of the UK's legal services in Russia, Singapore, China, South Korea and Turkey," while the fact that "companies are twice as likely to choose English law over other governing laws for arbitration" meant the Unlocking Disputes campaign had already considerable momentum on which to build.

Progress through partnership

Grayling thanked his audience for their "success in delivering all the outputs promised" under his department's first Action ▶

"Any initiative that strengthens London's reputation will be music to the ears of UK forensic accountants and expert accounting witnesses"

Andrew Maclay, BDO

Plan, saying he was "very pleased that all the key organisations have worked so efficiently together since 2010 to promote this jurisdiction abroad." He hailed the Unlocking Disputes campaign as "a notable success," while Lord Green welcomed the fact that UKTI would continue its collaboration to "further cement our position as the jurisdiction of choice."

Ted Greeno, soon to join US firm **Quinn Emanuel** in London, told *CDR* last year that "support from UKTI and in the embassies is very important as part of the MoJ's published Action Plan." So how have the professional bodies taken part in the campaign? Profile-raising activities have been undertaken by the former Lord Mayor of London, **Sir David Wootton**, while his fellow Allen & Overy compatriot, ex-Law Society president **John Wotton**, was also a vocal supporter of the Action Plan.

That drive has been followed up by Wotton's successor, **Lucy Scott-Moncrieff**, who has promoted English law in emerging markets from Brazil to South Africa. Scott-Moncrieff's colleague, deputy vice president **Andrew Caplen**, said at TheCityUK's launch event: "Trade and investment are central to re-generating strong, sustainable and balanced growth in the UK and overseas. This cannot be done without solicitors."

Similarly, the Bar Council's extensive series of trade visits, spearheaded by key commercial barristers like 2012 Bar chairman **Michael Todd QC**, has seen it travel to the USA, Dubai and the Cayman Islands. The organisation has also led initiatives in which it has encouraged young lawyer exchanges between Russian, Chinese and Korean young lawyers and the English Bar.

The international earnings of the Bar have risen more or less steadily over the last 10 years, to around GBP 200 million, as have the number of barristers engaging in international practice. Bar chairman **Maura McGowan QC** has extolled the virtues of the Bar's business model, which she said provided for low overheads and a personal, high-quality service.

Despite a history of occasional conflict between the bodies, the Unlocking Disputes campaign and the Action Plan have seen the professions largely work together successfully. Both the Law Society and the Bar Council have been a key driver of some initiatives, such as English Law Week Moscow, seeking to significantly raise the awareness of the wealth of legal expertise available to Russian clients.

In 2013, the Week will be held from 19-22 November in Moscow, made up of a two-day conference from 19-20 November (with the Bar Council), followed by specialised English law training workshops from 21-22 November, accompanied by promotion at events aimed at developing Russia's own such systems.

Speaking at the British Consulate in St Petersburg in May 2013, as part of the city's International Legal Forum, Scott-Moncrieff highlighted the ways Russian litigants are already using UK courts to settle disputes. That included their use – such as in the recent *Berezovsky v Abramovich* litigation – of the Rolls Building, but also in using English law within commercial cases in foreign jurisdictions, including Russia.

As Scott-Moncrieff indicated in her speech, more international and commercial disputes took place in London under English law than in any other city in the world, and 90% of commercial disputes handled by London law firms involved an international party. She noted that parties, particularly commercial ones, "can predict, with greater certainty than in many civil law systems, whether a proposed course of action is likely to be lawful or unlawful giving them a more detailed context in which to make any decision." That is "even more appealing for litigants for whom the rule of law in their own countries is unpredictable, or if judges are inexperienced in handling these types of cases," she added.

Grass roots backing

Support from within the City has been longstanding. Greeno says: "This is the

first time that the government has involved itself in promoting legal services abroad and there is no doubt that it can make a real difference." He notes that key target audiences had been identified and targeted in a number of ways, including through Lord Mayoral visits, TheCityUK and through sponsor firms and chamber and their overseas offices. "The Unlocking Disputes website is also an important tool and we are measuring and identifying the source of hits on the site, which are coming from all over the world," Greeno adds.

The mainstream media is increasingly turning its attention to the campaign's progress. For example, a recent *Financial Times* supplement on London's economy examined the capital's attraction as a legal centre for international disputes.

A spokeswoman for the London Solicitors Litigation Association also says there was broad support for this initiative, especially among those with a significant international client base, although "there has not been much recent contact by TheCityUK with LSLA members." The LSLA nonetheless acknowledges that "there is most commercial resonance with overseas clients who are in doubt about where to litigate. Practitioners certainly appreciate the campaign." The spokeswoman adds that "some LSLA members spend up to half of their time litigating in London on behalf of international clients."

Nor is support limited to law firms. **Andrew Maclay**, a director at **BDO**, suggests that "as with all symbiotic relationships, where the lawyers go, expert accounting witnesses follow." He adds: "Forensic accounting work and other litigation support industries such as e-discovery depend on the success of London as a centre for international dispute resolution."

According to Maclay "as far as accountants in international litigation go, London lists more expert witnesses in the directories than any other city. So any initiative that strengthens London's reputation will be music to the ears of UK forensic accountants and expert accounting witnesses."

Yet the work to promote legal expertise cannot stand still. New dispute resolution centres are springing up around the world; some present opportunities while others more of a threat, notably when closer to home.

For example, German courts are now offering international litigants proceedings in English language. Maclay also notes the promotion given to Paris, which touts itself as "the home of international arbitration." He says: "Mauritius has just reinvented itself as an aggressive international arbitration centre, while Singapore has enjoyed rapid growth and even New York is getting in on the act, launching the Manhattan International ADR centre to maintain its share of the market."

As the *Financial Times* itself noted, London's reputation may be under threat by jurisdictions such as Singapore. That country's arbitration centre had 235 new cases in 2012, more than three times the number in 2001. **Melanie Willems**, an international arbitration partner at **Chadbourne & Parke** in London, told the *FT*: "One also needs to distinguish between the venue of arbitration proceedings and the 'governing law' of the contract in dispute. Singapore is an attractive venue [but] you can quite easily export a London arbitration team to Singapore to run an English law case there."

Keeping costs down

Informing in-house counsel helps to counteract hesitation among foreign parties to commit to dispute resolution in London – notably by providing easily accessible information on how costs can be controlled. As the LSLA notes: "Some believe far too little is being done by the judiciary to control unnecessary costs in litigation. If addressed, this would do far more to promote the utility of the City as a forum for resolving disputes than any other form of general publicity."

Costs are one thing, but gaps between have and have-nots are another. One facet of TheCityUK's event was the largely negative reaction it received from sections of the criminal Bar, responding to the announcements on Twitter. There are those who say that the campaign promotes commercial dispute resolution for corporates at a time when access to justice for most ordinary people is being diminished or reduced.

Yet McGowan disagrees, saying the organisation was "committed to effective access to justice and has been at the forefront of campaigns to oppose legal aid cuts which will have a devastating impact on people without the means to pay for legal representation."

She adds: "Part of the case for the importance and relevance of the English legal profession is the enormous contribution it makes to UK PLC and the important role it plays in promoting the rule of law all over the world. We make no apologies for continuing to promote that hugely important area of the profession's work."

McGowan said England's "world leading justice system" was "admired for its excellence and integrity all over the world. It should properly be open to those with or without means, but we must also understand that part of our system's attractiveness to privately-funded clients is the fairness and accessibility at all levels for which it has historically been known." She concluded: "If that model was to be undermined or destroyed by government cuts, that would also represent a significant challenge to our international success."

The Law Society's head of international, **Julia Bateman**, echoed those sentiments, saying: "The plan is not about justice for the rich and none for the poor. It is about supporting the growth of the legal sector as a whole, which contributes over GBP 26 billion to the UK economy, including a trade surplus of around GBP 3 billion. It is about supporting trade and investment, which are central to growth that benefits everyone."

She added: "The pursuit of one need not be at the expense of the other. Promoting London as a centre for excellence and the increased income that produces should deliver long-term benefit for all." Long may all hope that it does. ■

"British law has an unrivalled reputation in the world: a decision from a UK court carries a global guarantee of impartiality, integrity and enforceability"

Chris Grayling,
Lord Chancellor of Great Britain

Will other jurisdictions follow the lead of the US and provide bounties for whistleblowers? **Tom Moore** reports

READY TO BLOW

Disloyal. Troublemakers. Individuals with vendettas. Words that **Sherron Watkins**, the former vice president of corporate development turned whistleblower at corporate crime poster child Enron, says are still used to describe informants. The business world was supposed to change after the largest accountancy fraud scandal ever to hit the US, with 24 executives convicted and shareholders losing billions of US dollars. Not so: the downward spiral that consumed the financial services industry in 2007 has resulted in reams of cases against the likes of **Barclays**, **RBS**, **Credit Suisse**, **JP Morgan**, **Deutsche Bank** and **Citigroup** over claims that they mislead investors. Scandal has not been restricted to the financial services industry, either, with **Facebook** and others having faced similar claims.

Regulatory reform and enhanced whistleblowing protection for employees followed early corporate crises. Most significantly, the Sarbanes-Oxley Act

increased penalties for attempting to defraud shareholders, a reaction to a number of major corporate and accounting scandals in the early 2000s, including Enron, **Tyco** and Worldcom. With the **Department of Justice** and **Securities and Exchange Commission** in the US wielding enforcement power unrivalled by prosecutors in other countries, the Administration is now focused on luring the whistleblower who sits behind the wall of silence. Offering a 10% to 30% bounty for fines that arrive off the back of whistleblower information, the Dodd-Frank Act was signed into federal law by President Barack Obama in July 2010.

The Act is already enticing whistleblowers able to detect and reveal the largest frauds. While telling the truth is admirable in its own right, anonymity rules in place across the majority of Europe and the US rarely protect the corporate tipsters. Indeed, protection has increased since Enron, but whistleblowers still face the two obstacles that Watkins encountered: being ignored by the company or the authorities, pushing them to put their face to the claim, or leaks to the press.

Shooting the messenger

It is a catch-22 situation, with Watkins saying she was "ignored when anonymous but dismissed as one lone voice" when she did come forward. Enron's law firm, **Vinson & Elkins**, "sent a memo about the pluses and minuses of firing people who raise accounting concerns," Watkins says, adding that Andy Fastow, the former chief financial officer at Enron who served a six-year sentence for concealing the company's massive losses, "wanted me fired within a week of coming forward."

Despite her desire that companies "ought to be focused on what's causing rules to be broken instead of shooting the messenger," the antipathy towards whistleblowers has remained the norm on a global scale. Academics at Greenwich University in London found that 74% of 1,000 workers who approached a UK whistleblowing helpline between August 2009 and December 2010 had complained to their line manager about a serious concern with nothing being done as a result. The study also revealed that 15% of the workers calling the line, run by employment charity Public Concern at Work, were eventually sacked from their jobs while many others were bullied, ostracised or victimised.

These risks scare the whistleblower from pursing their lips to the metal as it results in the death of their chosen career path, striking out time spent in education and any hard work to get to the rung they have reached on the ladder. While Watkins has been able to carve out a fairly lucrative living on the conference circuit due to the notoriety of Enron, she has been unable to return to the corporate world in which she was hitherto successful, as "organisations want to keep you at a safe distance," she laments.

"I've seen a tenfold increase in high level people, with inside information, who are now willing to take the risk"

Stephen Kohn
Kohn, Kohn & Colapinto

Those in the US have realised that professional and personal damage will likely result from their honesty. However, the Dodd-Frank's reward programme provides economic incentives that serve to replace the career of the whistleblower so that they, and their families, are not punished financially. "This is the most important breakthrough in whistle-blower law ever and Europe is radically behind," says **Stephen Kohn**, a name partner at **Kohn, Kohn & Colapinto** in Washington, DC.

Watkins says the bounties "are attracting the legal community to the aid of whistle-blowers, with people receiving good advice." Indeed, a cottage industry of law firms advising whistleblowers is emerging, while Kohn says his firm has "seen a massive leap in the number of people blowing the whistle. I've seen a tenfold increase in high level people, with inside information, who are now willing to take the risk."

While Kohn, Kohn & Colapinto has solely represented whistleblowers for 30 years, other firms have taken notice of Kohn's eye-catching representation of Bradley Birkenfeld, who was handed a USD 104 million reward from the Internal Revenue

Service in September 2012. Birkenfeld's windfall, given for his contribution of insider information on an illegal offshore banking scheme ran by Zurich-headquartered **UBS**, is largest reward ever given to an individual whistleblower in the US. Kohn says that this development has given the whistleblower unprecedented legal support, with "individuals now able to come and assess the bounty before deciding whether it is worth destroying your career for."

Safe? Don't bank on it

Although the figure may seem excessive to many, Birkenfeld exposed a USD 20 billion tax evasion scheme with documentation that landed UBS a USD 780 million fine. A wise investment by the US? It seems so, given the size of the fines that the SEC and DoJ are handing out, and the early signs of success. Indeed, activity in the US has already pricked the ears of countries eager to guard against shady corporate behaviour that contributed to the financial crash.

The American approach, the only country to offer rewards for whistleblowers other than South Korea, which has a reward programme capped at USD 2 million if the whistleblowing has served the public interest, is favoured by **Martin Wheatley**, head of the UK **Financial Conduct Authority** (FCA). He came out in favour of cash incentives earlier this year, and political support is slowly gathering, too, with Conservative MP Julian Smith having called on the Parliamentary Commission on Banking Standards to mirror developments in the US.

With 30% of foreign whistleblowing tips to the Securities and Exchange Commission coming from the UK as foreign citizens look to bite the carrot not offered at home, Smith says "the US taxpayer will continue to benefit from fines imposed on UK based financial services firms if no action is taken in the UK." While the US regulators have forged an iron fist, the UK still has a limp wrist. Dwindling regulatory budgets and prosecution errors don't encourage whistleblowers looking for a safe haven, particularly when other options come with a cheque. Splitting fines with whistleblowers would strengthen evidence without costing the taxpayer, but the size of fines handed out by the FCA and UK Serious Fraud Office could lack allure.

Kohn says that proposals "won't work unless they are large enough to entice highly placed professionals to risk their entire career." The US is able to fight dollars with dollars in order to attract people earning substantial salaries. Former director of the SFO, **Robert Wardle**, says British regulators "need to look at the size of fines and make it more of a deterrent," and an increase would create a structure in which financial rewards could flourish. "I'm in favour of fines that make people stop and think, particularly in the financial services sector where, if a financial reward was offered, which there needs to be as it is in the public interest, more people may come forward," he says.

Having led the watchdog for five years, Wardle admits that "very few" whistleblowers passed information to the SFO during his tenure. England is struggling to offer basic protection, with employment minister Jo Swinson recently criticising regulators for failing to protect whistleblowers from the sack or being relegated to office purgatory. While a national instrument to safeguard individuals is gaining political support in the UK, and continent-wide reforms under consideration by the Council of Europe, improvements are not imminent with talks still between the grassroots. Recent changes to UK law, requiring information disclosures to demonstrate public interest and thus ending the misuse of whistleblower protection, pushes the cause further down the to-do list. While the change will end bankers 'disclosing' breaches of their own contract over bonus

"New standards are slowly becoming embedded but we have a long way to go"

Lord Woolf

disputes, tightening protection around where it was always intended to be. **Tom Kerr Williams**, an employment partner at **DLA Piper** in London, says "the changes and lobbying by business groups means that incentivising whistleblowing is not high on the agenda."

Less English, more American

Support for the whistleblower is, however, high on the agenda for businesses themselves, eager to avoid the fines and reputational damage. **Lord Woolf**, Master of the Rolls in the 1990s and Lord Chief Justice of England and Wales in the 2000s, was head of the ethics committee at **BAE Systems** after the DoJ fined it USD 400 million in 2007 for bribing Saudi officials. He says "there has been a huge shift in the attitudes of big business."

