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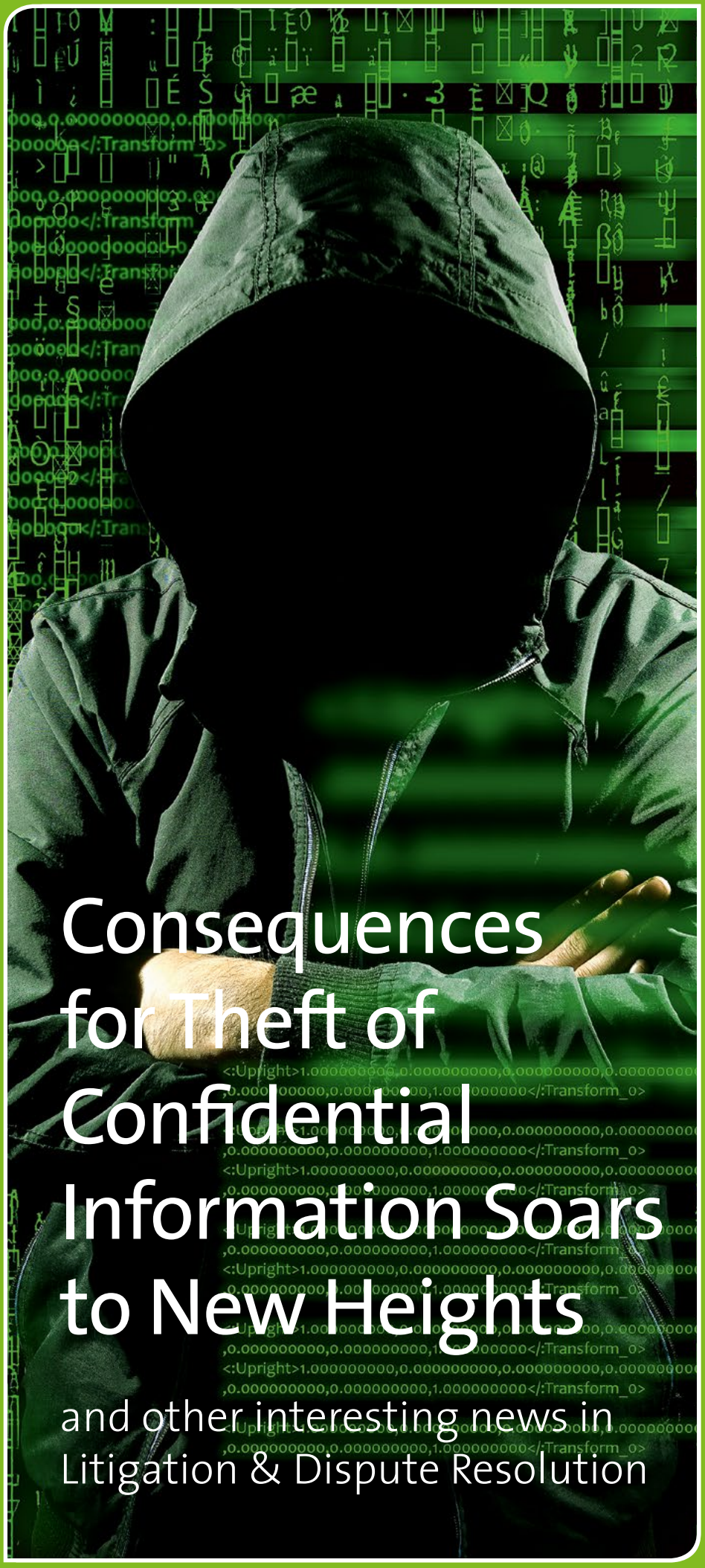
Litigation & Dispute Resolution NEWS



Consequences for Theft of Confidential Information Soars to New Heights

and other interesting news in Litigation & Dispute Resolution

Newsletter
No. 10 | Spring 2019

Diary

Upcoming GGI Litigation & Dispute Resolution (LDR) Practice Group meetings:

- **Prague, Czech Republic**
  10 May 2019
  GGI LDR PG Meeting
  at the GGI European
  Regional Conference

- **Houston (TX), USA**
  21 June 2019
  GGI LDR PG Meeting
  at the GGI Pan-American
  Regional Conference

- **Marrakech, Morocco**
  08 November 2019
  GGI LDR PG Meeting
  at the GGI World Conference

- **Bali, Indonesia**
  06 December 2019
  GGI LDR PG Meeting
  at the GGI Asia-Pacific
  Regional Conference

Editorial

Dear Reader,

While Europe follows the Brexit debates in the UK and holds its breath, our GGI Practice Group Litigation and Dispute Resolution (LDR) has held an extraordinary Practice Group meeting at the end of March in Miami (FL), USA: a clear commitment to what makes up a quality-driven, truly global alliance of independent audit, tax, legal and advisory firms. A clear sign also of how alive and vibrant our Practice Group is. We are excited to see how this meeting will further deepen the cooperation within our Practice Group and bring about fresh ideas to make it even more attractive for you.

