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Editors’ note

We are happy to share with you coverage of the latest developments in procedural law and litigation across the varied jurisdictions represented by our committee. This newsletter is being finalised as most of you travel to the IBA Annual Litigation Forum in Paris, which has a specific focus on regulatory investigations, ethical issues and group actions.

Thanks to the authors of the articles included in this newsletter, which cover similar issues to those to be discussed at the conference. No doubt the delegates of the Paris Conference will take this opportunity to put into action the issues raised during the event.

We hope you enjoy the issue: may the articles meet with your expectations and give you food for thought for the conference.

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Monday 0930 – 1230

**Resolving commercial disputes in the Arab region: the state of arbitration, litigation, mediation and enforcement in the Middle East**
*Presented by the Arab Regional Forum, the Arbitration Committee, the Litigation Committee and the Mediation Committee*

Arbitration centres are expanding in the Arab world. Most Arab countries are members of the New York Convention on Reciprocal Enforcement of Arbitral Awards (1958). This session will discuss the status of enforcement of foreign and local arbitral awards. What procedures and formalities must be observed to facilitate enforcement? Why is mediation not being used more extensively as the preferred method for resolving commercial disputes? What recent trends are there in regional court judgments in respect of international commercial disputes? All this and more will be discussed in detail during the Arab Regional Forum’s primary event of the year.

Monday 1430 – 1545

**Cornerstones of success: best practices version 2.0 for IT and outsourcing contracts 2015 – what really matters in order to support company strategy and to adapt to current business environment?**
*Presented by the Technology Law Committee, the Litigation Committee and the Mediation Committee*

This session will focus on IT contracts. The starting point and the basis for the session will be outsourcing contracts. During the financial crisis, virtually all companies have tried to ensure savings and achieve performance improvements by applying strategic outsourcing practices. Such endeavours are promising on paper but far too often companies are unable to effect the savings and obtain the quality envisaged by the outsourcing. As such it poses a top management challenge as failed outsourcing projects materially influence overall strategy to many companies.

What developments in global outsourcing practices – legally, commercially and technically – are needed to sustain cost reductions and drive quality improvements in a maturing and increasingly competitive outsourcing market. Building on practical experience throughout the world, this session will discuss, identify and explain the key elements of a successful outsourcing, including how to:

- keep focus on meeting customers underlying and ever changing business objectives
- build an effective KPI and KQI regime that is intended to reflect customers’ end-to-end experience and that will ensure material quality improvements
- apply early warning systems with customised, proactive remedies,
- support the business case underlying the outsourcing in a robust manner
- draft appropriate contract documentation to take account of changes in technology, market and best practices anno 2015

In order to capture relevant aspects across industries, jurisdictions and customer/supplier perspectives, we would involve people representing each of such segments.

Monday 1430 – 1545

**Sovereign immunity**
*Presented by the Litigation Committee and the Asia Pacific Regional Forum*

An examination of recent cases and comparative approaches to sovereign immunity – including enforcing judgments, issues involving international organisations, Argentina’s debt issues and expropriation cases.

Monday 1615 – 1730

**The age-old question – applicable law and jurisdiction in franchising, commercial agency and distribution agreements**
*Presented by the International Franchising Committee and the Litigation Committee*

This session will explore the effectiveness of choosing a foreign law to govern transnational/multinational franchising, distribution and commercial agency agreements and choice of jurisdiction, taking into consideration specific commercial regulations and procedural laws and the differences related to such agreements; new trends on the enforcement and recognition of foreign judgments and related case law in connection with the mentioned commercial arrangements in different countries; the arbitrability of franchising, distribution and commercial agency agreements in different countries and the recognition and enforcement of foreign arbitration awards.
Tuesday 0930 – 1230

**The influence of international arbitration on domestic litigation and vice versa**

*Presented by the Young Lawyers’ Committee, the Arbitration Committee, the Forum for Barristers and Advocates and the Litigation Committee*

This session will explore if and how (i) some of the most common arbitration techniques can be used before domestic courts, which techniques may be completely alien in the domestic court (for example, common law cross examination and production of documents in civil courts); and (ii) certain domestic procedural techniques alien to arbitration can be used in an arbitration, and, if so, how that impacts the way arbitral tribunals are constituted.

Tuesday 1430 – 1730

**Smarter ways to educate your court**

*Presented by the Litigation Committee*

Highly complex financial products, sophisticated engineering methods and causality in medical liability cases are only three simple examples where judges lack the necessary ‘technical’ knowledge to decide the case.

To prove our case and convince the court, we need to fill the gaps.

Do court-appointed experts have the expertise? Are party-appointed experts independent? What alternatives exist?

Litigation and arbitration lawyers across the globe are exploring the different approaches to tackle the issue.

Also cutting-edge methods of presenting evidence, such as hot tubbing and 3D-animated videos, will be explored.

This interactive session will also involve a TED-voting system to determine which system should ultimately prevail.

Wednesday 0930 – 1230

**Towards more effective fact-finding in arbitration and litigation**

*Presented by the Arbitration Committee and the Litigation Committee*

A decision meting justice depends on two things: the law, and the facts as applied to the law. The soundness of a justice-meting decision, then, is directly dependent on an adequate determination of the material facts.

Generally speaking, though, arbitrators, judges and advocates are not trained in fact-finding. For example, studies have shown that judges are not adept at detecting lies. Some in the arbitral community have argued that this diminishes the utility of oral testimony for purposes of determining what really happened.

But studies have shown that while judges are not particularly good at detecting lies, trained intelligence officers are markedly better at it. Presumably, then, this skill can be learned, and the evaluation of testimony can be enhanced through better training for arbitrators and lawyers.

Fact-finding goes far beyond the evaluation of testimony. It involves, for example, methodologies for organising and analysing conflicting evidence, be that testimonial, documentary or expert.

This session will analyse how fact-finding can be improved in arbitration and other adjudicative processes. Among other things, this panel of experts will analyse challenges to accurate and efficient fact-finding, contrast fact-finding in civil and common law systems, present techniques and practices aimed at improving fact-finding by arbitrators, judges and lawyers, based on testimonial, documentary or expert evidence and yes, even present lie-detection techniques....

Wednesday 1430 – 1730

**How to market a litigation department**

*Presented by the Litigation Committee and the Law Firm Management Committee*

How do you sell a distressed product? What is the best way to market a litigation department? What features does it need to have, in terms of technology and fee structures? We will workshop the business plan of your dreams!

Thursday 0930 – 1230

**Environmental justice and the trans-shipment of waste products**

*Presented by the Environment, Health and Safety Law Committee, the Corporate Social Responsibility Committee, the International Sales Committee, the Litigation Committee and the Mediation Committee*

Advancing international dispute resolution in environment and natural resource disputes issues include the trans-shipment of waste, for example, cars and waste from Western countries to the developing world.

Thursday 0930 – 1230

**Role of judges and arbitrators in natural resources activities**

*Presented by the Mining Law Committee, the Arbitration Committee, the Judges’ Forum, the Litigation Committee and the Power Law Committee*

Judicial review has become quite frequent in natural resources and energy projects around the world. Also investment protection arbitration through BITs, has become a common feature when the state does not fulfil its obligations as receiver of FDI for these projects.

Not only in the way the judiciary traditionally has been an instance of analysis and review for the protection of rights of interested parties, though also suspending projects due to review of environmental or other permits through actions by communities. Concepts such as ‘judicial activism’ and ‘judicial review’ will be examined and discussed with examples of mining and energy-related projects in different jurisdictions and legal systems.
Thursday 1430 – 1730

**Martial arts ethics: the offensive and defensive use of the rules of professional conduct**

*Presented by the Professional Ethics Committee, the Arbitration Committee, the Judges’ Forum, and the Litigation Committee*

To many lawyers, ‘ethics’ remains an amorphous concept. In the practice of law, it means adherence to the relevant rules of professional conduct. Those rules embody policy considerations; at its most basic, that lawyers preserve confidences and avoid conflicts of interest. In a borderless world, with increasingly complex legal and business relationships, lawyers are now using these rules in an aggressive means as part of litigation strategy. Motions to disqualify counsel or efforts to claim waiver of privilege are becoming more common. Violations of ethics rules are sometimes cited as grounds for causes of action by clients. On the other side, courts are starting to impose sanctions for improper use of the rules of professional conduct to seek improper advantage. This session will explore the offensive and defensive use of rules of professional conduct in a global context, focusing on model rules and the IBA ethical principles.

In October 2015, the IBA Annual Conference will be held in the baroque splendour of Vienna, with its Hofburg Palace, Spanish riding school and famous Viennese coffee houses. More importantly, Vienna is the hub for Central and Eastern European business, with more than 1,000 international companies coordinating their regional activities from Austria. Over 300 international companies have their CCE headquarters in Vienna and it is the seat of several international organisations such as OPEC and the third United Nations Headquarters. With these links and connections Vienna is a fitting and inspiring setting for the International Bar Association’s 2015 Annual Conference.

**What will Vienna 2015 offer?**

- The largest gathering of the international legal community in the world – a meeting place of more than 6,000 lawyers and legal professionals from around the world
- Nearly 200 working sessions covering all areas of practice relevant to international legal practitioners
- The opportunity to generate new business with the leading firms in the world’s key cities
- A registration fee that entitles you to attend as many working sessions throughout the week as you wish
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To find out more about the conference venue, sessions and social programme, and to register, visit [www.ibanet.org/conferences/vienna2015.aspx](http://www.ibanet.org/conferences/vienna2015.aspx). Further information on accommodation, tours and excursions during the conference week can also be found at the above address.
Key issues in transatlantic litigation

Europe and the United States have long been key to each other’s economic health. According to the Center for Transatlantic Relations, the transatlantic economy is the largest and wealthiest market in the world: accounting for more than 50 per cent of world gross domestic product (GDP) in terms of value and 40 per cent of GDP in terms of purchasing power.¹ This high level of transatlantic commercial activity inevitably generates a substantial number of commercial disputes, bringing the complex issue of jurisdiction into play. All well and good where the contract contains an effective and explicit jurisdiction clause; but, where it doesn’t, the question of which legal jurisdiction a claim falls under could be a matter of choice (or indeed debate).

In England, if a non-European Union domiciled defendant is physically in England or Wales and is validly served with process, the English court has jurisdiction, whether or not he is an English national and however temporarily he may be there. However, a claimant must seek the court’s permission to serve a non-EU defendant outside the jurisdiction,² unless he or she submit to the English court’s jurisdiction. Permission will only be granted where the claim falls within certain categories,³ has a reasonable prospect of success, and England is the proper place to bring the claim. (Any mention of ‘England’ or the ‘English’ courts is in reference to the legal jurisdiction of England and Wales.)

The federal structure of the US, with its scores of overlapping jurisdictions, has given rise to a jurisprudence in which extraterritoriality is the norm. US courts have an extremely long reach. Unsurprisingly, perhaps, a corporation can almost always be sued in the state where it is incorporated or has its principal place of business.⁴ But if a corporation has business contacts within a particular US jurisdiction, any lawsuit concerning that business can also be brought there. Accordingly, a company with its principal place of business in England that exports products directly to customers in the US can be sued by those customers in the US rather than England.⁵ There may therefore be situations where the parties have a choice of jurisdiction between the English and US courts. While both systems are common law systems, their different procedural rules (the Civil Procedure Rules (CPR) and Federal Rules of Civil Procedure (FRCP), respectively) and approach to litigation impact massively on a potential litigant’s chances of success. So which jurisdiction should you choose?

Commencing proceedings

In England, the CPR has the ‘overriding objective’ of enabling the court to deal with cases justly and at proportionate cost. As part of this regime, parties must follow pre-action protocols before commencing a claim in order to allow the parties every opportunity to settle the claim once the details of the dispute have been identified. Failure to comply with the pre-action protocols may result in a party being penalised as to costs at a later stage. No such requirements exist in the US.

A claim is commenced in England by the claimant issuing and serving a claim form and particulars of claim. Similarly, a civil action in the federal court is commenced by filing a complaint, although the complaint need not be ‘particularised’ in as much detail as is required in England. It is also easier to amend the complaint after filing in the US than it is to amend statements of case (once served) in England; technically speaking, there are no ‘causes of action’ in the US, which provides greater flexibility in bringing a claim. In most US jurisdictions, all that is required is that the underlying transaction be set out. Whether the transaction sounds in contract, tort or equity can be resolved later.

Disclosure

The English courts are required to limit disclosure to that which is strictly necessary to deal with the case justly. Disclosure is not automatic; it requires a court order. An order for standard disclosure will require each party to disclose only the documents on which he or she relies, which adversely affect
his or her own case or another party’s case, which support another party’s case, or which he or she is required to disclose.6

By contrast, FRCP 26(b)(1) provides that ‘parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense’. ‘Relevant’ in this context is anything ‘reasonably calculated to lead to the discovery of admissible evidence’.7 Discovery in the US is much broader than in England, but also more costly.

Depositions

Depositions are live pre-trial testimony provided by a witness, which are carried out in a similar manner to that at trial. Lawyers from both sides will usually be present, the witness will swear an oath and the evidence will be recorded. No judge will be present, however, and the evidence may or may not be used in court. This process provides flexibility if there are geographical restraints involved, providing the opportunity for live cross-examination of witnesses outside of the trial courtroom. It also allows the parties to analyse the strengths and weaknesses of their case at a relatively early stage in proceedings.