As part of this shift, Lord Woolf says companies now "know that behaving ethically means having a system in place to support whistleblowers and not retaliate against them." BAE Systems implemented all 23 recommendations in Woolf's report, and has so far proved to be a successful turnaround after consecutive scandals. Indeed, Transparency International, the independent civil society organisation, ranked the UK-based company fourth out of 129 companies in its latest defence industry anti-corruption index. A spokesperson for BAE Systems says "we have stepped away from deals when they haven't been right and removed all third-party agents that we previously relied upon to make introductions."

An ethics helpline was established with harsh penalties for those found to be breaking the new ethical code. It is increasingly being used: in 2012, 1,024 enquiries were reported to ethics officers via the helpline, with 292 employees dismissed as a result of internal investigations. While the majority of these complaints were employment-related, 21 people passed on information relating to ethical practices and international business issues. It seems staff are increasingly happy to blow the whistle; a recent report on ethics in the banking sector by the Chartered Institute of Personnel and Development, a professional association for human resource management, found 38% of workers in the sector see enhanced whistleblowing protection for staff as the most effective means of culture change. DLA Piper's Kerr Williams says that the large percentage of individuals in the financial services sector wanting improved whistleblower protection shows "people still feel that they can't raise issues. It also suggests there is more of a culture of keeping things secret than commentary leading up to UK whistleblower changes may have suggested."

However, change is accelerating in UK's financial services sector, due to pressure from regulators and politicians alike, raising the possibility that corporate crime and accountancy tricks will be discovered and fixed before investors bring disputes and prosecutions take place. Indeed, self-regulation is the name of the game, with just under a third of the Public Concern at Work survey's respondents commenting that awareness of procedures for deterring and/or disciplining poor behaviour has increased and 17% reported the introduction of new procedures to support whistleblowing.

Lord Woolf says: "New standards are slowly becoming embedded but we have a long way to go. We have to get to a situation where the employer appreciates it is extremely important, for their own wellbeing, that a whistleblower feels able to say what needs to be said." Government officials are well aware that reform is needed, and if Dodd-Frank continues with its early success then the calls for information bounties will grow louder. To some extent, Europe needs to walk with protection before it can run with financial incentives. However, if the continent waits for too long, the long arm of the US regulators may continue to stretch, leaving them as mere piggy-backers on American cases. ■

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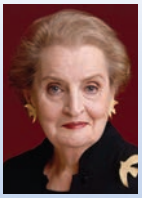

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E-DISCOVERY AND COMPLIANCE

- THE DATA DILEMMA
- DISCOVERY AFTER JACKSON
- LIBOR AND PRIVATE LITIGATION

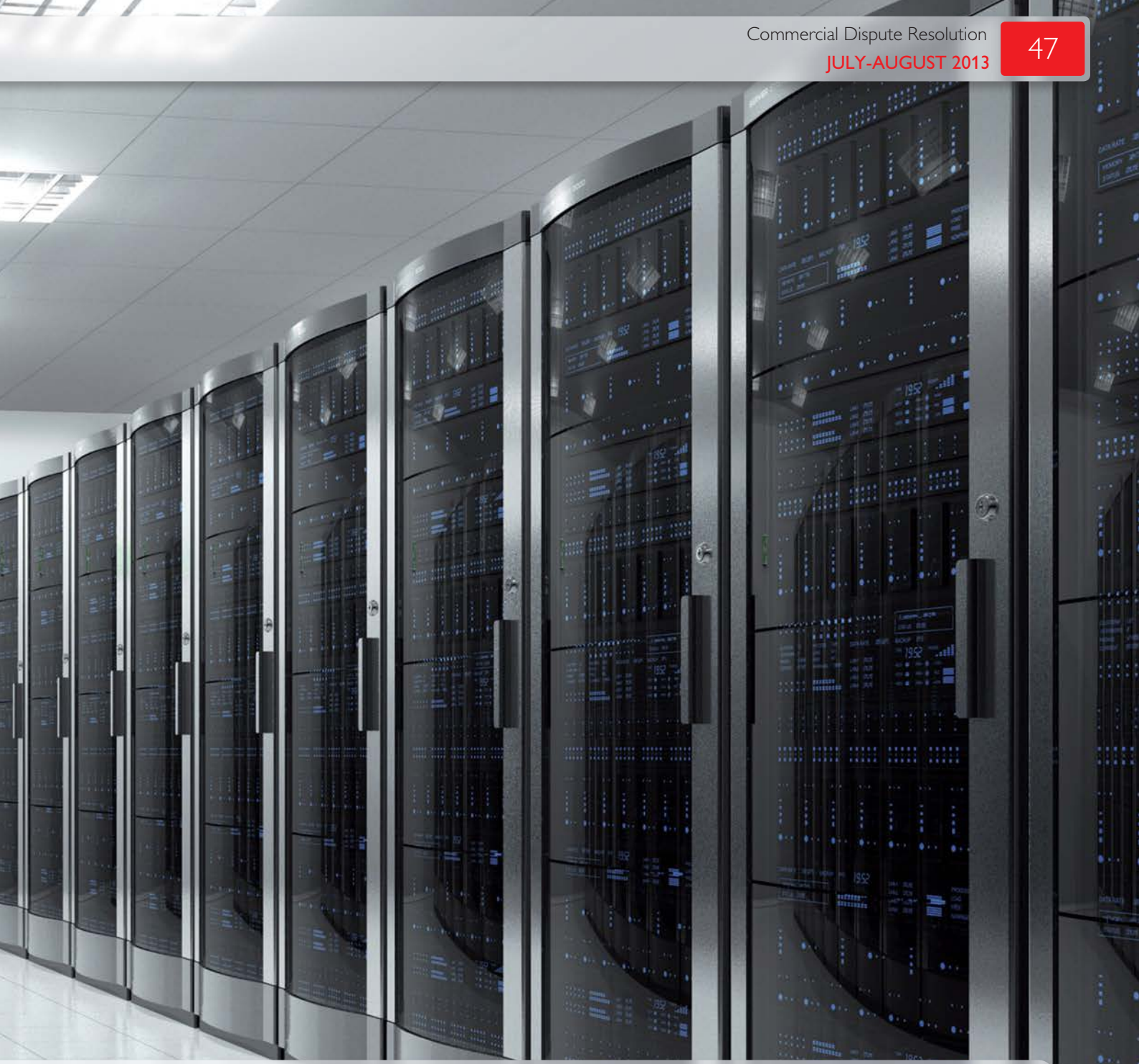
The corporate world is having to deal with ever-greater volumes of data, and the prospect of e-discovery is daunting for many. But, writes **Fraser Allan**, it's not all bad news

Preparing for e-discovery in the age of

BIG DATA

In the 1950s, computer data was stored on punch cards (which themselves had already been around long before the invention of the computer), strips of cardboard or paper which the computer perforated with a pattern of holes representing the data and could then be read back by scanning the holes. However, they could store only a few kilobytes of data at best, and were not reusable. It didn't take much data to create roomfuls of the things, and government departments and companies alike had to learn quickly how to choose what was worth keeping and what wasn't.

The advent of magnetic tape and hard disks for archival storage in the 1950s was a breakthrough in both the speed and volume of data that could be saved, exponentially outstripping the punch card and allowing



megabytes of data to be stored in relatively little space.

Since then, the cost of storage has plummeted at rate even greater than its capacity has grown. In the 1960s and 1970s the storage of just a few megabytes cost thousands of dollars, while in 2013 a one-terabyte (a million megabytes) disk drive can be bought for around USD 50, and a three-terabyte tape for about USD 25.

The result of all this is that in the last several years a tipping point has been reached: the price of storage is now so low that the value of even the most inconsequential mass data is greater than the cost of keeping it. Perhaps the most publicly-discussed manifestation of this is the recent revelation that the US government has been capturing and storing gargantuan volumes of telephone and internet data – not to analyse on the fly, but to be able to sift through later. It seems that its reason for doing so was simply because it found itself able to do so relatively cheaply, if the USD 20 million annual cost of the so-called PRISM programme alleged by whistleblower Edward Snowden is to be believed.

Waking up to new realities

Corporations – thankfully for mostly less nefarious reasons – are now behaving in much the same way. Where backup tapes and drives were once re-used to keep costs

down or disposed of due to the space they took up, everyone these days seems to be intent on keeping everything, much for the same reasons as the US government is stockpiling data – because it's now both technically possible and cheap enough. And in today's era of e-discovery, the risk reduction gained from retaining and safeguarding data – no matter how trivial or inconsequential it may seem – is now greater than the cost of holding on to it. A few thousand dollars more for another tape or disk backup array to store millions of routine emails seems insignificant if just one sentence in one of those emails could later determine the result of a bet-the-company litigation.

So, storing data is cheaper than ever. But what many companies are yet to understand, or are having to learn about the hard way, is that the more you store, the more expensive any e-discovery exercise is likely to be, unless you implement strategies and policies that incorporate future e-disclosure requirements before litigation or a regulatory investigation. Simply adding to the virtual pile isn't only just an insufficient approach – searching through all that unorganised, unstructured data later on is almost guaranteed to be financially ruinous. **Nick Patience**, director of product marketing and strategy at **Recommind**, a US-based technology firm which specialises in e-discovery, search and information governance technology, says: "If you're not prepared, each investigation or litigation event becomes a firedrill which tends to get more and more expensive each time you go through it."

Bob Tennant, Recommind's CEO, says that for the unprepared, things can only get worse. "We've reached an inflection point in the history of information," he says. "Ninety per cent of all data on the planet was created in the last two years, and the cost of managing and organising it all is becoming unsustainable. Manual approaches to information governance are failing. Employees are wasting time and money searching for information and re-creating content they couldn't find. Legal staff can't respond quickly to litigation or regulatory demands. It is difficult for executives to get at the information they need to create value and make good business decisions. Organisations are desperate for better ways to find, index, understand and act on the huge amounts of data they generate every day."

According to **Michael Madden**, managing partner and litigation head of **Winston & Strawn's** London office, companies on the whole understand the need to adopt new strategies to meet the legal challenges of Big Data, but that process is in practice proving to be a hesitant one for many. "There's a whole cultural change going on that still has a way to go," he says. "The people leading that change tend to be corporate counsel, but they typically have a lot else on their agenda and often do not have the time or resources to ensure compliance with (for example e-mail) policies and best practice. As a result, this sort of thing tends to become a priority only after a dispute has arisen, and by then of course it's too late."

"The train has left the station, and it's now up to the purveyors of predictive coding tools to prove that the risks one would naturally assume to be involved in a computer making decisions for a human being are as low as they claim them to be"

Scott Cohen, Winston & Strawn

A few thousand dollars more for another tape or disk backup array to store millions of routine emails seems insignificant if just one sentence in one of those emails could later determine the result of a bet-the-company litigation

Hope in new technology

As discussed in the article overleaf, even the courts – which are often guilty of failing to move quickly enough with the times – have woken up to the fact that there is now so much data available that in addition to ballooning costs, too many cases have been bogged down by complex, wide-ranging e-discovery phases, risking a dangerous obfuscation of the very issues originally at dispute. The US and UK have finally introduced long hoped-for measures to cut the volumes of data that can be demanded of parties, or presented as evidence, which will hopefully in turn reduce costs while promoting a more methodical and targeted approach to e-discovery practices.

In addition to the courts' recognition of the problem, the technology firms are also responding, and in recent years the Next Big Thing has been a technology called predictive coding. This approach where large volumes of documents are processed using complex software algorithms and prioritised before being passed for human review – which is invariably the most expensive aspect of e-discovery. The idea is that the documents that are most likely to be of relevance will be reviewed earlier, thus eliminating, or at least drastically reducing, the needle-in-a-haystack problem.

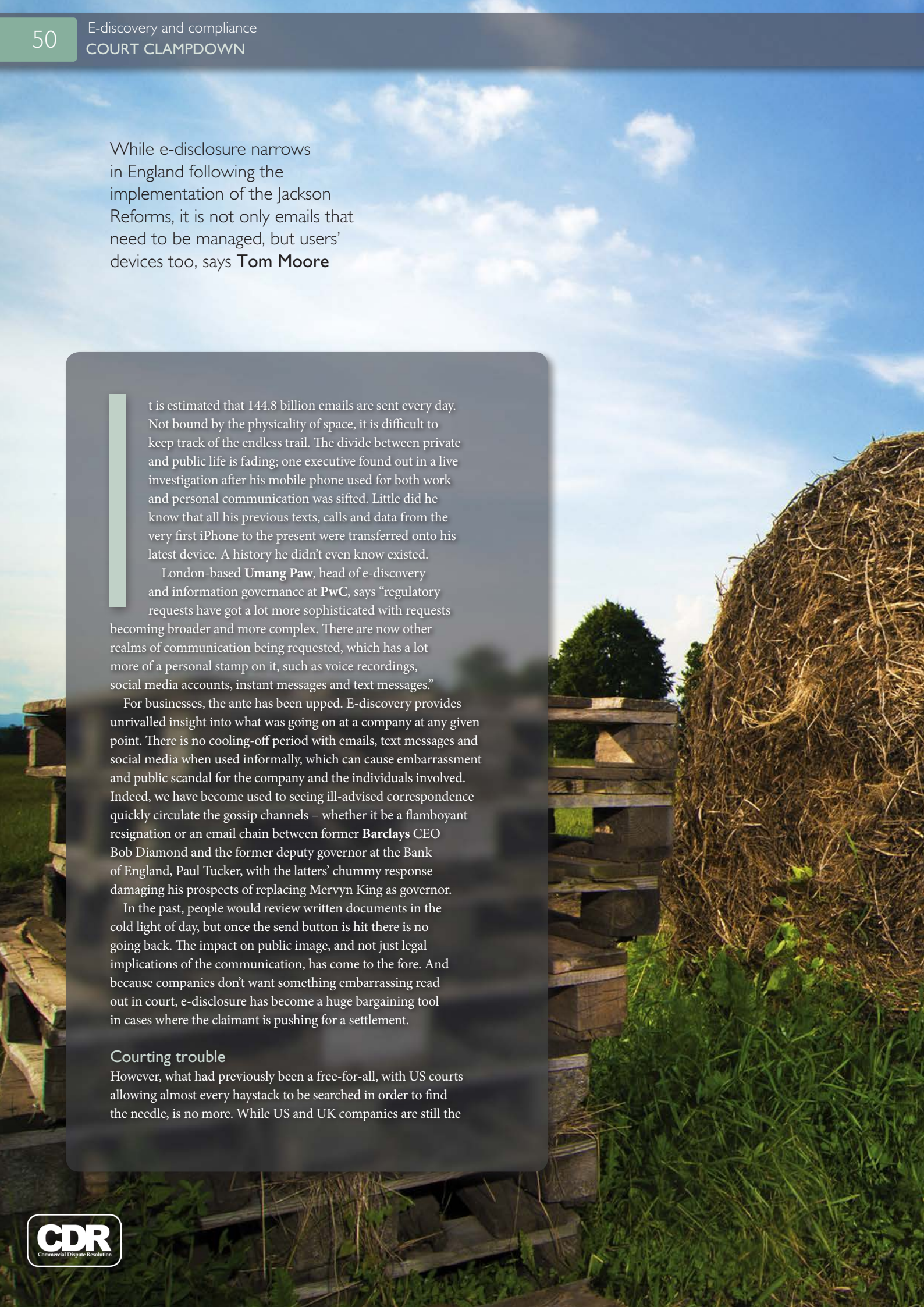
"Information overload is more than an annoyance; it's a chronic problem with serious financial consequences," says **Vivian Tero**, programme director for governance, risk & compliance at **IDC**. "The larger the organisation the more overwhelming the problem. Highly automated machine learning-based solutions will play an important role helping enterprises move toward proactive information governance."

Not all are convinced that predictive coding is quite ready to be relied on as a matter of course, despite it already having been court-approved in the US. **Scott Cohen**, director of e-discovery support services at Winston & Strawn, says that while he is cautiously optimistic of the technology's potential, its usage is still in its infancy. Regardless, he says, "the train has left the station, and it's now up to the purveyors of predictive coding tools to prove that the risks one would naturally assume to be involved in a computer making decisions for a human being are as low as they claim them to be."

A hidden upside?

