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INTERNATIONAL SOCIETY OF PRIMERUS LAW FIRMS

FALL 2018

President's Podium: Serving Our Communities

In-House Lawyers Find Value with Primerus

Six Diamonds: Primerus Firms Sparkle for Clients Around the World

Current Legal Topics:

Asia Pacific

Europe, Middle East & Africa

Latin America & Caribbean

North America

Every lawyer in Primerus shares a commitment to a set of common values known as the Six Pillars:

Integrity
Excellent Work Product
Reasonable Fees
Continuing Legal Education
Civility
Community Service

For a full description of these values, please visit primerus.com.

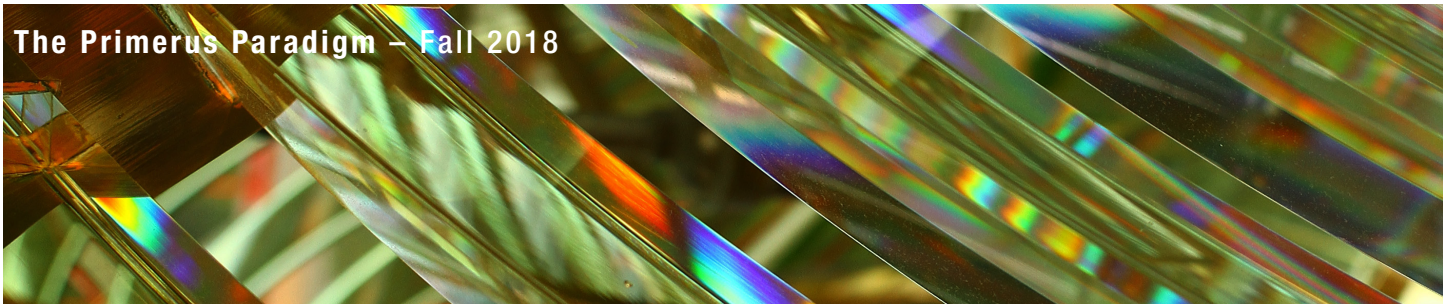
About Our Cover

Our cover shows a Fresnel lens, crafted with precision to magnify and focus a light source to increase its intensity and purpose, such as in a lighthouse. Primerus does the same for law firms around the world, bringing them together to strengthen their collective ability to serve clients.

Scan this with your smartphone to learn more about Primerus.

Primerus
The World's Finest Law Firms

Publisher & Editor in Chief: **John C. Buchanan**
Managing Editor: **Chad Sluss**



President's Podium

John C. Buchanan

Serving Our Communities

Greetings. I have gained great personal and professional satisfaction over the years from my career as a trial lawyer. I am sure many of you can relate. But what means the most to me is knowing that I have worked hard to not only practice law to the best of my ability, but to improve the profession and help restore the dignity of lawyers through Primerus.

When we formed Primerus in 1992, we wanted to hold law firms to the highest standards of integrity and professionalism. We were concerned about the deterioration of the profession we loved, and we wanted to do something about it. So we established the Six Pillars, a list of values that every Primerus member commits to following in their daily practice of law – integrity, excellent work product, reasonable fees, continuing legal education, civility and community service.

The sixth pillar – community service – might not seem like it has as much to do with carrying out the daily practice of law as the other five pillars do. But practicing law is, in essence, a service to the community, because law exists to improve communities. With that as a foundation, Primerus calls upon its members to take community service even further, to serving the communities around us with our time and resources, including providing pro bono legal services for those who cannot afford legal counsel.

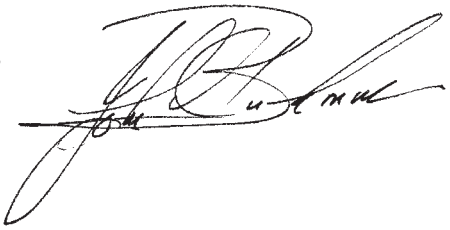
Over the years, Primerus firms have embraced this value in remarkable ways in their own communities. Now, we are coming together as a Primerus family to fight hunger – at home and around the world. Launched in 2017, the Primerus Fights Hunger effort already has resulted in thousands of dollars in donations to the World Food Programme and many pounds of food being donated to food banks and other community organizations in cities including Washington D.C., New Orleans, San Francisco, New York City, Pittsburgh, Nashville and more.

We know that list will grow in 2019. As you will read on page 50, we're forming a new board devoted to making community service a priority throughout the future of Primerus. At the Primerus Global Conference in Boston in October, for the first time Primerus members from around the world will gather for a joint community service project of packing and sorting food at the Greater Boston Food Bank. I look forward to joining my fellow Primerus members in this effort. Recently, our Primerus staff completed a similar effort near our offices in Grand Rapids, Michigan, with a service project at Feeding West Michigan.

In the last 25 years, Primerus has grown into a global society of the world's finest law firms, with 3,000 lawyers in 170 law firms in nearly 50 countries. As you will read on pages 5-6, clients around the world seek out Primerus firms without hesitation, in many cases instead of larger, more well-known firms. They do so because they know without a doubt that they will receive the highest quality legal work for reasonable fees with personalized service. They also know they will be working with "good people who happen to be good lawyers." Many clients remark how they feel immediately comfortable with Primerus attorneys and how their professional interactions often spill over into personal friendships.

The sixth pillar – community service – might not seem like it has a lot to do with carrying out the daily practice of law, as the other five pillars do. But practicing law is, in essence, a service to the community, because law exists to improve communities.

We have a responsibility – to ourselves, our clients, our cities and our global community – to give back through community service efforts. I can assure you that the satisfaction you receive from this will far exceed any business success you have experienced.



In-House Lawyers Find Value with Primerus

Susie Woodard was taught to believe what many general counsel were: when it comes to law firms, bigger is better.

But since getting to know Primerus and its small to mid-sized law firms, Woodard has changed her mind.

"I have always been in-house. I was raised to believe that you use big law firms," said Woodard, who is senior vice president and general counsel for Riviana Foods Inc. in Houston, Texas. "This has certainly changed my attitude."

Woodard learned about Primerus through member firm Gordon Arata Montgomery Barnett in New Orleans, Louisiana. Firm attorney John Y. Pearce invited her to attend the Primerus International Convocation in Miami this past May.

"I was just blown away by the whole experience," Woodard said. "From the moment I walked in and met people from Primerus, I understood exactly why they're good lawyers and good people."

Woodard was referring to the familiar Primerus tagline of "good people who happen to be good lawyers." Based on her interactions there, she became convinced that small to mid-sized, high quality law firms are an ideal fit for many of her needs.

"I just love Primerus," she said. "I think it's an in-house counsel's dream."

Her company, Riviana Foods, is the United States' largest processor, marketer and distributor of branded and private label rice products, as well as the second largest producer and marketer of pasta products in the U.S.

She often needs to hire outside counsel in various jurisdictions, and she's looking for quality attorneys she can trust.

"What clicked for me as in-house counsel was why I should go to a smaller law firm rather than big law. What Primerus law firms together are is like big law firm," Woodard said. "I have ready for me 3,000 lawyers in [more than] 40 countries that are going to give me lower cost, efficient service and good relationships."

She said that because of technology, all law firms, regardless of size, are on the same playing field with the same resources.

"I think that in-house counsel are missing out. I don't care what size your company is, we all have all kinds of sizes

of legal projects," Woodard said. "The only time I can see needing a big law firm is if you have a 'mega' acquisition or merger and you need a vast number of people to do due diligence. Otherwise, there's no reason not to use a small or mid-sized law firm."

She appreciates that Primerus strictly vets firms before inviting them to join and then continues to screen them for quality every year they remain members. She also likes that Primerus then puts them at her fingertips through the website (primerus.com) and personal interactions with members she met at the International Convocation. In cases where Primerus does not have the lawyer she needs, she knows Primerus will use their resources to find another attorney for her.

Connections Around the World

Jose Baron, tax director for Ingersoll-Rand Latin America in Miami, Florida, also attended the Primerus International Convocation in Miami. He was a guest of Felipe Chapula, a partner of Primerus member firm Cacheaux, Cavazos & Newton, which has various locations throughout Mexico.

After working with the firm for more than 10 years, Baron has been very pleased with the quality of their work and commitment to excellent customer service. He was pleased to be connected with other Primerus firms like them at the event.

"I am very excited about the opportunity that this conference has given me to find other 'Cacheaux' outside of Mexico," he said.

Baron said the best part was the understated, non-salesy tone of the event. He found the attorneys very easy to interact with and get to know – and that's the foundation of the relationships he wants to establish with outside counsel.

He has worked with both the world's largest law firms, as well as smaller, regional law firms.

"I get more attention when I work with small firms, and the fact that the fees are reasonable helps," Baron said. "I get more personal service, and I know that I can talk with a partner at any time with a small firm."

Using Primerus Resources to Expand

Heather Friedl, senior house counsel for Society Insurance in Fond du Lac, Wisconsin, learned of Primerus through law school colleague James Whalen, who is now an attorney with Primerus member firm Lipe Lyons Murphy Nahrstadt & Pontikis in Chicago. She attended her first Primerus event three years ago and has since attended three more events and used several Primerus law firms in various cities.

Friedl appreciates the quality and "cutting-edge" relevance of the educational offerings at Primerus events, she said. She also values the focus on building relationships between attorneys and clients.

"As a client, you often feel like you are a piece of meat in water with a lot of sharks," Friedl said.

But at Primerus events, she said, "People are talking to you, not imposing themselves on you. There's not a frenzy of passing business cards around."

With her company expanding to write policies in a new state every year, she looks to Primerus both to find attorneys as well as to help guide her company's growth.

"I feel this as a really good opportunity each time we are moving into a new jurisdiction," she said. "We make decisions about where we want to go based on a variety of factors, including our conversations with attorneys."

Primerus attorneys have come to Society Insurance's offices to give presentations about relevant topics as well as to train their insurance adjusters. Based on those interactions with Primerus law firms, they have recently expanded into Tennessee and will expand into Minnesota this year.

"It has been a tremendous thing for us," Friedl said.

Six Diamonds: Primerus Firms Sparkle for Clients Around the World

When Primerus was created in 1992, its founding members wanted the public to know what makes a good lawyer and how to find one. This became the basis for the Six Pillars, which still stand more than 25 years later as the values that every member of Primerus must adhere to in their daily practice of law:

- **Integrity**
- **Excellent work product**
- **Reasonable fees**
- **Continuing legal education**
- **Civility**
- **Community service**

In 2018, Primerus added the Six Diamonds. Designed as a way to describe what Primerus offers to new member firms around the world, the Six Diamonds also carry a strong message to clients about what Primerus firms bring them.

