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Litigation and Dispute Resolution NEWS

Dispute resolution – restructuring – staff reduction

and more current information

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Editorial

Dear Reader,

It gives me great pleasure to present to you Issue No. 6 of our GGI Practice Group Litigation and Dispute Resolution Newsletter. Thanks to the overwhelming response of so many of you, it is packed with highly interesting articles. The lead article from Christine Libor of FPS law firm in Germany gives us an insight into the relevance of so-called name lists under German labour law in the context of restructuring and staff reduction measures. Byron Moldo of US law firm Ervin Cohen & Jessup explains the laws of California regarding the partition of real property, which include the appointment of referees and procedures regarding the property sale. Anthony J. Soukenik from US member firm Sandberg Phoenix & Von Gontard provides tips for a successful mediation. Laura A. Patti from the Italian law firm Patti Avvocati & Rechtsanwälte then takes us on a challenging dogmatic journey on the topic of the force of *res judicata* in an unusual German decision involving a property case. Seiichi Yoshikawa of the Tokyo law firm Koga & Partners familiarises us with the requirement imposed on a foreign plaintiff to deposit the anticipated cost of litigation as a security under Japanese civil procedure law. Matteo Zanotelli from the Italian GGI member SLT Strategy Legal Tax provides us a few brief considerations on interim measures in arbitral proceedings, while Jenni Jenkins and Thomas Grace from our London-based member firm Memery Crystal discuss when an English court can provide interim assistance or support to parties in arbitration. Steven Rubin and Julia Gavrilov from US member firm Moritt Hock & Hamroff continue with their article on the Internet of Things (IoT) and how it implicates increased new and unique cybersecurity issues, a current topic. Francis P. Donovan and Jérémie Longpré from Montréal firm Ravinsky, Ryan, Lemoine complete the sequence of fine contributions to this issue of our newsletter with an account of a decision from the Supreme Court of Canada, which has confirmed the inviolability of the World Bank Group Archives.

I thank all members of our Practice Group for their overwhelming response to our call for contributions to this newsletter. Please continue to support our newsletter in portraying a colorful picture of the different aspects of litigation and dispute resolution in the various jurisdictions!

Our next Practice Group meetings will be held during the GGI European Regional Conference in Brussels (11-14 May 2017), the GGI North American Regional Conference in Vancouver (22-25 June 2017), and the GGI World Conference in Vienna (19-22 October 2017). We are also planning another standalone Extraordinary Practice Group Meeting in North America in November. I look forward to meeting you at one of these conferences.

Best regards,
Dr Karl Friedrich Dumoulin
Global Vice Chairperson of the
GGI Litigation & Dispute Resolution
Practice Group

Dispute resolution – restructuring – staff reduction

By Christine Libor

Restructuring not only causes non-productive disturbances among staff, it can also be expensive due to lawsuits raised by affected employees. Therefore it is important to plan strategically at an early stage. Skilful use of the legal measures at hand can ultimately avoid many

disputes.

If there is a works council in the company, it is mandatory that the employer informs them at an early stage and under certain statutory conditions negotiates a reconciliation of interests and a social-compensation plan. This is a labour-management contract, in which the measures for restructuring are determined and the financial compensation for those employees who are affected by the changes are laid out. If this is not done, employees may lodge damage claims and the works council could even stop the restructuring by means of a court order.

The works council is entitled to consult a lawyer at the employer's expense. Quite often, the relevant workers union presses to be involved in the negotiations, but the support of a non-legal labour union representative or of any labour union representative besides a lawyer can only be claimed by the works council if there are more than 300 employees in the company. If not, employers can decide on a case by case basis whether they consider it to be reasonable to involve the labour union.