For a long time, our LDR Practice Group Newsletter has been an essential component of our Practice Group activities. Probably, together with our regular Practice Group meetings, it belongs to our Group's DNA. Since Issue No. 1, in 2013, numerous "parents" have contributed to this newsletter. I am proud and grateful that again, for this tenth issue, so many colleagues, despite their busy work schedules, have sent us articles for our newsletter.

This issue covers both perspectives: On the one hand, there are articles on purely international aspects, such as the investor-state arbitrations in ICSID; the opening of a new forum-choice-based Netherlands Commercial Court in Amsterdam for complex international business disputes; the European legislator's recent proposals for improving the efficacy and speed of judicial proceedings at European Union level; and the "Long Arm of the Law" of Canadian courts to seize certain Iraq deposits in a Swiss bank account. On the other hand, we have articles on interesting developments in various national jurisdictions such as the liability for defective products under French law; the consequences for theft of confidential information under Australian law; recent Italian legislation on Blockchain technology; and last, but not least, some fundamental reflections on conflict resolution.

I thank all members of our Practice Group for their great response to our call for articles for this newsletter!

Our next Practice Group meeting will be held during the GGI European Regional Conference in Prague. Please refer to the diary on the left side for further upcoming Practice Group meeting dates.

I look forward to meeting you at the next GGI conferences.

Best regards,

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

Consequences for Theft of Confidential Information Soars to New Heights

By Andrew Lacey and Luke Dominish

Business owners are often faced with the risk of employees taking their confidential information and moving to a competitor, who may then use that confidential information for their own benefit. In Ancient Order of Foresters vs Lifeplan Australia [2018] HCA 43 (10 October 2018), the High Court of Australia delivered a stern warning to competing businesses knowingly involved in an employee's theft of confidential information.

The case concerned two competing businesses that provided pre-arranged funeral services. Lifeplan was highly successful in this market whilst one of their competitors, Foresters, was unprofitable. Two managers at Lifeplan approached Foresters with a proposal: they would use Lifeplan's confidential business records and client lists to divert business to Foresters. In exchange, Foresters would employ them and engage a new company they had established for marketing services to win over the clients of Lifeplan. This plan was highly successful. Within two years, Foresters' business grew by approximately AUD 20 million and Lifeplan's shrunk at an almost identical rate.

Lifeplan caught on and commenced proceedings against Foresters and the two former employees. At an early stage, Lifeplan elected to claim accounts of profits rather than to pursue damages. At trial, the Courts found that the former employees had breached fiduciary duties owed to Lifeplan, and that Foresters was knowingly involved. However, the issue that the trial and intermediate courts had to grapple with was the extent to which they could order Foresters to account for the profits they made as a result of the former employees' breach of duties.

This issue made it all the way to the High Court of Australia, which disagreed with Foresters' attempt to limit its liability to account. The High Court emphasised the role of

...next page

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McCabe Curwood is a multi-disciplinary law firm, providing astute and commercial legal solutions for its clients. By emphasising technical excellence and commitment to quality, the firm offers pragmatic legal solutions tailored to current and future business objectives of its clients. McCabe Curwood's Litigation and Dispute Resolution Group was recently nominated as a finalist for the Lawyers Weekly Australian Law Awards 2018 – Dispute Resolution Team of the Year.

Andrew Lacey is the Managing Principal of McCabe Curwood. He also heads McCabe Curwood's Litigation and Dispute Resolution Group, acting for medium to large Australian and International businesses across a variety of industries including manufacturing, property, insurance and finance.