"The Six Diamonds help us show member firms and clients alike all that Primerus offers," Primerus President and Founder John C. "Jack" Buchanan said. "Together with the Six Pillars, they describe the essence of Primerus."

The Six Diamonds are:

1. Primerus levels the playing field for small and mid-sized law firms.

In a law firm climate in which many in-house counsel have been conditioned to turn first to big law firms, Primerus helps the world's finest small and mid-sized firms compete – and helps clients find them. Primerus travels around the world searching for high quality, small to mid-sized law firms who are committed to performing quality work for reasonable fees. Primerus submits the firms to stringent screening before they are admitted to the society, and then continues to review their performance every year they remain members. Primerus then brings these law firms together into a society to work together for clients.

"What clicked for me as in-house counsel was why I should go to a smaller law firm rather than big law. What Primerus law firms together are is like big law firm," Woodard said. "I have ready for me 3,000 lawyers in [more than] 40 countries that are going to give me lower cost, efficient service and good relationships."

— Susie Woodard, senior vice president and general counsel for Riviana Foods Inc. in Houston, Texas

2. Primerus facilitates face-to-face time with potential corporate clients.

Primerus organizes many opportunities every year for attorneys and clients to meet in person through events like the annual Primerus Defense Institute Convocation and Primerus International Convocation, as well as efforts like the Primerus Client Resource Institute. These are not your typical law firm network gatherings. Rather, they're filled with highly relevant legal seminars and plenty of time for clients and attorneys to get to know one another personally and professionally through multi-day events. Clients tell us they often emerge from these events with new, lifelong friends, as well as valuable professional connections.

"As a client, you often feel like you are a piece of meat in water with a lot of sharks." But at Primerus events, "People are talking to you, not imposing themselves on you. There's not a frenzy of passing business cards around."

— Heather Friedl, senior in-house counsel for Society Insurance in Fond du Lac, Wisconsin

3. Primerus facilitates member-to-member referrals and collaboration.

With 3,000 lawyers in 170 law firms in nearly 50 countries, Primerus can be likened to a large, virtual law firm with countless opportunities for collaboration among members and with clients. Primerus calls itself a society and not a network, as law firms networks are often perceived as just referral organizations. Primerus brings so much more to relationships between lawyers and clients, calling upon members to become active partners in the society – making connections that will benefit clients in many ways.

"To think that there is a Primerus member firm virtually anywhere on this planet is incredible. Primerus has enabled the small or mid-sized firm to practice on a different level because of the contacts and relationships it encourages."

— Robin Lewis of member firm Mandelbaum Salsburg in Roseland, New Jersey

4. Primerus provides a powerful website and social media presence.

Primerus features its members on primerus.com, creating a go-to source for clients around the world to find the lawyer they need, where they need it. And if Primerus does not have the lawyer a client needs with the right expertise, and in the right location, members work together to use their connections to find one.

"Primerus is a great organization. I have been really pleased. It's the ultimate resource. Now if I need someone quick, I don't have to waste time going through all those steps."

— Mark Di Giovanni, vice president of litigation management for Global Indemnity Group in Bala Cynwyd, Pennsylvania (said of going to primerus.com instead of other resources to find an attorney)

5. Primerus provides a comprehensive strategic marketing program.

Primerus is a trusted business development partner for its member firms, making it easier to get the word out to clients about all they offer. Clients around the world tell us it's a struggle when they're looking for quality, smaller law firms. Because Primerus gets the word out about their member firms, it makes finding those quality firms so much easier.

"Hiring a law firm to me is very precarious. It's hit or miss. What I like about the Primerus model is that the firms are already vetted. There is a screening process, and if something goes wrong with a firm, I need to contact someone who can hold the firm accountable. That to me is the value."

— Rodolfo Rivera, chief international counsel for Fidelity National Financial, Inc. in Jacksonville, Florida

6. Primerus provides a global platform of the world's finest law firms.

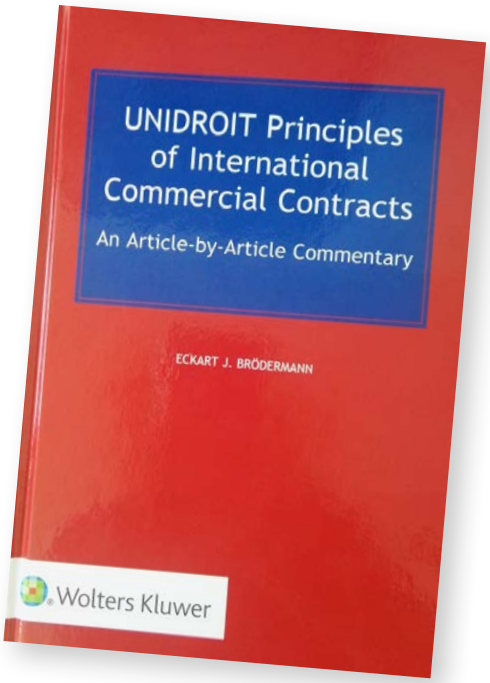
After starting in the United States, over the past 25 years Primerus has expanded to include 170 law firms in nearly 50 countries. Even the world's largest law firms cannot offer the global coverage Primerus does. Because Primerus firms are independent law firms, they avoid the potential conflicts of interest that arise with big law firms. Clients can turn to Primerus with confidence, knowing it will open a world of opportunities.

"We joined Primerus because we wanted to be able to offer our clients quality legal services worldwide. As a member firm, we are able to share knowledge and to refer our clients to the best lawyers and offer them specialized service all over the world."

— Reinier Russell of member firm Russell Advocaten in Amsterdam, Netherlands

The Future of International Contract Drafting Has Begun

An Interview of Eckart Brödermann by Marc O. Dedman and Caroline Berube



In May 2017, the council of the intergovernmental organization "The International Institute for the Unification of Private Law" (UNIDROIT), uniting the governments of 63 nations, released the fourth edition 2016 of the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles). In two resolutions of 2007 and 2012, the United Nations Commission in International Trade Law (UNCITRAL) recommended the use of previous versions.

Here, Caroline Berube and Marc Dedman conduct an interview with Eckart Brödermann, the author of a recently published article-by-article commentary of the UNIDROIT Principles of International Commercial Contracts (Wolters Kluwer 2018). As an added note to this interview, Caroline Berube is common law educated but practices civil law. Marc Dedman is civil law educated but practices common law.

Eckart Brödermann

Eckart Brödermann is the founding partner of Brödermann Jahn in Hamburg, Germany, RA GmbH and professor of law for international contract law, choice of law and arbitration at the University of Hamburg. He has worked with the UNIDROIT Principles since 2001, was one of the experts observing the process of their creation between 2005 and 2010 (on behalf of a committee of the International Bar Association), and he wrote an article-by-article commentary on the UNIDROIT Principles of International Commercial Contracts (Wolters Kluwer 2018).

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Marc O. Dedman

Marc O. Dedman is a partner in Spicer Rudstrom LLC's Nashville office. Civil law educated and licensed, he has practiced common law for over 30 years. His primary focus is on business and international contracts and litigation and insurance coverage. He was involved as proofreader of Brödermann's commentary on the UNIDROIT Principles of International Commercial Contracts.

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Caroline Berube is the managing partner of HJM Asia Law (with offices in China and Singapore). She is admitted to practice in New York and Singapore. She has worked in Singapore, Bangkok and China for a British and a Chinese firm before setting up her own firm 12 years ago. Caroline has been representing international corporate clients and family-owned companies in M&A cross-border manufacturing and technology transactions and IP in the Asia Pacific region for 20 years.

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Marc: ***Eckart, I am a U.S. attorney. You are a European attorney with much practice involving the UNIDROIT Principles. Why is there benefit for U.S. clients to consider utilizing the UNIDROIT Principles rather than the Uniform Commercial Code or similar U.S. laws?***

Eckart: Marc, you are essentially asking the "what's in it for me?" question for a U.S. client. The answer is simple. A U.S. client can save money and reduce risks by using the UNIDROIT Principles for its international contracts. I give you a concrete example from my practice. Earlier this year, the general counsel of a well-known U.S. company in the automotive industry followed our advice to integrate a UNIDROIT Principles clause in the standard terms of its German subsidiaries for the purchase of goods from foreign suppliers. We combined this choice with an arbitration clause because, in Germany, the arbitration law explicitly permits the choice of rules of law such as the UNIDROIT Principles. Thereby, the company can avoid the domestic German law on standard terms. German law on standard terms is mandatory if German law applies, but it is not "internationally mandatory" law. If ever the risk of arbitration substantiates, the U.S. client can point at the chosen regime in Articles 2.1.19 through 2.1.21 and other principles of fair dealing in the UNIDROIT Principles, which provide a balanced and special regime for standard clauses. In this example, the choice of the UNIDROIT Principles saves attorney fees in case of dispute. Compared to the otherwise applicable German law on standard terms, the UNIDROIT Principles also enhance the freedom of the U.S. company when acting in the German market. This is just one concrete example. There are numerous other examples, starting with language. Distinctly from the Uniform Commercial Code (UCC), the UNIDROIT Principles have been translated into 15 languages; contract partners can read them in their native language.

Specifically designed to cope with international "business-to-business" needs, the UNIDROIT Principles thus provide a perfect "Plan B" to any international contract negotiation. When one gets to know them better, one discovers that they should be considered even as a first option, your "Plan A." My example of our U.S. client from the automotive industry speaks for itself.

