Litigation & Dispute Resolution NEWS

Negotiation of conflict management tools: what negotiator are you?

and other interesting news in Litigation & Dispute Resolution

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Editorial

Dear Reader,

It gives me particular pleasure to present to you issue no. 8 of our GGI Practice Group Litigation and Dispute Resolution (LDR) Newsletter well ahead of the GGI European Regional Conference in Berlin, since the law firm FPS, where I am partner, will have the honour to be amongst the hosts of this conference.

Thanks to the great response of so many of you, once again this new issue is full of highly interesting articles. They cover such different areas as conflict management in Italy, legal issues in connection with blockchain companies, an overview on Austrian litigation, litigation against foreign companies and international organisations from the Dutch perspective, the history and purpose of common law courts of equity, the introduction of a 3% web tax in Italy, the legal effects of expert determination in Australia, the legal impact of Brexit and recent reforms in Italian insolvency law.

The varied topics in this issue certainly showcase the wonderful members of our Practice Group, and the quality of the meetings we have had since the publication of our last newsletter (autumn 2017) prove the international strength of our group. For the Practice Group meeting in Vienna, we gathered 33 participants from 18 different countries – a truly global reach, and many participants confirmed after the conference, that the meeting was a great success and that they left with valuable new information, which they would not have gained in any other one-day training course. We are immensely proud of our international LDR network!

Our next Practice Group Meeting will be held during the GGI Regional Conference in Berlin (19 - 22 April 2018). Enjoy discussing current legal topics on litigation and dispute resolution in Berlin. Enjoy the vibrant, colourful and creative atmosphere of the German capital. Meet the 'GGI family' and make good new contacts.

I look forward to seeing you there!

Dr Karl Friedrich Dumoulin
Global Vice Chairperson of the
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Negotiation of conflict management tools: what negotiator are you?

By Dr Mariagiulia Signori

When managing a conflict within the Italian system, it must first be verified whether an Alternatice Dispute Resolution (ADR) instrument – such as negotiation, mediation or arbitration – may be used before being forced to go to court. The idea of using ADR techniques is to find a solution between the parties without going to court. My dear colleagues from Australia, Andrew Lacey and Nathan Jones, discuss in detail the ADR process 'Expert determination' in their article on page 9.

Among the various ADR techniques, negotiation is the only one in which an impartial third participant does not

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seek to facilitate discussions between the parties, as in the case of mediation; instead, the process is handled directly by the parties and their representatives.

Accordingly, resolving a conflict using this method is more complex than it may seem.

The renowned Harvard University professor Howard Raiffa (who created the innovative Program on Negotiation) defined negotiation as 'a situation in which two or more parties recognise that different values exist among them'.

His colleague, Professor Sebenius, identified six major errors committed during negotiations that can undermine and even result in the failure of the process.

These errors are committed when one party – or its representatives – ignore the other party's problems, allow their economic interests to prevail over their other interests, focus on the parties' positions and not their interests, insist on seeking common ground, ignore better alternatives to a negotiated settlement and, finally, harbour prejudices regarding the other party and improperly assess them.

In order to avoid these errors, professionals must keep an open mind and be willing to change their point of view as they analyse each case, focusing on all parties to the conflict and not just on their clients.

Clearly, this is not easily done and goes against the natural tendency in all of us to view negotiation as a distinctive aspect of our profession and to see ourselves as having our own distinctive conflict management styles. Some take a competitive approach, while others are collaborative; some avoid direct conflict, while others are accommodating.

Within this framework, the new negotiation techniques proposed increasingly suggest that professionals change approaches, switching from conflict to cooperation and taking a dual view of the situation, thus permitting observation and understanding of the dynamics of the conflict.

This makes it easier to identify the right questions to ask the client so as to achieve a clearer understanding of actual relationships between the parties and change the perspective on the situation.

Professionals must also refrain from expressing an opinion to the people they are dealing with in order to understand the parties to the conflict, identifying their true interests and needs by listening to them.

The purpose of structuring negotiations in this manner is to create an environment of trust and empathy at the negotiating table where strategies can be flexibly integrated. Creating a collaborative atmosphere helps the other party understand that we respect their positions, even if they differ considerably from ours.

Finally, in this context professionals must always explain to their clients the best and worst alternatives to a negotiated settlement. The goal of presenting these opposite alternatives is to bring to light sustainable prospects for both parties and identify feasible solutions, and thus to reach an agreement that is satisfactory to all parties, who come out believing that they have won.