Luke Dominish is a lawyer in McCabe Curwood's Litigation and Dispute Resolution Group. He has experience in advising on disputes in a range of issues across multiple jurisdictions, including contractual disputes, directors' duties, succession law, consumer law, real property, and insolvency.

deterrence in ordering an account of profits, stating that it is intended to be a "prophylactic" remedy, designed to deter fiduciaries from being swayed by interests other than duty, and equally to deter other persons from knowingly assisting fiduciaries to violate their duty.

The Court also held that the test for causation is a holistic one, and that it was misconceived for Foresters to frame the issue as involving an enquiry as to whether there is sufficient causal connection between each of its particular wrongful acts of knowing assistance, and the profits made by its business. Rather, the High Court confirmed, it is sufficient for a plaintiff to show that the profits would not have been made but for dishonest wrongdoing. That is, Foresters could not deny liability by saying they could have made the profits honestly: the fact that they knew and were involved in the breaches alone was sufficient to make them liable to account for the profits made.

The Court went on to say that, once the involvement was established, Foresters bore the onus to establish why it should not account for the full amount of the benefit gained. Foresters could have done this by showing that an allowance should be made for its own labour, or that accounting for the full profits would be disproportionate. They were unable to demonstrate either.

The Court ultimately ordered Foresters to account for the full value of its pre-arranged funeral business and pay that amount to Lifeplan, being approximately AUD 15 million. That is, through their knowing involvement in the theft of confidential information, Foresters obtained a business opportunity from Lifeplan. Therefore, equity required that they account for the entire value of that business and its profits to Lifeplan.

Business owners throughout Australia can see this as a positive result and evidence of the Court's increasing protection offered to confidential information. This case serves a warning to competing businesses: if you induce, or are involved in, the theft of confidential information from your competitors, you may have to account for the full value of the profits you make.

Update from the Netherlands: Judgments with Cross-Border Impact

By Michiel Teekens

Dutch judges often and increasingly deal with international disputes. Due to this development, the forum-choice-based Netherlands Commercial Court opened its doors in Amsterdam on 01 January 2019 to swiftly and effectively resolve complex international business disputes. Proceedings and judgments are in English and foreign attorneys can represent their clients.

Meanwhile, the Dutch Supreme Court provided two interesting judgments with cross-border impact. In its judgment of 18 January 2019, in one of the many Yukos cases, the court ruled that the recognition and enforcement of a Russian bankruptcy judgment, and legal consequences thereof, is in violation with the Dutch (civil) public policy, because the bankruptcy was orchestrated by the Russian government. The fact that an appeal proceeding was not instigated by the shareholders in Russia, does not necessarily justify the conclusion that they did not exhaust their rights, because that appeal proceeding does not qualify as an effective remedy. Based on these conclusions the recognition and enforcement of the Russian bankruptcy judgment was denied. In its judgment of 22 January

2019, the court raised questions with concern to the possible applicability of the Brussels Recast Regulation to an injunction claim to lift extraterritorial seizing measures by a foreign state or international organisation, based on the principle of immunity from execution. The court indirectly considered the possibility that, although the principle of immunity from execution can only be instigated by public entities, the underlining contractual relationship might play a role in determining the possible applicability of the Brussels Recast Regulation. The court decided to file preliminary questions with the CJEU.

Another interesting judgment came from the Amsterdam Court concerning the question whether a Tennessee judgment ordering the defendant to pay punitive damages can be recognised and enforced in the Netherlands. The court finds that the principle of civil punitive damages is not part of the Dutch legal system and, if such punitive damages are excessive, that part of the foreign judgment cannot be recognized and enforced.

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TeekensKarstens advocaten notarissen (TK) is a full-service Dutch law firm with extensive experience in the field of international law. TK has established specific international teams to provide international clients with tailor-made services and information.

Michiel Teekens is an international corporate and commercial litigator and Chair of the International Law team of experts in TK.

Michiel Teekens

Consequences of the Lactalis Case in France on Liability for Defective Products

By Pierre-Yves Rossignol

Distributors that do not withdraw from sale products reported as defective may be prosecuted under criminal law and subject to civil proceedings with the manufacturer.

The years 2017 and 2018 were marked by the infected **Lactalis** milk scandal in France. Lactalis is a French food company. It is the world's largest cheese-processing group and the number-two food group in France, after Danone.

It was identified that 53 infants in France suffered from salmonellosis in late 2017 after eating a product for children – mainly products branded Milumel or Picot – which came from the Craon factory in Mayenne.

The recall process was chaotic and various failings were discovered that had caused the contamination.