The English courts have no such process, relying instead on written witness statements that are submitted to court. At trial, direct and re-direct examination is limited to confirmation of the content of the witness statements and the scope of cross-examination only. This can vastly reduce the amount of time the witness spends testifying at trial, although it can also potentially limit the scope of the testimony given.

Compliance with deadlines

The past couple of years have seen the English legal system become much more rigid in terms of compliance with court orders, directions and the CPR. The consequences of missing a deadline, even by a matter of minutes, can be catastrophic to a civil case. In any event, failure to comply can increase costs due to the need for additional applications or a negative costs award to penalise poor conduct.

In the US, a failure to comply with the rules does not usually carry consequences in and of itself. The usual practice is to submit a motion to the court asking it to order the offending party to remedy its failure. If the party disobeys the subsequent court order, it can then be sanctioned, not so much for breaking the rules, but for disobeying the court. Broadly speaking, US courts are not as rigid as their English counterparts, and are extremely reluctant to bring litigation to an end or make costs awards. However, a continuous and wilful failure to comply with the rules will eventually lead to sanctions against the non-complying party or even involuntary dismissal of the case.

Juries

One of the biggest differences between English and US litigation is the ability to have a trial by jury in civil cases in the US. This is upon election from either party and will consist of a minimum of six members and a maximum of 12. The number of jurors is ultimately at the court’s discretion. The decision will depend on a number of factors, including cost, the complexity of the case, the need for a diverse jury and the parties’ preference.

What are the advantages of a jury trial? A jury trial should encourage in-depth discussion of the issues and therefore lead to a more considered verdict. Any decision reached will be based on the jury’s view of what is socially acceptable behaviour, arguably leading to a ‘fairer’ verdict than a case which is decided simply on the legal merits.

On the other hand, jurors can easily be influenced by a myriad of factors, including the likeability of the lawyer and any personal biases they may have. There is also the issue that any decision must be unanimous, and thus there is the possibility of a retrial.

Damages

There are many different types of damages available as a legal remedy in both jurisdictions. The purpose of punitive (or exemplary) damages is to punish the defendant as opposed to compensating the claimant. Punitive damages tend to be much more limited in England, only being used in cases of particularly oppressive or unconstitutional action.

The US legal system has a less reserved approach to awarding punitive damages, often in large amounts. Federal juries nowadays tend to consider less whether or not to award punitive damages, focusing more on how much to award. For example, last year a Louisiana federal court jury awarded $6bn in punitive damages against Takeda Pharmaceutical Co Ltd and $3bn against Eli Lilly and Co. This was on top of
compensatory damages of $1.475m. It should be borne in mind, however, that punitive damages are usually awarded for tortious violations. Punitive damages for breach of contract are much more circumscribed.

Legal costs

One of the benefits of litigation in England is the ‘loser pays’ principle: the winning party will ordinarily recover most of their litigation costs (including solicitors and barristers’ fees and any disbursements) from the other side. The amount recoverable, if not agreed between the parties, will be assessed by the court and will usually be reduced in line with what is considered to be ‘reasonable and proportionate’.

In recent years, depending on the size of the claim, there has also been a requirement for parties to submit a costs budget to the court at the start of proceedings. There may be a costs management conference between the court and the parties to discuss and agree the budget in line with what is considered to be ‘reasonable and proportionate’ to the size and complexity of the case. The budget can be amended (on application) if required. Following determination of liability, if the costs sought exceed the budget by more than 20 per cent, the receiving party is unlikely to recover the excess without good reason. Costs that are not considered by the courts to be proportionate in amount may be disallowed or reduced, even where they have been reasonably or necessarily incurred.

There are no such limitations on legal costs in the US. Further, because US courts believe it discourages people from making use of the court system, there is no ‘loser pays’ principle. Each party usually has to cover their own legal fees, regardless of the outcome of a trial. A successful party will usually be able to recover costs of disbursements, such as court fees, and those of non-attorney professionals. Multinationals reported that US litigation costs on average four to nine times more than non-US litigation, despite the fact that FRCP 1 requires ‘the just, speedy and inexpensive determination of every action and proceeding’.

Appeal

In the US, the right to appeal is automatic and must be filed within 30 days of the initial judgment date. Parties are also able to file a motion for reconsideration to the judge in interlocutory applications who provided the judgment, although, for obvious reasons, these are rarely successful.

In England, the right to appeal is not automatic. There must be grounds for appeal and an appeal can only be brought with the court’s permission. The appellant must file a notice of appeal with the court of appeal within 21 days of the decision against which it is wishing to appeal (although the lower court has discretion to amend this time limit).

Conclusion

Commercial litigation is diverging more rapidly than previously between the US and England. The consequences of not knowing the vagaries of the systems can be fatal to a civil litigation claim, particularly in the current climate of compliance and proportionality in England. Some cases will benefit from the stricter procedural confines of the English system; other cases will be better suited to the broader scope of discovery and the front-loaded nature of depositions in the US. In order to maximise their chances of success, potential litigants should seek the advice of local counsel or lawyers who are well-versed in operating transatlantic litigation proceedings.

Notes

1 The Transatlantic Economy 2014 (Center for Transatlantic Relations 2014).
2 Civil Procedure Rules 6.36.
3 Practice Direction 6B.3.1.
4 Daimler AG v Bauman [2014] 134 S Ct 746.
5 World Wide Volkswagen Corp. v Woodson [1980] 100 S Ct 559.
6 CPR 31.6.
8 CPR 44.3(2)(a).
EU regulation on jurisdiction, applicable law, recognition and enforcement of decisions and of authentic instruments in matters of succession

The rules on successions having cross-border implications within the European Union will be modified as of 17 August 2015 by the Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (the ‘Regulation’).

The Regulation, entered into force on 16 August 2012, will be applicable to transnational successions of persons who died on or after 17 August 2015, whenever the deceased was resident in a country different from the state of which he or she was a national or has properties in a country other than the state of residence.

The Regulation is directly applicable, and legally binding in its entirety, in EU Member States excluding the United Kingdom, Ireland and Denmark, which have exercised the opt-out right provided under Protocols No 21 and 22 of the EU Treaty. The Regulation shall prevail over the Member States’ internal rules on private international law, including Italian Law 218/1995, and over international treaties currently in force between Member States on the same matter.

Any agreement signed between a Member State and a non-Member State, as well as Articles 64 et seq of the aforementioned Italian law, shall continue to apply to decisions and acts coming from non-Member States or Member States not subject to the Regulation.

The Regulation has introduced important innovations in terms of jurisdiction, derogation from the Regulation, wills and validity of mortis causa provisions, as well as the admission of renvoi. The main provisions of the Regulation to consider are as follows.

The Regulation (chapters II and III) provides for a series of mechanisms which would come into play where the deceased has not chosen the law to govern his or her succession and the competent court to rule on any dispute arising from the succession.

The general connecting factor for the purposes of determining both the jurisdiction and the applicable law is the habitual residence of the deceased at the time of death. It means that the courts of the Member State in which the deceased had his or her habitual residence at the time of death shall have jurisdiction to rule on the succession, and the law of the same state shall apply to the succession, unless otherwise provided for in the Regulation. For example, should the habitual residence of the deceased at the time of death not be located in a Member State, the courts of a Member State in which assets of the estate are located shall have jurisdiction, provided that the deceased: was a national of such Member State at the time of his death; or had previously resided in such Member State. Derogations from this approach are possible and are mainly provided for estate planning purposes.

A person may choose that his or her succession be governed by the law of the country whose nationality he or she possesses when he or she made the choice or at the time of his death. A person with multiple nationalities may choose the law of any of the countries whose nationality he or she possesses. Furthermore, should the deceased choose the law of a Member State of which he is a national to govern his succession, the parties concerned may agree that the courts of such Member State have exclusive jurisdiction on any succession dispute.

The conflict-of-laws rules provided for in the Regulation may also lead to the
application of the law of a non-Member State. In such cases, regard should be given to the private international law rules of that state. If those rules provide for renvoi either to the law of a Member State or to the law of a third state, such renvoi should be accepted in order to ensure international consistency.

It is understood that the succession as a whole – that is to say, all of the property forming part of the estate, irrespective of the nature of the assets and regardless of whether the assets are located in another Member State or in a third state – shall be solely governed by the law, and subject to the jurisdiction, provided under the Regulation or chosen by the deceased. The above rule is aimed at ensuring legal certainty and avoiding the fragmentation of the succession.

With regard to recognition and enforceability of decisions given in a Member State, such decisions shall be recognised throughout the EU without any special procedure being required. As per the acceptance and enforcement of authentic instruments in a Member State, they shall have throughout the EU the same evidentiary effects that they have in the Member State where they have been created, or the most comparable effects, provided that no public policy rule of the Member State concerned is affected. Furthermore, both the decisions and the authentic instruments enforceable in the Member State where they have been given or established shall be enforceable in another Member State when they have been declared enforceable by the local court or competent authority, upon application of an interested party.

One of the problems the heirs, legatees, executors of the will or administrators of the estate usually have in cross-border succession is giving evidence of their status/powers in another Member State (for instance, in a Member State where the assets are located). In order to solve this problem, the Regulation has provided for the creation of a uniform certificate, the European Certificate of Succession (the 'Certificate'), to be issued for use in another Member State. Once issued, the Certificate shall have an evidentiary effect and be effective in all EU countries without the need of any special procedure. The Certificate will certainly simplify the documentation required from heirs and legatees habitually resident in a Member State other than that in which the succession is being or will be dealt with, and it will greatly facilitate the transnational administration of estates by heirs and representatives.

The main rule of the habitual residence ensures that the succession is governed by a predictable law to which the deceased was closely connected. Indeed, the Regulation enables citizens to know in advance the law applicable to their succession and, at the same time, to plan their succession by choosing the applicable law.

The limitation of the deceased’s choice to the law of the state of his nationality is aimed to ensure a connection between the deceased and the law chosen, and avoid the risk that a law is chosen with the only purpose of frustrating the legitimate expectations of persons entitled to a reserved share of the estate.

Furthermore, the rules of the Regulation are devised so as to ensure that the authority dealing with the succession will, in most situations, be applying its own law. In fact, in the majority of cases, the adoption of the habitual residence as the main criterion for the allocation of jurisdiction and the determination of the applicable law will allow national courts in the Member States to regulate the succession according to their domestic law.

Last but not least, the unification of the conflict-of-laws rules in the Member States, as well as the extension of the principle of mutual recognition to decisions and authentic instruments to succession law matters, will also avoid contradictory judgments, and will significantly contribute to legal certainty.

The main weaknesses of the new instruments concerns the relationships with non-Member States, and with those Member States that are not subject to the Regulation. Potential conflicts with the courts of those states, due to the wide reach of the Regulation’s jurisdictional rules, cannot be avoided through recognition mechanisms and lis pendens rule (which will come into play only if the same succession case is brought before different courts in different Member States).

It is therefore to be hoped that the efforts of harmonisation in the area of international succession will continue at a global level.

Notes
2 Chapter IV of the Regulation.
3 Chapter V of the Regulation.
4 Chapter VI of the Regulation.
Let them go nicely: French Supreme Court upholds conditions of termination and compensation for an abrupt break-off of an established business relationship

Frenche law provides that the party that abruptly breaks off an established business relationship is liable to compensate its business partner. Although this is a matter of French public policy, which therefore precludes any contractual provisions to the contrary, the Cour de Cassation (the French Supreme Court) clarified on 16 December 2014 that parties may, once termination has occurred, enter into a settlement agreement on the conditions of termination.1

Pursuant to Article L442-6, I, 5° of the French Commercial Code (the ‘Code’), the party that abruptly breaks off an established business relationship can be found liable. Proceedings based on this provision of the Code are grounded in tort law, notwithstanding the existence of a contract between the business partners.2

One must be careful not to consider commercial contracts governed by foreign law as immune to these rules. In fact, as French courts apply international conflicts of law rules, the applicable law is that of the place where the tort occurred. Accordingly, when a commercial contract is performed in France, the relationship between the parties is governed by Article L442-6 of the Code, regardless of the law that the parties had chosen to govern their contract.3

For this reason, international trade professionals should be reminded of the conditions under which they may terminate established business relationships without running the risk of breaching Article L442-6, I, 5° of the Code.

The decision rendered by the Cour de Cassation on 16 December 2014 falls within this context. Ikea AG, the Swiss furniture distributor, had been in an established business relationship with a French manufacturer since 1993. On 5 January 2009, Ikea launched an invitation to tender, and the manufacturer made a bid. French case law generally considers an invitation to tender equivalent to a termination of ongoing business relationships and as the departure point of the termination notice period.4

Due to the drop in sales in the context of the economic crisis, the distributor then notified the manufacturer that the volume of its purchase orders would be reduced over the years to come. That is when the parties entered into a termination settlement agreement, whereby they expressly set out and agreed to a gradual decrease of purchase orders and compensation to partially cover the financial losses resulting therefrom. The manufacturer’s bid was successful, thus allowing for the continuation of business relations between both parties for about two years until the final end to their collaboration.

