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International Dispute Resolution

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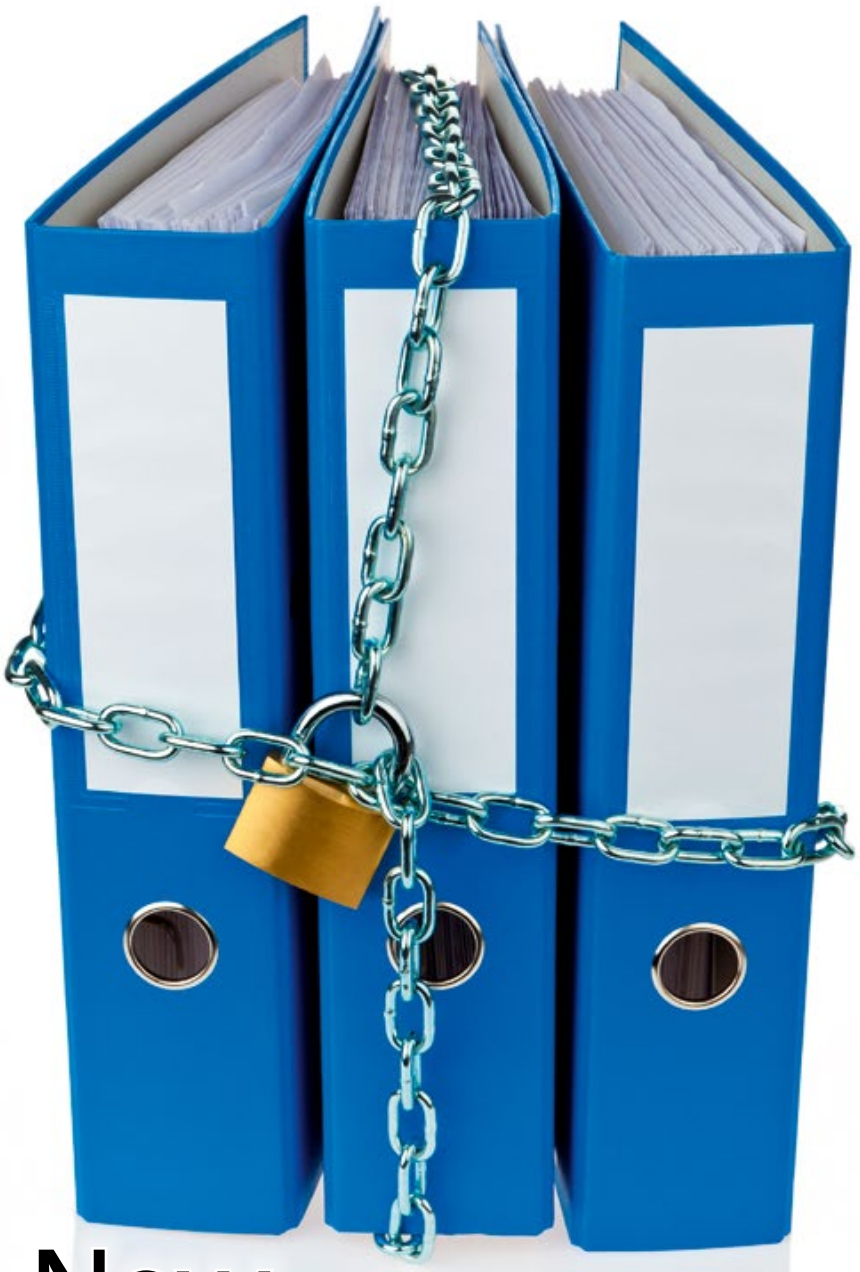

New European seizing proceedings

and more current information

Information Newsletter
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New European seizing proceedings – Part II

By Johan F. Langelaar & Michiel Teekens

The Proposal for a Procedure of the European Parliament and the Council in creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters (COM, 2011, 445 final).

This proposal contains a new and independent procedure for (international) European seizing proceedings related to bank accounts. The proposal contains proceedings in which the authorised court – or in some circumstances even a bailiff – can invoke a European Account Preservation Order ("EAPO") which leads directly to seizing bank account assets in the specific Member State(s).

It is felt that creditors seeking recovery of debts in Member States other than their own face significant difficulties. Executing provisional measures in those other Member States is difficult, time consuming and costly. This is a problem because the quick and easy access to such provisional measures is often crucial in ensuring that the debtor has not removed or dissipated their assets by the time the creditor has obtained and enforced a judgment.