But, as the aforementioned US government data-collecting activities have recently placed into sharp focus, vaccuuming up all those once-unstorable petabytes and exabytes of data not only serves as a repository for future e-disclosure requirements. They can have other value. Nick Patience at Recommind says: "One of the key things people probably need to understand about big data is not just volume, but the variety of data sources from which you can extract intelligence, whether from **Twitter** or your own Sharepoint implementation. There are ways of pulling in information from these sources that you previously thought couldn't be analysed."

So, to all the corporate counsel who are having a hard time convincing their boards to invest in getting the IT house in order: remind them that organising and structuring archived data isn't only a way to sensibly prepare for litigation or regulatory challenges – it might just also turn out to be a bigger commercial asset than they ever imagined. ■



While e-disclosure narrows in England following the implementation of the Jackson Reforms, it is not only emails that need to be managed, but users' devices too, says **Tom Moore**

It is estimated that 144.8 billion emails are sent every day. Not bound by the physicality of space, it is difficult to keep track of the endless trail. The divide between private and public life is fading; one executive found out in a live investigation after his mobile phone used for both work and personal communication was sifted. Little did he know that all his previous texts, calls and data from the very first iPhone to the present were transferred onto his latest device. A history he didn't even know existed.

London-based **Umang Paw**, head of e-discovery and information governance at **PwC**, says "regulatory requests have got a lot more sophisticated with requests becoming broader and more complex. There are now other realms of communication being requested, which has a lot more of a personal stamp on it, such as voice recordings, social media accounts, instant messages and text messages."

For businesses, the ante has been upped. E-discovery provides unrivalled insight into what was going on at a company at any given point. There is no cooling-off period with emails, text messages and social media when used informally, which can cause embarrassment and public scandal for the company and the individuals involved. Indeed, we have become used to seeing ill-advised correspondence quickly circulate the gossip channels – whether it be a flamboyant resignation or an email chain between former **Barclays** CEO Bob Diamond and the former deputy governor at the Bank of England, Paul Tucker, with the latters' chummy response damaging his prospects of replacing Mervyn King as governor.

In the past, people would review written documents in the cold light of day, but once the send button is hit there is no going back. The impact on public image, and not just legal implications of the communication, has come to the fore. And because companies don't want something embarrassing read out in court, e-disclosure has become a huge bargaining tool in cases where the claimant is pushing for a settlement.

Courting trouble

However, what had previously been a free-for-all, with US courts allowing almost every haystack to be searched in order to find the needle, is no more. While US and UK companies are still the

MORE NEEDLES, FEWER HAYSTACKS

biggest users of e-discovery, the scope has narrowed in US federal courts and district and commercial courts in the UK following the Jackson reforms. The upheaval in UK civil litigation included plans to cut the escalating cost of e-discovery, with all parties committed to agreeing costs and approach at the first cost management conference. This methodical approach requires parties to produce an accurate budget for the litigation, with courts ruling what is reasonable and proportionate.

Speaking at the Information Governance & E-disclosure Summit held in London in May, Master **Steven Whitaker**, senior master of the senior courts in the Queen's Bench Division at the Royal Courts of Justice, said the "idea is to establish scope rather than allow a party to go away and come back with a list in six weeks. It is a fundamental change in our attitude, and while judges don't find it easy to do, there are an awful lot of costs if disclosure isn't done efficiently."

However, he added that judges in his and the Chancery division will allow for flexibility "if parties agree that it is too premature to put a budget in and tell the judge." If judges didn't offer this, Master Whitaker expects lawyers to overestimate the cost of the case, largely due to not knowing what will turn up during disclosure.

This would risk striking out the lot. But with the reforms pushing all costs to be entered at the first case management conference and making it easier for judges to sanction strikeout, Master Whitaker says "a lot of judges will take a broader view that punishment will have to be there, but that it should fit the crime." He adds: "There is potential tension between filing a cost estimate at the same time as e-disclosure. There are a lot of pitfalls in this ▶

area but a more inventive remedy [to breaking cost rules] is to say 'if you win, you lose five per cent of costs,' not necessary strikeout."

While it would benefit claimants and disadvantage defendants, a sensible option would be for parties to agree to a slightly higher cost budget when there is a balance in the amount of work to be done on both sides. While litigation managers are unlikely to agree to higher fees, it would mean that 100% of the budget is reclaimed by the successful party, without losing 10% in front of the costs judge.

Losing weight

Costs management will focus lawyers on case fees, although the reforms are unlikely to lead to cheaper litigation in England. But law firms are innovating as an increasing number of clients look to carve up disputes to save money. A recent survey by PwC, *Corporate Choices in International Arbitration*, found that while most corporations retain outside counsel, a number of them now seek to do part of the legal work in-house, sometimes drafting submissions and sharing case preparation work, such as the document production process, with outside counsel. Speaking at the Information Governance & E-disclosure Summit, Professor Richard Susskind OBE said that "once you break down litigation into component tasks you see that work can be sourced in different ways."

Competing against in-house counsel in a climate of corporate cost-cutting, law firms are increasingly outsourcing or near-shoring support work related to e-disclosure. Following decisions by **Herbert Smith Freehills** and **Allen & Overy** to set up support service offices in Belfast, Northern Ireland, London-headquartered **Ashurst** in June 2013 announced the opening of an office in Glasgow, Scotland. **James Collis**, managing partner of Ashurst, says that in the quest for lower costs "the shape of the legal services market is changing and clients want their law firms to take responsibility for efficient sourcing of services." A spokesperson for the firm added that the decision "will reduce the cost of e-disclosure."

Magic Circle firms have found that clients are increasingly willing to switch lawyers to cut costs. **Wim Dejonghe**, managing partner at Allen & Overy, recently said that the firm's Belfast base "is enabling us to serve clients more flexibly, handling the high value work for them and holding on to work that might otherwise have gone to lower-cost rivals."

Despite this, studies in the US have shown that, when properly used, technology is more accurate than manual search and review, putting litigation boutiques that outsource work to technologists on the front foot. PwC's Paw says it is "the most costly and time consuming part of the e-discovery process."

Clients are also demanding alternative methods of reviewing documents, with analytics tools now able to replace the human element in the process. Indeed, some programmes have a 'find similar' option at a time when keyword searching has become a license to fish.

Much ado about nothing?

But is it actually worth the spend? **Volker Mahnken**, senior counsel at **Siemens AG** in Erlangen, Germany, says that e-disclosure doesn't provide "a lot of real benefit for either party but it costs a lot."

He explains: "Normally, in arbitration, there is a small amount of information we provide that ends up being used against us. Document disclosure is nowadays quite normal in international arbitration even if there is no link to a common law jurisdiction in the particular case. We send documents to the other side who already know a lot when it is a construction dispute, since they get a lot of information during the course of the project. In return, we end up asking for a lot of documents and the cost of the whole case escalates. In construction cases with large numbers of documents, disclosure can easily cost six-digit figures of euros or pounds."

The increasing volume of disclosure in arbitration is certainly one reason why arbitration has become so expensive and why Mahnken

"Regulatory requests have got a lot more sophisticated with requests becoming broader and more complex. There are now other realms of communication being requested, which has a lot more of a personal stamp on it, such as voice recordings, social media accounts, instant messages and text messages"

Umang Paw, PwC

says that ADR mechanisms like mediation, construction adjudication or dispute boards should be considered as an alternative.

Kevin Mescall, senior counsel at New York-headquartered firm **Lewis Johs**, believes lawyers and arbitrators find themselves in a tricky position. "E-discovery has gone too far in some cases and been hampered in others as not enough evidence was gathered," he says. "There are some attorneys that don't know when to stop and there are some attorneys that don't know when they should press."

While companies have complained about the cost of e-disclosure, Master Whitaker said that "it is a firm's fault if it has a poor IT system, and they should pay." Indeed, Siemens, like other large companies permanently caught up in disputes, is in the process of implementing a new system to manage its information. While this will cut costs in disputes, the primary motivation for the German engineering giant is to destroy information it is not required to hold and avoid disclosing information it doesn't need to.

Mahnken says "it isn't good to keep documents forever," and companies are gradually waking up to the need to do something about their data communications. As a result, the cost of e-disclosure should reduce as forensic service departments and law firms invest in new technology and management to meet demand. Companies will also be able to self-regulate, carrying out checks on their own business so the regulators don't have to. If data protection acts can be successfully negotiated, this will be a hugely valuable business function with regulators having the ability to automatically run regular searches on banks, to uncover regulatory breaches.

New technology such as **Autonomy's** IDOL automatically clusters documents by theme, and is able to detect the content of the email, whether the documents are off-balance sheet transactions or unauthorised credit card transactions, and separate them so that information is automatically deleted when the company is no longer required to keep the communication. As a result, law firms will have fewer documents to deal with and may be able to piggy-back off of new technology to cut the cost of litigation for clients.

However, Paw says that "most organisations are still grappling with information governance and who is responsible for managing an organisation's information assets. The lines of responsibility are blurred as to who is responsible, whether it lies with compliance, IT officers, management or the board."

And further problems exist, with **Joshua Holzer**, chief compliance counsel for global trade at pharmaceuticals firm **Pfizer**, saying that deletion is more complex than meets the eye. He explains: "There are documents that move all over the place, so in some cases companies are more conservative than they have to be. There is nothing you can do about that absent a tremendous amount of resources to track a particular document and tag it to be destroyed at this particular date. In some cases you keep things for much longer than you have to for the UK, but in the US it may meet the requirement."

bARBed wire

For Siemens, the demand for its data is increasing beyond national courts and into international arbitration. **Noah Rubins**, a partner at **Freshfields** in Paris who specialises in cross-border disputes, says that while "e-disclosure is not really common so far…document production is an increasingly burdensome part of international arbitration."

If that trend continues, with e-discovery narrowing in scope in court litigation while gradually widening in international arbitration, the costs of arbitration will comprehensively outstrip the cost of litigation. None of the major arbitral organisations have so far adopted requirements regarding e-discovery, meaning that discretion lies with the tribunal. **John Beechey**, chairman of the **ICC Court of Arbitration**, says disclosure needs to be "more focused, as things are often dressed up as issues when they're usually not." ■

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Programme *(as of June 2013)*

1.30pm **Registration**

2.00pm **Opening remarks**
Philippe Coen (ECLA President, Paris)

2.15 pm **Panel 1: The Legal Privilege's Saga**
From the *AM&S* and *Akzo Nobel* matters to the 2013 Belgacom's appellate local matter and the subsequent Dutch legal privilege case
ECLA Pro bono outside counsels' testimonials
Maurits Dolmans and John Temple Lang (Cleary Gottlieb Steen & Hamilton)
Philippe Marchandise (former ECLA President, Honorary chairman, Belgian Company lawyers Institute, Brussels)

3.00 pm **Panel 2: New breakthrough trends in company lawyering**
The new positioning of the legal function in modern companies in Europe and new challenges for company lawyers (duties and liabilities for company lawyers in an era of increasing corporate social responsibility, and transparency for companies)
Prof. Christophe Roquilly (Director of LegalEdhec, Lille)
Marina Kralj Milisa (General Secretary of ECLA, General Counsel, Koncar, Zagreb)
Michael Junge (General Counsel, SAP)

4.00 pm **Coffee Break**

**to be confirmed*

4.30 pm **Panel 3: Company lawyers: ethical and independent 'by design'**
Sergio Marini (ECLA Vice President, Director of the Legal and Corporate Affairs, Shell Italy, Milan)
Jean Cattaruzza (ECLA, General Counsel, ING Belgium, Brussels)
Keith Carr (General Counsel Alstom, Paris)

5.30 pm **ECLA Ceremony**
ECLA: a 30-year History
Bengt Gustafson (former ECLA President, SVP Senior Advisor to Group Management Securitas AB, Stockholm, TBC) - Francesco Benigni (ECLA, former GM, Roma) - Han Kooy (ECLA, Vice President, The Hague)

Introducing the newly founded ECLA ADVISORY Council
Petr Šmelhaus and Kristina Nordlander (Sidley Austin, Brussels and former pro bono lawyer for ECLA)*

Keynote speakers
Business Europe [Emma Marcegaglia, Business Europe, President]*
*EU Commission Commissioner**

Closing remarks
Philippe Coen (ECLA President, Paris)

6.45 pm **Cocktail & Awards Ceremony with a gathering of former ECLA presidents, Advisory Council and officials**

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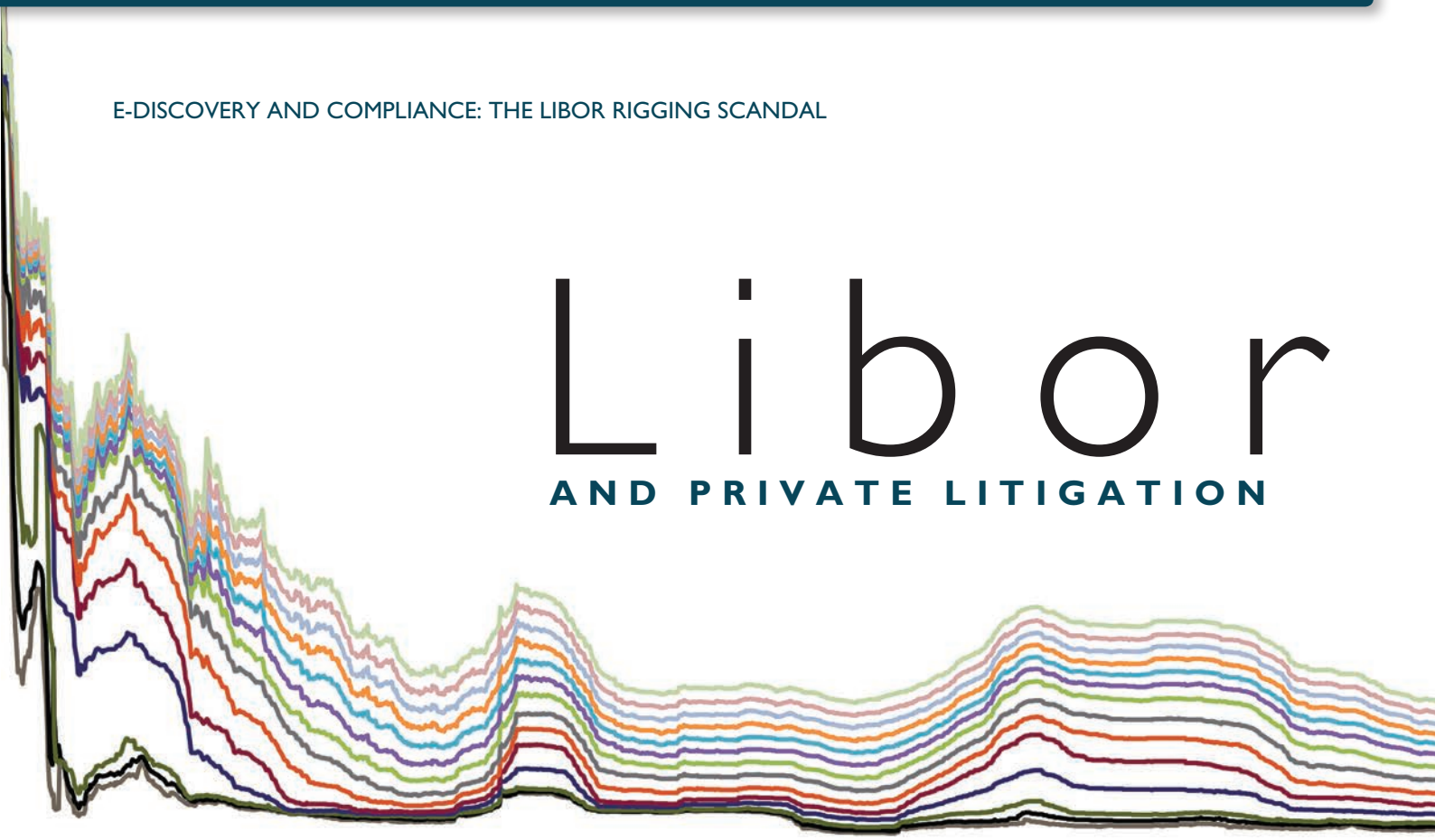
GLOBAL LEGAL INSIGHTS

E-DISCOVERY AND COMPLIANCE: THE LIBOR RIGGING SCANDAL



Libor
AND PRIVATE LITIGATION

David Ellis and **Bruno Campana** of **FTI Consulting** consider the raft of private litigation that may be brought against the banks involved in the Libor rigging scandal

The last 12 months have seen three major banks emerge from lengthy investigations into their interest rate setting behaviour by regulatory bodies in three countries, and are, as a result, facing billions of dollars in fines. It is known that other banks are undergoing similar investigations, and that these may lead to yet more fines.