Caroline: ***Eckart, I got to know about the UNIDROIT Principles many years ago when we agreed on a Chinese-German cooperation agreement and chose the UNIDROIT Principles to govern our relationship. This was long before either of our firms joined the International Society of Primerus Law Firms. As you know, much of my legal practice of law is in Asia. I want to follow up on Marc's question. What's in it for my Canadian clients acting in Asia or for my Asian clients negotiating with foreign companies? What do they gain by relying upon the UNIDROIT Principles versus contractual provisions they have used, many times for decades, in the past? Why would they want to change what they have done?***

Eckart: The UNIDROIT Principles are all about freedom of contract. This is the first of the 211 principles, enshrined in Article 1.1. Thus, there is no need for your clients to change their substantive individual contractual provisions if they want to keep it. As the world is constantly changing, it may be wise to consider change and to read what the UNIDROIT Principles offer. But they do not impose any need to change an existing practice. Respecting freedom of contract (i.e., party autonomy) as a starting point, the UNIDROIT Principles do respect just about all contractual clauses as long as they do not manifestly contravene the principles of good faith and fair dealing in Article 1.7 UNIDROIT Principles. By the way, in this respect, the UNIDROIT Principles will sound familiar to U.S. lawyers because § 1-302 lit. b) provides in a similar way: "The obligations of good faith, diligence, reasonableness, and care prescribed by [the Uniform Commercial Code] may not be disclaimed by agreement." The choice of the UNIDROIT Principles provides in essence for an adequate regime of default rules for issues not explicitly covered in the contract. This is why neutral default rules are helpful both for your Canadian clients acting in Asia and for your Chinese clients engaging in contracts with foreign business partners. In this respect, the clients can gain time and save money by avoiding orchestrating their international trade activities through a myriad of different national contract laws.

The UNIDROIT Principles provide a neutral compromise, agreed between experts from all major regions of the world between 1985 and 2016. Why not take that modern international standard, acceptable around the globe as a default regime of those issues which are not explicitly covered in your contract?

Marc: ***How do the UNIDROIT Principles address the tension that can exist between U.S. UCC provisions and international mandatory laws, multinational treaties, conventions and other national laws?***

Eckart: We need to distinguish between two kinds of possible tensions. First, regarding possible tensions with internationally mandatory law of national, regional (e.g. NAFTA) or international regime, it is always important to bear in mind which national or international mandatory law may apply on top of and irrespective of the contractual regime. This question arises irrespective of the contractual regime. If the parties choose the UNIDROIT Principles, there will be no tension with such international mandatory law. Article 1.4 of the UNIDROIT Principles explicitly

provides that "[n]othing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law." Which private international rules apply depends on the competent court or arbitration tribunal. If a contract infringes a mandatory rule, a section on illegality sets forth the consequences in a very straightforward and nuanced way. Article 3.3.1 UNIDROIT Principles enumerates the multitude of circumstances which will have to be considered.

Second, regarding conflicts with "other national laws," by choosing the UNIDROIT Principles instead of the UCC, an American company operates with a set of rules which is based on a compromise between all major legal systems. As a matter of logic, such a set of rules will often be closer to any "other national laws" than the UCC. This is true at least when the other law comes from another family of law like the two branches of continental European law which derive from German and French law (e.g. Greek or Japanese civil law being based on German law or the civil law in Romania, Egypt, Qatar and Mexico which is based on French law). This is also true with regard to modern mixed laws incorporating inspirations from many sources (like Chinese civil law which still has a lot in common with German law).

Caroline: ***On an even more basic level, how do the UNIDROIT Principles ameliorate tensions that can exist between common law and civil law?***

Eckart: That is a very good question. The tensions between common and civil law are multiple. For example, common and civil law have different pre-concepts. For example, in civil law countries you will often find a concept of responsibility in the case of withdrawing from a contract negotiation, while this concept may be strange for a U.S. lawyer. During the writing of my book, I have encountered about 30 situations where the UNIDROIT working group had to cope with sometimes entirely different pre-concepts of common and civil law lawyers (or between different common laws or different civil laws). There is no general "better;" human nature is inventive. By agreeing on the UNIDROIT Principles, parties can incorporate – at no cost – the results of the working group which will have spent usually days, weeks or years to find the best possible solution as a compromise between the different systems. Sometimes the compromise will be closer to one side and sometimes closer to the other side. On rare occasions, the work has resulted in an entirely new approach like in the case of hardship (Article 6.2.2). On balance, the advantage of a neutral set of rules where these kinds of conflicts are resolved, or at least addressed, has a big advantage. Pursuant to the principle of party autonomy, the parties are always free to negotiate deviations if they wish to do so. For example, in my standard terms for the client agreement with foreign clients of my law firm, which are based on the UNIDROIT Principles and not on German law, we always add a clause pursuant to which during negotiations the statute of limitation can be interrupted. That is a concept which was not integrated into the UNIDROIT Principles, but which we like. Our contract has been always accepted regardless of the common or civil law origin of the client.

Marc: ***Following up on Caroline's question, the UNIDROIT Principles are only approximately 25 years old. Legal authority interpreting those Principles is not as well developed as are many countries' existing laws. Given your premise that the UNIDROIT Principles lessens potential for conflict in contract interpretation between the civil and common law systems, where would legal practitioners who seek to advise their clients on the effect of the inclusion of a UNIDROIT provision to a cross-border contract look to give advice to clients as to how such provision should likely be interpreted in the event of dispute?***

Eckart: First of all, it helps to look at the UNIDROIT Principles itself which are written in neutral English, including some explicit definitions and trying to avoid as much as possible words with a concrete connotation in certain domestic jurisdictions.

Second, UNIDROIT itself has issued Official Comments, with illustrations, which are available on the internet. They have been produced by the working group. Many of those illustrations will sound familiar because, for example, famous examples known from jurisprudence such as old English cases, and examples from practice have been included.

Third, the Chairman of the Working Group, Professor Michael Joachim Bonell, has been editing a website at unilex.info for years. It compiles over 444 court and arbitration decisions from around the globe. This is, of course, only the tip of the iceberg because arbitration decisions are, by their nature, usually confidential. In a recent project of the International Bar Association (IBA), we are presently compiling further cases from over 25 jurisdictions. The website also includes a detailed bibliography. For example, an international team of authors from around the globe with Stefan Vogenauer, a German academic who used to teach at Oxford University, has written a detailed article-by-article commentary of 1,500 pages. With my article-by-article commentary of 433 pages, I have added a practice-driven tool. It includes many observations from my international practice using the UNIDROIT Principles around the globe since 2001.

Marc: ***Let me ask this: Can the UNIDROIT Principles offer benefit to two parties from, for example, different states in the U.S. given that different states sometimes interpret the same UCC provision differently?***

Eckart: The laws of the U.S. are still the laws of 50 different states. In light of the existing differences between those 50 states, the rules developed as an international compromise may also be helpful or inspiring for contracts between different U.S. states with a different understanding of certain UCC provisions.

Marc: ***If what you say is accurate, Eckart, you are suggesting that there may be benefit to U.S.-based parties by adopting certain UNIDROIT provisions to an agreement between them even if the contract is not international.***

Eckart: Yes, of course. In the business world, contracting is all about party autonomy used to realize business goals. You can do anything as long as you do not infringe third parties' rights or mandatory law. If the UNIDROIT Principles offer concepts or clauses, such as the concept of hardship in Chapter 6.2, why would a party from Tennessee be prohibited from incorporating those provisions on hardship from the UNIDROIT Principles into its own contract, when contracting with a party from, say, the state of Washington? As noted once by the Chairman of the Working Group, Professor Bonell, the Official Comments to § 1-302 of the United States UCC explicitly state that "[...] parties may vary the effect of [the Uniform Commercial Code's] provisions by stating that their relationship will be governed by recognized bodies of rules or principles applicable to commercial transactions [...] [such as e.g.] the UNIDROIT Principles of International Commercial Contracts […]." I see no reason not to do the same in a U.S. – U.S. federal context.

Caroline: ***At the end of the day, a conflict in a contract between parties must be interpreted. With a myriad of languages, cultures and legal systems in the world – including civil law, common law, Shariah law, etc. – what are examples of existing impediments to contract negotiation and interpretation that the UNIDROIT Principles address better than existing laws?***

Eckart: I give you an example which I discovered during my writing of my commentary on the UNIDROIT Principles. The approach to interpretation differs between civil and common law jurisdictions, something of which both you and Marc are aware. In case of a dispute, the UNIDROIT Principles can help. Their Chapter 4 on Interpretation includes the possibility of "supplying an omitted term" in article 4.8. This is a technique used under certain circumstances by lawyers trained in civil law. It may sound unfamiliar for a lawyer trained in common law. Chapter 5 on Content includes in Articles 5.1.1 and 5.1.2 rules on "implied obligations" which relies on a legal technique which is more familiar to lawyers trained in common law. If the arbitrators on a panel include both common and civil law trained lawyers, the panel can develop a joint understanding of what was meant by certain contract language. However, they can leave open the question whether they consider (1) an obligation to be implied in the contents of the contract or (2) supplied because the words in the contract might not state the obligation expressly.

Caroline: ***What can an international organization, such as Primerus which is involved in education to clients and others of the UNIDROIT Principles and whose member firms span the globe, offer to clients as a benefit that those clients do not currently receive?***

Eckart: Primerus members have an open mind. With the UNIDROIT Principles and their implementation into international contracts, the future of international contracting has begun. Primerus members trust each other and meet regularly. They can afford to integrate new developments in the law and combine this with sound practice and experience. In international teams they can offer, at very reasonable cost, tailor-made solutions to clients. By integrating the UNIDROIT Principles in their portfolio, Primerus members can reduce risks and costs for their clients. Instead, they can concentrate on the negotiation of the individual contract (rather than the default rules) to make their clients' concrete goals happen. As an international organization, Primerus thrives by taking a lead here and continuing to organize conferences teaching the UNIDROIT Principles. Primerus has done this in Hamburg in 2016 jointly with the Association of Corporate Counsel (ACC). Primerus is doing this at its Global Conference in Boston October 17-21, 2018. And Primerus will do this at its next International Convocation in Miami, Florida, May 3-5, 2019. There, we will again mix Primerus colleagues from at least 35 U.S. jurisdictions, 25 jurisdictions from around the globe, and general counsel of multi-nationally and worldwide acting companies.

Marc: ***Thank you, Eckart, for the time you spent with us. Having been a proofreader, and now user, of your outstanding book, I concur with you that the UNIDROIT Principles can facilitate transactions between parties in ways that existing laws sometimes do less efficiently.*** P

For a longer and more detailed version of this conversation, please visit primerus.com/files/PRI_0718_Dedman BrodermannBerube_LONG_FNL.pdf.