The proposal states four main shortcomings:

1. the conditions for issuing orders preserving assets in bank accounts under national law vary considerably throughout the European Union, which makes it more difficult for creditors to obtain an account preservation order in some Member States than in others, including the problem that ex parte court grants are not recognised by other Member States;
2. in many Member States it is difficult, if not impossible, for a creditor to obtain information on the whereabouts of their debtor's bank account without having recourse to the services of private investigation agencies;
3. the costs of obtaining and enforcing an account preservation order in a cross-border situation are generally higher than in domestic cases;
4. national enforcement systems differ in effectiveness.

The proposal establishes a new and self-standing European procedure for the preservation of bank accounts which will enable a creditor to prevent the transfer or withdrawal of their debtor's assets in any bank account located in the European Union.

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TeekensKarstens attorneys and notaries (TK) is the largest legal services provider in the Rijnland area of the Netherlands, which is centrally located between Amsterdam, The Hague and Utrecht, and just fifteen minutes from Amsterdam Schiphol Airport. From its offices in Leiden and Alphen aan den Rijn, more than fifty lawyers and (candidate) notaries operate and provide full services to predominantly large and medium enterprises, (semi-) public sector companies and individuals hailing from the Netherlands and beyond.

The European procedure will be available to citizens and companies as an alternative to remedies existing under national law. The proposal sets out the EAPO proceeding, as well as the implementation thereof by the bank(s) of the holding account(s) targeted. The EAPO proceeding can be instigated before and after obtaining an enforceable title.

As a general rule, the courts of the Member State having jurisdiction on the substance as determined by European instruments or national laws that are competent to issue the EAPO. The order can be issued by the courts of the Member State where the account is located.

The proceeding in obtaining the EAPO is in line with the general approach of the majority of Member States. The creditor has to show that they have a good prospect of winning the case on the substance and that there is the risk that the enforcement of a subsequent judgment would be frustrated if the measure is not granted. The EAPO will – in most cases - be an ex parte proceeding, safeguarding the "surprise effect" of the preservation measure.

The proposal also obliges Member States to provide for a mechanism facilitating the obtaining of information about the debtor's account(s). There are two choices: Member States can provide for an order of disclosure obliging all banks in their territory to disclose whether the debtor has an account with them or they can grant their enforcement authorities access to information held by public authorities in registers or otherwise.

Set course European seizing proceedings

The general course is set. Europe is developing new tools for efficient seizing proceedings abroad executed in other Member States, including a whole new system for seizing bank accounts and by taking care of the exequatur proceeding and allowing ex parte seizing grants to be enforced with the European Union. The effectiveness of these new instruments will depend on their final outcome and on the cooperation of the Member States. However the course is set for an interesting time in international debt collection.

Mediating with the new Kid in Town

By Leslie A. Berkoff

Mediation in the bankruptcy context can present a very unique situation as the party acting as the plaintiff in a contested matter may not necessarily be the business owner but rather a court-appointed party who is managing the litigation long after the debtor has failed. In these cases, the plaintiff has no historical knowledge of the facts, or underlying business arrangements, which relate to the dispute at hand; moreover, it is entirely possible that the parties with knowledge of these facts are long since gone. Thus, the plaintiff has to learn all of the key facts at a time when there may be no one with first-hand knowledge to educate them.

Can you successfully mediate with a

...next page

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new and unfamiliar party at the table? The answer is yes. The presence of a new party does not preclude the mediation from being successful. Rather, the replacement with a party whose primary obligation is to act as a fiduciary to minimise expenses, and ensure a reasonable return for creditors may in fact allow for a more expeditious resolution of the case. In my experience, this new plaintiff is often able to survey the facts with more benign objectivity and call upon prior knowledge to resolve the matter. Moreover, they can analyse the pros and cons of the litigation risks that are before them and decide how to proceed. Overall, defendants should appreciate that an increased level of objectivity and financial accountability is brought to bear on the process.

Anti-Dumping in Australia

By Andrew Lacey

In accordance with the 1994 World Trade Organisation Agreement on anti-dumping (to which Australia is a signatory), Australian legislation does not prohibit dumping (being the practice of exporting goods at lower than their "normal value" compared to the exporter's domestic market) but rather regulates dumping through the imposition of "interim dumping duties" where it has caused material injury to the local Australian industry. In Australia, anti-dumping is regulated by the Customs Act 1901 (Cth) and the Customs Tariff (Anti Dumping) Act 1975 (Cth).