Interest rate benchmarks themselves, primarily the London Interbank Offered Rate (Libor), have come under close scrutiny, and as yet unknown changes in how they are determined will be implemented.

While most attention has thus far focused on the investigations by the various government agencies and the possible changes to the rate setting mechanisms, an important question being asked by many concerns private litigation against the banks. In particular, what kinds of cases could be brought, and what are their chances of success?

Background

Libor is the primary benchmark for short-term interest rates globally and is used as the basis for settlement of various financial instruments. In the mid-1980s, banks were actively trading new instruments such as interest rate swaps, foreign currency options and forward rate agreements. Libor was introduced by the British Bankers Association (BBA) in 1986 as a measure of uniformity for these new markets. The original aim was to provide an estimate of banks' funding costs in the absence of observable transactions data.

Following questions raised in the press about the behaviour of Libor relative to other interest rates, regulatory agencies in several countries initiated investigations into banks' historical ▶

submissions, internal and external communications and the operational channels in place. Table 1 below summarises the list of banks and brokers which are or have been under investigation.

Three of the banks investigated were levied fines as a result of the regulatory probes: **Barclays**, **UBS** and the **Royal Bank of Scotland** have been fined a total of over USD 2.5 billion by regulators (CFTC, FSA, FINMA). Of the remaining banks listed in Table 1, two are believed to be close to finalising settlements with the relevant authorities, namely **Deutsche Bank** and **Rabobank**.

Table 1 Banks under investigation

Investigating Body	*Banks under investigation*
State of Connecticut, State of New York	Bank of America, Bank of Tokyo Mitsubishi UFJ, Credit Suisse, Lloyds Banking Group, Rabobank, Royal Bank of Canada, Société Générale, Norinchukin Bank, WestLB, Deutsche Bank, JPMorgan Chase, HSBC, Citigroup, Royal Bank of Scotland, Barclays and UBS
European Commission	Deutsche Bank, JPMorgan Chase
Swiss Competition Commission	Bank of Tokyo Mitsubishi UFJ, Sumitomo Mitsui Credit Suisse, Deutsche Bank, HSBC, Citigroup, Royal Bank of Scotland, UBS and JPMorgan Chase
FSA (UK)	Société Générale, Royal Bank of Scotland, UBS, Deutsche Bank, ICAP, Barclays
CFTC (USA)	Société Générale, Royal Bank of Scotland, UBS, Deutsche Bank, JPMorgan Chase, Barclays
BaFin (Germany)	Deutsche Bank
DoJ (USA)	Société Générale, Royal Bank of Scotland, and UBS, Deutsche Bank, JPMorgan Chase, Barclays
Canadian Competition Bureau	JPMorgan Chase, Royal Bank of Scotland and UBS
JSESC (Japan)	Citigroup and UBS
FINMA	UBS
Other regulators	UK regulator - Bank of Tokyo Mitsubishi UF, HM Treasury - HSBC, US and UK Regulators - ICAP, Tullett Prebon, RP Martin, SFO - RP Martin, Citi Japanese regulator - UBS
Notes	Citigroup: Nine separate enforcement agencies in the US, Europe and Japan have been probing whether US and European banks manipulated the London Interbank Offered Rate Credit Agricole: No evidence of being investigated, but anonymous traders in the Barclays settlement were identified as being from Crédit Agricole. HSBC: *"DoJ chose not to criminally charge HSBC."*

The fact that a number of large banks have been found to have engaged in inappropriate behaviour with respect to Libor raises the question of what is the motivation behind this manipulation. Periods during which the rates will be vulnerable to manipulation will differ between currencies, owing to specific factors such as composition of the submitting panel for a particular currency, derivatives market volumes and the period between fixing and value date. However, the investigations into Barclays, RBS and UBS show that incentives to manipulate the rates can be generally be categorised into three types regardless of currency:

- **Reputational:** If a bank or group of banks is concerned that submitting their "true" cost of funds might cause them to be perceived as being financially weak, they will be motivated to submit a low rate. This action is purely in the interest of the bank *vis-à-vis* market expectations during stress periods.
- **Direct and indirect collusion:** This arises out of poor internal controls. Direct collusion among traders who know each other from mutual relationships or because they worked at the same institution in the past. Indirect collusion through brokers has been evidenced by the FSA in the case of UBS.
- **Rogue trader:** Money market traders having sizeable positions in assets or derivatives that are linked to Libor had personal incentives to manipulate Libor to gain from the resulting change in the rate.

Regardless of the reason to manipulate Libor, such actions may not always be in the overall interest of the bank, because not all traders within the bank will have the same exposure to Libor.

In the RBS settlement, the FSA produced evidence of "wash trades" with interdealer brokers as apparent payment for passing information between banks. The FSA has subsequently extended the Libor probe to include those brokers.

Potential allegations as a result of manipulations

While investigations by regulators continue, attention is now turning to the issue of private litigation brought against banks by their current or former customers or investors. There are several ways in which banks' Libor-related activities may have harmed customers or investors. They can be roughly grouped as follows:

Inter-institution disputes: As more details of the nature and extent of banks' activities in setting interest rate benchmarks emerge, we can expect litigation to arise between panel banks and other financial institutions.

For example, small US banks have filed lawsuits accusing contributing banks of collusion. Additionally, the US federal watchdog in December estimated that mortgage lenders **Fannie Mae** and **Freddie Mac**, which had to be bailed out during the 2007/08 financial crisis, could have lost more than USD 3 billion as a result of Libor manipulation.

Mis-selling claims: These could arise on instruments directly tied to Libor if they are perceived to have suffered as a result of the alleged mispricing. While floating rate borrowers will benefit from lower rates, this would be at the expense of investors in products with values that appreciate if rates increase. In falling rate environments, the benefit/cost relationship would be reversed.

Thus, it is not obvious who has been harmed by the manipulation of Libor. Banks might therefore face claims

related to losses on interest rate swaps, options or structured notes, while investors in money markets and bond funds and investors holding portfolios of floating rate securities might claim loss of income due to banks setting Libor rates artificially low.

Examples of recent mis-selling claims being tied to Libor:

• **Mis-selling:** The investigation by the FSA into interest rate hedging products (IRHPs) alleged to have been mis-sold by banks to SMEs. IRHPs include swaps, caps, floors, collars, and structured collars. To the extent that Libor was manipulated at the time these products were sold, or during their lifetime, then purchasers of IRHPs may have been further harmed.

• ***City of Baltimore v Barclays*:** A claim for more than USD 300 million arising from the alleged mis-selling of interest rate hedges.

• **Fraud:** In the US, several class-actions suits were filed last year and are directly related to Libor-linked products, and include false or misleading Eurodollar interest rates linked to the Eurodollar futures contracts (*Metzler Investment GmbH v Bank of America, et al.*). **Metzler Investment** is a German company that managed investment funds which traded Eurodollar futures. The complaint was originally filed in October 2011 and was later consolidated into the federal multidistrict action *In re: Libor-Based Financial Instruments Antitrust Litigation.*

As of April 2013, most plaintiffs' claims in US courts have been denied, namely, the:

- antitrust claims;
- commodities manipulation claims;
- racketeer Influenced and Corrupt organizations (RICO) claims; and
- state-law claims, including:
    - Cartwright Act (California's antitrust act);
    - New York common law unjust enrichment claim; and
    - other unnamed state-law claims.

More recently, **FrontPoint** sued the Libor banks for manipulating Libor in a way that adversely impacted FrontPoint on swaps it had purchased from the banks (*Salix Capital v Bank of America et al*). The swaps were part of a larger negative-basis package trade, which involves buying a bond and buying credit default swap (CDS) protection and earning the yield difference (the basis) between the two.

A negative basis exists if the credit protection is cheaper than the yield earned on the bond itself; in other words the credit risk premium in the bond is overpriced relative to the CDS premium. This trade is an arbitrage between the bond and CDS markets. Negative basis traders expect the basis to tighten as the bond's price increases (yield decreases). This trade also involves other risks such as counterparty risk with the credit protection seller, and interest rate risk.

> While floating rate borrowers will benefit from lower rates, this would be at the expense of investors in products with values that appreciate if rates increase

In very simple terms, FrontPoint:

- purchased bonds from debt issuers;
- purchased CDSs from banks to hedge credit risk; and
- entered into interest rate swaps (IRSs) with the bank to hedge against losses arising from changes in interest rates.

FrontPoint was paying the fixed leg under the IRSs, and entered into collateral margin agreements under the Credit Support Annexes (CSAs) governing the IRSs transactions. These CSAs allowed the parties under the IRSs to request cash collateral equal to the mark-to-market value of the swaps. As Libor decreased below the fixed rates, FrontPoint faced margin calls from its counterparties under the IRSs, as well as cash outflows.

According to the complaint: *"satisfying these collateral calls used up much of the Funds' remaining liquidity. Redemption demands due to losses on the basis packages and the collateral calls led to forced sales of many of the bonds and early termination of many of the swaps on very unfavourable terms in November and December 2008."*

FrontPoint's claim is that, had the bank reported their true unsecured interbank funding cost, which should have been higher than the published Libor rates, then it would not have faced such funding issues. This will be a difficult claim to substantiate, as Libor is supposed to reflect transactions in the interbank market, and during this period the interbank market was highly illiquid. ▶

Alleged harm on investors and customers

Libor is an index that arose out of banks' other activities, namely making loans. It is thus a by-product of that activity. While rate decreases after 2007 may have been exaggerated by banks seeking to avoid appearing financially weak, Libor USD generally followed the same pattern as Federal Funds Target Rate and related central bank interventions during the relevant period (see Figure 1). This is true for all currencies and their related central bank rates.

The general level of these benchmarks, throughout the period identified by investigators, is therefore difficult to dispute. Evidence of manipulation has been observed on specific dates or over short periods and on specific maturities.

Sometimes manipulations appear to be linked to specific cash-flows (realised Profit & Loss, or P&L) and sometimes linked to risk measures within the bank (unrealised P&L). Risk measures report on a daily basis how traders' books are expected to change in response to specific market factors. It is therefore possible to determine whether the bank would have benefited from an increase or a decrease in rates and by how much. Nevertheless, it is not as simple as that.

Banks do not all consolidate data in the same manner, and risk management policies differ from one bank to another. Some banks are very segmented and P&L belongs to specific geographical locations or specific service lines, while other banks are more integrated and P&L is consolidated and valued at a global level, but may be segmented by product, by market or by complexity.

Also, banks do not use the same systems. Assessing the payoff from manipulations will therefore be complex and very different from one bank to another. It would require (i) tracing back historical cash-flows or mark-to-market positions within the banks, (ii) correcting for the manipulation, (iii) recalculating Libor, (iv) running all the positions with the corrected Libor level and (v) measuring the difference between historical and corrected P&L figures.

Libor rates are calculated by averaging out bank submissions and stripping out some of the highest and lowest outliers; therefore, it makes it harder for any individual bank to cause a material loss to any particular customer.

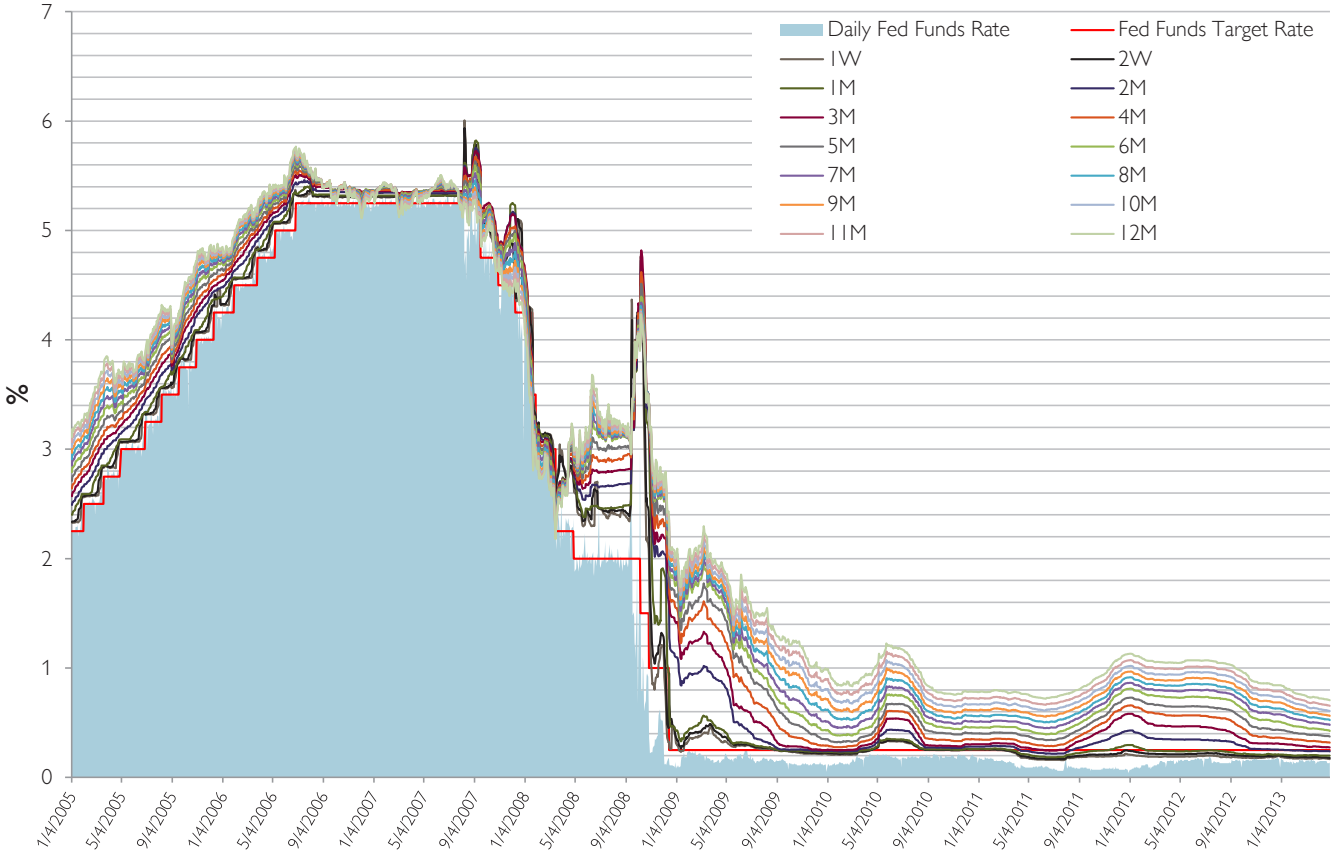
Lower rates in the economy may have helped to mitigate systemic risk. Idiosyncratic risk may therefore need to be looked at relative to other banks in the panel as opposed to the composite rate level.

Potential disputes as a result of reforms

On 28 September 2012, *The Wheatley Review of Libor* was published, which included a 10-point plan for a comprehensive reform of Libor, acknowledging limitations in the current governance framework. On 14 December 2012, the BBA confirmed that it would implement a phased discontinuation of certain Libor rates (AUD, CAD, DKK, NZD and SEK). CHF, GBP, EUR, JPY and USD will remain active but only for fewer maturities: one week, and one, two, three, six and 12 months.