The manufacturer nevertheless decided to bring suit against the distributor in France to claim damages for the abrupt break-off of a business relationship, arguing that the order reduction was wrongfully notified during the termination notice period. The French Economy Minister decided to join the proceedings against Ikea and to petition the Cour de Cassation for a civil penalty, in accordance with a procedure that is expressly laid out under Article L.442-6, III of the Code.

The Court of Appeal ruled that the existence of a termination settlement agreement did not in fact preclude jurisdictional oversight regarding the effectiveness of the termination notice given to the manufacturer insofar as Article
L442-6 of the Code is a matter of French public policy that cannot, for this reason, tolerate any contractual derogations. The Court of Appeal found that the distributor had abruptly terminated its established business relationship with the manufacturer. The distributor was therefore held liable to pay hefty damages to the manufacturer, as well as a large civil fine as petitioned by the Economy Minister.

The Cour de Cassation overruled the Court of Appeal decision, holding that while Article L442-6, I, 5° of the Code lays out a liability regime that is a matter of public policy, which cannot be waived in advance, it is, however, possible for parties to agree on the terms of the breaking-off of relations, or to enter into a financial settlement agreement, once the abrupt termination of their business relationship has effectively occurred.

In its ruling, the Cour de Cassation expressly referred to Articles 1134, 2044 and 2046 of the French Civil Code relating to settlement agreements, stating that settlements on compensation or on the conditions of the breaking off of relations are mutually binding. This precludes the party suffering from the abrupt breaking off of business relationships from invoking Article L442-6 of the Code to claim damages. Moreover, although Article 2046 of the French Civil Code expressly states that criminal proceedings initiated by the French public prosecutor cannot be hampered by the existence of a settlement agreement, there is no equivalent provision to be found concerning parties other than the public prosecutor – namely, any person demonstrating a valid interest, the Economy Minister, and the President of the French Competition Authority – that may start proceedings pursuant to Article L442-6 of the Code. Consequently, a settlement agreement following an abrupt break-off of a business relationship is binding not only on the parties to the settlement, but also on third parties, and notably on the courts and on the Economy Minister.

Insofar as settlement agreements are valid, it is clearly in the interest of the party which abruptly breaks off an established business relationship to enter into a settlement agreement, rather than let the courts decide on the amount of damages, and possibly on an additional penalty amount. Nonetheless, one ought to be cautious when entering into such settlements, which must be drafted in good faith. Parties are obviously not sheltered from the settlement agreement being pronounced null and void, for lack of mutual concessions, for significant imbalances between the rights and duties of the respective parties or for vitiated consent.

Notes
2 Cour de Cassation, 13 January 2009, No 08-13.971.
3 Grenoble Court of Appeal, 5 September 2013, No 10/02122.
Recognition and enforcement of foreign decisions in the Republic of Serbia

Recognition and enforcement of foreign decisions in the Republic of Serbia are governed by the law on resolving legal conflict with other countries1 (the ‘Law’), which was initially adopted by the then Yugoslavia in 1982. Considering the great importance of this Law for the economy and citizens, Serbia has continued to apply it on its territory since the dissolution of the former Yugoslavia.

According to the Law, a decision of a foreign court, a court settlement and a decision of another authority that is equivalent to a court decision in the country where it was taken, shall have the same status as the decision of a court in Serbia. The decision shall produce legal effects in Serbia only if recognised by a court of Serbia and if the applicant has accompanied his request for the recognition with a confirmation of the competent foreign court or another authority respectively that the decision is final and enforceable under the law of the country in which it was taken.

The process of recognition of foreign court decisions is a bipartisan process, and contradictory, since the opposing party has the right to challenge the proposal and present the facts and evidence that indicate that the conditions for recognition of a foreign court decision are not fulfilled.

There are a number of other conditions stated by the Law. These include: that there is no exclusive jurisdiction for the courts of Serbia; that, if there is a non-enforceable decision passed by the Serbian authority, or foreign authority decision that has been already recognised in the same legal matter and between the same parties, the decision cannot be contrary to the foundations of the social system established by the Constitution of the Republic of Serbia (the ‘Constitution’); and reciprocity has to exist between the state that has rendered the decision and Serbia.

Also, the court of Serbia shall decline to recognise a foreign court decision if it establishes, as a result of a review of an objection lodged by the person against whom the decision is passed, that such person was not able to participate in the proceedings due to procedural shortcomings.

There is a considerably small number of limitations regarding exclusive jurisdiction of the Serbian authorities. Those limitations are usually established for the protection of economic interests of the state, especially in legal matters concerning immovable property or protection of citizens, especially children in matrimonial matters.

However, the interests of the parties, especially when it comes to private matrimonial legal matters, have priority. For example, if the respondent is seeking recognition of a foreign decision made in matrimonial proceedings, or if the plaintiff requests so and the respondent is not opposing, the exclusive jurisdiction of a Serbian court shall not be an impediment to the recognition of such decision.

A foreign court decision shall not be recognised if a court or other Serbian authority has rendered an enforceable decision on the same cause of action or if another foreign court decision passed in relation to the same cause of action has already been recognised. The court shall stay the recognition of a foreign court decision if proceedings involving the same cause of action between the same parties have been brought in a court in Serbia until the latter proceeding is completed.

A foreign court decision shall not be recognised if it is contrary to the foundations of the social system established by the Constitution. This provision of the Law represents the well-known legal institution of public order. Public order represents the core values and principles of the state’s social, political and legal foundations and cannot be sacrificed in the international legal traffic. As such, it can differ from state to state, depending on political, social or religious views of a particular state establishment.

Also, the formulation ‘contrary to the foundations of the social system…’ is quite unusual when talking about the provisions
that are in fact public order limitations. This formulation certainly suggests a narrow interpretation of the institution of public order. Foundation of the social system established by the Constitution, above all, is a much narrower category of the totality of peremptory norms. Only the most important peremptory norms of the legal system of the Republic of Serbia are considered to be public order: these make up the foundation of the legal and political system. For example, a natural person is of legal age when the age of 18 years is attained, and attaining legal age is a peremptory norm. However, it would not be justified for a Serbian court, when recognising and enforcing a foreign decision where the applicant is younger and is considered an adult in the legal system that rendered the original decision, to refuse recognition and enforcement on the basis of public order. On the other hand, if recognition and enforcement is sought for a decision that contains elements of discrimination on the basis of gender, race or religion, and even if such a decision is rendered according to law of the foreign country, it will not be recognised by the court, on the basis that is contrary to the public order, bearing in mind that the prohibition of discrimination is a constitutional principle.

It is quite clear that the intention of the legislator was that public order is used only in situations where the standards of foreign law or foreign decisions encroach upon fundamental constitutional principles.

As in the example outlined, the interest of the state is much greater when protecting the constitutional principle of prohibition of discrimination with the institution of public order, than when protecting other peremptory norms of the state’s legal system. Only such great state interests justify refusal of recognition and enforcement of a foreign decision.

A foreign court decision shall not be recognised by the courts of Serbia if reciprocity is lacking. Reciprocity shall be presumed until evidence to the contrary is presented. As we can see, the reciprocity needed is factual, real reciprocity, not diplomatic reciprocity. This means that if a court of a foreign state recognises decisions of Serbian courts, the courts in Serbia will recognise the decisions of said foreign state, even if there is not a bilateral or multilateral agreement between them. The lack of international agreement does not prejudice the presumption of reciprocity in terms of recognition of foreign court decisions. Also, reciprocity does not have to be 'total'; that is, not all of the court or other authority decisions in Serbia have to be recognised by the foreign court in order for reciprocity to exist. If the Serbian court finds that the authorities of the foreign country have recognised the decisions of Serbian authorities in the same legal matter, it will be satisfied that factual reciprocity exists.

In the case of doubt as to the existence of such reciprocity, a clarification shall be provided by the state authority responsible for the judiciary. Furthermore, the court is authorised to – regardless of the lack of initiative of the parties in the procedure – ex officio discover if there is reciprocity throughout the procedure, providing there is doubt that reciprocity is lacking.

The lack of reciprocity shall not be an impediment to the recognition of a foreign court decision made in matrimonial proceedings or proceedings for the establishment or denial of paternity or maternity, nor if the recognition or enforcement is sought by a Serbian national.

The domestic court will not examine if the decision is rendered according to material laws of the foreign country. Powers of the domestic court are limited to formal testing, which involves the control of fulfilment of conditions for the recognition, or the existence of obstacles that would prevent the recognition, of foreign court decisions.

A decision of a foreign court relating to the personal status of a national of the country from which the decision originates shall be recognised without court examination, where the exclusive jurisdiction of Serbian authorities exists, it is contrary to public order or reciprocity exists. If a foreign court decision relates to the personal status of foreigners who are not nationals of the country that passed the decision, the decision shall be recognised only if it meets the requirements for recognition in the said person’s home country.

All of the above applies when the applicant seeks an enforcement of a foreign decision. An applicant must submit, in addition to the confirmation of the competent foreign court or another authority, respectively, a declaration that the decision is final and enforceable under the law of the country in which it was taken.

The court in the territory of which the procedure of recognition or enforcement is to be carried out shall have territorial
Taking of evidence abroad in civil litigation

The Vienna Commercial Court has recently reinforced its willingness to apply the extensive set of rules at its disposal for the active taking of evidence worldwide. The Austrian civil procedure rules allow for a court to take evidence also outside its circuit and even abroad. The author of this short article has participated as counsel in evidentiary hearings, which took place under Austrian civil procedure rules during more than one week in New York City, United States.

One of the quality criteria of civil procedure rules is the amount of flexibility they provide to the parties and the court to adapt the proceedings to the necessities of the case at hand. Austrian law has evolved in recent years to provide a higher degree of flexibility in the taking of evidence, not only within the European Union framework, but also on an international level.

As in most Continental European civil procedure rules, Austrian court proceedings rely heavily on the taking of evidence directly in front of the competent court. Since in civil cases the decision on the facts of the case lies with either a single judge or a board of judges, their immediate impression, in particular of witness statements, is found to improve the correctness of the decision. In statutory law, there is a strong preference for interrogating witnesses directly in public.¹

As a general rule, Austrian courts have a defined circuit within the territory of the

country. However, they were already allowed to act beyond the boundaries of their circuit if: a) there is immediate necessity in taking the action (periculum in mora); or b) in a much more practice-orientated approach, it is necessary to uphold immediacy in taking the evidence while at the same time considering expediency and economic efficiency of the proceedings. Any other court, in whose circuit the acts shall be taken, should be informed out of comity, while there is no possibility of such other court to prevent the acts. Courts can even decide to hear witnesses who are unable to appear in front of them in their own home or at any other suitable place together with party counsel.

Today, there is a wide variety of tools available for Austrian courts that may facilitate the taking of evidence also in an international context.

Austrian courts can summon foreign witnesses to participate in proceedings in Austria. The European Court of Justice has affirmed that this possibility under national law is not superseded by the rules of EU law. If a witness is unwilling to cooperate, this method can, however, fail due to practical limitations on the enforcement of compulsory measures.

Quite recently, the Austrian judiciary has additionally started a programme to enhance audio-Visually assisted evidence-taking. Today, most Austrian courts are equipped with videoconferencing equipment. Section 277 of the Austrian Code of Civil Procedure regulates the use of such equipment and holds it equal to interrogation in the presence of the court. Nevertheless, there are still issues of compatibility of the technical system in the international sphere. Additionally, if translation of the witness statement is necessary, the additional complication of the videoconference setting might hinder an effective interrogation.

The classic method would be the request to another court to take a specific witness statement or other evidence in the place of the Austrian court and report in writing. In this context, Austria is however not party to the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. The only multilateral treaty in force for Austria is the Convention of 1 March 1954 on Civil Procedure, and there is a series of bilateral treaties. In general, it will also be possible outside the treaty regime to attempt such taking of evidence, but it is likely to consume considerably more time. Most relevant communication in this context is still based on consular relations.

On the application of a party, Austrian courts can also consider evidence directly taken by this party in accordance with foreign rules of evidentiary procedure, which may be used as a means of importation of the results in particular of witness discovery. However, the court has considerable discretion to refuse such evidence, if mutual participation of both parties is not ensured.

Finally, minutes on the taking of evidence in other court cases can also be included in the proceedings, if both parties agree or if immediate evidence is no longer available; for example, if a witness died after making his or her statement. Additional exception can be made in circumstances where both parties consent.

Within the EU, further facilitation of evidence-taking is achieved by the Evidence Regulation. This regulation streamlines communication and, in Article 17, also provides for direct evidence-taking abroad. Under Austrian law, this direct taking of evidence abroad is, however, not only restricted to the EU, but in principle applicable in all countries worldwide, supposing acceptance of the relevant foreign country under public international law. While the agreement of both parties might be desirable, a decision can also be taken by the court against one party’s will.

In order to prepare the decision, counsel has to consider the following checklist of necessary requirements and ensure that:

1. it is admissible under international public law (including comity or specific consent in the case) or EU law;
2. the cost of travel is not excessive compared to costs of hearing witnesses in Austria;
3. conditions in the relevant country are sufficiently safe for the court to travel there;
4. there are exceptional circumstances or an importance of the immediate impression of the evidence on the court; and
5. the requesting party is willing to pay an advance on travel and translation costs.