After several weeks of crisis, in mid-January, the group – known for its culture of secrecy – had withdrawn all of its infant formula in the offending factory, and production had to be suspended for six months.

Overall, a little more than 300 criminal complaints were lodged with the public health department of the Public Prosecutor of Paris, including those filed by four consumer associations (such as the consumer protection associations UFC-Que Choisir and Foodwatch).

...next page

The products' removal from sale and recall was ordered by Minister Bruno Le Maire on 09 December 2017.

It is suspected that the company had taken no steps whatsoever to remedy the discovery of salmonella when carrying out its own product checks. If the facts are proven, the company managers could be prosecuted for fraud/forgery. There may also have been shortcomings in their production-control system.

Such actions are punishable under criminal proceedings with seven years' imprisonment and a fine of EUR 750,000 if the offence or attempted offence resulted in the goods becoming hazardous to human or animal health.

In this case, large retailers (including Edouard Leclerc) had to acknowledge that they did not comply with the decree ordering the products to be withdrawn, but rather that they distributed the disputed batches to their shopping centres throughout France and sold the infected milk.

After more than nine months of extensive preliminary inquiry, a judicial investigation was opened on 09 October 2018 against X for "deception about the essential quality of the goods", "unintentional injuries resulting in incapacity for work lasting three months or fewer" and "failure by a food industry operator to carry out the procedures for withdrawing or recalling a product that is harmful to health".

At the end of 2018, a parliamentary inquiry committee suggested streamlining of state departments, with centralised governance in the food safety sector. A single authority should be put in place, instead of the three ministries (Ministry of Health, Economy [Bercy] and Ministry of Agriculture).

You can read a more detailed version of this article here.

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Pierre-Yves Rossignol

Herald (previously Granrut) is a well-established, independent law firm created in 1957. Herald's lawyers always try to bring fresh ideas, innovation and best practice in its core practice areas. Two Granrut partners have been elected Bâtonnier of the Paris Bar.

Admitted to the Paris Bar in 1990, **Pierre-Yves Rossignol** has been a partner of Herald since 1997, and specialises in litigation and arbitration disputes in the field of business law, insurance, and defective products. He monitors litigation proceedings in the area of defective product liability on behalf of corporations and insurance companies.

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Investor-State Arbitrations in ICSID

(International Centre for the Settlement of Investment Disputes)

By Akin Alcitepe

Most foreign governments require disputes with parties with which they have agreements to be litigated in their courts using their domestic law. Under certain circumstances, however, a company doing business with a foreign government may be able to bring its claim to a neutral international arbitration forum through the use of a Bilateral Investment Treaty (BIT) or a Multilateral Investment Treaty (MIT).

BITs or MITs provide the investor with a right to "fair and equitable treatment", meaning the host state will not engage in behaviour that discriminates against the investor. They also provide companies with protection from expropriation by the

state without fair compensation. The rights granted in these treaties are district and separate from contractual rights. They are international law rights provided by the treaty. As such, the law that is applicable in these disputes is public international law, as opposed to the laws of any particular country. Treaty rights arise when there is some action or omission by the host state that adversely affects the rights of the private company. They cover acts not only of the central government but also local governments and state agencies.

The dispute clauses of the treaties often require a period of negotiation between the parties for amicable resolution of the dispute, after which the company can resort to arbitration. One effective mode of arbitration is the International Centre for Settlement of Investment Disputes (ICSID).

ICSID, is an arbitral institution that is part of, but also autonomous from the World Bank and located in Washington, DC. Over 150 countries have executed the ICSID Convention and its caseload has grown considerably in the last 25 years. And, due to its semi-public nature, the threat of ICSID arbitration can sometimes be used quite effectively against foreign governments as a tool for settlement. Once filed, an ICSID arbitration can be a lengthy process. That process, however, is generally well-run and often yields a fair outcome, given the expertise of most investment treaty arbitrators.

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Akin Alcitepe concentrates his practice on complex commercial, construction and treaty matters before international and domestic dispute-resolution tribunals such as the International Centre for Settlement of Investment Disputes (ICSID), ICC International Court of Arbitration and the American Arbitration Association, as well as US state and federal courts. He has had litigation successes on all three stages – local, national and international. Mr Alcitepe regularly handles high-profile, treaty, construction and commercial claims.