Negative Online Reviews: Recommendations for Navigating an "Ethical Minefield"

The way in which prospective customers or clients get referrals from prior clients is undoubtedly shifting. Instead of word-of-mouth referrals from trusted friends and family, potential clients today get their recommendations from a host of online options – Google+, Yelp and Avvo are just the tip of the iceberg. In fact, 90 percent of consumers say that they read online reviews before visiting a business.[1] Law firms and other businesses should pay heed to that statistic, as a one-star increase in Yelp rating leads to a five to nine percent increase in revenue.[2] With that type of revenue on the line, when a disgruntled client or customer leaves a negative review about your business, your natural, instinctual reaction is to leap to the defense of the business's reputation. However, responding to critical online reviews can have detrimental consequences that may actually cause more harm than the review itself.

For that reason, careful attention needs to be given to whether and to what extent a response is appropriate and, indeed, wise. The overarching consideration to remember is that the underlying events (i.e., the facts and circumstances that produced the negative review) cannot be changed. This leaves only one thing within your control: your response.

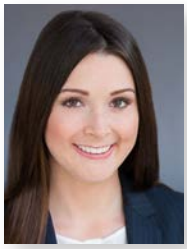
Should You Respond at All?

Before responding, it is critical to consider, in theater parlance, the setting and the cast of characters. An online forum lends itself to overly pointed, oftentimes uncivil commentary that otherwise reasonable persons would generally not give in a face-to-face conversation.[3] This is not a new phenomenon, of course, and researchers have found that even when conversations were initially reduced to letters or telephone calls, subsequent online critiques posted by the client contain levels of vitriol absent from those prior communications.[4]

It is partly for this reason that the best response to a negative review is almost always silence. Engaging the online "letter writer" can amount to throwing gasoline on a fire – a fire that is on display for all internet users to rubberneck. Responding to negative reviews with silence cuts off further dispute, debate or response, and avoids any prospect of a back-and-forth firefight. By not engaging the online reviewer, any possible debate about the merits of the underlying complaint are not publicized or exposed.

Attorneys, particularly, should reel back the impulse to respond defensively to negative online reviews. Other online reviewees – like restaurants, movie theaters, dating services and the like are not subject to the rules of confidentiality that apply to lawyers. In that regard, the American Bar Association (ABA) and all states each have a rule outlining the protection of client confidences for attorneys, even when the scope of the representation has concluded. By way of example, ABA Model Rule 1.6(a) provides that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation or the disclosure is permitted by paragraph (b)." Suffice it to say, defense of one's business reputation is not a disclosure that "is permitted by paragraph (b)."

In fact, the ABA has offered commentary on Model Rule 1.6(a) that is particularly instructive in considering a response to a negative online review: "The confidentiality rule…applies not only to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its source."[5] Cases reprimanding attorneys who ignored these rules in the context of responding to online reviews are already on the books. In one Colorado case, the court upheld the suspension of an



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attorney's license for responding to two negative online reviews.[6] Specifically, the court held that divulging the nature of the underlying cases against the clients and how the attorney was paid was a violation of attorney-client confidentiality, regardless of the fact that the client had already disclosed the information in the review.[7] Similarly, a special master upheld a public reprimand of a Georgia attorney who responded to a negative online review by posting the name of the former client, her employer, how much the client had paid her, the county in which the client's case was filed, and that the client had a boyfriend (a relevant fact in the underlying proceeding, which was a divorce).[8]

If anyone in your organization is considering responding substantively to a negative review, understand that "anything you say can and will be held against you." Even if the business is not subject to confidentiality restrictions, a poorly conceived response to a bad online review can have more adverse consequences than a complete lack of response.

If You Respond, What Should You Say?

If you do choose to respond, there are some guidelines which may help mitigate any potential blowback a response may trigger. First, resist the urge to debate the merits of the critique, even if done in a passive manner. It is also important to never admit anything that might be seen as a dereliction of duty. Marketing experts have offered the "Triple A" response to online reviews:

- **A**cknowledge the customer's concern,
- **A**ccount for what happened,
- And, if appropriate, explain what corrective **A**ction will be taken to correct the problem.[9]

Limiting your response to a general expression of regret demonstrates the humanity behind your business. As fictional entities, businesses cannot respond to reviews on their own. A remorseful response necessarily means that a person – a living, breathing human being – read the review and prepared a response. This can humanize the business and make it harder for the reviewer to maintain an overly critical demeanor. Further, acknowledging your regret puts a limit on any further response from the reviewer.

Obviously, even a perfectly crafted response to a heated, negative review may not yield ideal results. "True believers" will never be satisfied and will never accept an expression of regret, no matter how thoughtful or well-intentioned. Be prepared that these keyboard correspondents may even try to throw your response back in your face: "If you were really disappointed about my experience, you'd give me my money back!" Fortunately for business owners, such an inflamed reply to a measured, "humanizing" response is likely to come across poorly to anyone reading the follow-up, reflecting worse on the reviewer than you or your business. If you are met with a further screed in reply to your "humanizing" statement, silence is the only advisable way to respond.

In extreme cases, a negative online review may amount to defamation. If the underlying facts of the review are simply untrue and the allegations are sufficiently poisonous as to cause significant business harm, consulting an attorney may be a viable option. An attorney should be able to quickly assess whether a Yelp critique or other negative publication is defamatory. P

1 Erskine, *20 Online Reputation Statistics That Every Business Owner Needs to Know* (Sep. 19, 2017) Forbes forbes.com/sites/ryanerskine/2017/09/19/20-online-reputation-statistics-that-every-business-owner-needs-to-know/#3a5cd54cc5c9 [as of Jul. 3, 2018].

2 Luca, *Reviews, Reputation, and Revenue: The Case of Yelp.com* (September 2011) hbs.edu/faculty/Publication%20Files/12-016_a7e4a5a2-03f9-490d-b093-8f951238dba2.pdf [as of Jul. 3, 2018].

3 Konnikova, *The Psychology of Online Comments* (October 23, 2013) The New Yorker newyorker.com/tech/elements/the-psychology-of-online-comments [as of Jul. 3, 2018].

4 *Ibid.*

5 ABA Model Rule 1.6 Comment [3].

6 *People v. Isaac*, 2016 Colo. Discipl. LEXIS 109, *5 (2016).

7 *Ibid.*

8 *In the Matter of Skinner*, 295 Ga. 217, 218

9 Robertson, ARTICLE: *Online Reputation Management in Attorney Regulation* (2016) 29 Geo. J. Legal Ethics 97, 121.

The Rhode Island Supreme Court Refuses to Adopt the Mode of Operation Theory

The mode of operation theory is one favored by plaintiffs in negligence actions, particularly slip or trip and fall matters, filed against self-service businesses. The mode of operation theory relieves a plaintiff of the requirement that he or she prove that a self-service business owner had actual or constructive knowledge of a dangerous condition or conditions on its premises if the manner of operation of the business creates a reasonably foreseeable risk of hazard or injury to patrons expected to be on the premises.

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** The Rhode Island Supreme Court licenses all lawyers in the general practice of law. The Court does not license or certify any lawyer as an expert or specialist in any particular field of practice.*

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The Rhode Island Supreme Court, in Dent v. PRRC, Inc., 2016-129-Appeal (R.I. 2018), refused to recognize the mode of operation theory as a separate and distinct cause of action in a negligence lawsuit. To date, the Court has refused to endorse the mode of operation theory for use in any manner.

In Dent, the plaintiff slipped and fell on a liquid in a self-service supermarket. Shortly before the fall, the plaintiff's husband had selected for purchase two bottles of a beverage and placed them in their shopping cart. It was later discovered that one of the bottles selected had been leaking. While not specifically stated, it was certainly inferred that the cause of the plaintiff's fall was the liquid from the leaking bottle selected by her husband, or from a similar bottle displayed for sale but not selected by her husband.

The plaintiff in her complaint raised a number of alternative theories of recovery, including one count alleging mode of operation as a distinct cause of action. Without any extensive analysis, the Court refused to recognize mode of operation as a distinct cause of action and held instead that the plaintiff's only avenue for potential recovery was pursuant to traditional slip and fall negligence law, which requires proof of actual or constructive notice on the part of the defendant.

The most common example for the application of the mode of operation theory is a self-service supermarket in which loose grapes are displayed for sale to the public in the store's produce section. The rationale is that it is reasonably foreseeable that patrons shopping for grapes could easily drop a grape or two upon which a customer could in turn slip and fall.

The mode of operation theory was most likely first set forth in Wollerman v. Grand Union Stores, Inc., 221 A.2d 513, a 1966 New Jersey Supreme Court Decision. The Court in Wollerman ruled that liability can be based on the store's mode of operation even if the store has no notice of a dangerous condition created by a patron "since the patron's carelessness is to be anticipated in this self-service operation." 221 A.2d. at 514. In such an instance, the store is liable without actual or constructive notice of the dangerous condition if it "failed to use reasonable measures commensurate with the risk involved to discover a debris a customer might leave and to remove it before it injures another patron." 221 A.2d at 514.

The mode of operation theory as set forth in Wollerman has been adopted in one form or another in over 20 states. As stated in Sheehan v. Roche Brothers Supermarkets, Inc., 863 NE.2nd 1276, 1283 (Mass.2007), "[M]ode of operation does not constitute a distinct cause of action, but rather is a theory that alters the burden of proving actual or constructive knowledge in premises liability cases…". To apply, there must be a particular mode of operation that makes the hazardous condition a recurring feature of the mode of operation,[1] as opposed to a condition that could just conceivably arise.

It is important to note that the mode of operation theory only serves to satisfy one element that a plaintiff must prove to establish negligence. It does not mean that a self-service business is an insurer against all hazards. It most certainly does not give rise to any suggestion of strict liability.

While the mode of operation theory makes it easier for a plaintiff to prove negligence in a slip and fall action, the so-called "burden shifting approach" followed in three or four states goes even further and should be of greater concern to self-service businesses. Like the mode of operation theory, it eliminates the need of a plaintiff to establish actual or constructive knowledge. Rather, when a plaintiff proves that an injury occurred from a premises hazard,[2] or from a transitory foreign substance in a self-service store, a rebuttable presumption of negligence arises. At that point, the burden shifts to the defendant store to show by the greater weight of the evidence that it exercised reasonable care in the maintenance of the premises under the circumstances.