By the beginning of June 2013, the number of Libor rates which are published daily will be reduced from 150 to 37. According to the International Swaps and Derivatives Association (ISDA), any

Figure 1 Daily Fed Fund Rates and Target Rates v Libor USD 1M-12M from 2005 to present



Although a number of scenarios can be posited, it remains difficult to forecast at this stage the systemic aspect of disputes that will arise and the consequences of this reform

disruption to the Libor or Euribor process could have systemic repercussions in the OTC markets.

While reforming Libor and Euribor may solve past problems, it might also inadvertently lead to new risks for market participants. Issues arising between market participants following from such a reform such as valuation, contractual and settlement disputes or litigations, are expected.

Mis-valuation: Libor-referenced products are not the only ones that are expected to be impacted by the discontinuation of the rate in various currencies and tenors. For example, CDS trades will also be impacted since Libor rates are used by the credit derivatives industry to discount cash flows in the determination of upfront payments on all trades. Nor is the CDS market the only one to rely on Libor: almost all financial instruments' expected cash flows are discounted using Libor (or a similar benchmark for the relevant currency), namely: CDOs; ABSs; structured notes; OTC and exchange traded derivatives; floating rate notes; bonds; loans; foreign exchange related products; forwards; and futures, among others.

At present, complete term structures are used by valuation systems as an input for running these valuation models. Keeping everything else equal, with fewer tenors, interpolations and extrapolations on the term structure will be necessary to complete the full range of rates, and will produce different rates than the ones produced with more points.

Consequently, the resulting discounted cash flows will be different. Additionally, discontinuing some maturities might create errors in various systems used to value transactions. The short notice may not allow enough time to update and test systems accordingly and for the development of new market practises to mark banks' books to market.

Although the market agrees that it is economically and conceptually reasonable to discontinue illiquid maturities, such reforms might lead to investors being exposed to sudden changes in the value of their financial instruments. Bespoke products in particular might be more sensitive to abrupt changes in the slopes of the rate curves compared to transactions with standard maturities. Some OTC swaps specifically refer to interpolations between less liquid maturities for settlement purposes (first or last cash flow under the swap).

For example, if a contract had a period of 3.5 months (and currently would be based on a rate calculated by interpolating between Libor 3M and Libor 4M) and Libor 4M and 5M are discontinued, the new rate based on interpolation between Libor 3M and Libor 6M is likely to be quite different. Depending on the notional amounts at stake, this could have a material impact.

Contractual and settlement disputes: OTC transactions are generally contracted under the standardised terms for bilateral transactions published by ISDA. These transactions are typically documented under an ISDA Master Agreement and a Trade Confirmation, which references the financial terms and relevant ISDA Definitions. Libor- and Euribor-referenced OTC derivatives contracts would, for example, most likely be agreed under ISDA Interest Rate and Currency Derivative Definitions, Confirmations and Supplements.

Of the five currencies that will be discontinued (AUD, CAD, DKK, NZD and SEK), ISDA has only published definitions for the AUD and CAD BBA benchmarks. Parties using any of the other three rates will presumably have had to define these rates in their own bespoke documentation which might or might not define and cover the event of discontinuation.

However, according to ISDA, trade volumes are particularly low in DKK, NZD and SEK. While DTCC Global Trade Repository indicates that there are only a few contracts in AUD and CAD, ISDA highlights that there is a sufficient level of outstanding trades in AUD and CAD to cause unmanageable disruption to these markets as firms will need to bilaterally agree an alternative rate to use.

According to the BIS, in December 2012 ▶

these contracts represented USD 51 trillion, or 10.5% of the outstanding total notional amount of OTC single-currency interest rate derivatives only (ignoring cross-currency swaps and other products). According to DTCC, the total notional amounts of Interest Rate Swaps and Forward Rate Agreements daily trades recorded from 20/02/2013 to 23/05/2013 in AUD, CAD, NZD and SEK were USD 226 billion, USD 304 billion, USD 33 billion and USD 48 billion, or USD 612 billion in total (representing circa 3% of the FRA and swap market).

Table 2 Notional amounts outstanding of OTC single-currency interest rate derivatives (USD billion)

	Dec-10	Jun-11	Dec-11	Jun-12	Dec-12	Dec-12 %
CAD	4,247	6,905	6,397	7,380	7,507	1.53%
EUR	177,831	219,094	184,702	179,076	187,363	38.26%
JPY	59,509	65,491	66,819	60,092	54,812	11.19%
GBP	37,813	50,109	43,367	39,913	42,244	8.63%
SEK	5,098	5,832	5,844	6,994	6,193	1.26%
CHF	5,114	6,170	5,395	5,494	5,357	1.09%
USD	151,583	170,623	161,864	164,024	148,676	30.36%
AUD, DKK, NZD	24,064	29,017	29,729	31,452	37,551	7.67%
All	465,260	553,240	504,117	494,427	489,703	100.00%
Discontinued maturities	33,409	41,754	41,970	45,826	51,251	10.47%

Source: Bank of International Settlements

Although a number of scenarios can be posited, it remains difficult to forecast at this stage the systemic aspect of disputes that will arise and the consequences of this reform. It is likely there would have been discussions ahead of the discontinuation to amend the terms of certain contracts linked to discontinued maturities and/or currencies.

Little to no interbank funding transaction is taking place beyond the one month maturity, and most transactions are collateralised. One effect of the reform has been the reliance on overnight funding indices as reference funding rates (shorter-term and transaction-based benchmarks). Thus, the industry has become more conservative. Data providers are now developing alternative indices focusing on overnight short-term collateralised funding (as opposed to unsecured funding). Nevertheless there are outstanding transactions still referring to Libor rates.

It is too early to expect firms to have acted yet; the interruption of certain maturities and currencies only starts at the time we are writing this article. Legal disputes, if any, should emerge after the implementation of the Libor reform. ■

*- The authors would like to thank **Chris Halas** and **Marco Shek** for invaluable research assistance.*

About the authors

David Ellis serves as Managing Director in the Economic Consulting practice at FTI Consulting. Prior to this, David was a Director with Navigant Consulting and an Associate Director with NERA Economic Consulting. Previously, he was a finance professor at Babson College and Texas A&M University. He has testified in both litigation and arbitration; venues include the UK High Court, US Federal and State courts, the New Zealand High Court, the London Court of International Arbitration, the American Arbitration Association, the World Trade Organisation and FINRA. His institutional experience includes working at Salomon Brothers in Institutional Fixed Income Sales and Trading.

Bruno Campara is a Director at FTI Consulting in London. At FTI, Bruno brings capital markets experience on valuation, structuring and risk management across a wide range of asset classes, financial instruments, products and derivatives. He has experience in equity, fixed income, interest rates, foreign exchange, credit and energy markets. Bruno is certified by the Chartered Alternative Investments Analyst association (CAIA) and often acts as testifying or advisory expert in capital markets disputes and litigations.

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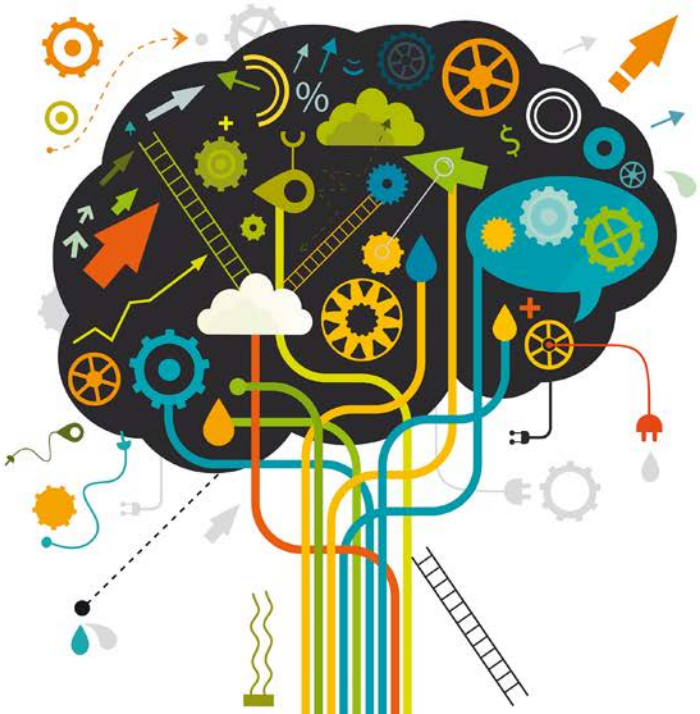
EXPERT VIEW: REASONED ARBITRAL AWARDS

In the first of a two-part article, **James Hope** and **Mattias Rosengren** of **Vinge** argue that more can be done to ensure arbitrators regularly issue high-quality, reasoned awards



A CALL FOR REASON(S)

Do you recognise the following story? The arbitration has been a long and hard-fought battle. The parties' written submissions and exhibits are voluminous, and they take up a large portion of your bookcase – 80 cm have been submitted by the claimant and 270 cm by the respondent. Some 13 witnesses have been heard during a complex five-day hearing.

When the arbitral award is issued, however, you are dismayed to find that the arbitrators have only cursorily dealt with the factual and legal issues that were the subject of so much detailed argument. The witness evidence and the factual issues have not been considered in any detail. Instead, the arbitrators have taken a so-called broad brush approach. The parties – and their witnesses – are, to put it mildly, surprised, and the losing party does not understand why it lost the case.

Is this acceptable? Is this justice? We think the answer is a resounding "no."

The duty to give reasons

Once upon a time, arbitration was informal, quick and inexpensive. Arbitrators were often experienced men of business, and one of the perceived strengths of the system was that disputes could be decided by non-lawyers who had particular technical expertise.

"....decisions without reasons are certainly not justice:

The international commercial disputes that most of us see nowadays are very different. They are formal, large-scale legal disputes, and each party is invariably represented by a team of lawyers. Although it is still said that arbitrators can be non-lawyers, in practice virtually all the arbitrators we appoint nowadays are legally trained.

Is it necessary for arbitrators to give reasons in their awards when deciding these international commercial disputes? Some arbitration laws continue to allow awards to be given without reasons – see, for example, section 31 of the Swedish Arbitration Act, which includes no requirement for reasons to be given and the discussion in the preparatory works to that Act, Govt Bill 1998/99:35, p 134. However, most modern arbitration laws require reasons to be given – see section 52(4) of the English Arbitration Act 1996: "The award shall contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons," and Article 31(2) of the UNCITRAL Model Law, which is in similar terms.

Most arbitration rules, which are designed with commercial disputes in mind, require arbitrators to give reasons unless the parties expressly agree otherwise – see, for example, Article 36(1) of the SCC Arbitration Rules: *"The Arbitral Tribunal shall make its award in writing, and, unless otherwise agreed by the parties, shall state the reasons upon which the award is based."* Article 31(2) of the ICC Arbitration Rules states simply: *"The award shall state the reasons upon which it is based."*

In short, by virtue of the arbitration rules that are adopted in most international commercial arbitrations, the arbitrators have a duty to give reasons for their awards.

What is the scope of the duty?

Judges, and most arbitrators, can no longer rely on the advice which Lord Mansfield apparently gave to a general who, as governor of an island in the West Indies, had also to sit as a judge:

> *"Lord Mansfield said to him, 'Be of good cheer – take my advice, and you will be reckoned a great judge as well as a great commander-in-chief. Nothing is more easy; only hear both sides patiently – then consider what you think justice requires, and decide accordingly. But never give your reasons; for your judgment will probably be right, but your reasons will certainly be wrong.'"*
>
> (Quoted in Jackson, Natural Justice (2nd ed, 1979) p97, and by The Hon. J.J. Spigelman, Chief Justice of New South Wales, in his Keynote Address to the 31st Australian Legal Convention in Canberra on 9 October 1999. A slightly different quote appears in Redfern & Hunter, Law and Practice of International Commercial Arbitration (4th ed, 2004), section 8-63.)

Anyone who has ever lost a case in circumstances where it was agreed that no reasons were to be given will know how unsatisfactory such a decision can be.

It was once accepted in England and in other common law systems that there was no requirement for arbitrators to give reasons, and that arbitrators would be wise to avoid doing so. However, times have changed, and largely as a result of modern human rights jurisprudence, reasons are now generally required. To refer to Lord Neuberger's remarks at the top of this page, justice is as important in arbitration as it is in litigation, and justice requires that arbitrators should strive to provide good reasons for their decisions.

However, there is also another important principle in arbitration, which is the principle of finality of arbitral awards. In most seats of arbitration, it is not possible to challenge arbitral awards on substantive grounds, and courts are therefore most reluctant to allow challenges on the grounds of insufficient reasoning. For an example of the difficulties faced by courts in this situation, compare the Australian Victorian Court of Appeal decision in *Oil Basins Ltd v BHP Billiton Ltd* [2007] 18 VR 346 (CA), which upheld a challenge to an award for failure to give adequate reasons, and the subsequent decision of the federal High Court of Australia in *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 37, which denied such a challenge.

The fact that courts in challenge proceedings are reluctant to set aside awards for failure to give adequate reasons does not mean that arbitrators do not need to give adequate reasons. It simply means that the arbitral tribunal is, in this respect, the tribunal of first and final instance.

The Swedish *Soyak II* case

The set of facts which we outlined at the start of this article is taken from the *Soyak v Hochtief* case, which was ultimately decided by the Swedish Supreme Court on 31 March 2009 ("*Soyak II*", NJA 2009 p 128). See also the detailed article by Sigvard Jarvin, *Kraven på domskäl i skiljedomar*, JT, Nr 3 2009/10.

This arbitration case was long and complex, and Soyak was dissatisfied with the arbitral award, which it complained was poorly reasoned. Soyak brought challenge proceedings before the Svea Court of Appeal and later the Swedish Supreme Court, arguing (a) that the arbitral tribunal had exceeded its mandate by failing to give adequate reasons contrary to the express requirements of the SCC arbitration rules, and (b) that the arbitral tribunal had committed a procedural error of such a serious kind that it should be presumed to have affected the outcome of the case.

Soyak lost on both grounds, but the Supreme Court's reasoning is

indeed, they are scarcely decisions at all...”

Extract from the first annual BAILII Lecture *No Judgment – No Justice*, delivered by Lord Neuberger, President of The UK Supreme Court, on 20 November 2012

instructive. The following is our translation of the key passages:

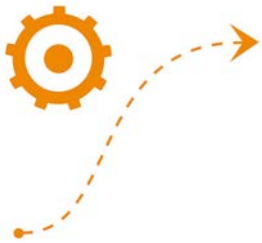
“There can be different reasons as to why it is written in an arbitration agreement that the arbitral award should contain reasons. The parties can also have more or less extensive expectations of the arbitrators’ expression of their determinations, unless the arbitral award contains more precise instructions as to what the reasoning should contain. However, the question of the parties’ expectations as to the reasoning, whether justified or not, and the question of what can be considered to be good practice amongst arbitrators, need to be distinguished from the question of whether the arbitrators’ reasoning is so lacking as to constitute a ground for challenge.

A description of sufficient reasoning in an arbitration award constitutes a guarantee of legal certainty, since it forces the arbitral tribunal to analyse the legal issues and the evidence. However, in considering the question of a ground for challenge, the value of giving full reasons for the outcome needs to be balanced against the interest of finality in arbitral awards. A challenge proceeding does not provide an opportunity for a substantive reconsideration of the arbitrators’ considerations. Because of this, and since a qualitative judgment of the reasoning would give rise to considerable problems of determining boundaries, it is only where there is a total lack of reasoning, or where the reasoning in the circumstances must be considered so insufficient that it can be considered to be the same as a total lack of reasoning, that a procedural error can be said to have occurred. On the other hand, it can be assumed in such circumstances that a total lack of reasoning has affected the outcome of the case.” (Emphasis added)

It should be noted that the Swedish Supreme Court stresses here the importance of having sufficient reasoning in an arbitration award. However, because of the interest of finality in arbitral awards, it is only in the very clearest cases that a failure by an arbitral tribunal to provide sufficient reasoning would constitute grounds for setting aside the award.

Some other similar cases

Although challenges on the grounds of a failure to give adequate reasons appear to be rare, courts in several jurisdictions have accepted that clear cases of insufficient reasoning can give grounds for setting aside or refusing to enforce an arbitral award. The following selection of cases reveals a reasonably consistent view by courts on this issue.