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Blockchain companies have raised billions of dollars – Has it all been legal?

By Edward Tolchin

Part 1 of a 5-part series. Future segments will be published on the GGI Forum – www.ggiforum.com

Blockchain companies have raised billions of dollars through Initial Coin Offerings (ICOs) this past year. Has it all been legal? Have all the correct taxes been paid? Are all the companies issuing the coins operating legally?

The answer may likely be 'no' to at least one, or perhaps all three, of these questions.

If you are considering a blockchain enterprise and an ICO and want to abide by the law, or want to assure that any company in which you are participating is abiding by the lawIn this issue and in further discussion on GGI Forum we examine part one of a five part series on the issues to consider.

Part 1: The Securities Quagmire

The US securities laws regulate the offer and sale of 'securities', and those laws in most circumstances impose expensive registration and reporting requirements on securities transactions. Securities transactions which don't comply with these laws expose the sellers to significant fines, potentially prison sentences, and expose the buyers to potential financial losses.

Under a seemingly ancient standard from the mid-1940s known as the 'Howey test', the United States Securities and Exchange Commission (SEC) defines a transaction to involve a securities contract, when:

1. It is an investment of money;
2. There is an expectation of profits from the investment;
3. The investment is in a common enterprise;
4. Any profit from the enterprise comes from the efforts of a promoter or third party.

If a company is raising funds to develop a token to be distributed later to investors, then the company is likely selling securities under US law. This type of transaction is technically not an ICO, but rather is more akin to a token presale, and it is virtually certain that the SEC would assert jurisdiction over it if the marketing is aimed at, or the investors include, US citizens. It is for this reason – because a failure to register the sales or offers to US citizens could constitute a violation of the law – that many token pre-sellers explicitly bar US investors. Of course, in the virtual and crypto world,

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policing a US citizen ban is problematic, to be charitable.

For real ICOs, there are exceptions to the registration requirements under the securities laws, such as sales which are limited to wealthy accredited investors, sales to no more than 35 sophisticated investors, or sales under the SEC's Regulation Crowdfunding. Some token offerings take advantage of these exceptions – it is do-able. But many do not because, realistically, the blockchain enterprises need to raise relatively small amounts of money from many sources and not large amounts from a few sources, or they simply won't have the funds to comply even with the far less burdensome requirements of these types of sales.

If a company has completed development of a token and is distributing the token in a public ICO, the experts can begin their debate. The SEC's position is relatively firm: registration is required, but the law and the SEC leave some small amount of daylight.

Twice in the past two months, the SEC or its Chairman, Jay Clayton, has issued public statements on cryptocurrencies and ICOs, telling blockchain startups and their promoters that they may be violating the securities laws, and warning ICO investors that they may be risking their investments.

Austrian Litigation – an Overview

By Raffaela Lödl and Eva Pany

Court Structure

The judicial organisation in Austria is characterised by a division into the ordinary jurisdiction (for criminal and civil law) and the courts of public law (for constitutional and administrative law). There are two separate supreme courts. In civil proceedings, District Courts and High Courts are engaged as first instance courts, depending on the value of the matter in dispute and the subject of the litigation. Four higher regional courts have jurisdiction as appeals courts. In addition to the general court system, specialised courts rule on specific subject matter, such as the Vienna Commercial Court (dealing with commercial law disputes).

Judges and court procedures

Austrian judges are career judges and the judiciary is independent and

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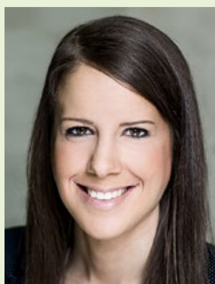
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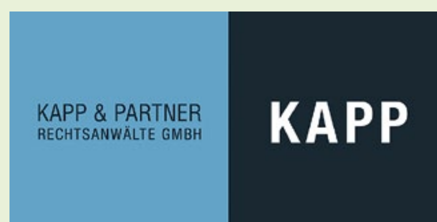

well known for high ethical standards. Judges open, chair and close the oral hearings and are first in questioning the persons who have to testify in order to give evidence. Civil proceedings are commenced by filing a complaint which must satisfy a certain form. Certain complaints for payment which do not exceed EUR 75,000 are treated in shortened proceedings (and can be legally enforced within a few weeks). The average duration of normal procedures is 6 to 13 months. Only a few procedures take longer than three years.