Upon application from a producer or manufacturer of like goods with sufficient standing, the Australian Anti-Dumping Commission ("ADC") will undertake an investigation (with the assistance of submissions from interested parties) into the alleged anti-dumping practices before making a recommendation to the Minister for Home Affairs. This process typically takes six months. In certain circumstances, provisional anti-dumping measures may be imposed pending a final decision.

An application for review of anti-dumping measures may be made where a relevant variable factor (such as normal value or export price) has changed or the measures are no longer warranted. Parties affected by anti-dumping measures may also seek judicial and/or administrative review. Limited exemptions to anti-dumping duties apply.

Recently, as it is also seen in Europe and the USA, the ADC is investigating alleged dumping by Chinese producers of solar PV panels.

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Multi-tiered Dispute Resolution Clauses in International Contracts

By Prof. Dr. Renate Dendorfer-Ditges

Multi-tiered dispute resolution clauses provide for at least two consecutive stages of dispute resolution and they enable the respective parties full use of the ADR-toolbox. Such clauses, also referred to as "multi-step ADR clauses" or "Wedding Cake Clauses" have a filter effect by using the escalation ladder from negotiation without a third party involved, over mediation as an amicable process including a neutral third party, both focusing on "win/win"-results. The ultimate ratio is arbitration as an adversarial "win/loose"-proceeding.

When drafting multi-tiered clauses some standards should be considered (see also: IBA Guidelines for Drafting International Arbitration Clauses, 2010):

There is a clear choice of the appropriate procedures: A clause such as: "The parties use their good faith efforts to agree upon an appropriate method of non-judicial dispute resolution." transfers the decision regarding the dispute resolution method to a situation where the parties are rarely able to agree on the further necessary steps:

Unquestionable wording, especially to specify a period of time for negotiation or mediation, triggered by an indisputable event (i.e., written request) for the transfer to arbitration

Legal certainty and avoiding the trap of rendering arbitration permissive and not mandatory

Definition of the dispute to be submitted to the different ADR methods in identical terms

Example for a two-stage multi-tiered clause

In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to mediation according to the ICC Mediation Rules as amended from time to time. Before and for the duration of the mediation proceeding, any court or arbitration proceeding regarding the dispute shall be excluded.

If the dispute has not been settled pursuant to the said Rules within 45 days following the filing of a Request for Mediation, such disputes shall thereafter be finally settled under the ICC Rules of Arbitration by three arbitrators appointed in accordance with the said ICC Rules of Arbitration.

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DITGES is a well-established law firm in Bonn. DITGES offers strong expertise in the areas of bank law, tax law, corporate law, labour and employment as well as for all methods of dispute resolution. The firm's experienced team is active in a number of domestic as well as international organisations and supervisory bodies and provides services for corporate and private clients in English and German.

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International Commercial Arbitration – Lost?

Take a glance at our Road Map! – Part I

By Patrizia Giannini

In general – or, roads you can drive down in your sleep! – International commercial arbitration (ICA) involves a business-related dispute among citizens of different nation-states, including investor-state arbitration between foreign private parties and state entities, according to bilateral investment treaties (BITs). ICA is private, but parties may contest the agreement to arbitrate, or the award, in Court. The Arbitration Agreement is usually one paragraph in a contract and requires a panel of arbitrators to reach a binding award, which a party may move to set aside. The award will be recognised and enforceable in states where the debtor has assets.

First Rule: follow the applicable convention – or, keep your eyes on the road! – Most countries are signatories to The New York Convention, one of the most successful treaties ever. Controlling rules also are in UNCITRAL, ICC Rules and Bilateral Investment Treaties (BITs).

Some leading ICA institutions – or, who's going to be your passenger and share some driving? – For example: International Chamber of Commerce (ICC), International Centre for Dispute Resolutions (ICDR-AAA), Milan Chamber of Arbitration (CAM).

Arbitrator Ethics and Challenges – roadside help or roadside trouble? – Strategise the timing of raising a challenge!

Arbitration proceedings—maps or satellite navigational system – or BOTH? – Different rules for Civil/Common law, as well as particular nations' interpretation. There are differences in Institutional Rules regarding experts (right to cross-examine?—if tribunal-appointed?) and for taking evidence.

Follow this road map – more details to follow, but don't be afraid to ask for directions!