It was once accepted in England and in other common law systems that there was no requirement for arbitrators to give reasons, and that arbitrators would be wise to avoid doing so. However, times have changed, and largely as a result of modern human rights jurisprudence, reasons are now generally required

In 1987, the Italian Corte di cassazione refused enforcement of an award because the reasons given were insufficient and illogical (*SpA Abati Legnam (Italy) v Fritz Häupl*, XVII YBCA 529 (1992)). In 2008, the Tunisian Court of Cassation set aside an award because the reasons given were contradictory and therefore were to be considered non-existing (Court of Cassation, Tunisia, 27 November 2008, case No. 20596/2007, referred to in the UNCITRAL 2012 Digest of Case Law on the Model Law on

Although challenges on the grounds of a failure to give adequate reasons appear to be rare, courts in several jurisdictions have accepted that clear cases of insufficient reasoning can give grounds for setting aside or refusing to enforce an arbitral award

International Commercial Arbitration, page 128).

A German court has suggested that an award could be set aside if the reasoning lacks any substance, and is evidently paradoxical or conflicts with the decision made, although on the facts of the case the reasoning was found to be sufficient (CLOUT case No. 569, 8 June 2001; UNCITRAL 2012 Digest, page 127). Similarly, a court in the Netherlands considered that an award could be set aside if the reasoning was so incorrect that it constituted a failure to explain the award (*AZ NV. v N.N. (Nomen Nescio)*, Hoge Raad, Netherlands, 8 January 2010, BK 6056, Hoge Raad, 08/02129; UNCITRAL 2012 Digest, page 127). However, a Canadian court found that arbitrators can give reasons in commercial terms as opposed to legal terms (CLOUT case No. 10, 16 April 1987; UNCITRAL 2012 Digest, page 128), and the High Court of Australia came to much the same view in the *Gordian Runoff* case, referred to above.

Some advice to arbitrators

How should arbitrators ensure that they provide adequate reasons for their award, and that justice is thereby seen to be done? Again, it is helpful to obtain advice from an expert in the art of decision-making. Lord Hope of Craighead, who was until recently the deputy president of the UK Supreme Court, made the following remarks in an unpublished lecture on legal reasoning, delivered to the Judicial Studies Committee Seminar on 14 November 2011:

"Clear reasoning and analysis are basic requirements in judicial decisions and an important aspect of the article 6 right to a fair trial."

"The reader, whoever he or she is, should be able to understand what led us to the conclusions that we have reached."

"[The judgment] has to satisfy the rule of law that says that the litigant has a right to know why he has won or lost his case."

"The key is to think of your audience and to imagine yourself having to justify your reasoning to it face to face. Although you are setting out your conclusions on paper, the techniques are those that you might want to use if you were having to debate the issue orally. There is no need to go on at length if the point can be made quite simply. But there are some borderline cases where it is worth taking the effort to reason the arguments out point by point."

Of course, arbitrators are not judges. In particular, in commercial arbitration as opposed to investment treaty arbitration, their audience is confined to the parties themselves, and arbitrators have no obligation to clarify or develop the law. However, to the extent that arbitrators have a duty to the parties, the basic requirement of justice is the same.

We suggest that more can be done by the international community of arbitrators, in seeking to uphold high standards in the art of writing arbitral awards. As noted above, it is not the place of the court in challenge proceedings to review the arbitrators' reasoning, but where scrutiny is provided by arbitral institutions (whether formally or informally), then an important role can be played by those institutions. We suggest that arbitral institutions and arbitration training courses can also assist arbitrators in the art of setting out and explaining their reasoning.

Modern books and commentaries are also helpful. Good general advice is provided, for example, by Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, section 8-65:

"The way in which reasons are given in arbitral awards varies considerably. Sometimes the reasoning (or "motivation") is set out with extreme brevity. However, a mere statement that the arbitral tribunal accepted the evidence of one party and rejected the evidence of the other, which was a common practice in some circles, had rightly fallen into disrepute by the end of the twentieth century. Certainly such a practice would be regarded as being defective as a matter of form by the ICC's Court. In other cases, awards may run into hundreds of pages, including a detailed review of the evidence and arguments put forward by the parties, followed by a closely reasoned conclusion.

The general practice of arbitral tribunals in international cases is to devote more time and space in the award to giving reasons for its determination of the legal arguments than it devotes to a review of the factual issues. This is not surprising, since most

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arbitral tribunals in international cases are composed of lawyers. However, it should be borne in mind by such tribunals that what is needed is an intelligible decision, rather than a legal dissertation. The object should be to keep the reasons for a decision as concise as possible and limited to what is necessary, according to the nature of the dispute. The parties want the essential reasoning underlying the decision, not a lesson in the law."

Further good advice is given by Professor Kaj Hobér in his book, *International Commercial Arbitration in Sweden:*

"7.63 … the structure and style of the reasons will vary depending on the dispute in question, as well as on counsel and arbitrators. The general idea is that the arbitrators discuss and analyse the legal and factual arguments put forward by the parties. This is also where the arbitrators assess and evaluate the evidence presented by the parties. In many cases, a sensible approach is to have an introductory section where the arbitrators outline the various issues which will be discussed in detail in the remainder of the reasons.
7.64 One question that troubles arbitrators from time to time is whether they should, or must, discuss or analyse every argument put forward by a party – even if the argument is hopeless in the view of the arbitrators. It is submitted that there is no general answer to this question. Often it makes sense for the arbitrators at least to address, however briefly, all arguments put forward. In other cases, it would seem unnecessary."

Often, the key issues in an arbitration turn on an evaluation of complex technical or expert evidence. In such circumstances, as the English Court of Appeal stated in *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, it is necessary to do more thans simply say: "I prefer the expert evidence of A to that given by B." If the evidence of one expert is preferred over that of another, then the Court of Appeal suggested (at para. 20 of the judgment) that reasons should be given for that preference:

"[The Judge] should simply provide an explanation as to why he has accepted the evidence of one expert and rejected that of another. It may be that the evidence of one or the other accorded more satisfactorily with facts found by the Judge. It may be that the explanation of one was more inherently credible than that of the other. It may simply be that one was better qualified, or manifestly more objective, than the other. Whatever the explanation may be, it should be apparent from the judgment."

Arbitrators need to give good reasons for their decisions in order for justice to be done. Our purpose in writing this article is to encourage a debate on this important, but in our view somewhat neglected, issue.

Given the restrictions that have quite rightly been imposed on the challenge to arbitration awards, it needs to be the arbitration community itself which sets best practice in this regard. Best practice is certainly required. We cannot allow arbitration to be a second-rate system of justice.

A last word can be given to Lord Neuberger (again from the first annual BAILII Lecture):

"It might be asked why this is important. … There are two answers to that: one general and one particular. And both these answers rest on our commitment to open justice which underpins the rule of law.

The particular reason is the right to a fair trial in each individual case. The need, the duty, to provide a reasoned Judgment is a well-established 'function of due process, and therefore of justice.' (Flannery v Halifax Estate Agencies Ltd [2000] 1 WLR 377 at 381-2). A clearly reasoned Judgment enables the litigants to understand why the court arrived at its decision. As for the general reason, a clearly reasoned Judgment enables the public to understand the law and to see what is being done and said by the judges in the courts, to see how justice is being dispensed. Accordingly publicly pronounced Judgments represent an important means through which public confidence in, and understanding of, the courts, and therefore in the rule of law, can be secured."

Unlike litigation, arbitration is not generally open to public scrutiny, since most parties wish to preserve confidentiality. It is, therefore, even more important in arbitration, which risks being tarnished with the worst elements of a closed and secret system, that arbitrators work hard to show to the parties that they are committed to upholding justice and the rule of law by providing high-quality, reasoned awards. ■

- In part two of this article, to be published in a later edition of this magazine, the authors will explore the extent to which arbitrators have a duty to follow the law in reaching their decisions.

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turning the TANKER

On 6 December 2012, the EU Council adopted the recast of the Brussels I Regulation (the "Recast Regulation") on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters which applies to legal proceedings commenced on or after 10 January 2015. According to the Explanatory Memorandum *Recast of the Brussels I Regulation: towards easier and faster circulation of judgments in civil and commercial matters within the EU*, the purpose of the Recast Regulation is " to make the circulation of judgments in civil and commercial matters easier and faster within the Union, in line with the principle of mutual recognition."

The Recast Regulation retained the so-called arbitration exemption in Article 1(2)(a). The scope and consequences of that exception had given rise to considerable controversy in the *West Tankers* case. In that case (Case C-185/07, *Allianz SpA v West Tankers Inc*), the European Court of Justice (ECJ) held that if a party to an arbitration agreement introduced court proceedings on the merits in which the invalidity of the arbitration clause was raised as a preliminary question, those proceedings would fall within the scope of the Brussels I Regulation.

The ECJ also held that an anti-suit injunction against a litigant pursuing litigation in the courts of a member state would undermine the jurisdictional system created by the Brussels I Regulation. The decision of the ECJ thus precludes any EU member state from issuing an anti-suit injunction to restrain a litigant from bringing court proceedings in another EU member state which are arguably in breach of an arbitration agreement.

The proposal for the Recast Regulation presented by the EU Commission in December 2010 explicitly recognised this

problem: "By challenging an arbitration agreement before a court, a party may effectively undermine the arbitration agreement and create a situation of inefficient parallel court proceedings which may lead to irreconcilable resolutions of the dispute. This leads to additional costs and delays, undermines the predictability of dispute resolution and creates incentives for abusive litigation tactics." The extent to which the Recast Resolution resolves this issue is considered further below.

The scope of the arbitration exception

The Recast Regulation aspires to, and to some extent does, provide a greater degree of clarity regarding the arbitration exemption. This is to be welcomed. The Recast Regulation includes a new recital which aims to clarify the scope of the Arbitration exemption. Recital 12 of the Recast Regulation states that "[n]othing in this Regulation should prevent the courts of a member state, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law."

Recital 12 also explains that any court decision on the validity of an arbitration agreement is not caught by the Recast Regulation "regardless of whether the court decided this as a principle issue or as an incidental question." Thus an EU member state is not bound by a decision from another EU member states' court relating to the validity of an arbitration agreement.

The Recast Regulation also provides clarification as to the types of proceedings that fall within the scope of the Recast Regulation: "[T]his Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, ▶

WilmerHale's Duncan Speller and **Eleanor Hughes** consider whether the Recast Brussels I Regulation, which seeks to give greater clarity to the European Court of Justice's much-criticised *West Tankers* decision, represents steady progress or a missed opportunity

The *implication* of the Recast Convention is that the courts of EU member states should recognise and enforce awards pursuant to their New York Convention obligations even where there in an inconsistent judgment in another EU member state

nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement if an arbitral award."

The Recast Regulation does, therefore, make clearer the scope of the arbitration exception and that, in respect of arbitration, "the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1959 ('the 1958 New York Convention')…takes precedence over this Regulation." However, the Recast Regulation does not delineate a clear framework as to what should happen in practice when there is a conflict between an arbitral award and a judgment in an EU member state. For example, where a court of an EU member state decides that the arbitration clause is invalid and goes on to decide the substance of the dispute, this decision may conflict with the award of an arbitral tribunal which has held that the arbitration clause is valid.

What, then, should the courts of another EU member state do where recognition and enforcement of the arbitral award is sought? Should the court give precedence to the arbitral award or the judgement of the EU member state? The *implication* of the Recast Convention is that the courts of EU member states should recognise and enforce awards pursuant to their New York Convention obligations even where there in an inconsistent judgment in another EU member state. However, that implication is not expressly stated in terms.

Proposals to go further were rejected

During the legislative process, the European Council rejected a proposed new Article – 29(4) – which would have gone much further towards supporting arbitration proceedings and eliminating the risk of tactical parallel court proceedings. The proposed Article stated that where the agreed or designated seat of an arbitration is in a member state, the courts of another member state whose jurisdiction is contested on the basis of an arbitration agreement shall stay proceedings once the courts of the member state where the seat of the arbitration is located or the arbitral tribunal have been seized of proceedings to determine, as their main object or as an incident question, the existence, validity or effects of that arbitration agreements.

However, this proposed Article would necessitate considering of other potential issues with respect to the recognition of arbitration awards as between member states. In this respect, the European Parliament on 7 September 2010 recognised in its Resolution on the Recast Regulation that "a rule providing that the courts of the Member State of the seat of the arbitration should have exclusive jurisdiction could give rise to considerable perturbations."

The European Parliament further noted that "it appears from the intense debate raised by the proposal to create an exclusive head of jurisdiction for court proceedings supporting arbitration in civil courts of the member states that the member states have not reached a common position thereon and that it would be counterproductive, having regard to world competition in this area, to try to force their hand."

Does the Recast Regulation go far enough?

There is little doubt that the Recast Regulation is a step in the right direction; the pertinent question is whether it goes far enough in clarifying the arbitration exception.

Some commentators have expressed concerns that the continuing uncertainty surrounding the application of the Recast Regulation will lead to a decrease in the popularity of the main European arbitration centres. However, other commentators believe that the practical difficulties associated with the interface between arbitration and Brussels I Regulation (even before the clarifications in contained in the Recast Regulation come into effect) are overstated. Indeed

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during the consultation process for the Recast Regulation the majority of EU member states reported satisfaction with the working of the New York Convention within EU member states.

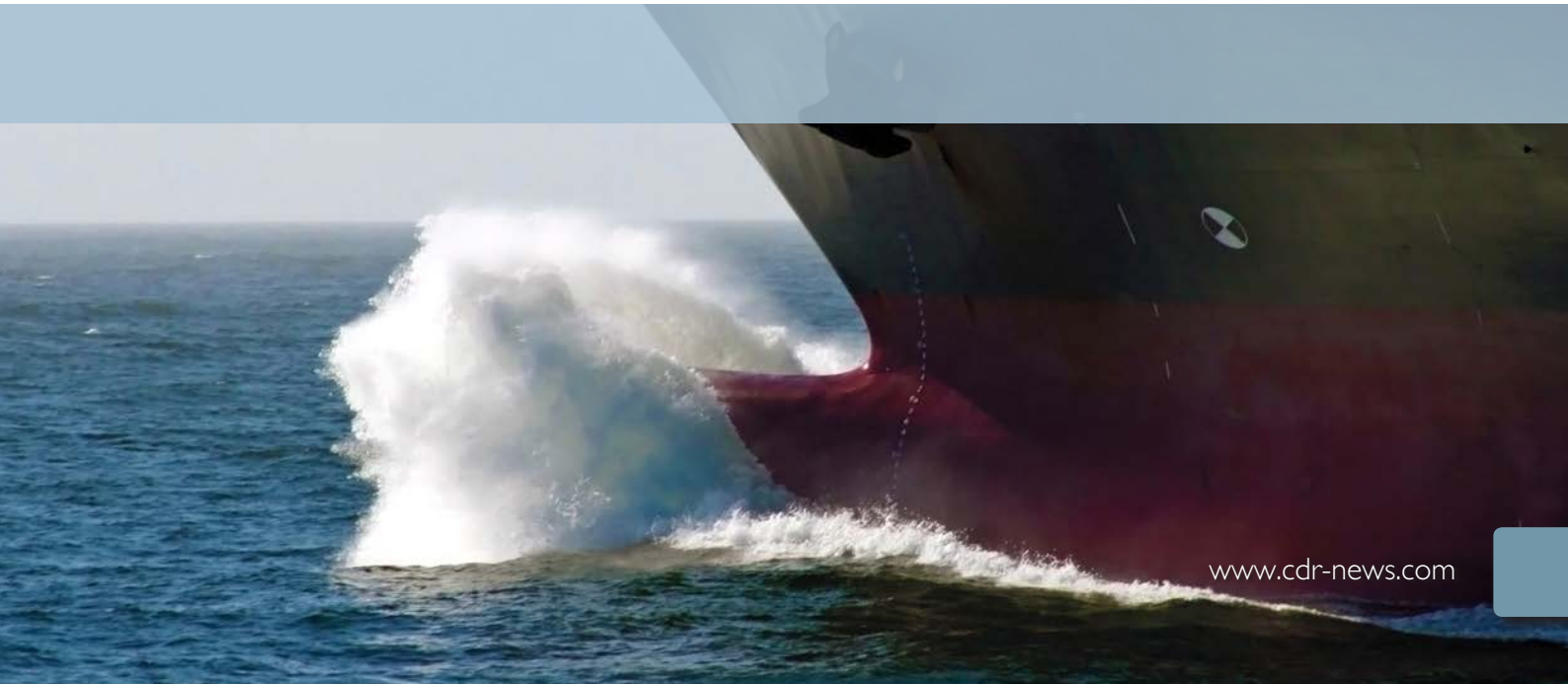
On the one hand, the Recast Regulation expressly recognises the primacy of the New York Convention. In theory, then, the fact that the Recast Regulation gives precedence to the New York Convention over the Recast Regulation should mean that when faced with two conflicting decisions a court of an EU member state should give primacy to, and enforce, the arbitral award. However, absent clear guidance in the Recast Regulation, there is ambiguity (and scope for different interpretation) on important issues in the application of the New York Convention.