As the initially mentioned case has shown, at least the Commercial Court of Vienna is willing to use this procedure. The reasoning for the immediate taking of evidence in this specific case was both quantitative as well as qualitative. First, a large number of witnesses were resident in the US, as well as two experts appointed by the court who would have had to travel to Austria for the hearing. It made more sense to move the court and party counsels instead.
Furthermore, from a business perspective, it would have been considerably burdensome for some of the witnesses in management positions to be absent for an extended time just to make one statement. Insofar that the parties could not guarantee that the most knowledgeable witness would travel to Austria for the hearing.

Once the decision is accepted, the court – potentially also with assistance of the parties – needs to fulfil a number of administrative and organisational tasks:

- in cases outside the EU, both the ministry of justice and the foreign ministry have to be notified;
- the foreign ministry would usually contact its foreign counterpart on the permissibility of direct evidence-taking, if there is not already precedent established regarding this country;
- the judge has to request a leave of absence of the ministry of justice, which should usually be granted without real discretion, once the decision regarding evidence-taking has been taken by the court;
- a visa for the judge has to be cleared;
- cost advances of the requesting party or parties have to be collected;
- a location for the hearing has to be secured, which might be any available conference centre; for example, even in a hotel, or a cooperating law firm; and
- translation services have to be procured, potentially with the help of the local consulate on their preferred translators.

With good preparation, it should be possible to make the hearing abroad as efficient as one held locally.

Wrong testimony of foreign witnesses in front of an Austrian court will still constitute a crime under Austrian law, even if the testimony is taken outside Austria. However, it is to be expected that foreign countries will not allow coercive measures to be taken by the court in their territory. This has to be considered when dealing with witnesses whose appearance cannot be ensured by the parties. In this context, the provisions of Austrian law allow even for a combination of the advantages of direct evidence-taking with the coercive powers of local foreign courts. One possible alternative is to request a foreign court to take the evidence under supervision of the Austrian judges while the extent of their participation would be limited by local court rules.

While not suitable for all types of proceedings, the described set of rules add additional flexibility in particular to international cases. It can be hoped that the Austrian courts will follow the example of the Vienna Commercial Court and apply the provisions more freely in the future. It is to be expected that, with continued use, administrative effort will also be reduced.

Notes
1 s276 ss1, Austrian Code of Civil Procedure (ZPO).
2 s33, Austrian Law on Court Jurisdiction.
3 s328 ss2, ZPO.
4 EuGH C-170/11 Lippens/Kortekaas.
5 s283 ss1, ZPO.
6 s283 ss2, ZPO.
8 The core of rules is provided in s291a-291c, ZPO.
10 s64 ss3, Austrian Code of Criminal Law.
11 s283 in connection with s291a ss1, ZPO.
The Directive on antitrust damages actions and the European Court of Justice’s Kone decision: need for implementation in Germany?

European Union and German competition law have traditionally been enforced by public bodies. In case of a breach of competition law, either the European Commission or the national competition authorities impose heavy fines. By contrast, in the United States most cases under antitrust law are brought by private parties. With its decisions on Courage and Manfredi, the European Court of Justice (ECJ) paved the way for the private enforcement of competition law in the EU. However, it stated that the competence to implement a corresponding procedure still lies with the Member States.

The German legislator was one of the first within the EU to adopt a procedure for private damages action for breaches of competition law in 2005. Commentators predicted a flood of actions and, indeed, private enforcement of competition law gained importance for practitioners. The number of pending cases is increasing significantly in some EU countries, especially in Germany, the United Kingdom and the Netherlands due to ‘plaintiff-friendly’ features of their legal regimes. In one of the most recent cases in Germany, the Deutsche Bahn (German railway company) brought an action against a cartel of 13 internationally operating air cargo carriers before a German court, claiming compensation exceeding €1bn.

Nevertheless, the European Commission was of the opinion that the right to compensation in many other countries of the EU was all too often theoretical because of national procedural obstacles to exercising this right in practice. The Directive on antitrust damages actions (the ‘Directive’) was adopted to strengthen private enforcement by harmonising diverging national rules and establishing a minimum standard. It was signed into law on 26 November 2014 and Member States have two years to implement it.

Standing of indirect purchasers and the passing-on defence

Following the principle of compensatory damage and placing it above deterrence, the Directive allows for both the indirect purchaser standing and the passing-on defence. To ensure the full effectiveness of the right to full compensation, according to Article 12, Member States have to ensure that compensation for harm can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers from an infringer. Hence, standing is granted also to any indirect purchaser in the distribution chain.

To avoid overcompensation, the Directive recognises the passing-on defence. The Directive follows the European legal tradition that damages are limited to the actual loss and loss of profit. According to Article 3, full compensation for suffered harm caused by an infringement of competition law shall not lead to overcompensation. Member States therefore have to ensure that multiple liability of the infringer is avoided. Following this reasoning, Article 13 allows an infringer to invoke as a defence against a claim for damages the passing-on of the overcharge to the purchaser of the claimant. The infringer must prove the existence and extent of pass-on of the overcharge. Other than the indirect purchaser, who is regarded as having proven that an overcharge paid by the direct purchaser has been passed on to its level, the infringer does not benefit from the possibility of prima facie evidence. However, the Directive facilitates his task to a certain extent as the infringer may reasonably require disclosure from the claimant or from third parties, according to Article 13. Besides that, Article 12 implies that the victim and not the infringer bears the burden of proof for
The Directive on Antitrust Damages Actions and the European Court of Justice’s Kone Decision

It states that the right of an injured party to claim compensation for loss of profits due to passing-on of the overcharge shall not be affected by the passing-on-defence. The jurisdiction of the German Bundesgerichtshof (Federal Court of Justice (the ‘Court’)) complies in essence with the rules of the Directive as it allows for indirect purchaser standing and the passing-on defence. Yet, looking in more detail, the Directive makes relying on this defence easier both for infringers and indirect purchasers. In its ORWI decision, the Court allowed indirect purchasers to claim damages from the infringer. However, contrary to the Directive, it did not recognise any kind of prima facie evidence in favour of the indirect purchaser. The German legislator will have to implement this rule.

In the same decision, the Court decided that the passing-on defence of the infringer must be allowed according to the general principle of Vorteilsausgleich (offsetting of benefits). However, he or she has to prove not only the passing-on of the overcharge but also that there are no disadvantages, such as a decline in sales due to the passing-on compensating the increase in price. As shown, the Directive puts the burden of proof for this fact onto the claimant.

The Court moreover lays down higher barriers for infringers to obtain disclosure of documents from the plaintiff than the Directive (see below). The purchaser may be required to disclose information only in very exceptional cases.

Disclosure of documents

Competition law cases are characterised by an information asymmetry between parties. Therefore the Directive gives detailed rules on disclosure of evidence in Articles 5 to 7. Emphasising equality of arms, it does not differentiate between the infringer and the victim demanding disclosure. Parties have the right to obtain disclosure of specified items of evidence as well as categories of evidence by claimants, defendants or third parties. National courts have to control the necessity and proportionality of the disclosure. The Directive specifies which considerations courts have to take into account in determining whether any disclosure requested is proportionate, such as scope and cost of disclosure and confidentially of information. Member States are free to introduce rules which lead to wider disclosure of evidence.

A key issue discussed in this matter is the access to leniency-related documents. Leniency programmes are probably the most important tools of public enforcement. Infringers are offered immunity from, or a reduced fine, in exchange for their cooperation. In its Pfleiderer and Donau Chemie judgments, the ECJ ruled that national courts must weigh the respective interest in favour of disclosure of the information and in favour of the protection of information, when claimants seek access to documents relating to national proceedings concerning a cartel.

The European Commission had concerns that the effectiveness of public enforcement could be undermined if documents relating to a leniency procedure were disclosed to persons wishing to bring an action for damages. It feared that the aforementioned judgments of the ECJ would be followed by considerable uncertainty as to which categories of documents would be disclosable and therefore deter cartel participants from cooperation with the Commission and national competition authorities.

Hence, Article 6 of the Directive contains detailed rules on the disclosure of evidence included in a file of a competition authority and provides additional guidance for the assessment of proportionality of the disclosure of documents. The disclosure of two categories of documents is subject to strict regulation: the first category of information, leniency statements and settlement submissions, can never be disclosed; a second category of information, which is produced within public enforcement proceedings, can be disclosed only after the investigation is closed.

In the German legal system, the right to obtain disclosure of specified documents irrespective of the burden of proof is acknowledged. The right to demand the disclosure also of categories of evidence, however, has to be implemented by the German legislator as there is no such possibility until now. In addition, the rules on the disclosure of evidence included in files of competition authorities have to be implemented.

Quantification of harm

Whereas it shall be presumed that cartel infringements cause harm, there is no such presumption of proof concerning the
THE DIRECTIVE ON ANTITRUST DAMAGES ACTIONS AND THE EUROPEAN COURT OF JUSTICE’S KONE DECISION

quantification of harm. However, according to Article 17, Member States shall ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult. They have to ensure that national courts are empowered to estimate the amount of harm, if it is impossible or excessively difficult precisely to quantify it. This corresponds to the current legal position in Germany.

To offer assistance to national courts and parties involved in actions for damages by giving information on quantifying harm caused by infringements, the European Commission published a practical guide on the quantification of harm in actions for damages based on breaches of European competition law.

Standing of victims of ‘umbrella effects’

The Directive does not explicitly take into account so called ‘umbrella pricing’, which was the subject of the ECJ’s Kone judgment in June 2014. The liability of cartel members for umbrella pricing had hardly been discussed in the EU and Germany until now. Also, US courts are reluctant to acknowledge liability of cartel members for umbrella effects.

The ECJ recognises the economic effect of umbrella pricing as a consequence of a cartel and expands the circle of potential claimants. According to this judgment, not only direct or indirect purchasers of the infringer can claim damages, but also purchasers of undertakings not party to the cartel.

The court ruled that where a cartel has the effect of leading competitors to raise their prices, the members of the cartel may be held liable for the loss caused as a result. In such a case, the victim may claim compensation even in the absence of any contractual link with the members of the cartel, if there is a causal relationship between the loss claimed and the cartel at issue. However, in individual cases, concerned parties will meet obstacles in proving causality between the loss claimed and the cartel. Article 14, paragraph 2, of the Directive applies only to indirect purchasers of the cartel members. Nonetheless, Member States are free to implement a corresponding rule for umbrella effects of a cartel.

Until now, the Bundesgerichtshof did not have to decide on the liability of cartel members for umbrella effects. However, there is good reason to assume that the Kone decision corresponds with current German competition law. Although the ORWI judgment of the Bundesgerichtshof dealt only with the standing of indirect purchasers of cartel members, the main reasoning of this judgment can be applied to the question of liability for umbrella pricing. The Bundesgerichtshof explicitly stated that causality between the loss claimed and the cartel cannot be denied because of the autonomous pricing policy of the direct purchaser. This reasoning can be transferred to cases of umbrella pricing. However, under current German competition law, the claimant has to bear the burden of proof that the increase in price in fact results from umbrella effects of the cartel. There is no such prima facie proof that the price increase is a result of the cartel. However, the Kone decision will encourage claims for damages due to umbrella pricing also in Germany.

The Directive on antitrust damages and the Kone decision do not bring major changes for the legal framework of private enforcement in Germany. Still, there is need for implementation of certain rules. Although in some respects the current case law of the Bundesgerichtshof might be more plaintiff-friendly than the Directive, harmonisation and strengthening of private enforcement in the EU will further boost private actions in Germany.

Notes
1 Art 14, para 2, Directive on Antitrust Damages Actions.
2 Art 12, para 3, Directive on Antitrust Damages Actions.
3 Art 17, para 2, Directive on Antitrust Damages Actions.
4 Art 17, para 1, Directive on Antitrust Damages Actions.
Recent financial litigation in Denmark

Like most other countries, Denmark has seen a pick-up in litigation against financial institutions in the wake of the financial crisis. The claims have essentially revolved around allegations that the financial institutions had been negligent in advising customers on the risks involved in various financial products and allegations of mis-selling.

An essential problem seems to have been that sophisticated financial products previously sold to professionals familiar with the risks involved were sold to a much wider range of customers, who were not familiar with these risks to the same extent.

We are normally involved in a number of financial litigation issues and have had our fair share of the Danish cases reflecting this problem. This article will focus on a number of cases where customers have initiated litigation based on allegations of negligent advice on, or mis-selling of, interest rate swaps.

The interest rate swaps were often sold in connection with the financing of real estate and, to a large extent, to limited partnerships where the investment was also tax-driven. In these cases, it was often argued that the customers were of the opinion that they had in fact entered into an agreement identical to a fixed interest mortgage bond. It has mainly been argued that they were not liable for the negative market value that resulted from the drop in interest rates. For instance, if the loan was terminated, the negative market value would be an actual, and not only a contingent, obligation. To the extent that the swap also had a currency element, it has proven more difficult to submit a claim taking into consideration that the element of different currencies in itself indicates that there is a risk involved if the currency rates changed unfavourably.