Returning to Rhode Island, the Rhode Island Supreme Court has only addressed the mode of operation theory on two occasions and has refused to endorse it each time. The first, in Bates-Bridgmon v. Heong's Market, Inc., 152 A.3rd 1137 (R.I. 2017), concerned an appeal in which the plaintiff alleged that the trial court failed to include a jury instruction as to mode of operation. In that decision, the Rhode Island Supreme Court refused to address the issue, finding that the plaintiff had failed to properly request such a jury instruction, thereby waiving any right to raise it on appeal. In the second such appeal, Dent v. PRRC, Inc., 2016-129-Appeal (RI. 2018), the Rhode Island Supreme Court refused to recognize mode of operation as a separate and distinct cause of action, and further declined to adopt the mode of operation theory in any form. However, the Court did leave the door open for future attempts to consider this theory, by stating that it was declining to adopt the mode of operation theory "at this juncture." Given this rather cryptic language coupled with the fact that the mode of operation theory has been, at least in part, raised in appeals to the Rhode Island Supreme Court in each of the last two years, it is fair to predict that it will be raised again at some point in the future.

1 Such as the example of a self-service store that sells grapes.

2 Defined as a condition of the premises of the store operation that results in an unreasonable risk of harm under the circumstances.

How Semi-Autonomous Driving Technology Impacts the Practice of Law

As we transition into a world of driverless vehicles, civil practitioners must prepare for a change in the way we prosecute and defend lawsuits stemming from motor vehicle accidents. The fully autonomous vehicle is coming, and we will undoubtedly see a shift from driver liability in negligence to manufacturer and automotive industry actions based in products liability.

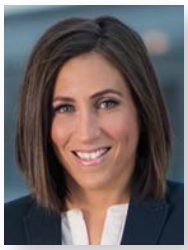
In the interim, the semi-autonomous vehicle is here. As a result, civil practitioners must factor both human error and the shortcomings or failures of semi-autonomous driving technology into the analysis of determining fault. Human error may present more of an issue now than ever before, as drivers are lulled into a heightened state of security brought about by advancements in driving technology, resulting in greater inattention and distraction.

American drivers spend an average of more than 17,600 minutes, or 290 hours, behind the wheel of a motor vehicle each year; travel almost 10,900 miles each, annually; and make around two trips a day, each covering 30 miles over 48 minutes.[1] Despite the influx of vehicle safety features, such as collision avoidance systems, adaptive cruise control systems, electronic stability control systems, anti-lock braking systems, cameras, shatterproof glass and airbags, motor vehicle accidents remain one of the leading causes of death, and traffic-related injuries remain one of leading causes of emergency room visits. Advocates of full and semi-autonomous driving systems, which navigate with the use of a combination of sensors, cameras and GPS (global positioning system), argue that these features will make travel safer by removing the potential for human error.

In analyzing the facts surrounding a motor vehicle accident, civil practitioners investigate the speed and positioning of the vehicles before, during and after the accident, and they scrutinize the drivers' actions leading up to the accident. Those of us on opposite sides dispute the particular cause, or causes, of a motor vehicle accident in a given case, but we generally agree on one thing: in the context of a personal injury or wrongful death lawsuit stemming from a motor vehicle accident, excluding those cases involving claims of negligent roadway design, liability usually rests with the driver of a motor vehicle. With advancements in semi-autonomous driving technology, we must broaden our search from human error to include errors and malfunctions related to coding, operating systems and software.

Semi-autonomous driving systems vary in their ability to identify and navigate depending upon the manufacturer and vehicle type; however, as long as a human remains behind the wheel, arguably none of the semi-autonomous driving systems negate the obligations of a driver to remain alert and attentive to the surrounding traffic and road conditions. Thus, the current legal framework continues to apply, but we are beginning to see cases involving the engagement of semi-automotive technology at the time of a crash and the apportionment of fault between the human driver and the automakers, manufacturers and software developers.

This apportionment of liability between the human and the machine can be seen in what is regarded as the first lawsuit filed in the United States involving autonomous vehicle technology. The suit was commenced by motorcyclist, Oscar Nilsson. The complaint, filed in United States District Court in San Francisco, alleges that General Motors (GM) "owes a duty of care in having its self-driving vehicle operate in a manner in which it obeys the traffic laws and regulations." It also states that GM breached the duty of care when "its self-driving vehicle drove in such a negligent manner that it veered into an adjacent lane of traffic without regard for a passing motorist." The accident is alleged to have occurred when, after attempting to change lanes, the vehicle suddenly veered back into its initial lane of travel, striking the motorcyclist and knocking him



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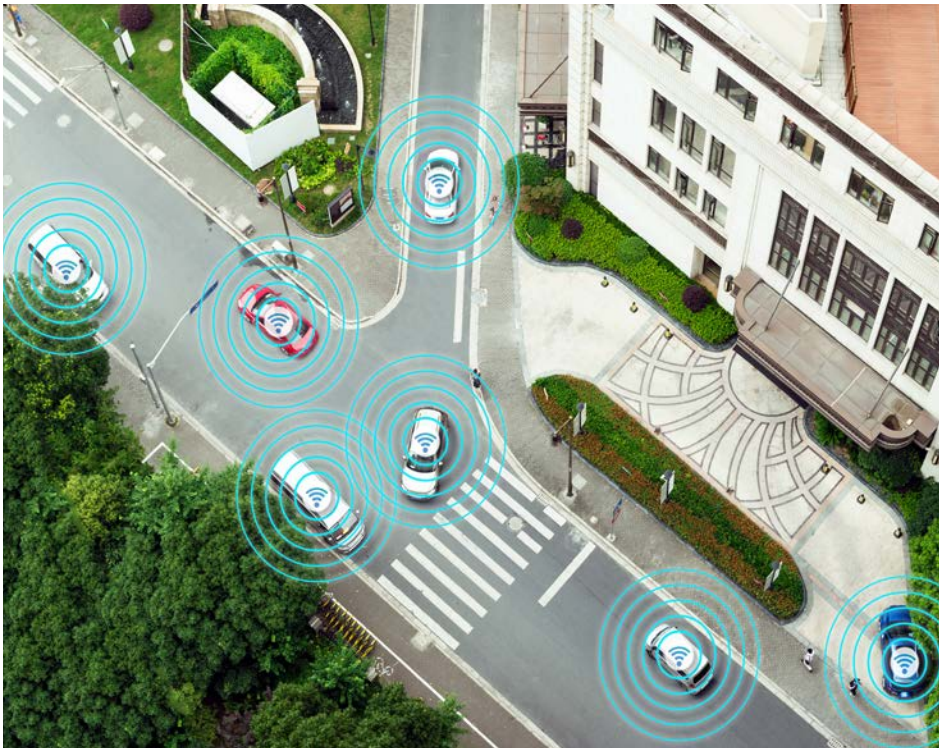
to the ground. A very different picture is painted by the defense, who claim that the vehicle was re-centering itself in the lane when the motorcyclist, who had been illegally riding in between two lanes, sideswiped the vehicle. There was an individual seated in the front of the GM vehicle who allegedly had his hands off the wheel at the time of the accident. In addition to being a key witness to the events, the individual who was seated in the front of the GM vehicle, to the extent that he retained, or should have retained, any degree of control over the vehicle's operating system, arguably bears a portion of the fault for the happening of the accident.

In what has been regarded as the first pedestrian death associated with self-driving technology in the United States, the case of Elaine Herzberg raises similar issues of comparative liability. Ms. Herzberg was walking her bicycle outside the crosswalk on a four-lane road in the Phoenix suburb of Tempe when she was hit by a Volvo XC90 SUV. The vehicle, which also had an individual behind the wheel, was traveling in an autonomous mode at a speed of about 40 miles per hour in a 45 mile per hour zone. Footage of the crash, taken from the vantage point of the vehicle's front dashboard, shows the pedestrian approach the front driver's side of the vehicle just about a split second before the collision. In footage depicting the interior of the vehicle, the individual behind the wheel appears to be looking away from the road. Critics of autonomous software point to the vehicle's light detection and ranging system (LIDAR) radar, arguing that it failed to detect the pedestrian approaching. However, from the perspective of the driver's camera, it is not entirely clear that a reasonably prudent person would have seen and reacted to Ms. Herzberg any better than the LIDAR, as she seemingly walks out of the shadows directly into the path of the vehicle.

In the case of Joshua Brown, an individual who was killed when his Tesla Model S struck the side of a tractor-trailer in May 2016, The National Transportation



Safety Board (NTSB) investigated and determined that, in addition to faults in the operational design of Tesla's automation software, which "allowed prolonged disengagement from the driving task and enabled the driver to use it in ways inconsistent with manufacturer guidance and warnings,"[2] human error – both on the part of the tractor-trailer driver and Mr. Brown – were factors in the accident. The NTSB detailed what it described as Mr. Brown's "over-reliance on the automation." According to data recovered from the Tesla, Mr. Brown's hands were not on the wheel at the time of the accident, despite multiple audible prompts directing that he put his hands on the wheel. Data reportedly also showed that Mr. Brown had adjusted the vehicle's rate of speed just minutes prior to the accident and that the vehicle was operating at a speed greater than the posted speed limit.

The advancement of semi-autonomous capabilities and features designed to assist with accident avoidance begets perhaps an even greater responsibility on a driver to remain vigilant and attentive to the roadway. As we begin to see cases where human involvement and semi-autonomous software each play a role in the operation of a vehicle, it is incumbent upon legal practitioners prosecuting or defending cases involving fault for the happening of a motor vehicle accident to dig even deeper into the mechanics of the accident. At minimum, the scope of our discovery efforts should be widened as many vehicles now contain data recording devices and are equipped with a driver's camera which must be demanded during discovery. At depositions and during pre-trial discovery, we should be questioning drivers about the capabilities of their vehicles and the extent to which they were utilizing semi-autonomous driving systems at the time of the accident. Attention should be paid to any potential visual or audio safety prompts within the vehicle in the moments leading up to an accident. Impleader of automakers, manufacturers and software developers should be considered in cases where semi-autonomous technology is engaged at the time of an accident. In this new, exciting legal landscape, civil practitioners must stay ahead of the curve.P

1 The "American Driving Survey," conducted by AAA's Foundation for Traffic Safety using data reported by nearly 6,000 drivers about their daily driving habits in 2014 and 2015.