A strategically important instrument in handling staff cutbacks is an agreement on a name list. For this purpose, in the reconciliation of interests, not only the jobs which shall be cut back are listed, but also (usually in an attachment) the names of the employees who shall be made redundant. The works council is not obliged to agree to such a name list and therefore usually requests additional payments for the employees affected in exchange for their support. On the other hand, this list has the important legal advantage that termination notices which are declared on grounds of a name list can be reviewed by a Labour Court only to a very restricted extent. Without this list, every single termination notice would require a very complex statement of reasons why the job has been cut back and why exactly this employee must be laid off. It has to be taken into account that most employees tend to sue against their redundancy. This leads to a considerable extra costs, expenditure of time and, last but not least, disruption in the company, because in the case of a return of the employee originally laid off, another employee would have to expect a termination notice. If the termination notice is declared on the grounds of a name list, the court will review the statement of reasoning only with regard to gross mistakes. This crucially turns things in favour of the employer. In practice, this leads to a situation with much fewer lawsuits and leads more often to positive outcomes in remaining trials.

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Christine Libor is a Partner at FPS in Dusseldorf. Her areas of expertise cover the entire range of labour law and media law, including litigation and dispute resolution. She regularly advises companies in change processes, focusing on economic and amicable solutions, and also representing clients in necessary lawsuits.

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Tips for successful mediation

Part I

By Anthony J. Soukenik

Mediation or ADR (Alternative Dispute Resolution) seems to be the way of the world, as parties can often "get what they need, not what they want"[1]. Come to a common ground agreement early in the process; let the other side choose the mediator, with some coaching as to your experiences. Prepare a concise pre-mediation statement which unbiasedly describes the equities and law applied to the facts. Let your client be a part of this process as this may be the first opportunity for your client to analyse their case, as mediation is a process of the clients helping themselves to reach an agreed solution.

Next, prepare the mediation settlement agreement before the day of mediation, with your client's input, so that fatigue does not get the best of both of you and your client. Make sure that

...next page

all the pertinent terms are reasonably considered in writing, anticipating the compromise acceptable to your client and in a word document format ready to be edited based on the events of the day.

Always have the client sit next to the mediator. The client should be coached in advance to do most of the talking when in joint session or in private caucus with the mediator. Prepare your client before the mediation accordingly.

To be continued in issue no. 7

[1] *From the lyrics sung by the Rolling Stones, "You Can't Always Get What You Want" often quoted by one of our local mediators, Ronald G. Wiesenthal, Esq.*

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When breaking up with partners is difficult, call a partition referee

Part I

By Byron Moldo

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In the US, when partners own real estate or a business and are unable to resolve a dispute, one remedy available is to file a lawsuit and seek the appointment of a partition referee. The referee is an independent person (usually a lawyer or business person) that reports to the appointing court and is required to comply with all court orders. One of the referee's obligations is to maintain neutrality (not favour one party to the litigation) and to maximise the estate over which the referee was appointed. This article briefly explains the use of a partition referee.

In California, there are statutes re-

garding the partition of real property, which include the appointment of referees and procedures regarding the property sale.

Partition referees are appointed after the court determines the parties' interests in the property and orders its partition through an interlocutory judgment. The litigant needs to prove co-ownership and that a disagreement exists about whether the property should be sold. Only after a proper showing of evidence is made will the trial court appoint a partition referee.

The court's appointing order will contain the powers, duties and responsibilities of the referee. Sometimes the appointing court requires the referee to post a bond. Any party may file a motion for instructions regarding the referee's duties. A referee may hire, with court approval, attorneys, realtors, auctioneers and other professionals.

To be continued in issue no. 7

The force of *res iudicata* of an unusual German decision involving a property case

By Laura A. Patti

A German judge holds that the jurisdiction does not belong to him (being an Italian judge the competent one) but, at the same time, incidentally decides upon one of the issues in the merits, contrary to the client's interest. When suing in Italy, which part of the German decision is covered by force of *res iudicata* and, thus, binding for the Italian judge?