Costs & fees

Court fees must be seen as a flat fee which is calculated as a percentage of the value of the dispute. Court fees are payable by the plaintiff when instituting proceedings. Attorneys' fees are regulated by 'The Austrian Act on Attorneys' Tariffs'. This law is the basis for the court's decision on the reimbursement of the parties' costs. The losing party has to bear the costs including the costs incurred by the opponent. Another settlement can be agreed with the own party (e.g. according to an agreed hourly rate). Therefore, a party's actual expenses may be lower or higher than the replaced costs.

Litigating against foreign companies and international organisations

By Michiel Teekens

Immunity of jurisdiction and immunity of enforcement are well known international principles that can complicate any successful litigation against foreign states and international organisations. Based on the principle of immunity of jurisdiction, a foreign state or international organisation are protected from (civil) litigation in other countries. Based on the principle of immunity of execution, enforcement of a judgment against assets of a foreign state or international organisation is only allowed if those assets lack a governmental goal or goal related to the international organisation.

The Supreme Court of the Netherlands ruled earlier that the Convention on Jurisdictional Immunities of States and their Property (UN Convention), which is still not in effect, does codify principles of international law related to the immunity of execution (HR 30 September 2016, ECLI:NL:HR:2016:2236, JIN 2016,201). Based on article 19 (c) of the UN Convention, the Supreme Court determined that immunity of execution is an international principle and from that principle also derives the principle of the presumption of immunity of execution. This latter principle means that any assets of a foreign state or international organisation are deemed to be excluded from enforcement, unless the plaintiff can objectively prove that those assets are not

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used for governmental purposes or purposes related to the goals of the international organisation.

On 1 December 2017 the Supreme Court reiterated that the UN Convention codifies principles of international law in relation to the immunity of jurisdiction (HR 1 December 2017, ECLI:NL:HR:2017:3054, JIN 2018,15). The Supreme Court ruled that, based on Dutch Procedural Code, the principle of immunity of jurisdiction must also be presumed in any litigation proceeding where the foreign state or international organisation does not appear as defended. From 2018, any Dutch judge is obliged to determine in such default proceeding if the foreign state or international organisation falls under the principle of immunity of jurisdiction. Both cases show that litigation proceedings against foreign states and international organisations can be troublesome with regards to enforcement and concerning default proceedings.

The unique history and purpose of common law courts of equity

By William M. Kelleher

When it comes to the common law, England started it all really. In the late Middle Ages, England developed a Court of Chancery headed by the Lord Chancellor that handled cases in which an equitable remedy was sought. While this may be somewhat of an oversimplification, the defining distinction between civil courts of law and courts of equity (such as Chancery) is that courts of law have exclusive jurisdiction whenever monetary damages can make a party whole. Thus, for example, if a party needed an injunction, and the jurisdiction at issue had both law courts and a court of equity, that party would look to the court of equity for that injunction because monetary damages would not make it whole.

In the late 1800s, after many years of declining importance, the English Parliament dismantled the English Court of Chancery. Likewise, most of the jurisdictions in the United States that inherited equity courts from England have fused their equity courts with their law courts, including the United States federal court system.

However, a few American states did not merge their equity courts. Most prominent among the surviving courts of equity is likely the Delaware Court of Chancery. That court is internationally known for being one of the world's premier venues for the resolution of corporate governance and control disputes. This prominent position partly results from the fact that so many corporations and other business entities are domiciled in Delaware. The Delaware Court of Chancery is routinely tasked with deciding whether huge corporate mergers can go forward or should be enjoined, and such questions often have to be answered in an expedited time frame of only a few days or weeks. That this modern court can – and very often does – act so ex-

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peditiously is particularly interesting, as one of the frequent criticisms made centuries ago of the now-defunct English Court of Chancery was that it acted too slowly.

For those that are curious, in addition to Delaware, the US states of New Jersey, Mississippi and Tennessee are among the few US states that retain, in one form or another, courts of equity.

Italy introduces 3% web tax

By Prof Stefano Loconte and Angela Cordasco

Digital transactions are no longer exempted from taxation: the 2018 Italian Budget Law has introduced a web tax on digital-based services, which will be definitely in force from 1 January 2019.