2 *See* The Nation Transportation Safety Board's Accident Report ntsb.gov/investigations/AccidentReports/Reports/HAR1702.pdf

E-Discovery and Joint Expert Engagements

The use of digital forensic experts and vendors is a common and often vital part of litigation, especially during discovery. Traditionally, each party may hire their own expert to conduct work on their behalf. Each expert will typically perform a forensic collection of the data, conduct an independent analysis, and relay the results to the respective party. This approach works, but often means there will be duplicative work, delays and overall increased cost in discovery, as both parties debate the scope and type of work of the opposing expert. A dual party engagement is a fresh alternative that can be arranged to mitigate or eliminate some of the downsides of the traditional approach. There are several key considerations, however, before deciding which approach is best for your case.

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Verifiable and Repeatable Processes

It is helpful to have a baseline knowledge and appreciation of the nature of true digital forensic processes. Operations performed according to stringent digital forensic standards are verifiable and repeatable, regardless of the expert used. Simply put, this means that a forensic collection completed by one qualified expert will produce the same outcome that it would if it were completed by another qualified expert. This universal standard for digital forensics, when truly appreciated, tends to increase the comfort level between contentious parties.

Issues with Status Quo

When each party retains its own digital forensics expert, each expert will often be working with the same set of data. In most cases, the data under examination or subject to review is from a desktop or laptop computer, tablet or smart phone. Each expert will conduct his or her analysis and relay the results to the hiring party. Those results may also be disclosed to the opposing party as part of a production, testimony, or otherwise.

If there is a set of stipulated keywords or an analysis protocol that has been agreed upon by the parties, the issue of duplicative work is often compounded. Both experts may indeed be conducting the same examination, running the same keyword searches, and arriving at the same results. This duplication of work is still problematic for two reasons: it increases the overall cost of the litigation, and it almost certainly extends the amount of time required for discovery. If one party's expert has a larger backlog or fewer resources than the other, the examination results may be delivered to each party at significantly different times.

Advantages of Coordination

Coordination between two parties with respect to retaining a digital forensics expert alleviates many of the issues encountered when each party retains their own expert. If a dual party engagement is to be arranged, both parties need to agree on the following, at a minimum:

- the expert or third-party vendor to be used;
- the specific tasks contemplated by the agreement (conducting the collections, keyword searches and/or examination of the data);
- the protocol for communication that will be used by all parties; and
- how the responsibility for payment will be assigned.

Dual party engagements help to ensure that both parties agree on the type of analysis to be conducted, keyword lists to be used, how the results of the search and examination are to be disseminated, and any other factors that are important to the matter. In some cases, the results of the search and examination are disclosed to both parties simultaneously. In other cases, deadlines are put into place to govern the production of documents after both parties have an opportunity to review material culled during the search for privilege.

The specifications of a dual party engagement are limited only by the flexibility of the parties. Dual party engagements allow for the analysis, searching and other related tasks to be performed once and disseminated to both parties. This arrangement reduces the overall cost of litigation as compared to two independent experts conducting the same analysis for their retaining party. When the results are provided to both parties at the same time, neither party is disadvantaged by the delivery time of the results.

Considerations for Dual Party Engagements

While dual party engagements solve a number of issues faced by traditional engagements, there are some important considerations that the parties must weigh before going this route.

- Are both parties comfortable with the expert's qualifications and prior work? If both sides have previously worked with the expert, they are much more likely to have a greater comfort level with the expert and his or her ability.
- Having a qualified expert is critically important since both sides could be relying on the results produced by the expert.
- Dual party engagement does not preclude one or both of the parties from arranging a third-party review of the results.

Another consideration that demands careful forethought in a dual party engagement is the impact of the communication and delivery protocol.

- If both parties are to receive the search results simultaneously, the results cannot be examined or redacted by one party prior to disclosing to the other party.
- If any type of review or redaction is necessary prior to one of the party's review, the manner of delivery will need to be detailed in the dual party engagement letter.

In many cases, each party will review the searching and analysis results of their own data for privilege prior to approving the release of discoverable material to the opposing party. This process is easily accomplished, but should be addressed in the joint contract to ensure both parties agree on the delivery protocol.

Conclusion

The dual party engagement approach is increasing in popularity as practitioners become more comfortable with the concepts and techniques employed by forensic experts during electronic discovery. These practitioners have come to recognize the inherent safeguards afforded by a trusted digital forensic expert and welcome the cost and time savings benefits of a joint engagement.

To Provoke or Not to Provoke Heavy Metals

Cases in which plaintiffs claim health problems associated with heavy metal toxicity due to products they have ingested, including dietary supplements, seem to be filed with more regularity. Mercury, lead and arsenic are targeted frequently as the alleged causes of neuropathy, "foggy headiness," heart palpitations and other health problems.[1] Some of these plaintiffs appear to rely upon faulty medical data to substantiate their claims. For example, some physicians may provoke heavy metals out of their patients' tissues and into their urine and then compare those heavy metal levels to reference ranges for unprovoked urine tests, resulting in false positive results.

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What Are Heavy Metals?

Heavy metals are defined as metals with relatively high densities, high atomic weights or high atomic numbers. Some heavy metals are essential nutrients for humans. For example, iron is required for the transport of oxygen needed for cellular respiration and zinc is needed to heal wounds.

Where Are Heavy Metals Found?

Many heavy metals are ubiquitous in that they occur naturally, so nearly everyone has some low-level exposure throughout their lifetime. They can be found in fruits and vegetables. If these plants are used to feed livestock, then the metals will leech into the livestock. Water obtained from natural springs often contains some heavy metals. The point is that we all have small amounts of heavy metals in our bodies, but our bodies generally reach a steady state in which the heavy metals are absorbed and excreted with no adverse consequences.

Heavy Metals Can Be Poisonous

There is no doubt that exposure to certain heavy metals in abnormal concentrations can cause adverse health consequences. The most common example is children ingesting lead via paint. In some situations, the health problems associated with heavy metal toxicity can be corrected by stopping further exposure followed by time to allow the body to naturally lower the level of heavy metals.

Toxicology Evaluations

A physician who suspects a patient is suffering from heavy metal toxicity will conduct a thorough medical examination, including an oral history to determine if the patient has been exposed to heavy metals. The physician also will try to correlate the patient's symptoms to one or more metals. One of the most beneficial tools for a toxicologist is an exposure assessment, which is the process of estimating or measuring the magnitude, frequency and duration of exposure to a substance. These assessments can help determine if the patient has ingested metals in a sufficient quantity to produce adverse health effects. Unfortunately, these important steps in a toxicology evaluation may not always be performed by treating physicians.

Measuring the Level of Heavy Metals

If a toxicology evaluation results in a physician suspecting heavy metal toxicity, then the physician probably will order a urine test. The patient's urine is collected and evaluated for the presence of heavy metals expressed as micrograms per grams of creatinine (ug/g). There are two types of urine tests for heavy metals: unprovoked and provoked. Unprovoked urine collection means the patient does not take an agent to entice the body to excrete metals. Provoked urine collection means the patient takes a chelating agent to encourage the body to excrete metals. Chelating agents are chemical compounds that react with metal ions to form a stable, water-soluble complex that can be excreted by the body.

Chelation therapy can be beneficial in those situations when a physician determines an exposure to heavy metals, adverse health consequences from the exposure, stopping further exposure is

not sufficient to remedy the condition, and the patient needs additional help ridding the body of heavy metals.[2] The issue with chelating agents develops when they are used to determine if chelation therapy is necessary. A number of labs, including the Mayo Clinic, have developed reference ranges for heavy metals in unprovoked urine. A reference range is a scientific consensus for comparison, or a frame of reference, for health professionals to interpret a set of test results. However, there are no consensus guidelines for the interpretation of results of provoked urine testing. This lack of consensus for provoked references ranges is a function of variables, e.g., the variety of chelating agents, the various routes of administration of those agents (intravenous infusions, intramuscularly, orally, etc.), inconsistent doses of agents and inconsistent urine collection procedures.

Lacking reference ranges for provoked urine tests, physicians sometimes compare the provoked test results with unprovoked reference ranges. A provoked urine sample almost always looks elevated when compared to unprovoked ranges, but the results do not necessarily reflect an abnormal body burden of the presumed toxicant. This testing does little more than document a normal response to the chelator. Patients may then be mistakenly told their bodies have dangerously high levels of heavy metals and as a result, they should be "detoxified" to reduce these levels. However, experiments have established that provocation raises urine levels of heavy metals as much in people exposed to heavy metals as in unexposed control subjects and that the rise is temporary, ought to be expected, and is not evidence of a dangerous medical condition.

Comparing Apples to Oranges

Other problems that litigators need to watch for include the length of the urine collection process and controlling for creatinine in the urine. Unprovoked reference ranges are based upon 24-hour urine collections. However, it is not uncommon for physicians to prescribe provoked urine tests that require only a six-hour collection period. With provoked tests, most of the extra heavy metal excretion occurs toward the beginning of the test. This means a specimen obtained over a six-hour period and not the standard 24-hour period results in the reported heavy metal levels being higher. Also, the test results sometimes are controlled for creatinine, which falsely elevates the concentration of heavy metals reported. The end result is that even a "normal person" would tend to have a high result. An example helps drive the point home.

A person excretes 1 g of creatinine (Cr) into the urine in 24 hours and has a daily urine volume of 1 L. The same person excretes 0.4 ug/dL mercury into the urine over a day, which is 4 ug Hg/L. The urine mercury excreted over the course of one day is equal to 4 ug/g Cr. If urine is collected for six hours and controlled for creatinine, the mercury level would be expected to continue to be 4 ug/g Cr (since 250 mg Cr, 1 ug Hg, and 250 ml of urine are expected to have been collected over six hours). However, if a chelating agent were administered prior to collection of urine, the result would change. Assuming the excretion of mercury triples in the first six hours after chelator administration and then returns to baseline, the 24-hour excretion of mercury would increase to 6 ug, while the creatinine excreted over the same 24 hours would remain stable. However, if the urine was collected only for the first six hours and then controlled for creatinine, the 3 ug of Hg collected along with 250 mg of Cr would then be converted to 12 ug Hg/g creatinine. By cutting the urine collection period to six hours and controlling for creatinine, the results reported to the patient and provider has doubled. Thus, in this example, creatinine correction would be deceptive.

Conclusion

Attorneys litigating heavy metal toxicity cases need to ask a series of questions. Has the plaintiff undergone a thorough toxicology evaluation? Has a urine test been conducted with a provoking agent? Have the results of a provoked urine test been compared to reference ranges for unprovoked urine tests? Have the urine test results been corrected for creatinine? If the answer to any one of these questions is yes, you may have a very strong defense to a claim of heavy metal toxicity.