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A Ruling on Cross Border Product Liability Case

By Sharon Lam

Cross border litigation is increasingly common. Products can be produced and consumed from anywhere in the world. We are seeing more product liability claims involving UK products being purchased and used in non EEA countries. The case Allen v Depuy International Ltd [2014] has implications for non-EEA claimants who suffer personal injuries as a result of defective products, but wish to sue a UK manufacturer in England/Wales. The claimants in this case had all been fitted with prosthetic hip implants manufactured by an English registered company, Depuy. The operations took place abroad in Australia and other countries where the claimants live. The claimants suffered adverse reaction to metal debris, as a result of the prostheses that were subsequently found to be defective. The court had to decide the applicable law - as the claimants wished to rely upon the Consumer Protection Act 1987 (CPA) and argued that English Law should apply. The benefits of CPA are: 1) it enables claimants to sue manufacturers/suppliers without proving negligence; 2) victims of defective products have the benefit of strict liability even though they are not privy to any contract. In order to decide which country's law was applicable, the court had to decide whether the event giving rise to damages arose before or after 11 January 2009. If after the date, Rome II applies in determining the applicable law. If before the date, Private International Law (Miscellaneous Provisions) Act 1995 (PILA) applies. The judge held that the date of the event giving rise to damage was the date the prosthesis was despatched from Depuy's warehouse. Alternatively, it was the date of the individual claimant's implant operation. Either way, it was before 11 January 2009 and so it was held that PILA applied. PILA provides that the applicable law is that of the country where the claimant sustained the injury. This is not necessarily the country where the operation took place. Indeed the date on which a claimant suffered injury may not be determinable as it might occur shortly after implantation, or many years later. Taking relevant factors into account, the judge found that the applicable law was that of South Africa for some claimants, and New Zealand law for others.

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Largest Class Action in South African Legal History Launched

By Izak Potgieter

TA South African court recently gave the green light to launch the largest class action suit in the country's legal history, when two pensioners were granted permission to institute a lawsuit against the massive parastatal, Transnet.

Transnet is accused of stripping two of its pension funds from its assets and mismanaging its pension funds as a result of which thousands of its destitute members had their benefits reduced with some earning less than the state's old-age pension. The class action seeks to recover nearly R80 billion from Transnet on behalf of more than 62 000 members of the pension funds. Transnet is currently appealing the decision of the court to authorise the institution of the class-action, leaving the affected pensioners with further delays to contend with.

Class actions very seldom occur in South Africa. Prior to 2013, class actions were restricted to matters where the interest sought to be protected was contained in the Bill of Rights enshrined in the South African Constitution. However, the position recently changed to provide for class action suits to be instituted for general litigation as well.

Although courts recently laid down guidelines for instituting such class actions, it still remains a daunting task due to the number of litigants involved. As the South African judiciary braces itself for the largest class action case in its history, the unfolding of the matter will be followed with eager interest.

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Heyns and Partners Inc. was founded in 1958. In 1986, the firm started to operate and conduct business under its current name. It is privileged to represent a very diverse and extensive client base, both corporate and individual, offering litigation, conveyancing and notary services.

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Securing against risks of insolvency by retention of title in Germany

By Dr. Angelika Baumhof and Christian Pflaeger

Do you deliver goods to Germany and want to avoid that your pecuniary claims are as good as totally lost when the customer becomes insolvent before he has paid the bill?

An extended and expanded retention of title with a processing clause under German law agreed to at the right time are important means of security and could be a solution. On time means that such an agreement is either already included in your General Terms and Conditions or agreed upon individually together with the acceptance of the order of the goods.

The simple retention of title only helps you to retrieve your goods as long as they are still separate and identifiable from all the other goods of the debtor. Once the debtor has sold the goods, only an extended retention of title transfers the claim the debtor holds against the third party to you. These transferred claims are worthless debts of the insolvency assets, but you have the right of separate satisfaction. An expanded retention of title even has the effect that all claims resulting from your business relationship with the debtor are secured (you remain the owner of the delivered goods respectively and you have the right of separate satisfaction in the case of insolvency).

However in case the delivered goods are processed or transformed and therefore new items are created you will lose ownership even when you have an extended and expanded retention of title. In this case a processing clause helps to get pro rata property rights of the new item.

If you deliver goods to Germany mind an effective protection of your property under German law!

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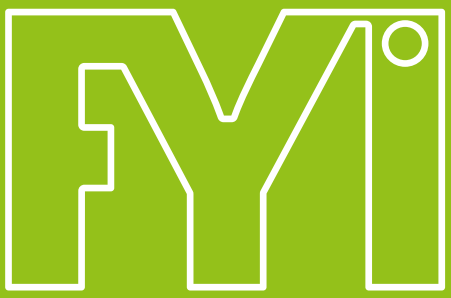

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