In Denmark, like other jurisdictions, we have also experienced other issues, for instance manipulation of the Copenhagen Inter-bank Offered Rate (CIBOR), but the banks were essentially cleared of wrongdoing in a report issued by the Danish Financial Supervisory Authority.

The BGH decision

The interest in the subject in Denmark was in reality set off by the judgment of Bundesgerichtshof (BGH), the German Supreme Court (the ‘Court’), on 22 March 2011 (the Deutsche Bank case). The judgment concluded that the financial institute was liable for losses incurred by a commercial party following the parties’ conclusion of an interest rate swap agreement. The BGH took into account that the bank had a conflict of interest in the agreement, and that the swap’s market value was negative at the time of the conclusion of the agreement in order for the bank to finance its own expenses.

The essential part of the latter was that the Court held that the bank had failed to provide the customer with sufficient information, particularly of the fact that the agreement had a negative initial value for the customer and of the risks associated with the product. The Court’s decision was subject to aggravated emphasis on the complexity of the product.

The ruling is interesting, as it does not deem the customer omniscient in terms of financial products, despite the fact that the customer was a commercially acting professional. Therefore, the Court imposed a greater responsibility on the bank in terms of informing the customer of the product than normally anticipated, at least in Denmark.

The following wave

Because of the BGH’s emphasis on the customer’s limited knowledge of financial products, more parties deemed it worth the risk to try their luck with the courts for their own cases, based on the loss incurred in relation to swaps.

Notwithstanding the fact that BGH’s decision of course does not impose direct legal precedent on the Danish courts, the rules on a bank’s obligation to advise and know the customer originate from the same European Union directive: the Markets in Financial Instruments Directive. Scholars and advisers suggested that at least some
One case involved a housing cooperative, where the advice provided by the financial institution was deemed insufficient by the courts. This was because the financial institution could not prove that it had made sure that the cooperation had an understanding of the swap, despite the fact that the conditions were laid out in the actual agreement. On the other hand, in a case involving a professional investor, the court ruled it sufficient in terms of professional liability that the conditions were written in the loan agreement alone and not subject to specific additional advice. The type of party entering into loan agreements with financial institutions is thus essential when it comes to determining the extent of the financial institutions’ professional liability.

In addition to the actual issues of liability, a substantial number of the cases are determined on the issue regarding time-barring. In accordance with Danish law and the statute of limitations, liability claims are subject to a limitation period of three years. Danish courts have established that the period of limitation must be considered on a claims-occurrence basis. In relation to faulty advice, the period of limitation thus commences when the financial institution is advising the customer about the risks associated with a given financial product. As a result, the majority of the disputed agreements that have inflicted losses on the customers have exceeded the period of limitation.

However, the statute of limitation will suspend the period of limitation upon the existence of certain circumstances; for example, if the claimant was unaware of the existence of the claim. How the courts choose to determine whether a party has been unaware of the claim and what constitutes awareness is yet to be definitively decided. However, up until now, the courts have taken a relatively strict approach with regard to suspension of the period of limitation due to the customer’s unawareness of claims following advice.

A substantial number of cases have thus been decided based on this issue alone and have resulted in the financial institutions being acquitted without the courts even considering the question of professional liability. The courts have focused on the point in time when the customers should have known that the given financial product was associated with great risk, and thus should have been aware of the potential claim. In most cases, the financial institutions have
Without a doubt, one of the primary objectives of a legal order is providing fast and efficient access to the rights entitled to individuals by such order. In countries especially where the workload of courts is very high, such as Turkey, it is essential for judicial procedure to serve this purpose.

One of the principal purposes of recently updating the Civil Procedure Law (the ‘Law’) may have been to maintain such an approach. Using the phrase ‘recently’ for a law enacted more than three years ago may be conspicuous; the reason for this, however, is the Turkish law practice’s inability to rapidly adapt to developments and its tendency to continue old habits. This is especially true of the first instance courts waiting for the Court of Appeals to establish precedents in order to understand to what extent the mechanisms regulated by the new law should be applied, thus preventing the law from being effectively applied.

A series of amendments were made to the Law in order to simplify judicial procedures and enable individuals to effectively access their rights and bring the law up to date. Probably the most important change of all was the introduction to Turkish law of a new type of action, namely the ‘action of indefinite debt’. In an action of indefinite debt, the claimant is entitled to file an action by indicating the legal relationship and a minimum value of debt, when the value of the debt cannot be clearly and absolutely determined on the date of the action.

In the previous procedure law, the claimant was obliged to clearly determine his or her claim and, if this was not possible, could file only a ‘partial action’ to claim a portion of the sum owed. When the entirety of the debt became definite as a result of the examinations during adjudication, the claimant was unable to freely increase his or her claim under the same action due to the prohibition to expand or change the claim.
and defence. In order to claim the whole sum, it was required that: the defendant give consent to increase the claim, the claimant amend the legal action, or an additional action be filed to claim the remaining portion of the debt.

Along with the impracticality of such application in the previous legislation, it also loaded financial burden and risks on the claimant, and was criticised in this respect, especially: the requirement for the amending party to pay for amendment costs, the right to amend the action only once, and the forming of two separate cases on the same subject at the same time, if this option was taken, and the consequent production of conflicting results, damaging the procedural economy and reliability of the judicial system.

Above all, when a partial action was filed, time limitation was suspended only for the portion claimed and the claimant was at risk of exceeding the limit for the unclaimed portion. Claimants who did not want to undertake such risk filed their action with an inflated value due to their inability to accurately determine the actual value of the claim, in order to suspend time limitation for the entirety of their claim, and undertook the risk to pay for court expenses corresponding to the rejected portion of their claim.

Hence, it was stipulated that action of indefinite debt would be a remedy for these issues. Thus, in the event an action of indefinite debt is filed, it was regulated that the time limitation for the entirety of the debt shall be suspended and the claim can be increased without amending the action, once the debt becomes determinable during adjudication. By these means, the risks were eliminated as to filing actions with higher claims and undertaking court expenses for the rejected portion of the claim.

However, certain problems are experienced in the application of the article regulating action of indefinite debt. First, which debts shall be deemed ‘indefinite’ is a matter of debate, both in academia and practice. For instance, some academics classify labour wage receivable claims as debts that are not indefinite, while the Court of Appeals accepts labour wage receivables as indefinite since information regarding the employment relationship is in the possession of the employer.

On the other hand, it is observed that some uncertainty is present in practice as to when an ‘indefinite debt’ shall become ‘definite’, and who shall identify it during adjudication. In reality, it can be easily stated that this is no different from the case in partial claims. The claimant still has the burden to make its claimed debt definite by using various proofs and examination methods during adjudication, and accordingly increase its claim. This instance strengthens the opinion that the reason for the introduction of this claim type is not to eliminate the risk for the claimant regarding court expenses, but instead to overcome the problems of time limitation and amendment of the action.

In our opinion, it would be accurate to digest and understand the reasons for introducing action of indefinite debt and enable practice to be in line with such construction of the provision of the article. In order to realise this objective, lawyers, who can let go of old habits, have a lot of work to do.

Note
1 Civil Procedure Law No 6100 was enacted on 1 October 2011. Civil Procedure Law No 1086 (1927) was annulled.
Third-party funding: when the trial is no longer a burden

An individual or business who wishes to file a lawsuit to enforce its rights will inevitably consider the economic criterion as part of their overall reflection. Indeed, in addition to lawyers’ fees, a lawsuit can require legal recourse to one or many experts, financial analysts, investigators, translators and so on, over the course of several years in the event of any subsequent legal recourse. Further to these irreducible costs, in matters of arbitration, additional fees have to be paid to the arbitrators.

These costs can prove to be dissuasive when committing to legal proceedings. Even if the litigation presents favourable chances for undeniable success, many plaintiffs simply renounce asserting their judicial right, for lack of being able to fund a trial that they fear will be long and costly. A company that believes that its adversary is more economically powerful might not continue a trial to its own detriment; if funds are limited, it might prefer to invest in its business or it might not be able to secure a bank loan to finance a trial.

In order to restore the equality between parties in access to justice, the plaintiff may consider appealing to a third-party funding (TPF) company.

The mechanism

TPF, of British origin, is a practice by which a third-party funder covers part or all of the trial’s expenses. If necessary, the TPF will cover the recovery costs pursuant to the arbitrator’s award or the final judgment. In return, the funder generally collects its fees by calculating a percentage of all the sums allocated by the decision or recovered as a result of the procedure (usually between 20 and 60 per cent, depending on the company).

From the moment that the TPF has agreed to finance the trial of a plaintiff, the client does not assume any financial risks associated with the trial. In the event of a negative outcome, the investor will not, of course, collect any fees and it will not demand the reimbursement of the client’s lawyer’s fees that he or she paid in advance. In the event of success, the funder will recuperate a percentage of the overall sum granted by the court or the arbitrators. This adheres to the logic of a ‘win-win’ situation.

The mechanism can be put in place at any point during the trial: either before committing to a lawsuit, during the trial, or after, during the stage in which funds allocated by a judgment or an award are recovered. In France, this practice is neither supervised nor regulated. Neither is there a code of conduct relative to this practice, unlike in other countries (the United Kingdom, for example).

The third party is generally a specialised investment fund; however, this practice can equally be exercised by some financial institutions, banks or financial holding companies. This technique is still fairly rare in France, but it is destined to be developed in the coming years.

First confined to arbitral procedures due to the costs they represent to the parties, today the technique has become general practice in any legal proceedings and is also now intended for all those subject to trial (both companies and individuals).

A sui generis contract

In France, the financing of a trial by a third party is subject to the contractual provisions discussed between the parties. With regards to its classification, the contract proposed by the third-party financer involves a certain number of composite services, which has led legal experts to question its classification and legality in accordance with French law.

This is neither an insurance contract (absence of risks in the event of legal action) nor a loan agreement (the financed party does not have the obligation to reimburse the costs).

Jurisprudence seems to opt for the qualification of a contrat d’entreprise, once the investor’s costs may be subject to a reduction when deemed excessive.

The doctrine considers the agreement to be a sui generis contract, of composite nature. This mechanism calls to motion provisions from various notable contracts under French law.
Third-party funding: when the trial is no longer a burden

The operating contract

The third-party financer subscribes to a certain number of obligations, which can vary according to the contract that links it to the financed party. It is not possible, therefore, to generalise, but the service provided by the third party is, above all, a cash advance, closely associated with a diagnostic and a litigation follow-up.

The third party generally includes among its teams lawyers and technical experts whose mission is to provide an initial filtering of files submitted by potential clients. They then ensure the monitoring of the trial in line with the client and his or her lawyer. According to the nature of the obligations proposed by the third party, one distinguishes at this stage the third ’active’ party who participates in the operation of the trial (as would the insurer) and the third ’passive’ party who simply funds the trial.

Furthermore, certain funders participate in the recovery of the damages after the final judgment or the award.

The trial becomes an asset

From a philosophical point of view, this mechanism generates a financialisation of legal actions. The claim and the trial itself are considered as investments on which, in the relatively short term, the funder will capitalise. There arises, therefore, the ethical question of financial profitability of a trial for a third-party investor, the idea of which clashes with the classic vision of the French judicial system.

When solicited by a plaintiff, the third party will undoubtedly take a preliminary audit of the dispute pursuant to economic criteria. The chances of the trial’s success are then examined by taking into account the interest of financing and its cost. The third party generally agrees to finance the plaintiff’s files (and not the defendant’s) and, from there, only files with high financial stakes (with a fixed minimum cost).

The files are subject to a rigorous preliminary exam (due diligence), taking into account the net value of the demand, its legal grounds, the available evidence, the envisaged costs of the trial, the experience and expertise of the chosen lawyer, the solvency of the defendant, the chances of recovering allocated damages and the projected duration of the trial.

Since the return on investment is the main selection criterion, third-party funders are indeed attracted by the most profitable trials (offering them a minimum return of three or four times the invested sum). The collected fees can vary greatly: third parties in the US are paid between 20 and 50 per cent of the damages, while Australian companies report payments of between 30 and 60 per cent. Some others combine a percentage of the damages with the reimbursement of the client’s expenses.

Criticisms and precautions

Financing and profit-sharing in the event of a success generate the risk of intervention in the conduct of the trial. Yet, only the financed client reserves the litigation status in the proceedings; the funder will generally be considered as a third party to the lawyer-client relationship, even if it supports the lawyers’ fees and is financially interested in the success of the trial.

Consequently, from an ethical point of view, the lawyer remains the debtor of the client (and not the funder), retaining his obligations to the counsel, diligence, confidentiality and independence. In particular, in order to avoid any potential conflict of interest, the lawyer should take his instructions in the conduct of the trial only from the party to whom he is appointed, and not from the third-party financer. The funder must not therefore substitute himself for the client during the conduct of proceedings.

However, it is admitted, in practice, that the third party participates in a minima and important decisions. That is why the financing contract generally involves, for the financed party, an obligation to provide information to the investor. This information will relate to the choice of the lawyer, the chosen line of defence, the trial’s evidence, the evolution of the trial, and the potential interest in an amicable solution putting an end to proceedings.

This raises the question of who has to communicate this information which is,
by its nature, covered by confidentiality. The question is raised at all stages of the procedure: during the preliminary analysis of the financing, during the trial, and thereafter or subsequently during the execution of the decision.