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European Regulations on Servicing of Documents

By Dr Jiri Novák and Jan Sekret

Based on the findings of the 2017 regulatory fitness evaluation, the European Commission proposed amendments to both the Regulation on the service of documents and the Regulation on the taking of evidence in civil or commercial matters. On 13 February 2019, the European Parliament (EP) adopted the legislative resolutions on the proposal for regulation amendments at the first reading.

The main objective of the Regulations is to improve the efficacy and speed of judicial proceedings at Union level. In order to meet that objective, EP proposed that the communication between subjects at Union level should be transmitted through a decentralized IT system based on the e-CODEX, which would secure reliable and real-time cross-border exchange of information between the national systems.

EP emphasized the necessity to protect the defendant's interests. It must be ensured that the addressee explicitly accepts the method of service by electronic means. There is also still a possibility to refuse to accept the document within a maximum of two weeks by returning the standard form to the receiving agency, based on reasonable grounds. If there is no such refusal, the law of the forum Member State shall offer to parties who are domiciled in another Member State the option of appointing a representative for the purpose of service of documents on them in the forum Member State for the proceedings, provided that the party concerned has been informed of, and explicitly accepted, such an option. According to the EP, it is also essential to ensure that all reasonable efforts are made to inform the defendant that court proceedings have been initiated against her or him.

Moreover, the remote communication technology should be used for hearing a person domiciled in another Member State as witness, party or expert in the form of video conference or any other appropriate technology, if available. In that case, the court should notify the person to be heard, the parties, including their legal representatives, of the date, time and place of the hearing via remote communication technology, including the conditions for participation in it.

EP's proposal is currently awaiting a first reading in the European Council; no date of reading has yet been set.

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Broz & Sokol & Novák is a Czech full-service law firm. Their 32 lawyers provide expertise in all the significant fields of law. They are especially renowned in the field of litigation and criminal law (law firm of the year for nine consecutive years).

Dr Jiri Novák is an equity and managing partner of Broz & Sokol & Novak. His area of expertise includes IT-related fields and human rights. Currently he is the chair of CCBE IT law committee and his practice usually involves civil litigation and criminal defence. His aim within the law firm is to promote modern technologies and new ways of providing legal services. This includes the law firm's online platform available at https://akbsn.online

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Jan Sekret is a young and enthusiastic lawyer at Broz & Sokol & Novák. His interest lies in criminal and medical law.

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Italian Parliament Recognises Blockchain and Smart Contracts

By Patrizia Giannini

Today, Blockchain is the one of the most discussed topics all over the world. On 13 February 2019, the Italian Parliament approved a law which recognises the legal validity of Blockchain and its applications in Smart Contracts; moreover, at the end of 2018, Italy formed a 30-member advisory panel focused on Blockchain and its applications.

Article 8 of this new law gives a definition of Blockchain and Smart Contract: "Technologies based on distributed ledgers are technologies and protocols using a shared, distributed, replicable ledger accessible simultaneously, architecturally decentralised on cryptographic basis, allowing registration, validation, updating and storage of non-cryptographic data, that can be verified by each participant, but that can't be modified or edited. "Smart Contract" is a programme for programmers that operates on technologies based on distributed ledgers and whose execution automatically binds two or more parties according to predefined terms. The smart contract satisfies the requirement of being in writing if the parties are electronically identified

according to the requirements that will be established by the Agency for Digital Italy. The guidelines shall be adopted by mid-May 2019. Those smart contracts that meet the requirements that will be established by the Agency for Digital Italy will be considered as being in writing and this may contribute to the validity of the agreement itself".

What is it Blockchain and how it can change our professions?

Blockchain is a decentralised database that keeps track of an unlimited number of data assets and transactions through a peer-to-peer network; a registry maintained by a consensus algorithm and stored in a network of computers. This allows data to be included in "blocks" that are chained one to another. Blockchain's

...next page

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S4B Solutions 4 Business provides assistance and consulting services in bookkeeping and accounting, management processes, personnel administration, support and advice on web communication and document management, welfare services and facility management. It serves all industries.

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advantages are a) transparent processes, b) disintermediation, c) security, d) cost reductions and e) trust, because each transaction is verified by a wider number of nodes.

At the beginning, Blockchain was famous for cryptocurrencies but now its applications are innumerable, e.g. financial services, insurance sectors, in the enhancement of e-government services but also increased transparency and reduced administrative burdens, better customs collection and better access to public information, as well as automatic execution of contracts.