The case has to be decided according to German Law, i.e. Article 322 of the German Code of Civil Procedure (hereinafter "ZPO"), which states in the first paragraph: "(1) The judgements can acquire force of *res iudicata* insofar as a decision on the claim or counterclaim has been issued."

The commentators of the ZPO hold that the legislator wanted to limit the force of *res iudicata* to the subject matter of the dispute and, as a result, no force of *res iudicata* extends to the facts, nor to the judicial consequences. Also, the jurisprudence stated that "The force of *res iudicata* of a decision is limited to the immediate subject of the decision, i.e. the legal consequence that forms the operative part of the decision. The single elements of the decision, the factual findings and the judicial inferences, based on which the decision has been taken, on the contrary are not affected by the force of *res iudicata*" (German Supreme Court - BGH, NJW 1986, 2509).

In the present case, the German Court, besides establishing its lack of jurisdiction, decided upon a question posed in the alternative, whereas no decision has been issued on the main demand.

Thus, consistent with what has been said above, the inference, incidentally made on the issue on the merits, was not covered by *res iudicata*: a positive outcome for the client.

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The requirement imposed on a foreign plaintiff to deposit anticipated cost of litigation as a security

By Seiichi Yoshikawa

In Japan, the losing party of a civil litigation must bear the cost of litigation ("CL"). The scope of CL is prescribed by law and consists of court fees and certain other expenses (daily fees and travel expenses of witnesses and interpreters as well as expenses for preparation of briefs). However, since the amounts of some other expenses are fixed by law, and not actual amounts, they are not necessarily overly large. Most importantly, attorney fees are not included in CL and must be borne by each party. Court fees are fixed based on the amount of the claim; for example, filing fees for 1st instance court are 10,000 JPY, 50,000 JPY and 320,000 JPY for claims of 1, 10 and 100 million JPY, respectively. Fees for appeals to 2nd and 3rd instance courts are 1.5 and 2 times as much as such filing fees, respectively.

If a plaintiff ("P") does not have an address or office in Japan, upon defendant's motion, the court will order P to deposit an amount of CL fixed by the court as security in case P loses the case, because the defendant may have difficulty recovering the amount of CL from such P. Since P has already paid the filing fees when P files the case, the security to be deposited is mainly court fees for the 2nd and 3rd instance courts in normal cases. P can have the deposit refunded should they ultimately win the case.

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KOGA & PARTNERS

Interim measures under arbitral proceedings: a few brief considerations

By Matteo Zanotelli

Drawing from my own recent experience, I will briefly report a few considerations on interim measures in arbitral proceedings.

Generally speaking, when considering whether or not to introduce an interim measure request, a party should first evaluate if such an application is more appropriate during the course of arbitral proceedings or directly before national courts.

The most common arbitral procedural rules, I note, in fact grant the arbitral court the power to award interim measures upon a party's request (see UNCITRAL Arb. Rules, LCIA Arb. Rules, ICC Arb. Rules, AAA Arb. Rules).

Alongside specific arbitration rules, in granting the interim measure the arbitral court shall also consider other applicable rules of law; typically, in absence of an express choice by the parties, the law of the forum (i.e. the national law of the place where the arbitral proceeding is held) shall also determine the applicable procedural law and, as a consequence, the content or the extent of the interim measure.

Once granted (usually in the form of an ordinance and/or a partial award), the interim measure shall be recognised and enforced in a specific nation, frequently different from the one where the arbitral proceeding is held.

As a result, when considering whether or not to apply for an interim measure during arbitral proceedings, a party should consider if the request complies with: a) the specific arbitration rules applicable to the proceedings; b) the national procedural rules applicable to the dispute(1); c) the national law of the place where the interim measure shall be enforced(2).

If one of the above-mentioned requirements cannot be met, a party should seriously consider applying for the interim measure directly before the national court of the place where the interim measure shall be enforced.

(1) National law can restrict the panel of available measures. (2) For example, under Italian Law, the arbitrator's authority to grant interim measures is not recognised. An interim measure awarded by an international arbitral court is likely to be unenforceable in Italy.