Under French law, rules of professional secrecy are a principle of public policy for lawyers and it would be forbidden for them to send any information directly to the third-party funder, even with the agreement of their client. The financing contract should therefore organise the way the client himself will deliver information and documents related to the trial to the funder.

The lawyer must equally be vigilant and prevent any potential conflict of interest between those of the client and those of the investor: these two parties may differ, most notably regarding the evolution of the procedural strategy, or a transaction with the adversary which would end the trial.

The practice of financing the trial by a third party may, in France, disrupt litigation management, but it is perfectly compatible, subject to certain reservations, with the ethical rules to which French lawyers have submitted.

One must take note of the possibility for lawyers to profit from a financial partnership by allowing their client’s right to ease their access to justice, which is an impressive achievement. This activity is not yet subject to regulation in France, but it presumably will be in the coming months.

Indeed, the Conseil National des Barreaux recently mandated one of its commissions to elaborate the draft of rules governing this practice, which it did at its General Meeting of 12 and 13 December 2014. The work of the commission will be more specific on three points: the framework of third-party financing contracts; the respect of the necessary rules of a lawyer’s profession, particularly with regards to secrecy and the absence of conflict of interest; and the protection of the financed party.

The objective is to present a comprehensive draft text in the next six months to the French government.
ITALY IMPLEMENTS MEASURES TO RECOVER FROM ITS CIVIL LITIGATION BACKLOG

Italy implements measures to recover from its civil litigation backlog

The Italian ordinary system for the adjudication of disputes has a negative reputation due to the duration, not only of the aggregate of the three potential steps of the trial (first and second instance as to the merit and third, the Supreme Court for complaints as to the rule of law), but also of each step itself.

The European Court of Human Rights for a long time and by several awards has granted substantial amounts in favour of petitioners claiming for the excessive duration of Italian civil (and criminal) proceedings. Under the pressure of such decisions and of the international community, and with the need not to discourage foreign investors in the country, the Italian parliament on the initiative of the Government over the past few years has passed a number of bills to make alternative mechanisms available in order to discourage litigants from lodging ordinary proceedings to solve their disputes.

At the same time, it has set up a a body to reorganise the adjudication of the different civil proceedings without (for the time being) amending the procedural rules.

Here is a rough outline of the more relevant tools implemented.

The Strasbourg II Programme

On 14 January 2015, in the framework of a wider reform of the Italian judicial system, Minister of Justice Andrea Orlando – together with the Department of Judicial Organisation, headed by Mario Barbuto – set out the ‘Strasbourg II Programme’ to tackle the backlog of civil cases pending for more than three years.

The programme stems from the successful experience of the ‘Strasbourg Decalog’ adopted in early 2001 by the Court of Turin (under the vigorous and skilled approach of Barbuto, president of the First Instance Court), and aims to improve the efficiency of the Italian judicial system by eliminating within a short time a ‘pathological’ backlog (concerning the civil cases started before 2010) and speeding up the processing of civil cases – as a key step for sustaining economic growth and attracting investment.

Under the provision of Article 2 of the Pinto Act (No 98/2001), the Italian State must pay an indemnity to the parties of a judicial proceeding that is not completed within a reasonable time and thus violates Article 6 of the European Convention on Human Rights. Since the Act has entered into force, the Italian State has been ordered to pay out €400m.

The Strasbourg II Programme is based on three steps:

1. To acquire updated statistics on the current backlog (more than 3.7 million cases) pending before tribunals and the courts of appeal. The even more impressive number of 5.2 million pending cases is reached by also including such cases before the Supreme Court and honorary judges (giudici di pace).

2. To focus the recovery action on a ‘first in, first out’ principle; that is, to grant preference to the oldest and most severe backlog according to the following timelines to arrive at the award (starting from day one of the launch of the programme):
   (i) six months for the cases enrolled until the year 2000 (86,283 cases, as of November 2014); and
   (ii) nine months for the cases enrolled from 2000 to 2005 (127,146 cases).

3. The third step concerns the management of the remaining backlog (835,190 cases registered between 2006 and 2010) and the processing of the ‘physiological’ ordinary backlog, regarding 2.7 million cases registered between 2011 and 2013. The overall goal is to bring the current duration of each civil proceeding – thus, not the average duration of the total number of cases – at first to a maximum of three years, and thereafter to a two-year period.

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ITALY IMPLEMENTS MEASURES TO RECOVER FROM ITS CIVIL LITIGATION BACKLOG

Mediation procedure

The mediation procedure in civil and commercial disputes was introduced in Italy in 2011. It was the most incisive attempt to ‘convince’ the Italian legal community to opt for alternative dispute resolution (ADR) procedures.

In that respect, the mediation procedure has been set as a condition precedent in connection with the lodging of court proceedings as to specific matters. The decision for a mandatory procedure was taken, in accordance with the European Union Directive 2008/52/EC, with the purpose to supersede the ‘unwillingness’ of the legal community towards the ADR mechanism. The binding nature of the procedure was severely criticised as a challenge to the fundamental principle of free access to ordinary justice, as stated by Article 24 of the Italian Constitution. In December 2012, the Constitutional Court voided the mandatory procedure and instead confirmed a voluntary one.

Between March 2011 and December 2012, 215,689 mediation proceedings were lodged: 84 per cent in connection with mandatory matters; three per cent upon decision of the judge; and only 13 per cent on a voluntary basis. In 27 per cent of the cases, the tendered party to the mediation attended the procedure, while in the other cases the mediation failed before the first meeting because the tendered party did not attend or the starting party himself gave up the procedure. When the tendered party attended the procedure, in the 44 per cent of the cases the parties settled by the mediation. As a consequence of the Court order, there was a dramatic decrease in mediation procedures to 15,639 from January to September 2013.

Thus, the Italian Government (by Act No 69/2013) again made provisions to make the procedure mandatory (with some amendments) for a test period of four years. The main amendments are that: (1) parties must be counselled by a lawyer during the entire mediation procedure; (2) mediation chambers must be established in the territories of each court; (3) three months is the maximum duration of a mediation procedure; (4) settlement concerning real estate must be recorded in the public land register; and (5) if the parties do not settle or do not wish to carry on the mediation at the first meeting, then in such cases the mediation procedure is at no cost.

In the new legislative assessment, the judge may suspend the ordinary proceeding and order the parties to start a mediation procedure.

Assisted negotiation

A new mechanism was recently set up in order to enhance the options available to the parties before going to court. On 12 September 2014, an ADR (‘assisted negotiation’) under the control of counsels (not mediators) was implemented. Essentially, the advantage in connection to mediation is to avoid the fee of the ADR chambers.

Assisted negotiation may be mandatory (in connection with specific matters) or discretionary. In both cases the counsel has the ethical duty to inform the client about the existence of, and the possibility to use, assisted negotiation. Assisted negotiation has become mandatory for damages resulting from vehicle and boat accidents, as well as for any request of payment below the threshold of €50,000. Therefore, the Court shall stop a proceeding, postponing the flow of hearings, to allow the parties to comply with the rules of assisted negotiation if the mandatory negotiation has not been complied with.

The mechanism consists of a proposal from the interested party to the other parties to enter into settlement negotiation. The delivery of the proposal temporarily prevents the application of the statute of limitation. The time to negotiate from the execution of the agreement until the settlement shall not exceed three months.

Counsels and the parties have a specific duty to keep all the information acquired during the negotiation confidential and are prevented from its use during the potential following court proceeding. Counsels cannot be appointed as arbitrators, in case no settlement is reached. Additionally, counsels who assist both parties during the negotiation shall be prevented from assisting one of the parties during the court proceeding.

The settlement is immediately enforceable with no need for an exequatur to be granted by a court.

A sort of a hybrid system (court proceeding plus arbitration) has been made available as a further option to the litigation parties (only for proceedings pending on 13 September 2014). The mechanism allows the transfer of the dispute from the court where the litigation is pending to arbitration upon request of both parties (and if one party is a public entity, the will of the private entity is
sufficient, provided that no objection is raised in writing by the public one).

Although it is per se evident that the parties are always entitled to withdraw from a court proceeding, the advantage of this option is that the proceeding is brought in front of the arbitral tribunal at exactly the same stage that it was at when the petition was filed. This is an evident attempt by the State to favour parties accessing remedies different from ordinary court proceedings.

The appointment of the arbitration stays with the chairman of the local Bar. The move of the proceedings is allowed for any dispute dealing with disposable rights, except for labour and social securities charges.

Notes
1 A comprehensive outline of the mediation procedure can be found in the April 2011 edition of this newsletter
2 Condo, property rights, inheritance, family agreement, lease, loan, rental, damages resulting from movement of vehicles and boats, medical liability and defamation by press or other means of advertising, insurance contract, banking and finance contract. Mandatory mediation shall not apply to summary, chamber, enforcement proceeding and when the civil action is carried on in criminal trial.
3 Data from the Italian Ministry of Justice.

The enforcement of foreign legal privilege in legal proceedings: French and US perspectives

The scope – and even the definition – of confidentiality/legal privilege significantly differs from one country to another notwithstanding the principle of protection universally acknowledged by the IBA.1 The IBA’s International Principles on Conduct for the Legal Profession address this concern in the following terms:

‘A special international consideration arises from the fact that some jurisdictions permit employment of a lawyer admitted to the Bar while others do not permit employment of in-house counsel. Accordingly, the question arises how jurisdictions that do not recognise in whole or in part the duty of confidentiality on the part of in-house counsel deal with foreign in-house counsel who enjoy that protection in their home jurisdiction.’2

Indeed, while the Romano-Germanic legal system traditionally considers that lawyers must remain statutorily independent and free from any hierarchical subordination to their client, common law jurisdictions generally allow lawyers duly admitted to the Bar to work as in-house counsel.

This fundamental distinction has implications for corporations and legal service providers who adjust their structure and strategy for the purposes of preserving the confidentiality of the documents and communications drafted by and/or exchanged with in-house counsel.

Until the endorsement of a uniform set of rules applicable to legal professional secrecy, the authors’ opinion is that jurisdictional control over the enforcement of the national legal professional secrecy should extend to the protection of foreign legal privilege.

Legal privilege and professional secrecy

The protection of confidentiality under legal privilege is attached to the content of the communication. On the other hand, professional secrecy focuses on the identity of the author of the document.3

Legal privilege: scope and definition

In the United States, the purpose of attorney-client privilege is: ‘to encourage full and frank communication between attorneys and their clients and thereby promote broader
public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.14

In the United Kingdom, the House of Lords has similarly described legal privilege as: ‘… a necessary corollary of the right of any person to obtain skilled advice about the law. […] Such advice cannot be effectively obtained unless the client is able put all the facts before the advisor without fear that they may be disclosed and used to his prejudice.’15

Accordingly, client-attorney privilege covers essentially any and all communication undertaken to deliver information in confidence for the purpose of seeking or rendering legal advice.6

Importantly, the determination of who is an attorney for purposes of acknowledging the privilege is straightforward. Privilege makes no distinction between in-house counsel (individuals who both are employed by and serve as attorneys for a legal entity) and outside counsel: ‘the privilege applies to communications with attorneys, whether corporate staff counsel or outside counsel.’7

In-house counsel can serve as the client when communicating with outside counsel, or as ‘attorney-legal adviser’ when communicating with personnel within the organisation.8 Thus, communications with in-house counsel in the role of attorney-advisor are afforded the same protection as outside counsel.

French professional secrecy for lawyers: scope and definition

The scope of professional secrecy for lawyers in France is limited to the communications, either written or oral, between a lawyer and his/her client or between a lawyer and other lawyers unless such correspondence between lawyers is marked as official. The law states:

“In all matters, whether with regard to advice or in the matter of defense, written opinions sent by a lawyer to his/her client or intended for a client, correspondence between a client and a lawyer, between a lawyer and other lawyers with the exception, in this last case, of correspondence marked “official”, meeting notes and generally all documents held in a file are covered by professional secrecy.”9

The protection of secret des affaires (business secrecy) and the adoption of an in-house counsel status have been discussed at length by the French legislator over the past decade.

On 11 December 2014, the French Government presented an ambitious economic reform. It initially included provisions allowing the French Government to create a unified lawyer’s status under which both outside and in-house counsel would have been subject to the same code of conduct and rule of ethics. Under the unified status, in-house counsel working in France would thus have seen their documents and communications protected with the same level of confidentiality as any other attorney.10

The reform contemplated by the French Government clearly aimed to enhance the attractiveness of the French legal market, as other European jurisdictions such as Germany, Denmark, Spain, the UK and Sweden have already adopted a unified status for in-house and outside counsel in their own legal systems.11

Unfortunately, these provisions have been deleted from the current draft of the statute pursuant to an amendment voted by Parliament on 10 January 2015.12 As a consequence, different statuses governing in-house counsel will continue to interact and potentially conflict in the context of international transactions and cross-border disputes. The need for harmonised legislation governing both in-house and outside counsel in France is thus all the more relevant.