It is an undiscussed fact that today there is a huge buzz about this topic and great expectations in boosting the economics. And be assured that this new technology will deliver its effects also in litigation fields, in court; just to give an example, think about evidences verified by Blockchain.

Yes, there will be a revolution also in our courts, the question is: are we ready for this?

The Long Arm of the Law

By Francis P. Donovan

Can the courts of country A authorize the seizure by a company from country B, of funds owed by an organisation in country A to a foreign state (country C), where the funds are held in Country D? The Court of Appeal of Quebec, Canada, recently ruled in the affirmative in the case of *Instrubel, N.V. v the Republic of Iraq*[1].

The International Air Transport Association (IATA), based in Montreal, collects fees imposed by Iraq on airlines, deposits them in a Swiss bank account, and remits them to Iraq. Instrubel, a Dutch Company having a substantial arbitration award against Iraq, obtained an order from the Superior Court of Quebec for the seizure of funds belonging to Iraq and held by IATA. Iraq filed an application to quash this seizure.

The Superior Court quashed the seizure to the extent that it applied to sums held outside of Quebec. The Judge concluded that since the object of the seizure was money held by IATA and belonging to Iraq, Quebec Courts lacked jurisdiction because the funds were located in Switzerland. The Court of Appeal overturned this ruling and confirmed the seizure. The Court concluded that IATA did not hold property belonging to Iraq, but rather was indebted to Iraq for the amounts collected. The debt could be seized by order of the courts of IATA's domicile, namely Montreal, Quebec. The Court reasoned that money is fungible, and that it was impossible to identify the specific funds that were said to belong to Iraq. Also, if the seizure in question were viewed as a seizure of specific monies (rather than a debt), Instrubel would be forced into an international "shell-game" of discovering where the funds had been deposited.

The approach taken by the Court of Appeal facilitates the international collection of debts. It is worth noting, however, that at the time of writing the present article, the deadline for application for leave to appeal to the Supreme Court of Canada had not yet expired.

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Francis P. Donovan is a partner in the Litigation and Dispute Resolution group of Ravinsky, Ryan, Lemoine LLP. For more than 20 years, he has sought to maximize the value of his services through proactive legal counselling and vigorous dedication to the interests of the client in the event of a dispute.

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Conflict Resolution

By Dr Thomas Ditges

Conflict resolution is situational. In the private sphere, many people seek legal clarification and, sometimes, undue advantages, if the law enables them to. The good entrepreneur has no lawsuits. If the legal situation is unclear, he derives his planning from experience. Although it is not possible to avoid every dispute, his ability to anticipate legal issues can substitute for legal advice.

Labour law protects the employee. That must be compensated. Formulas for the calculation of severance pay convey uniformity in a way of a fictitious law. That, too, must be mastered.

The business dispute is different; liability for performance is often complicated, so much so that all involved parties may fail in the end, often beginning with the court. How can a judge, who has never been tried and tested in business and who has never felt the danger of personal liability, understand what production, commercial, consulting or managerial situations involve, what average due diligence obligations they actually entail and what legal duties they create? Consumer protection overall does not replace knowledge. If the overview is lost, procedural law comes into play. Which party is responsible for the ambiguities? The judge unpacks his toolkit, the procedural code. This intellectual approach conveys a high-value appearance. The ropes of procedural law must also be mastered. Nevertheless, procedural law does not have a pacifying effect on the parties. It is not without reason that business has lost confidence in the judiciary. In real terms, the number of proceedings has been declining sharply.

Arbitration is one solution. Arbitration can guarantee competence, but it can also be expensive, lengthy and imposed.

Mediation is another alternative, when the parties negotiate without a judge. The mediator is the catalyst for the proceedings, resulting in a profit for the client. Tough, fast, discreet and resource-efficient negotiation is rewarded. Irrespective of the court and attorney fees, the reduction of imputed internal costs is a significant factor. Our past achievements have proven this effect. I do not see any alternative for some conflicts – entrepreneurial by way of trial.

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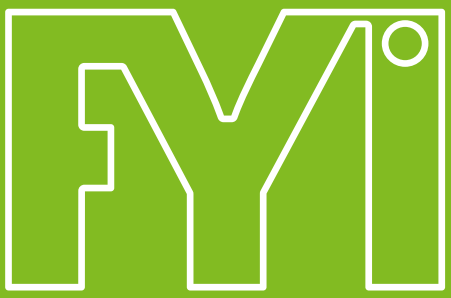

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