1 Some heavy metals are subject to California's Proposition 65, which requires that products include detailed warning labels if they contain chemicals known to the State of California to cause cancer, birth defects or other reproductive harm. Please refer to the Spring 2017 edition of *Paradigm* for the author's article discussing Proposition 65.

2 The purpose of this article is not to debate the value of chelation therapy, but there is significant debate about the practice. For example, some medical practitioners claim chelation therapy can treat a variety of ailments other than heavy metal toxicity, including heart disease, cancer and autism. The American Heart Association and the American Cancer Society have stated that there is no scientific evidence to demonstrate any benefit from this form of therapy.

Consider the Risks When Hiring "Independent Contractors"

The California Supreme Court has unanimously ruled in Dynamex Operations West, Inc. v. Superior Court of Los Angeles that all workers are employees unless proven otherwise. Notably, the Court has made it much more difficult to prove that a worker is an independent contractor.

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The Old Standard

For nearly 30 years, courts have applied a "multifactor, all the circumstances standard" in which the primary concern for independent contractor classification was whether the hiring company had the right to control the "manner and means" by which the worker performed the work. Other factors considered included the degree of skill required to perform the work, the ability for the worker to profit, the nature of the hiring company's regular business, and whether the worker supplies his or her own equipment.

The New Standard

Now, in the Dynamex decision, the Court considered whether delivery drivers, who were classified by their hiring company as independent contractors, were entitled to California Wage Order protections, such as minimum wage, overtime, and meal and rest periods. In doing so, the Court ruled that a worker cannot be classified as an independent contractor unless all three prongs of the following "ABC Test" have been satisfied:

- (A) the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;
- (B) the worker performs work that is outside the usual course of the hiring entity's business; and
- (C) the worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed for the hiring entity.

Part (A) of the test is unsurprising as it is akin to the common law control standard that prevents a hiring company from designating a worker as a contractor if the company exercises the same control over the worker that it would typically exercise over employees. However, parts (B) and (C) of the test could significantly hamper California's numerous independent contractor relationships in a variety of industries and bring the burgeoning "gig economy" to a halt.

In addressing part (B), which requires that the worker perform work outside the usual course of the hiring entity's business, the Court provided specific examples:

- a plumber temporarily hired by a retail store to repair a leak would be an independent contractor because she is doing work outside the usual course of business;
- an electrician hired by a retail store to install an electrical line would be an independent contractor because he is doing work outside the usual course of business;
- a seamstress who works at home to make dresses for a clothing manufacturer from cloth and patterns supplied by the hiring company is an employee because her services are within the clothing manufacturer's usual business;
- a cake decorator who works for a bakery on a regular basis to provide custom-designed cakes is an employee because his services are within the usual course of the bakery's business.

With respect to part (C) of the test, which requires a showing that the worker is customarily engaged in an independently

established trade, occupation or business of the same nature as the work he or she is performing for the hiring company, the Court made clear that the hiring company must prove more than the fact that it has not prohibited or prevented a worker from engaging in his or her own business. The Court suggested that this part of the test might be satisfied if the worker has generally taken the steps to establish and promote his or her independent business, such as through incorporation, licensure, advertisements and routine offerings to provide the services of the independent business to the public or other customers.

Business Take-Aways

As we have previously advised, independent contractor misclassification carries serious statutory penalties of $5,000 to $15,000 in California for each "willful" violation. Moreover, hiring companies can be subject to time-consuming and expensive audits and be held liable for back wages, penalties, fines and the assessment of back taxes in the event workers are found by state and/or federal agencies to have been misclassified.

As such, all businesses should reevaluate their independent contractor classifications under the new ABC Test, including but not limited to:

- evaluate your contractor agreements with any contractors based on the factors established in Dynamex;
- remember that the ABC Test will be applied even if there is a mutually negotiated agreement for independent contractor classification status;
- evaluate your population of workers and the nature of the work they are performing as it relates to the core services or products of your company;
- require your contractors to show that they are independently taking the actions to run and promote their independent businesses;
- consider implementing arbitration agreements containing a class-action waiver; and
- strategize with counsel to determine various means of mitigating risk in case of possible existing misclassifications.

It is important to note that the ABC Test will be applied to determine if California Wage Order protections apply. However, it is not yet clear whether California agencies or courts will apply the ABC Test for other purposes such as tax withholdings, worker's compensation insurance and unemployment insurance. Businesses must use caution when entering into and/or continuing independent contractor relationships.

Beyond California

The ABC Test also is applied in a number of other states, including Massachusetts, New Jersey and Connecticut. In addition to state laws, all companies still need to be mindful of the Internal Revenue Service (IRS) and the federal Department of Labor's (DOL) guidelines as to when they will consider a worker an employee. The IRS, for example, with the goal of capturing as much employer tax revenue as possible, applies a multi-factor test focused on the degree of control an employer has over a worker. Specifically, the more control someone has over the worker's behavior, methods of performance and rate of compensation, the more likely they are deemed to be an employee.

Different from the IRS test, the DOL economic realities test seeks to determine whether the worker is economically dependent on the company. To do so, the DOL and most non-California courts consider seven separate factors:

1. the extent to which the services rendered are an integral part of the principal's business;
2. the permanency of the relationship;
3. the amount of the alleged contractor's investment in facilities and equipment;
4. the nature and degree of control by the principal;
5. the alleged contractor's opportunities for profit and loss;
6. the amount of initiative, judgment or foresight in open market competition with others required for the success of the claimed independent contractor; and
7. the degree of independent business organization and operation.

While no one factor is determinative, the overall analysis is intended to show if a worker is truly in business for herself or economically dependent on the one employing company.

The Changing Landscape of U.S. Sanctions in 2018

The U.S. Government made significant changes to some of its economic sanctions programs in the first half of 2018, including the reimposition of sanctions against Iran (in light of the Trump Administration's decision to withdraw from the Iran nuclear deal), expanded sanctions against Russia, and revised sanctions against North Korea.

Both U.S. and non-U.S. persons should take care to ensure that they understand the sanctions. Most U.S. sanctions apply to U.S. persons (defined as U.S. citizens or permanent resident aliens, persons in the United States, entities organized under the laws of the U.S., and subsidiaries or branches of foreign companies located in the U.S.). The Iran, Russia and North Korea sanctions are more extensive than most others imposed by the U.S., as they include both "blocking" sanctions (which prohibit transactions by U.S. persons with, and block the property and property interests of, particular designated individuals and entities) and other types of sanctions, including "secondary sanctions," which apply to persons (including non-U.S. persons) that engage in certain transactions not requiring a U.S. nexus. U.S. persons are also prohibited from facilitating transactions by non-U.S. persons that would be prohibited for U.S. persons.

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Iran Sanctions

The U.S. has maintained a comprehensive embargo against Iran, prohibiting nearly all transactions and trade with Iran by U.S. persons, directly or indirectly.[1] Most of these prohibitions remained in effect even while the U.S. had lifted certain sanctions pursuant to the Iran nuclear deal – formally known as the Joint Comprehensive Plan of Action (JCPOA).

On May 8, 2018, the President announced his decision to withdraw the U.S. from the JCPOA and to reinstate U.S. nuclear-related sanctions on Iran that had been lifted as part of the JCPOA, following wind-down periods.

After a 90-day wind-down period ending on August 6, 2018, the U.S. government reinstated sanctions on:

- the purchase or acquisition of U.S. dollar banknotes by the government of Iran;
- Iran's trade in gold or precious metals;
- the direct or indirect sale, supply or transfer to or from Iran of graphite, raw or semi-finished metals, such as aluminum and steel, coal and software for integrating industrial processes;
- significant transactions related to the purchase or sale of Iranian rials, or the maintenance of significant funds or accounts outside the territory of Iran denominated in the Iranian rial;
- the purchase, subscription to, or facilitation of the issuance of Iranian sovereign debt; and
- Iran's automotive sector.

The U.S. government also ceased authorizations for imports of carpets and foodstuffs and certain related financial transactions, and relating to exports or reexports of commercial passenger aircraft and related parts and services and contingent contracts.[2]

After a 180-day wind-down period ending on November 4, 2018, the U.S. government will reinstate sanctions on:

- Iran's energy sector;
- petroleum-related transactions with, among others, the National Iranian Oil Company, Naftiran Intertrade Company, and National Iranian Tanker Company, including the purchase of petroleum, petroleum products or petrochemical products from Iran;
- Iran's port operators, and shipping and shipbuilding sectors;
- certain transactions by foreign financial institutions with the Central Bank of Iran and designated Iranian financial institutions;
- the provision of specialized financial messaging services to the Central Bank of Iran and Iranian financial institutions;
- the provision of underwriting services, insurance or reinsurance; and

- various persons that had been removed from blocking designations.[3]

Moreover, after November 4, 2018, *non-U.S. entities* that are owned or controlled by a U.S. person again will be generally prohibited from knowingly engaging in any transaction, directly or indirectly, with Iran that would be prohibited if engaged in by a U.S. person.[4] Pursuant to the JCPOA, the U.S. government had issued Iran General License H, which authorized most transactions between U.S.-owned or -controlled foreign entities and Iran. That license has now been revoked.

In response to the U.S. decision to withdraw from the JCPOA, the European Union (EU) has launched the formal process to activate its Blocking Statute, which would forbid EU persons from complying with the reinstated U.S. sanctions.[5] This may leave businesses located or incorporated in EU countries in the Catch-22 situation of being prohibited from engaging in transactions with Iran under the U.S. sanctions on the one hand and being required not to comply with U.S. sanctions on the other. In such circumstances, licenses may need to be obtained from the U.S. government and/or foreign governments.

Russia Sanctions

In addition to blocking and secondary sanctions, the Russia sanctions program includes "sectoral sanctions," which prohibit only certain types of transactions with designated entities operating in the financial services, energy and defense sectors of the Russian economy.

Throughout 2018, the U.S. has designated additional individuals and entities under the Russia sanctions. For example, in April 2018, The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) designated seven Russian oligarchs, 12 companies they own or control, 17 senior Russian government officials, and a state-owned Russian weapons trading company and its subsidiary, a Russian bank.[6] The companies included United Company RUSAL, which is "one of the world's largest aluminum producers" and "responsible for seven percent of global aluminum production," and GAZ Group, "Russia's leading manufacturer of commercial vehicles."[7] OFAC subsequently issued general licenses allowing for certain time periods for winding down activities with, or divesting or transferring to non-U.S. persons debt, equity, or other holdings of, some of the designated companies.