For example, there remains scope for ambiguity, and different approaches, on the extent to which recognition and enforcement of an arbitral award can or should be refused on public policy grounds under Article VI of the New York Convention where the award conflicts with a prior judgment in another EU member state.

There is little doubt that the Recast Regulation is a step in the right direction; the pertinent question is whether it goes far enough in clarifying the arbitration exception

On the other hand, the Recast Convention is perhaps a missed opportunity to go beyond the New York Convention in creating an additional regime to ensure the effective recognition and enforcement of arbitration agreements within the EU. The Regulation could have provided an additional reason for parties to seat arbitrations within the EU by creating a pro-enforcement framework that supplements and goes beyond the New York Convention. This may have had significant practical benefits for a party to an agreement to arbitrate in an EU member state in the *West Tankers* situation.

Under the Recast Regulation, a party faced with proceedings in an EU member state in breach of an agreement to arbitration, can proceed with the arbitration and seek an award (including for damages caused by the breach of the agreement to arbitrate). The party can then seek recognition and enforcement of that award and, in principle, the courts in another EU member state must enforce the award under the New York Convention. This is a potentially effective and forceful remedy. However, there is still the risk of a conflicting judgment in the courts of an EU member state and the practical difficulties that this may create. ■



The fallout from the Cypriot financial crisis has made its way to the Supreme Court of Cyprus. **George Z. Georgiou**, managing partner at **George Z. Georgiou & Associates**, considers the court's recent judgment on whether bailout Decrees are to be deemed as governmental acts

CYPRUS: THE POST-BAILOUT BATTLE

On 16 March 2013, the finance ministers of the Euro currency countries, the Eurogroup, welcomed the conclusion of an agreement between the Republic of Cyprus and the other member states within the Eurozone for the grant of financial aid to the Republic of Cyprus, with a contribution from the International Monetary Fund (IMF) for the purpose of supporting the Cypriot economy, covering fiscal needs and the banking sector's restructuring. The total economic aid to be granted was EUR 10 billion.

However, the Republic of Cyprus was required to impose a one-off stability levy of 9.9% on all unsecured (deposits over EUR 100,000) and of 6.75% on all secured deposits (less than EUR 100,000). When the Cypriot government presented the proposed legislation needed to implement the above agreement to the Parliament for approval on 19 March 2013, the Parliament rejected the legislation with 36 votes against and 19 votes in favour.

On the 22 March 2013, the Parliament passed laws aimed at rescuing the economy, including the Resolution of Credit and Other Institutions Law of 2013 (Law 17(I)/2013), which was published in the Gazette on the same day. On the 25 March 2013, a second deal was reached between the Government of the Republic of Cyprus and the Eurogroup. The Eurogroup statement in regards to the agreement mentioned that **Laiki Bank**, one of the largest banks in Cyprus, would be resolved immediately, with full contribution of equity shareholders, bond holders and uninsured depositors, based on a decision by the Central Bank of Cyprus, using the newly adopted Bank Resolution framework.

Laiki Bank was to be split into a "good" bank and a "bad" bank. The "good" bank was to be folded into the Bank of Cyprus, again one of the largest banks in

Cyprus, and the "bad" bank was to be run down over time. It was mentioned that only uninsured deposits in the Bank of Cyprus would remain frozen until the bank's recapitalisation and may subsequently be subject to appropriate conditions. The recapitalisation of the Bank of Cyprus was to be achieved through a deposit/equity conversion of uninsured deposits with full contribution of equity shareholders and bond holders. It was stressed out that the financial aid granted (up to EUR 10 billion) was not be used to recapitalise Laiki Bank and the Bank of Cyprus.

Based on the above statement of the Eurogroup and under the authority granted by Law 17(I)/2013 to the Central Bank of Cyprus, the latter acting as the Resolution Authority issued several Decrees (Administrative decisions). Decrees 93/2013 and 94/2013 came into force providing for the sale of operations of the Bank of Cyprus and Laiki Bank respectively. Decrees 96/2013 and 97/2013 provided for the sale of operations of the Bank of Cyprus and Laiki Bank in Greece. Decree 105/2013 provided for the sale of the operations of Laiki Bank in the United Kingdom (UK) Ltd. Decree 104/2013 provided for the sale of certain operations of Laiki Bank in Cyprus and Decree 103/2013 providing for the rescue by the same means of the Bank of Cyprus.

Procedural facts

Following the issuance of the above Decrees, administrative actions were filed at the Registrar of the Supreme Court by numerous applicants with deposits held in Laiki Bank and the Bank of Cyprus, followed by ex-parte applications. Due to the nature and urgency of matters concerned the full bench of the Supreme Court of Cyprus decided to hear them all together. At the first hearing, the lawyers of the applicants agreed to withdraw the ex-parte applications after reaching an understanding with the full bench of the Supreme Court that the hearing of the administrative actions would be expedited.

Due to the many applications before the full bench of the Supreme Court, it was decided between the full bench of the Supreme Court and the lawyers of the applicants that the applications would be divided into two categories: the first category was for applications directed against Decrees concerning Laiki Bank while the second category was for applications directed against the Decrees concerning the Bank of Cyprus.

The full bench of the Supreme Court then proceeded to examine the preliminary objections raised by the attorney-general, who argued that the concerned administrative decisions which the administrative actions were directed against were not administrative ▶

decision, but "acts of Government" and thus they did not fall within the judicial review of the Supreme Court.

Decision

In issuing its decision on 7 June 2013, the Supreme Court found that Decree 104/2013 concerning Laiki Bank does not regulate the relationships between the state and the citizens but relationships concerning the operations of Laiki Bank and the sale of certain operations of Laiki Bank to the Bank of Cyprus – an act which, according to the court, falls within the scope of private law and not public law. The sale of the operations of Laiki Bank to the Bank of Cyprus was achieved by an agreement to which the said Decree pertains.

The Supreme Court also held that Decree 104/2013 concerns Laiki Bank itself as seller and the Bank of Cyprus as buyer, and does not concern the applicants who only have contractual relationships with Laiki Bank as depositors and/or creditors. The court then observed that Laiki Bank itself has not filed an administrative action, and neither has the Bank of Cyprus – although the court did not examine whether or not they were able to take such action. It stated that the above also applies to Decrees 96/2013, 97/2013 and 105/2013 concerning the sale of Laiki Bank's operations to other buyers.

The court concluded that there was no violation of any immediate interest of the Laiki Bank's depositors which may give rise to the right of recourse against the legality of the Decrees, and that this applies to all other contractual creditors of Laiki Bank. It also concluded that the depositors had been affected by the implementation of the resolution of the bank which can only be linked to whether or not the bank fulfilled its contractual obligations towards the depositors, and that the state intervention in the relationship between Laiki Bank and its depositors via the issued Decrees enables the depositors to claim in civil proceedings and not administrative proceedings against (a) the state within the framework of the resolution's procedure and (b) Laiki Bank based on their contractual relationship with the bank.

In relation to Decree 103/2013 concerning the Bank of Cyprus, the Supreme Court mentioned that it differs to Decree 104/2013 because it applies a different resolution measure, namely the rescue by the same means of the bank for the purpose of restoring the capital adequacy of the bank. For this reason, Decree 103/2013 provides for: (a) the conversion of 37.5% of deposits over EUR 100,000 into Class A shares; (b) the retention of a percentage of 22.5% on deposits over EUR 100,000 for potential

The court concluded that there was no violation of any immediate interest of the Laiki Bank's depositors which may give rise to the right of recourse against the legality of the Decrees, and that this applies to all other contractual creditors of Laiki Bank

conversion into Class A shares within 90 days, and; (c) the detention of the remaining 40% of the deposits over EUR 100,000 under certain terms. However, the court made the same legal findings as in Decree 104/2013.

Dissenting judgments

Judge Papadopoulou held that under the rule of law the acts of administrative bodies are subject to the Constitution, a foundation of which is the principle of legality of the acts and/or decisions of the administration. Judge Papadopoulou stated that the concerned Decrees were clearly individual administrative decisions of general application, and thus they did not constitute "acts of Government" which are exempt from judicial review by the Supreme Court. For this reason, Judge Papadopoulou proceeded to examine the preliminary objections raised by the attorney-general and concluded that the attorney-general had failed to prove that the agreement between the Republic of Cyprus and the Eurogroup amounted to a political agreement due to the fact that the Eurogroup is not a European statutory body and does not have any legal standing.

Judge Papadopoulou stated that the Decrees which were issued by the Central Bank acting as the Resolution Authority needed to be examined, rather than exempted from judicial review, so that the Supreme Court could determine whether the decisions were outside the power of the administrative body (ultra vires). Judge Papadopoulou concluded by stating that the preliminary objections should have been rejected by the Supreme Court so that it could proceed to examine the main body of the applications.

Judge Erotokritou took a similar view. He further mentioned that it is unacceptable for administrative bodies to use the "act of Government" as an excuse to avoid judicial review in relation to fundamental human rights enshrined in the Constitution, the European Convention of Human Rights and the Conventions of the European Union and supported that the concerned Decrees are individual administrative decisions of general application and are subject to the judicial review of the Supreme Court.

He further mentioned that as a result of the numerous Conventions which the Republic of Cyprus has ratified the legal framework of Cyprus has evolved. He found that every member state court is also a European Court, and thus there is an obligation by the court to review the faithful adherence of the national system to European law, with assistance from the European Court of Justice.

In relation to the ability of the depositors to take the alternative route of civil proceedings, Judge Erotokritou found it to be a significant mitigating factor for the violation of the principle of the effective protection of fundamental rights which does not extinguish the need for judicial review of administrative decisions. While fully respecting the majority decision, Judge Erotokritou took the view that the preliminary objections should have been rejected so that the full bench could proceed to examine the main body of the applications before the Supreme Court, stating that in the event that the Decrees are exempted from judicial review then the rule of law and the principle of legality will be in serious doubt.

The civil proceedings will allow the courts to examine whether the banks have breached their contractual obligations towards claimants as a result of state and/or European intervention, and whether this intervention violates the Constitution of the Republic of Cyprus and European law

Legal basis for claims

The aforementioned leads to the conclusion that potential claimants would need to file a civil action for breach of contract against the bank concerned (Laiki Bank and/or Bank of Cyprus) before the District Courts of Cyprus, with a potential extension of the civil proceedings against the state which affected the contractual obligation by issuing the concerned Decrees.

The civil proceedings will allow the courts to examine whether the banks have breached their contractual obligations towards claimants as a result of state and/or European intervention, and whether this intervention violates the Constitution of the Republic of Cyprus and European law.

In order to be successful in any claims against the Banks and/or the state, claimants will need to prove that the resolution or rescue of the credit institution concerned has put them in a worse financial position than they would have been in, had the credit institution been liquidated under Article 3(2)(d) of the Resolution of Credit and other Institutions Law of 2013 (Law 17(I)/2013). ■

About the author

George Z. Georgiou is the managing partner of George Z. Georgiou & Associates LLC. He studied law at Bristol University, England and was called to the Bar of England & Wales by the Honourable Society of the Inner Temple. Upon his return to Cyprus, he was called to the Cyprus Bar and became a member of the Chartered Institute of Arbitrators. He is also a member of EELA and RICS. George practises all fields of civil law and is considered an expert on Cypriot employment, pensions and corporate immigration laws. He regularly lectures in English and Greek on these subjects.

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CROSS-BORDER LITIGATION: PRACTITIONER PERSPECTIVES

At a recent seminar in Istanbul, practitioners from Turkey, Russia and the EU discussed the complications and challenges of cross-border litigation in their respective jurisdictions

Can Yeğinsu of **4 New Square Chambers** explores the reasons behind the continuing popularity of England as a forum for the resolution of commercial disputes between foreign parties

Foreign parties have long chosen English law to govern their arrangements, and the English courts as the forum in which to resolve their disputes. Yet competition between international dispute resolution centres has arguably never been so rife. Forum shopping continues, and today there are a wider selection of shops – and products: arbitration in its many forms as well as litigation – from which the well-informed consumer may choose.

In spite of the competition, England remains a leading centre for international commercial dispute resolution. Most of the reasons for this are well-rehearsed. London is an international business hub. England enjoys a long-established reputation as a safe and neutral forum for dispute resolution, underpinned by a strong and independent judiciary. Parties before the English courts enjoy the advantages of an adversarial system without, perhaps, facing the unpredictability that can be associated with jury trials, or the risk of punitive damages awards sometimes seen the United States. Moreover, disclosure before the English courts is ordinarily less wide-ranging – and therefore less expensive and time-consuming – than before their US counterparts.

Add to that picture a GBP 300 million state-of-the-art court complex – the Rolls Building – unveiled in 2011 in a move aimed to demonstrate a commitment to continue to attract international work to London. That work is certainly coming in: four out of five cases that are dealt with in the Commercial Court have one party that is based outside of England and Wales; in half of all cases neither party is based in England and Wales.

Certain commentators have linked these statistics to the actions of jurisdiction-hungry courts taking jurisdiction over disputes which have little or no connection with England. That characterisation is perhaps unfair. It is right that, for example, in the much reported case of *Cherney v Deripaska No.2 [2008] EWHC 1530 (Comm)*, the High Court: (i) found that Russia, and not England, was the natural forum for the resolution of the dispute between the parties; but (ii) accepted jurisdiction in any event on the basis that, on the evidence before it, there was a significant risk that justice would not be done to Mr Cherney in Russia.

That the decision in *Cherney* was specific to the parties – and not some general indictment of the Russian legal system – is borne out by the subsequent decision in *Yugraneft v Abramovich [2008] EWHC 2613*, where it was held that a fair trial was possible for those litigants in Russia. Similar results were reached, this time in the Ukrainian context, in *Pacific International Sports Club Ltd v Soccer Marketing Ltd [2009] EWHC 1839 (Ch); [2010] EWCA Civ 753* and *Ferrexpo AG v Gilson Investment [2012] EWHC 721 (Comm)*.

What these three cases have in common is that the party seeking to found jurisdiction in England was able to point only to generalised concerns (which the court was prepared to accept) relating to the integrity and reliability of the two legal systems involved – i.e. Russia and Ukraine – and was unable to identify (at least not to the requisite standard) any risk or risks of injustice that were specific to the parties or the particular litigation. This is to be contrasted with the position in *Cherney*.

Those with any residual concerns about jurisdictional over-reaching by English courts should take note of the recent decision in *VTB Capital plc v Nutritek Int. Corp. [2013] UKSC 5*. In that case, the UK Supreme Court dismissed an appeal from a refusal to grant permission to serve out of the jurisdiction in a claim where the claimants' claims were found to be governed by English law (relating to torts of fraudulent misrepresentation) on the basis that the "fundamental focus" of the dispute was on Russia such that the claimant could not discharge the burden of establishing that England was clearly the appropriate forum for trial. ■

Can Yeğinsu practises as a barrister at 4 New Square Chambers in London where he specialises in commercial dispute resolution, including international arbitration. Can has experience of a wide range of commercial disputes and has successfully appeared as counsel before the UK Supreme Court, the Court of Appeal, the High Court as well as in arbitral proceedings.