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SLT Strategy Legal Tax

"Holding the ring" – arbitration and English courts

By Jenni Jenkins
and Thomas Grace

When can English courts provide interim assistance or support to parties engaged in arbitration?

While the court's role in arbitrations is supportive, rather than supervisory, even when England is not the nominated seat of arbitration, parties may be able to apply to English courts for interlocutory relief in supporting arbitral proceedings.

Court powers exercisable in support of arbitration include:

1. Taking/preserving evidence (e.g. ordering a witness to give a deposition);
2. Orders relating to property (e.g. the appointment of a receiver); and
3. Orders relating to interim injunctions (e.g. a freezing order).

For the court to intervene without the other party's consent or permission from the tribunal, it must be satisfied that the matter is either urgent or that the tribunal cannot itself act effectively.

Urgency is defined as there being insufficient time to either expedite the formation of the tribunal or appoint an emergency arbitrator. Situations where the tribunal cannot itself act effectively would include those where it cannot exercise the necessary powers sought, such as a freezing injunction binding a third party.

This course of action is therefore most pertinent when urgent injunctive proceedings are required. However, while the court can make any order it sees fit, its intention is that any interim relief it orders, which the tribunal could exercise were it formed, will not go beyond holding the ring until the tribunal is constituted.

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Memery Crystal

The Internet of Things: marrying cybersecurity with product liability litigation

By Steven Rubin and Julia Gavrilov

The Internet of Things (IoT) refers to objects which have network connectivity, allowing them to send and receive data. Examples include thermostats, baby monitors and medical devices. As the number of connected devices proliferates, so too will the risk that vulnerabilities will be exploited by hackers, implicating new cybersecurity issues. Developments relating to damages caused by the vulnerabilities of IoT devices demonstrate how creative plaintiffs are exploiting this new technology medium.

Malefactors are exploiting vulnerabilities in certain IoT devices that fail to have adequate cybersecurity measures, resulting in attacks that cause either physical damage or the theft of personal data. For example, ADT's home security system has been targeted in multiple suits on the basis that its wireless systems allow hackers to, among other things, tamper with equipment and/or use customers' own security cameras to spy on them.

The next wave of IoT-related litigation will likely be in the context of a distributed denial of service attack (DDoS). For example, coffee makers are hacked and then used to issue thousands of queries to a website, effectively making that website inaccessible or denying service from that site. In such instances, a plaintiff such as Macy's could sue for intangible damage caused by the inability of customers to access their website.

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The Supreme Court of Canada confirms the inviolability of the World Bank Group Archives

By Francis P. Donovan and Jérémie Longpré

The World Bank Group ("WBG") is an organisation which provides financial support to developing countries. The Integrity Vice Presidency ("IVP") is a unit within the WBG that aims to prevent corruption in relation to projects financed by the latter. In 2012, members of an engineering firm ("respondents") were charged in Canada with fraud after the IVP disclosed investigative reports regarding the construction of a bridge in Bangladesh. In order to prepare their defence, the respondents made a court application to compel the IVP to produce documents in its possession. The application was granted at trial, but this decision was reversed by the Supreme Court of Canada. Although the decision was rendered in a criminal case, its principles also apply in civil matters.

In its reasons, the Supreme Court first recalls that the WBG's archives are inviolable under an international agreement, approved by Canadian Parliament and having force of law in Canada. The Court then states that the term "archives" should cover the entire collection of documents stored by the WBG. Moreover, the Court emphasises that "inviolability" protects not only against compelled production, but also against search and seizure. Canada's courts therefore lack the requisite jurisdiction to compel the production of documents held by the IVP.

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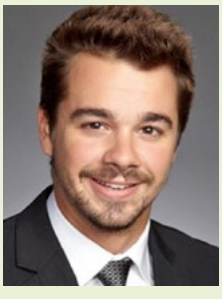

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