The introduction of the tax is aimed to avoid the situation in which big players of the online market (such as Google, Amazon and Facebook) make profits in our country without being subject to an indirect taxation. Indeed, this is another attempt to counter tax evasion of billions of euros on a global scale and finally, after several attempts of the Italian Parliament since 2013 (when the new tax was originally proposed by Deputy Francesco Boccia), it has succeeded.

The new tax, that is equal to 3% of the value of the single digital transaction (VAT excluded), will be due on supplies of services – such as online advertising, web-hosting, downloading and similar services – and will be withdrawn directly at the time of payment by the purchaser. It is worth underlining that supplies of goods have been expressly excluded from the application of the new tax.

The web tax applies not only to Italian resident taxpayers, but also to non-residents who make profits in Italy through web transactions, whether or not they have a permanent establishment in Italy.

Indeed, it should also be noted that revenues of digital companies are subject not only to the web tax, but also to the other direct taxes due in Italy, with a higher effective tax impact.

Since the aim of the introduction of the web tax is to subject to taxation the 'over the top' of the web market, the law provides that if the web-taxpayer can prove that the number of online transactions made during the entire tax year is less than 3,000 (so called 'small taxpayers'), the web tax is not due.

However, by 30 April this year, the Ministry of the Economy and Finance shall issue a special decree that will specifically indicate which kind of services will be subject to the web tax.

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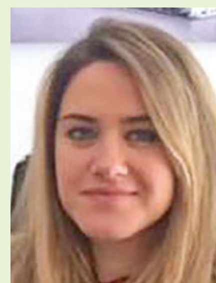

Angela Cordasco

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How 'final and binding' is an expert determination in Australia?

By Andrew Lacey and Nathan Jones

Expert determination is becoming an increasingly common Alternative Dispute Resolution (ADR) process provided for in the terms of commercial contracts between parties in Australia. It involves an independent third party, with recognised expertise in the subject matter, resolving an issue in dispute between the parties by making a determination.

It is now well-established in Australia that mistake or error on the part of the expert is not by itself sufficient to invalidate a determination. Rather, a determination may only be set aside if a court is satisfied that the determination is not in accordance with the terms of the contract. Determinations affected by fraud, collusion, dishonesty or impartiality will not have been made in accordance with the terms of the contract. There are, however, other instances where the position may not be so clear.

By way of example, a shareholder's agreement may provide for the appointment of a valuer to determine the 'fair' value of an outgoing shareholder's shares, and for such determination to be final and binding on the parties. If the expert proceeds to base his or her determination on the 'market' value of the shares, without making any (or adequate) reference to the need to ensure that the value which was determined was 'fair', then this may constitute grounds to have the determination set aside by an Australian court. This is because, in the valuation context, there is a well-established distinction between a 'market value', 'fair value' and 'fair market value' test.

In summary, whilst expert determination has the potential to provide an informal, speedy and effective way of resolving disputes, whether it does so in practice may hinge upon the particular form of wording which the parties have adopted in the relevant clause in their contract, and ensuring that the expert properly understands and applies such wording.

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Legal impact of Brexit – Selected Topics

Part I

By Dr Karl Friedrich Dumoulin

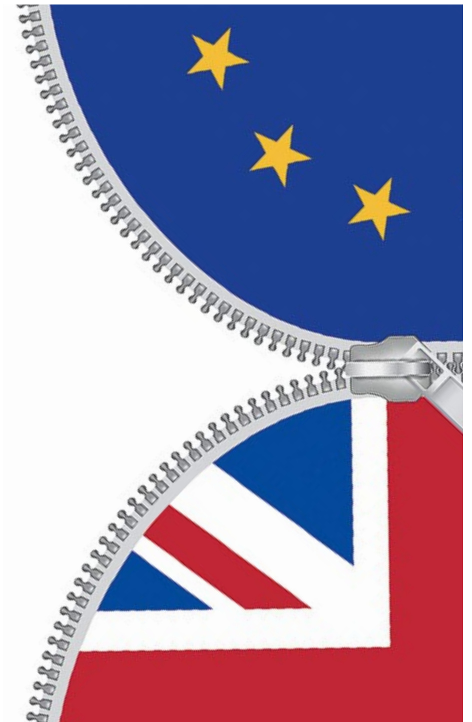
This short article will pick out some aspects which should gain importance for companies doing cross-border business from the UK into the EU and vice versa. Part 1 is published in this issue of the newsletter. Part 2 will be published in the next issue of the newsletter.