Varvara Knutova, head of the dispute resolution and mediation practice group at Russian firm **Pepeliaev Group**, considers the steps foreign parties need to take when investing in Russia

When entering the Russian market, the first step to be taken is related to checking the legal capacity and powers of the Russian partners you are planning to interact with. Identify their legal entities; besides the general information you can acquire from relevant resources, using the Unified State Register of legal entities is crucial. Indeed, one can extract data on any legal entity registered in the territory of the Russian Federation as an information extract.

The next crucial step is to inquire about the relevant corporate approvals – if any are required in order to contract with the Russian legal entity, for example. Finally, there are ancillary details on which to focus: paperwork and correspondence with business partners, for example.

When communicating with Russian partners one must note that electronic correspondence is considered to be weak evidence. Bilateral documents should be signed (or exchanged) in hard copy to support all important arrangements in person, while exchange of correspondence should be regulated by the contract and service of documents should be performed by authorised persons and with registration of delivery.

Entering into contractual obligations with a foreign agent brings us questions as to the choice of law. Accordingly, it is useful to emphasise the imperative rules of Russian law:

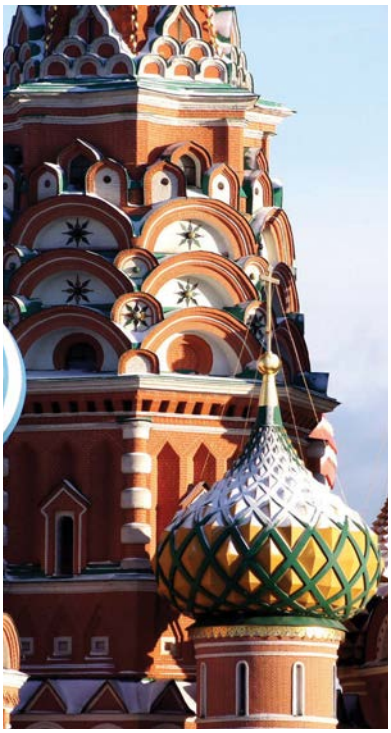
1. Principle *lex voluntatis*: parties to an international contract may choose any governing law;
2. Real connection rule: the application of mandatory rules of the Russian law (if any are applicable) cannot be derogated by contract;
3. Applicable mandatory provisions are of special importance for (including but not limited to) ensuring the basic rights and interests of participants in business, and;
4. Public order: a foreign law rule in exceptional cases shall not be applicable in Russia if it is contrary to fundamental laws (public order) of the Russian Federation.

Common mistakes in choice of law are: a choice of two laws simultaneously (e.g. Russian and Turkish) or a choice of law depending on the plaintiff. Both options are invalid. The application of different laws to different parts of the contract can, however, be possible.

A choice of forum made by parties to a contract is generally respected by Russian courts, although it should be noted that Russian courts have exclusive jurisdiction over certain categories of disputes – bankruptcy proceedings, corporate disputes, rights to real estate registered in Russia and IP rights registered in Russia, among others.

Moreover, it should be noted that the clause selecting a forum to resolve disputes which gives only one party the right to file a claim with a state court in Russia is invalid; this contradicts the principle of granting equal procedural opportunities to all parties to defend their rights and legitimate interests.

Foreign judgments can be recognised and enforced in Russia on the basis of an international treaty – although there is no such Russia-Turkey treaty in force – or on the basis of reciprocity and comity principles of international law. Besides, foreign arbitral awards can be recognised and enforced in Russia, as Russia is a member of the 1958 New York Convention. ■



Varvara Knutova is a head of the dispute resolution & mediation practice group at Pepeliaev Group's Moscow office. She specialises in conflict of law issues, regulation of international commerce, domestic litigation and arbitration, international commercial arbitration and alternative dispute resolution, jurisdictional disputes, enforcement of foreign judgments and commercial arbitration awards, as well as bankruptcy proceedings.

Dr Stephan Bausch and **Dr Hans-Peter Hufschlag**, partner and senior associate respectively at **Luther Rechtsanwaltsgesellschaft mbH** in Düsseldorf, discuss Germany's civil and commercial court system

The German court system comprises ordinary courts and specialised courts. Since ordinary courts are responsible for jurisdiction in all legal disputes which are not allocated to any of the specialised courts – i.e. administrative, financial, labour or social courts – they are responsible for civil and criminal jurisdiction. Within the ordinary courts, there are different hierarchy levels, which are (ranging from low to high) Local Courts (Amtsgerichte), Regional Courts (Landgerichte), Higher Regional Courts (Oberlandesgerichte), and the Federal Court of Justice (Bundesgerichtshof).

In order to ensure that any legal dispute is brought before a competent judge, panels specialised in specific fields of law have been established by many courts (e.g. competition and banking law, patent litigation, etc.) In addition, chambers for commercial matters (Kammern für Handelssachen) have been established at the Regional Courts. Consisting of one professional judge and two merchants, these panels are specialised in commercial law-related disputes and responsible for jurisdiction in such disputes at the request of one of the parties.

In principle, the Regional Courts are responsible for jurisdiction in all legal disputes which are not allocated to the Local Courts, whereas the Local Courts have jurisdiction over claims worth up to EUR 5,000.

In civil law matters, legal proceedings are initiated by submission of a written pleading (statement of claim) at the responsible court by the plaintiff. The court handles the service of the statement of claim to the defendant, as soon as the plaintiff has paid an advance on the court fees. The defendant may acknowledge the claim partially or entirely, or respond to the complaint through a statement of defence. If the defendant does not respond to a complaint in either way, or fails to appear at the oral hearing, the court can render a default judgment at the plaintiff's request. The plaintiff, on the other hand, may reply to the defendant's statement of defence or withdraw the complaint partially or entirely. Instead of contending for a judgment, the parties may also settle the claim amicably.

Judgments of first instance can be contested by appeal on issues of fact and law if the amount in dispute on appeal exceeds EUR 600 or if the appeal has been explicitly allowed in the contested judgment. Appeals are brought before the court of the next higher level of the hierarchy. Judgments of the Court of Appeal can be contested by appeal concerning points of law. Such an appeal has to be filed with the Federal Court of Justice and is only permissible if it has been explicitly allowed in the judgment of the Court of Appeal.

The duration of the proceedings depends on the complexity of the complaint and the workload of the court. For an average claim filed with a district court, a first instance civil action may conclude with the issue of a judgment within six to eight months. In ▶

principle, the losing party has to bear (and compensate to the other party) the costs of the proceedings which comprise court fees and extrajudicial costs, such as lawyers' fees. The compensation of lawyers' fees is limited to the statutory fees according to the Lawyer Fees Act. The amount of the statutory fees depends on the value of the claim in dispute and is generally less than the lawyers' fees calculated according to hourly rates.

Litigation before German courts can be considered efficient, rather fast and, compared to most other industrialised countries, cheap. The enforceability of judgments is guaranteed in the member states of the European Union by the Brussels Regulation; in most other industrialised countries, judgments can be made enforceable through an acceptance procedure in the relevant country. ■

Stephan Bausch is a partner with Luther Rechtsanwaltsgesellschaft mbH in Düsseldorf, where he is responsible for the litigation practice. From 2006 until 2013, Stephan was a member of the litigation practice of Freshfields Bruckhaus Deringer LLP. Stephan focuses on representing companies in complex commercial and corporate litigation. He also represents banks and financial service providers in banking law issues.

Hans-Peter Hufschlag is a senior associate with Luther Rechtsanwaltsgesellschaft mbH in Düsseldorf. He specialises in litigation in commercial law, corporate law and bankruptcy law matters.

Orçun Çetinkaya, a partner at Mehmet Gün & Partners in Istanbul, considers the problematic application of Turkey's integrity principle

Over the last three years, Turkey has been among the world's fastest growing economies, with an ambitious target to become one of the ten largest economies in the world by 2023, the centenary of the foundation of the Turkish Republic.

To achieve this goal, the government has made a large number of legislative improvements. In this respect, three major reform packages were passed, and some of the key laws – such as the Civil Procedure Code, Commercial Code and Code of Obligations – were fully renewed.

While these legislative developments can be regarded as improvements for the good, they did not touch on one of the crucial defects in Turkish Civil Procedure, which is the key reason why Turkish courts are mostly considered to be ineffective. One of the main problems of the current system is that there is no sufficient deterrence for the parties hesitating to play with the truth. It means that civil procedure in Turkey supports the integrity principle, but does not penalise parties who fail to comply with the principle.

The integrity principle is adopted in Article 29 of Civil Procedure Code, where it is indicated that parties are obliged to behave in accordance with the integrity principle. Besides, parties have to make their disclosures of facts supporting their claims consistent with the truth. But there is no indication as to what would happen if a party fails to comply with this rule. The direct result of such a lack of deterrence is that the parties who litigate before Turkish Commercial Courts raise their arguments without knowing, but rather wishing, that their counterparty is telling the truth.

On the other hand, like other European countries (except the UK), Turkish Civil Procedure does not require full disclosure but relies instead on party preparations. In a system where the integrity principle is not at all protected, it is difficult for judges to deliver justice on the basis of party submissions and evidence. It would have been the other way around in Turkey if the Civil Procedure Code had heavily protected the integrity principle or full disclosure had been compulsory.

The UK example should be examined to see how a court system can be effective and open the way for alternative dispute resolution methods if the integrity principle is protected and full disclosure is chosen as a means of review of facts and evidence.

As a civil law system it might be difficult for Turkey – or might take some time – to adopt the principle of full disclosure in the short term even though I believe that the principle of full disclosure would undoubtedly help reduce the judicial budget, decrease the number of cases, speed up the proceedings and be more open to ADR methods.

However, the integrity principle should be urgently protected and a good deterrence mechanism should be introduced in Turkey, regardless of its civil law system, so that parties can rely on party submissions and evidence in a system where full disclosure is not a must. ■

Orçun Çetinkaya is a partner at Mehmet Gün & Partners' corporate & commercial law department in Istanbul, Turkey. He has considerable experience on multijurisdictional commercial litigation, construction disputes, real estate projects and shareholder disputes, as well as domestic and international arbitration.

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Italy has re-established mandatory mediation following a challenge to a previous attempt in October 2012. **Dahlia Belloul** asks if it will be second time lucky

MEDIATION ALL' ITALIANA

Implementing the EU's Mediation Directive, Italian-style, has been anything but straightforward.

In March 2011, the Italian government implemented a mandatory mediation procedure which faced considerable backlash from the country's legal profession. Designed to fulfil the requirements set out by the Directive, it stipulated that all plaintiffs had to attempt to resolve their disputes via mediation prior to litigating in the courts.

The European Directive states: "Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements."

Mediation is developing apace within the EU, driven in part by Brussels' bureaucrats. While the UK's efforts have been largely positive, a range of attitudes remain.

The first Italian provision lasted until October 2012. Following a challenge from the national Bar association to the Italian Supreme Court, it was withdrawn by parliament for failing to adhere to proper legal requirements in being released as a decree, instead of parliamentary legislation.

That is not to say, despite its controversy, the development was unwelcome. Indeed, during its short life there was a "mediation explosion" in Italy, says **Giuseppe de Palo**, the founder and president of the **ADR Center**, the Italian arm of **JAMS International**.

"Italy saw over 250,000 mediations started in this time, compared to maybe 1,000 per year beforehand," he says. "We had a stunning increase, as one would expect." But on 24 October 2012, "the mediation movement came to an end."

All was not lost, however. On 15 June 2013, the government resurrected the provision by announcing a new mandatory mediation legislature, ensuring mediation's legal basis would be achieved via a parliamentary statute.

Yet this time there's a twist: the provision creates an opt-out system whereby all plaintiffs are invited to attend mediation within 30 days of the initial dispute. "If the parties decide that mediation is unsuitable, they can withdraw from the mediation by each paying a nominal fee," explains de Palo. This fee ranges from EUR 60 to EUR 200 depending on the size of the suit.

"The burden on people having to mediate, when they do not want to mediate, or where it is clear from the beginning that there is no chance of success, is limited," he says. The idea is for both parties to "at least give it a try."

He says the new legislation hopes to achieve a balanced relationship between litigation and mediation, as provided for by the EU Directive, while avoiding criticism that the proposal might violate access to justice, which was one of the arguments its opponents had raised previously.

International investors have also expressed concerns over dispute resolution in Italy. A 2010 **Hogan Lovells** study, for example, found that when asked to identify jurisdictions in which their litigation experience had been worse than in the UK, Italy topped the list with 36%.

Although only 17% of mediations were voluntary during the mandatory period, de Palo says "of all the cases mediated, approximately 50% settled." He notes that figure is echoed in other jurisdictions where similar provisions apply, like Australia, indicating the inclination to settle is present whether mediation is mandatory or not.

Italian prosperity

Five days before new Italian legislation was tabled, the New York-headquartered **International Institute for Conflict Prevention and Resolution** (CPR) announced a partnership with the

Milan Chamber of Arbitration.

The partnership includes an ADR provision which will see the latter promote the former's new "21st Century Pledge." The pledge asks signatories to agree to consider alternative dispute resolution, including mediation, prior to entering litigation.

Special counsel of the CPR, **Kathleen Scanlon**, says the initiative aims to prevent "pledge fatigue" – where international organisations are faced with a multitude of similar agreements in different jurisdictions. The providers also agreed to exchange mediators for early neutral evaluations, if so required.

"These types of ADR processes are best when each side has agreed to proceed; they are strongest if they're coming from the parties themselves, as opposed to being imposed from the outside," Scanlon says.

While respecting the Italian parliament's legislative interventions, she adds that "the role of government in these types of disputes is to have a legal structure that doesn't interfere with parties being able to choose these other alternatives."

For his part, de Palo says the Italian provision aims to bring those options to the attention of plaintiffs. "You need to kick people into the mediator's room, or else there are no mediations," he says. "There is evidence of this throughout the world, and there was evidence in Italy in the absence of the mandatory mediation provision."

He similarly addresses the fears of some lawyers that mandatory mediation would jeopardise the role of litigators in Italy, saying that "when mandatory mediation was being used, the busiest mediators were the lawyers; 85% of cases mediated were cases where the lawyers were at the table of the mediator with the client."

Italy's vibrant culture of litigation – albeit which remains hamstrung by backlogged courts – has seen considerable post-credit-crunch activity, ADR or no ADR. The country also generated the infamous 'Italian torpedo' in relation to the ouster of anti-suit injunctions, as well as in private actions claims, allowing an opportunity for Italian defendants to choose the court to hear the case.

Lawyers also want to preserve their options. Take banking litigation, which has seen double-digit rises in the number of suits filed since the global financial crisis took hold.

Speaking to *CDR* previously, **Andrea de Tomas**, a partner at **Bonelli Erede Pappalardo**, said: "Certain controversies that in the past would have been amicably and privately resolved now hit the courts, as plaintiffs are getting more aggressive towards banks, which they now see as weaker targets."

While dominated predominantly by

domestic firms, Italy's disputes landscape is also proving increasingly attractive to the Anglo-American legal machine.

Simmons & Simmons in December 2011 hired disputes partner **Giorgio Fraccastoro** in Rome, while **Latham & Watkins** established its Italian commercial litigation practice in Milan with the hire of litigator **Cesare Degli Occhi** in the same month. In July 2012, **Linklaters** launched its own litigation capability in Milan with the hire of dispute resolution partner **Alessandro Villani**.

Italy's new mediation provision presents a multitude of benefits. Besides helping to relieve the five million-odd cases currently pending in the country's court, mediation is considerably cheaper than both litigation and arbitration. That's no bad thing for a country currently sharing the burden of European and global economic crises.

The Italian provision, says de Palo, might be a "good model for Europe because lots of countries have thus far struggled with making mediation happen."

He adds: "If Italy becomes the poster child for the smart form of mandatory mediation, that is, mediation with an opt-out provision, I bet you that European countries will follow suit immediately." ■

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