Although the French legislator is well aware of the ‘improvement that could result from an extension of a legal privilege to the written opinions produced by in-house counsels in the scope of their work contract’,13 French in-house counsel are not attorneys. In that respect, their employers cannot claim the benefit of attorney-client privilege. As a consequence, whereas the use of documents protected by lawyers’ professional secrecy is strictly prohibited in the context of legal proceedings,14 nothing prevents the disclosure or the production of written opinions prepared by French in-house counsel.

Such a differentiation in the treatment of the confidentiality granted to communications in legal matters is a potential source of conflict of laws between the law of the forum (lex fori) and a foreign law applicable to the lawyers involved.
The application of foreign legal privilege: US and French case law

In determining which country’s law governs questions concerning attorney-client privilege, both US and French courts will analyse the applicability of foreign law.

In the US, when communications regarding legal matters involve attorneys and clients from different countries, the courts have developed a legal standard for determining which country’s law governs questions concerning the applicability of attorney-client privilege. Under this legal standard – often referred to as the ‘touch base’ analysis – a court applies principles of comity in a traditional choice of law ‘contacts’ inquiry.15

US courts engaging in the ‘touch base’ analysis defer to the law of the country that has the ‘predominant’ or ‘the most direct and compelling interest’ in whether communications should remain confidential, unless the foreign law is contrary to the public policy of the forum. The country with the predominant interest is either:

• the place where the privileged relationship was entered into; or
• the place in which that relationship was centered at the time the communications were sent.16

The French Cour de Cassation (the French Supreme Court) has ruled on a request by a party to declare inadmissible the production as an exhibit of correspondence between a Swiss and a French lawyer in French legal proceedings. The claimant argued that this production violated the privilege granted by the Swiss Code of Conduct for Attorneys. The Cour de Cassation upheld this argument considering that the foreign rule of confidentiality was a rule of public policy applicable to the production of evidence in France.17

Although this decision applied to the exchange of correspondence between lawyers based in different jurisdictions that share an equivalent form of professional secrecy, it is worth noting that the Cour de Cassation considered that a foreign confidentiality rule was a rule of public policy that must be enforced in France to the extent it does not violate French public policy.18

How would a French court react when confronted with the production of documents covered by a legal privilege that has a different nature and a different scope? In our view, if state courts were to refuse to apply a legal privilege existing under a foreign law that has a predominant connection with the document, the effect would be to encourage unwelcome forum shopping in the context of evidence collection measures and abusive litigation.

In an opinion dated 10 December 2010, the Paris Bar Ethics Commission for Professional Secrecy and Confidentiality stated that a lawyer who knows that documents are covered by a privilege before a foreign jurisdiction must refrain from producing such documents in the context of judicial proceedings, in application of the French National Code of Conduct for Attorneys.19

Although these rules are very clear, they shall be completed in the near future by a uniform set of rules applicable to legal professional secrecy.

The authors wish to thank Paul Wolf of Faegre Baker Daniels, for his contribution and assistance.

Notes

1 ‘A lawyer shall at all times maintain and be afforded protection of confidentiality regarding the affairs of present or former clients, unless otherwise allowed or required by law and/or applicable rules of professional conduct’. Confidentiality/professional secrecy’, International Principles on Conduct for the Legal Profession, adopted on 28 May 2011 by the IBA, p 21.

2 Ibid, p 22.


5 R (Morgan Grenfell & Co Ltd) v special commissioner of income tax et al [2003] AC 565; [2002] 2 WLR 1299 at 1302, per Lord Hoffmann.


7 Rossi v Blue Cross and Blue Shield of Greater New York, [1989] 540 NE2d 703, 705 (NY).


9 Article 66-5 of Law No 71-1130 of 31 December 1971 on the reform of certain judicial and legal professions.


11 Recitals of the draft law No 2447 for growth and activity submitted to the French National Assembly on 11 December 2014.

12 Amendment SPE 1767 voted on 10 January 2015 by the French National Assembly.

13 Amendment No SPE 1767 voted on 10 January 2015 by the French National Assembly.

14 Under certain exceptions professional secrecy for lawyers may be waived; for the purposes of a lawyer’s own defense,
A
fter years of failed attempts to implement class action laws, France finally joined the United States and many European countries – including Sweden (2002), Germany (2005), and Italy (2009) – by enacting its own class action procedures in 2014. This is called the action de groupe.

Two actions de groupe have already been brought before French Courts, and several others have been announced. All of them involve large financial claims and have been widely reported in the media, confirming the pecuniary and reputational risks for corporations and professionals targeted by these class action lawsuits.

One year after the implementation of the Consumer Law (Law No. 2014-344 on 17 March 2014, codified in Articles L. 423-1 and following of the French Consumer Code), and a few months after the commencement of the first procedures before the French Courts, it is interesting to be reminded of the main aspects of the ‘class action à la française’ and its various issues.

Limited scope

The French Parliament took particular care to establish the action de groupe with caution. Indeed, the action de groupe is limited to consumer damages. It is only available in actions involving the sale of goods, supply of services and infringements of European and French competition laws, thus excluding any other kinds of infringement.

The right to compensation for damages in the action de groupe is also limited in scope, the ambit of which is narrowed to material damages. The action de groupe thus excludes claims involving physical and moral damages; these may be recovered only through individual lawsuits brought before the courts. However, it appears that the French Parliament will soon extend the scope of the action de groupe to cover health and environmental injuries, along with collective discrimination disputes.

Authorised actors and the role of lawyers

The French Parliament also shaped the legislation to prevent US-style class actions from developing in France by limiting the scope of its actors. Only authorised national consumer associations are entitled to represent consumers and initiate an action de groupe in the tribunal de grande instance on their behalf. Therefore, lawyers are not allowed to represent consumers under the action de groupe.

The reason behind limiting the authorised actors to these authorised national consumer associations is that the legislature wanted to make sure that the consumers’ interest would be safeguarded. However, this limitation does not mean that associations cannot be represented by lawyers; lawyers are just not recognised as being representatives of consumers’ interests. Therefore, as they are not authorised actors, lawyers are prohibited from introducing such actions on behalf of consumers.

The provision favouring representation by non-profit associations over lawyers may be due to the common belief that, in US class action proceedings, lawyers are focused on more than just consumers’ interests. Since contingent fees cannot be the only type of

if the client decides to waive its right to secrecy or if the communication reveals the participation of a lawyer in the commission of a misdemeanour or crime.

16 Cadence Pharms, 996 F Supp 2d at 1019.
17 Cour de cassation, 1ère civ, 5 February 2009, No 07-17525, BICC 704 15 June 2009, 898.
18 Article 3 of the French Civil Code states: ‘statutes relating to public policy and safety are binding on all those living on the territory. Immovables are governed by French law even when owned by aliens. Statutes relating to the status and capacity of persons govern French persons, even those residing in foreign countries’.

Action de groupe: the French class action

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fee at stake, and since punitive damages – which usually increase the economic interest of class actions – as well as damages for physical and moral loss are not available in the French action de groupe, it is unlikely that the pecuniary awards will reach levels comparable to those seen in the US.

The ‘opt-in’ system

The French system may have been influenced by the well-known American class action model, but the two systems differ greatly from a procedural perspective.

The most striking difference is that the action de groupe offers an opt-in system rather than the opt-out system offered in Canada and the US, and more recently in the United Kingdom, Spain and Portugal.8 Under the opt-in system, consumers must expressly consent to their inclusion in the group on whose behalf the proceedings have been brought. The opt-in system occurs after the court rules on the defendant’s liability, which eliminates the uncertainty of compensation for consumers. In order to opt in to the group, consumers must be in a similar or identical situation.

While the opt-out system allows a higher number of parties to be compensated, it is also characterised by excessive costs. Furthermore, France had no other choice but to implement an opt-in system, as there is a French legal principle that requires that one must always have been empowered before bringing an action before the courts on someone else’s behalf (nul ne plaide par procureur). An opt-out option is impermissible.

The proceedings

The French action de groupe takes place in three steps.

1. The liability decision

The court will issue a first judgment ruling on the legal admissibility of the action de groupe as well as on the liability of the professional, based on at least two individual cases presented by the authorised association. If the professional is held liable, the court will, in the same judgment, determine the nature and amount of damages. It will also identify the group of, and set the criteria for, consumers likely to be entitled to opt-in for compensation (publicity measures).

2. Opt-in

The concerned consumers will elect whether or not to opt in in order to become members of the group, under the legal conditions and time period set by the court in its judgement. The court rules whether a consumer wishing to opt in to the group directly contacts the professional, the association or the court-appointed legal professional assisting the association.

3. Damages liquidation

The professional has to pay damages to any consumer who has elected to opt in and who fulfils the conditions set by the court in its liability decision. The same court will have the jurisdiction to hear any disputes which may arise during the liquidation phase, meaning that any issue regarding compensation as provided for in the first court decision must be addressed by the same court in the second ruling within the parameters provided for in the first ruling.

The legislation has also provided for a simplified proceeding in scenarios where the consumers are identified and their numbers are known. In these cases, the court can rule on the liability of the professional and order it to compensate the consumers directly and individually within a specified time period and under certain conditions. Under this procedure, the opt-in process is thus limited and suppressed before the start of the proceedings.

In both kinds of proceedings, it is notable that the intervention of consumers begins rather late in the process: they are allowed to act only after the court sentence has been rendered, and at a stage when the level of indemnification has already been decided.

Legal authors have criticised the late involvement of the consumer on two grounds:

• the consumer is a mere spectator of the procedure led by the authorised association, which is the sole plaintiff before the court; and
• the procedure makes it impossible for companies to anticipate the number of consumers who may eventually choose to opt-in and consequently, the amount of global indemnification that they will have to pay.

Out-of-court settlements

Class action lawsuits are often settled before the end of the proceedings since settlement agreements provide fast and negotiated
solutions that avoid the risks and costs inherent to any judicial proceeding. This will probably end up being the case in France for the same reasons, as the law provides the possibility for alternative dispute resolution driven by the authorised association and the professional.

Indeed, settlements may reduce the judicial duration,\(^2\) costs and risks, as well as speeding up the payment process, which would be beneficial for consumers. However, the opportunities within this alternative dispute resolution procedure is limited for professionals, since the post-settlement process of notification is identical to the opt-in notifications under the regular process.

In other words, the settlement would not be kept confidential since the law provides that the settlement agreement has to be approved by the judge and subsequently published in order for the consumers to opt in to the settlement agreement.\(^19\)

**Impact and risks for professionals**

The main and obvious risk for professionals is pecuniary in nature. Due to the opt-in system, professionals will not know the number of consumers in the group and the amount of indemnification to be paid out following the proceedings. Such uncertainty could have serious implications for any type of company.

The risks are heightened because of the way the court decides the *action de groupe* lawsuits. Since the court decides on the liability of the professional as well as the indemnification amount to be awarded based on a few individual cases, it will be difficult for professionals to estimate the total indemnification amount for the entire group. In addition, the cost of multiple proceedings (since other consumers may try to bring proceedings before the court after it releases its decision), the increase in insurance premiums and high accounting provisions (as it is impossible to determine in advance what the total indemnification figure would be) must be taken into consideration.

The other main risk raised by the *action de groupe* is that the professional’s image and reputation may be undermined because the authorised associations will disclose damaging information to the public regarding the proceedings in order to maximise plaintiffs’ awareness. Indeed, the pending *actions de groupe* have been widely reported by the press and impacted upon the communication of the companies targeted.

A study by the European Commission\(^11\) confirmed that, in the 13 European states with class action procedures, an action may be very costly for representatives. However, they have not caused unreasonable costs or impacts on businesses in a disproportionate manner as compared to the harm caused.

**Conclusion**

While it is clear that the *action de groupe* has significantly impacted French legal procedures, what remains to be seen is how much it will change the legal landscape.

It could incentivise consumers to act as a group under the *action de groupe* procedure. On the other hand, many consumers may choose an alternative, more developed procedure when bringing a case to court because of the strict limitations implemented in the new law. At present, less restrictive procedures in the consumer, banking and financial fields exist that allow several claimants to bring an action collectively.

With an increase in the means of communication and the ever-increasing exchange of information, more consumers may opt to initiate a collective suit procedure instead of an *action de groupe*. Also, more flexible judicial litigation or extrajudicial procedures (such as alternative dispute resolution) may be more appealing to consumers, hence further discouraging consumers from adopting the *action de groupe* procedure route. Unless the French Parliament expands the bounds of the *action de groupe* procedure, class actions may quickly become obsolete in France.

In other words, the legislative intent behind the bill was to protect consumers. However, if the *action de groupe* can only protect an extremely limited group of consumers, it will lose its efficacy.

“The author would like to thank Kathleen Adda and Christopher Shin for their help and reviews.”

Notes

1. The first action was brought on 1 October 2014, on behalf of tenants against the European leader of residential property management and real estate service over the allegedly illegal fees charged to tenants by the latter. The claimant argued that the company had collected €44m in unlawful charges over the past five years. The second action was brought against a global insurer, alleging that some of its life insurance policy cap rates were not respected. More than 100,000,000 consumers could be concerned according to the claimant’s lawyer, who could ask for a global indemnification of up to €500m.

2. The first of these is against the largest public housing agency in France (the claimant argues that the company has collected €3m in unlawful charges over the past five years); the second is against an important social housing landlord (the claimant alleges that the company collected...
Are the US courts moving towards greater consensus in the application of the ‘common interest privilege’?