In the field of distribution law, Brexit may in future allow companies to exclude post-contractual compensation claims of an agent, minimum periods for cancellation or the claim for an extract of the accounts.

In the area of product compliance, it is a totally open question whether permits in the UK for distribution of certain products (e.g. pharmaceutical, medical products, automotive) will be recognised within the EU or whether lengthy and costly application procedures to obtain such permits within the EU will have to be initiated. Vice versa, this applies to companies from EU member states exporting their products into the UK and having done so previously on the basis of a permit from another EU member state.

Supply contracts could be affected if customs are reintroduced between EU member states and the UK in future. Depending on the adverse consequences on a contractual party, this might even result in a right to amend or even terminate a supply contract.

With respect to labour law, it will be highly interesting to see what the outcome of the negotiations concerning the freedom of services will be. In company law, one main issue will be that the freedom of establishment will no longer be applicable between the UK and the EU. The incorporation of a UK Ltd company with a business seat in another EU member state in future will only be possible if the negotiations will bring about an agreement whereby in relation to the UK the so-called incorporation theory will be acknowledged.



As regards to M&A, it should be noted that with Brexit, the so-called Rome I Regulation on the law applicable to contractual obligations will no longer be pertinent.

In civil litigation, the so-called Brussels I Regulation will no longer be applicable. This regulation governs the international competence of courts of the member states of the EU, the mutual recognition of court decisions as well as their enforcement. It remains to be seen what the content of an agreement currently negotiated between the UK and the EU in that field of law will be. In the absence of any agreement, the national law of each member state will govern these issues.

Stayed tuned for part two in the next issue of the LDR Newsletter.

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A major reform of Italian insolvency proceedings

By Patrizia Giannini

Last October, by the Law No. 115 of 2017, Italy enacted a new insolvency legislation; the ground breaking text of such law provides inter alia for warning mechanisms to prevent corporate crises from becoming irreversible and emphasises out-of-court settlements in order to encourage a mediation approach between debtors and creditors to manage insolvency. What's new? In the insolvency proceedings, a major role will be played by the trustee ('curatore'), who will definitely be invested with enhanced powers compared to the past; such a trustee will be able to:

a) have easier access to the databases of the Public Administration;
b) promote legal actions that can be taken by shareholders or company creditors;
c) directly manage (no longer through the Bankruptcy Judge) the assets realisation among creditors.

Another innovative aspect is the so-called 'early warning phase', aimed at facilitating the out-of-court judge-aided settlement.

Such steps can be either activated directly by the debtor or ex officio, by the judge, upon notification by public creditors (the latter is compulsory if the Tax Agency and/or the National Institute for Social Security, 'INPS', are involved). In the case of the voluntary procedure, the debtor will be assisted by a special body (established within the Chambers of Commerce) and they will be given 6 months to reach an agreement with creditors. In the case of the ex officio procedure, the judge will hear – on a confidential and private basis – the debtor and will entrust an expert with the task of solving the crisis by coming to an agreement with creditors, within a 6 months time frame. Any negative outcome of the warning phase will be published in the Companies Register. If the entrepreneur promptly activates the warning mechanism or resorts to other instruments designed to come to an agreement on the settlement of the crisis, they will be granted some rewards (i.e. non-punishability of insolvency crimes, if the financial damage is of very small magnitude, extenuating circumstances for other crimes, lower interest expense and mitigated penalties for tax payables). Listed companies and large companies shall be excluded from the warning mechanism. Moreover, the reform has also simplified procedural rules: when addressing the proposals, priority will be given to those that ensure business continuity and liquidation by the court will be considered as a last resort. Particular emphasis was also given to reducing duration and costs of insolvency proceedings. The competent judge will be identified depending on the size and type of insolvency proceedings; specifically, procedures relating to large companies will be deferred to the Companies Court having jurisdiction in ratione loci. The pre-bankruptcy arrangement with creditors ('concordato preventivo') has been redefined by adding – alongside the procedure on a going concern basis – another type of arrangement aimed at liquidating the company if the latter is able to ensure payment of at least 20% of unsecured receivables. In the event of insolvency relating to groups of companies, a single procedure for dealing with the crisis and insolvency of the intra-group companies has been identified and, even in the case of separate procedures, the relevant bodies will be bound by a duty of cooperation and mutual disclosure.

In conclusion, it can be said that the aforementioned reform is a useful piece of legislation that paves the way to a healthier system which will undoubtedly boost Italy's economic growth.

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