In the United States legal system, confidential communications between clients and their attorneys are protected from outside inquiry and compelled disclosure by the attorney-client privilege. The US legal system also offers similar protections when privileged communications are shared between counsel representing different parties whose interests are aligned in certain ways. This protection is typically referred to as the ‘common interest privilege’.

In practice, the contours of the common interest privilege within the US vary widely among, and even within, jurisdictions. There are differences in how the privilege is applied by US federal courts versus US state courts; there are differences between how the court systems of different US states apply the privilege; and, in some US states, there are even differences in application of the privilege from one unit of the state court system to another. These differences can leave lawyers and their clients with a great deal of uncertainty regarding the application of the privilege in specific cases. Recent decisions, however, suggest that greater clarity may be emerging regarding the scope and contours of the common interest privilege, and that while the courts are far from unanimous, they may be moving closer to a consensus on the issue – particularly in New York, the commercial centre of the US.

The origins of the common interest privilege

The common interest privilege has its origins in the attorney-client privilege and an outgrowth of that privilege known as the ‘joint defense privilege’. The US has long recognised the attorney-client privilege, a legal concept that protects confidential communications between clients and their counsel from being exposed to third parties. Indeed, the attorney-client privilege is among the oldest privileges recognised in the US legal system, and it is intended to encourage ‘full

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absusive late rent payment charges. According to the claimant’s lawyer, the amount of damages cannot yet be determined.

3 Pursuant to the preliminary article of the French Consumer Code, a consumer is any natural person who acts without connection with his or her commercial, industrial, artisanal or professional activities. Legal entities and professionals thus fall outside the scope of this definition.

4 A recent bill on health law, which should be passed at the beginning of 2015, provides for compensation in the context of an action de groupe in case of defective health products that cause physical harm to consumers. This would represent higher indemnification than that obtained under sole consumer material damages.

5 There are only 15 authorised national consumer associations allowed to represent consumers in an action de groupe. For associations to be considered authorised national consumer associations, they must have received authorisation from both the Ministry of Justice and the Consumer Ministry. This is valid for three years. In order to obtain this authorisation, an organisation: (1) must provide evidence of effective and public activity with a view to the protection of consumer interests; (2) must have been officially established for at least a year; and (3) must have at least 10,000 contributing members.

6 Under French law, the Tribunaux de grande instance, which are the first instance civil high courts composed of professional judges, have been given exclusive jurisdiction over action de groupe claims.


9 An action de groupe may last for a long time – potentially around three to six years if the procedure is eventually brought up before the Cour de Cassation (the French Supreme Court). This consists of between one to two years before each of the following courts: the first instance civil court, the Court of Appeals and the Cour de Cassation.

10 Matthieu Brochier, ‘La transaction de groupe: Les particularités de la transaction dans l’action de groupe’, La Semaine Juridique, 4 December 2014 (concerning the private nature of settlements).

and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice. If communications between clients and counsel were not confidential, clients would have little incentive to disclose to their lawyers necessary information that their lawyers may need to fully and effectively advise their clients and represent their best interests.

Because the attorney-client privilege is intended to protect only ‘confidential’ communications between attorney and client, a fundamental corollary of the attorney-client privilege is that the privilege will be deemed waived if the communication is disclosed to a third party outside of the attorney-client relationship. However, certain exceptions to this waiver rule have developed. One of these is the joint defence privilege. This is not actually an independent basis for privilege, but rather an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party. The joint defence privilege protects the confidentiality of communications by providing that privilege protections will not be deemed waived when such communications pass from one party (or its counsel) to another where a joint defence effort or strategy has been decided upon and undertaken by parties and their respective counsel.

This situation arises most commonly when multiple codefendants in the same action are cooperating with one another in presenting their defence. In the 1960s, US federal courts began to recognise the joint defence privilege. The common interest privilege is a further outgrowth of the joint defence privilege. It arose as courts began to recognise the need to protect not only confidential communications shared among parties who are engaged in a joint defence strategy, but also more generally among confidential disclosures that are shared with third parties regarding certain other kinds of common interests that they may share.

**Variations among the US courts**

The variations in how the common interest privilege is applied in the US have stemmed principally from courts’ differing opinions on what features a ‘common interest’ must have in order to warrant protection under this doctrine. The principal questions on which courts differ are:

- must the common interest be strictly a common legal interest, or can it also be a common business or commercial interest?
- if a common legal interest is required, can the requisite interest exist outside the context of pending or imminent litigation facing the parties, considering how common interest privilege arose from the joint defence privilege? As one court has noted, an ‘obvious tension exists between the policy favouring full disclosure and the policy permitting parties to withhold relevant evidence’, and the variations among jurisdictions reflect an ongoing struggle to achieve the right balance between these two competing interests. Courts early to recognise the common interest privilege limited it to communications between parties having an identical – and not merely similar – legal interest in current or anticipated litigation. Indeed, to this day, New York courts still limit the scope of the privilege to cases where there parties have an ‘identical (or nearly identical), as opposed to merely similar interest’. Many federal courts have the same view. But some US state courts have adopted a more expansive view. Delaware courts have held that, for the common interest to apply, the parties’ interests need only be ‘parallel’ – a more liberal standard. Massachusetts has taken an even broader view, holding that a common interest need not be ‘congruent’ between the parties but rather only ‘sufficiently similar’. Whether the privilege applies only to litigation contexts, or perhaps beyond that to non-litigation common interests or even just common commercial interests, also varies among jurisdictions. Notably, on this issue even the US federal court system is divided, with some federal courts hewing closely to the privilege’s origins in the context of joint defence and thus applying the privilege only where litigation is pending or reasonably anticipated, while other federal courts impose no such requirement. But most courts allow the common interest privilege to apply outside a litigation context, provided the parties have a common legal interest of some kind, that is, ‘where it is clear that the parties were collaborating and sharing information in furtherance of a joint legal strategy or objective, rather than simply seeking legal advice with regard to a commercial transaction’. Some state courts go beyond this to allow fairly expansive use of the privilege between parties exploring the same commercial transaction.
THE CONTINUING EVOLUTION OF THE COMMON INTEREST PRIVILEGE IN NEW YORK

In New York, state and federal courts generally agree that for the common interest privilege to apply, the parties must share an ‘identical’ or ‘nearly identical’ legal, as opposed to commercial, interest. However, with regard to whether such a common legal interest can arise only in a litigation context, the New York state and federal courts historically have diverged. New York federal courts hold it to be ‘unnecessary that there be actual litigation in progress for the common interest rule of the attorney-client privilege to apply’, whereas New York state courts historically limited the common interest privilege to litigation contexts, frequently citing an influential lower court decision which held that the ‘“common interest” privilege must be limited to communication between counsel and parties with respect to legal advice in pending or reasonably anticipated litigation’.  

In December 2014, however, a notable New York state court appellate decision may have moved the state courts closer to the federal courts’ position by allowing the common interest privilege to be applied to common legal interests outside the context of litigation. In *Ambac Assurance Corp v Countrywide Home Loans, Inc*, the Appellate Division, First Department, New York Supreme Court – an intermediate appellate court in the New York state court system whose jurisdiction covers Manhattan in New York City – departed from the historically conservative approach of other New York courts on this issue. The First Department rejected the requirement that litigation be pending or anticipated in order for the common interest privilege to apply, holding that parties to mergers or other transactions may assert the privilege to protect certain communications among the parties to such transactions. 

In *Ambac*, the plaintiff alleged that the defendant mortgage lender had fraudulently induced the plaintiff to enter into certain agreements, and also asserted ‘successor liability’ claims against a defendant bank, alleging that the bank was liable for any judgment as the lender’s successor-in-interest because of a merger between units of the bank and the lender. When the plaintiff sought discovery of certain communications among counsel which had occurred after the signing of the merger agreement but before the merger closed, the defendants opposed this discovery on common interest privilege grounds. The First Department overruled the initial ruling of the trial court and held that the common interest privilege protected not just those communications made in contemplation of litigation, but rather applied more broadly and thus barred disclosure of the communications that the plaintiff had sought. Looking to the principles underlying the attorney-client privilege, the court noted that the privilege protects communications outside of the litigation context because clients often seek the advice of counsel for the very purpose of avoiding litigation. The court further reasoned that ‘imposing a litigation requirement in [a merger] scenario discourages parties with a shared legal interest… from seeking and sharing that advice, and would inevitably result instead in the onset of regulatory or private litigation because of the parties’ lack of sound guidance from counsel’. The First Department explicitly acknowledged that it was diverging from the decisions of other departments of the Appellate Division (covering different geographical regions of New York State) that continued to require pending or reasonably anticipated litigation for the privilege to apply.  

The expansive view of the common interest privilege taken by the First Department in *Ambac* has received great attention, given Manhattan’s status as the commercial centre of New York and indeed the US. But because the First Department is not the highest court in the New York state court system, whether *Ambac* will prompt a statewide change in the law of common interest privilege is as yet unknown. The precedents of other departments of the Appellate Division still require the existence or anticipation of litigation for the common interest privilege to apply. The issue may remain unresolved until it is addressed by New York’s highest court. Even beyond this, *Ambac* by its own terms leaves open a number of unresolved questions. The decision does not address, for example, whether the common interest privilege would apply to communications between counsel occurring before execution of a merger agreement but still relating to the pending merger. Some courts have declined to apply the common interest privilege to communications occurring at that earlier stage, holding that before a merger agreement is signed the parties’ interests are not sufficiently aligned to justify applying the privilege. How the First Department would address that issue remains unknown.
The problems posed by uncertainty as to privilege

The different approaches taken toward common interest privilege among US courts generally, historically between New York federal and state courts, and now even among certain units of the New York state court system, pose a serious challenge for parties and their counsel in anticipating whether their communications in a variety of situations will remain confidential. Parties often cannot know with any certainty in which forum their disputes will be litigated, and thus which law will apply. Indeed, the choice of forum can often depend on factors that lie outside parties’ control, such as whether the dispute will involve state-law or federal-law claims, where the other party to the litigation (who may not have been involved in the communications when they were occurring) is based, and where the claimed injury will be deemed to have taken place.

Provided this uncertainty exists, it may have a chilling effect on clients’ free and open communications with their lawyers, even in jurisdictions that seek to promote forthright communication with counsel by adopting an expansive view of the common interest privilege. If parties are uncertain as to where they may be forced to litigate communications to the broadest extent possible. As one New York federal court has stated, ‘[a]n uncertain privilege – or one which purports to be certain, but results in widely varying applications by the courts – is little better than no privilege’. While the recent New York state court decision in Ambac may be a significant positive development towards reaching greater consensus regarding common interest privilege, the ongoing lack of uniformity in this area will continue to make it difficult for clients and their lawyers to rely comfortably on the broader common interest privilege protections that now only certain US jurisdictions provide.

Notes
8 See, eg, Hyatt v State Franchise Tax Bd, [2013] 105 AD3d 186, 205, 962 NYS2d 282, 296 (NY App Div 2d Dept).
10 See Jedvab v MGM Grand Hotels, Inc, [1986] No 8077, 1986 Del Ch LEXIS 383, at *5-6 (Del Ch).
12 Compare, eg, United States v BDO Seidman, LLP, [2007] 492 F3d 806, 817 (7th Cir) and United States v Schwimmer, [1989] 892 F2d 237, 244 (2d Cir) (neither requiring actual or impending litigation) with In re Santa Fe Int’l Corp, [2001] 272 F3d 705, 711 (5th Cir) (requiring a “palpable threat of litigation at the time of the communication”).
13 Titan Ins Fund II, LP v Freedom Mortgage Corp, [2011] No 09C-10-259 WCC, 2011 WL 532011, at *4 (Del Super Ct) (emphasis in original); compare SGM Corp v Xenor Corp, [1976] 70 FRD 508, 512-15 (D Conn) (disallowing privilege where third party ‘was negotiating the price for relinquishing voting and managerial control [in a joint venture] to [defendant]’, on which issue the third party and the defendant were not commonly interested but rather ‘adverse, negotiating at arm’s length a business transaction between themselves’).
14 See STI Outdoor v Superior Court, [2001] 91 Cal App 4th 334, 341, 105 Cal Rptr2d 865 (Cal App) (common interest privilege protected documents ‘circulated between two parties bound by an offer and acceptance in contemplation of a binding, detailed license agreement’); Hanover Ins Co v Rafo & Jepson Ins Servs, Inc, [2007] 449 Mass 609, 617, 870 NED2d 1105, 1112 (‘Confidentiality of consultations between parties to business transactions with their respective attorneys is no less essential or less common than in the litigation context.’).
15 See, eg, Bank of Am v Terra Nova Ins Co LTD, [2002] 211 F Supp 2d 493, 492 (SDNY); Hyatt v State Franchise Tax Bd, [2013] 105 AD3d 186, 205, 962 NYS2d 282, 296 (NY App Div 2d Dept) (‘The legal interest that those parties have in their respective attorneys is no less essential or less common than in the litigation context.’).
16 See United States v Schwimmer, [1989] 892 F2d 237, 244 (2d Cir).
20 Bid, 124 AD3d at 130, 998 NYS2d at 331.
21 Bid.
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