In response, on June 4, 2018, Russian President Vladimir Putin signed a counter-sanctions law granting his government broad authority to retaliate against U.S. and EU sanctions with regard to various economic activities, including trade bans.[8] At this point, however, it is unclear what measures (if any) President Putin may choose to implement.[9] Russian lawmakers have also introduced a draft bill that would impose criminal liability for complying with U.S. or EU sanctions, but, as of the time of writing, that bill had not moved forward since late May 2018.[10]

North Korea Sanctions

The U.S. imposes comprehensive sanctions banning, absent specific authorization (i.e., by license), nearly all dealings by U.S. persons with North Korea.[11]

In February 2018, OFAC issued an advisory to alert persons globally to deceptive shipping practices used by North Korea to evade sanctions, including obfuscating the identity of the vessels, the goods being shipped, and the origin or destination of cargo. These practices are intended to circumvent existing sanctions compliance controls used by – and may create significant sanctions risk for – parties involved in the shipping industry, including insurers, flag registries, shipping companies, and financial institutions.[12]

In early March, OFAC amended the North Korea Sanctions Regulations, and reissued them in their entirety, in light of numerous changes.[13]

Penalties for Failure to Comply with U.S. Sanctions

The U.S. imposes severe penalties for sanctions violations. Persons that violate most U.S. sanctions, including the three sanctions programs discussed above, may be subject to civil monetary penalties equal to the greater of twice the value of the underlying transaction or $289,238 USD, per violation. Criminal penalties of up to $1 million USD, imprisonment for up to 20 years, or both, may be imposed for willful sanctions violations.

Compliance

U.S. persons, and many non-U.S. persons, must understand and comply with the changing U.S. sanctions. Even more changes may come in the future.

To minimize the risk of major penalties for sanctions violations, businesses should implement rigorous compliance programs, including due diligence procedures and screening of all transactions, and update them where necessary to reflect changes in the sanctions. Businesses should clearly communicate sanctions and compliance obligations to other parties involved in international transactions. Multinational businesses in particular should be aware of the risks they may face under both the U.S. sanctions and blocking laws of other countries. They should exercise extreme caution about potentially engaging in transactions that would cause them to become subject to U.S. secondary sanctions. Businesses should seek advice from legal professionals or OFAC, if needed. P

1 31 C.F.R. Part 560.

2 OFAC, Frequently Asked Questions Regarding the Re-Imposition of Sanctions Pursuant to the May 8, 2018 National Security Presidential Memorandum Relating to the Joint Comprehensive Plan of Action (JCPOA) (May 8, 2018) at 1-2, treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa_winddown_faqs.pdf.

3 *Id.* at 2-3.

4 31 C.F.R. § 560.215.

5 European Commission, Press Release, "European Commission acts to protect the interests of EU companies investing in Iran as part of the EU's continued commitment to the Joint Comprehensive Plan of Action" (May 18, 2018), *available at* europa.eu/rapid/press-release_IP-18-3861_en.htm.

6 U.S. Department of the Treasury, Press Release, "Treasury Designates Russian Oligarchs, Officials, and Entities in Response to Worldwide Malign Activity" (Apr. 6, 2018), *available at* home.treasury.gov/news/press-releases/sm0338.

7 *Id.*

8 *See* Orrick, Herrington & Sutcliffe LLP, *Further Update – Russian Counter-Sanctions Measures and New U.S. Sanctions Against Russia*, JDSUPRA (June 18, 2018), jdsupra.com/legalnews/further-update-russian-counter-28262/.

9 *See id.*

10 *See id.*

11 *See* Countering America's Adversaries Through Sanctions Act § 302A, 22 U.S.C. § 9241a (2017); OFAC, North Korea Sanctions Program (Nov. 2, 2016) at 4-7, *available at*treasury.gov/resource-center/sanctions/Programs/Documents/nkorea.pdf; Department of the Treasury, North Korea Sanctions Advisory, "Sanctions Risks Related to North Korea's Shipping Practices" (Feb. 23, 2018) at 6, *available at* treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/dprk_vessel_advisory_02232018.pdf.

12 *See* Department of the Treasury, North Korea Sanctions Advisory, *supra* note 11, at 1-3.

13 *See North Korea Sanctions Regulations*, 83 Fed. Reg. 9182 (Dep't Treasury Mar. 5, 2018) (final rule).

The Rise of Deepfake and Media Synthetization

Internet users are sounding the alarm as "Deepfake" videos are increasingly becoming more common. Deepfakes are videos made by software apps where users can take an original video file and have an app alter the subject matter's speech, appearance and facial expression in real time.

Concerns range from copyright violations, sexual harassment, video renderings depicting celebrities engaging in illicit acts, to the use of Deepfake videos as a form of subversive political tactics via "fake news." For example, in Iraq, there are reports of Deepfake videos being used against rival politicians.[1]

Privacy and other special interest groups[2] are monitoring the trends involving how Deepfake videos and "fake news"[3] are used and addressed by lawmakers.

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The proliferation of cheap technology and deliberate misinformation campaigns by state agencies,[4] have made internet users vulnerable to having their image manipulated. This area of the law must now evolve to keep up with the rapid pace of technology.

How Other Countries are Reacting

Other jurisdictions have enacted legislation designed to combat Deepfake videos. On January 12, 2018, Germany enacted the Act to Improve Enforcement of the Law in Social Networks, also known as the Network Enforcement Act (NEA). The NEA allows for stiff penalties against social media providers who host "hate speech."

In the United States, lawmakers are grappling with the inadequacy of their content provider laws, such as the Communications Decency Act of 1996 (CDA) in combatting Deepfakes.[5] The state of New York has introduced Bill A08155, preventing the unlawful use of personal images. This bill, if passed, would provide injunctive relief and a claim for damages for persons whose 'persona' is unlawfully used "without the written consent first obtained."[6]

Other countries such as the United Kingdom (UK), France[7] and Spain[8] have also proposed their own legislation with varying aims from combatting sexual harassment to combatting the proliferation of "fake news."

How Canada is Reacting

Canada has yet to legislate specific Deepfake concerns. Certain provinces have existing legislation that combats the distribution of intimate images without a person's consent (also known as "revenge porn" or "cyberbullying" laws). These provincial legislations provide for a tort of non-consensual distribution of intimate images. Similar laws are found under the Criminal Code of Canada (Criminal Code). How Canadian law defines "intimate image" under provincial legislation such as Manitoba's The Intimate Image Protection Act (IIPA) is in uniform with the Criminal Code.

The IIPA defines intimate image as "a visual recording of a person made by any means, including a 'video recording' in which the person depicted in the image is nude… or is engaged in explicit sexual activity, which was recorded in circumstances that gave rise to a reasonable expectation of privacy in respect of the image, and if the image has been distributed, in which the person depicted in the image retained a reasonable expectation of privacy at the time it was distributed."[9]

Under Canadian Federal legislation, the Criminal Code has existing harassment and unlawful distribution offenses under section 264(1) and 162.1(1) which may be of some assistance for victims. Under section 264(1), "No person shall, without lawful authority… engage in conduct… that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them… and repeatedly communicating with, either directly or indirectly, [to] the other person or anyone known to them."[10]

Under section 162(1) of the Code, it is an offense for anyone who knowingly publishes, distributes, makes available an "intimate image" of a person knowing that the person depicted in the image did not give their consent to that conduct. The penalty for this offense may result in imprisonment for a term of not more than five years; or an offense punishable on summary conviction."[11]

Where the need for the law to evolve arises in how the provincial legislation and the Criminal Code define "intimate image." An issue arises as these laws are designed to prevent distribution of "real" or "authentic" videos. In other words, the law presumes that the intimate images are true, that the events in the video occurred, or were done by the person(s) depicted in them. Both acts, and other similar legislation from other Canadian provinces do not specifically prohibit "created" or fictionally rendered "intimate images." An issue may arise as the Deepfaked video does not actually depict a "real" person, but rather a fictional simulation of an individual's likeness.

The vagueness in the legislation may make prosecution difficult but may still be used successfully. For example, the U.K. has recently successfully convicted an identifiable offender using Deepfake to harass their co-worker, leading to a 12-year jail sentence for the offender.[12]

Procedural Issues in Canadian Private Civil Claims

If the only viable solution appears to be private actions against offender(s) in defamation or copyright infringement claims, potential plaintiffs should keep these procedural issues in mind. Of course, a general warning is always warranted as these types of actions are almost always costly, time consuming and difficult for plaintiffs to obtain a judgement.

Here are eight things to keep in mind when deliberating whether to file a claim for a private tort or copyright action.

1. Jurisdictional concerns

Defendant(s) may be spread throughout Canada, or the world. Deciding which forum to use will dictate procedural steps that need to be complied with, such as filing and serving a notice of action against all defendants or internet service providers. It is best to ensure you check with the local jurisdictions as to what notice provisions are required.

2. The medium for the message is ever changing

Video distribution is no longer reliant on websites. There are now more mobile apps where media is distributed, such as Instagram, Snapchat, Discord and other livestreaming applications. Lawyers should ensure that they have mechanisms in place to preserve evidence in the proper format.

3. Defendant(s) are most likely anonymous

Websites don't require you to disclose who you are prior to using them. Doxing (the public posting of personal identifying information) is usually prohibited by website user norms and breach privacy laws. Cooperation from internet service providers (ISP) is difficult to obtain and usually requires a court order compelling the ISP to provide disclosure. Furthermore, disclosure from ISP may only be useful where the defendant(s) is in the ISP's coverage area.

4. Financial compensation is hard to find

Unlike traditional corporate media defendants, online publishers may have no assets or have non-attachable assets that are outside the jurisdiction of the court where the claim is filed. Worse still, defendants may be transient or may involve an unknowable number of users all participating in the creation and dissemination of Deepfake videos.

5. Lawyers are not exactly safe from abuse

Parties to traditional defamation disputes usually see lawyers as disinterested actors. Online disputes involving anonymous users make no consideration for this and lawyers may be subject to personal attacks, doxing or defamatory comments.

6. Decision whether to file a claim entails new variables

Traditional claims for defamation require clients to act due to strict limitation dates (often plaintiffs must act, or not at all) and actions seek to force the defendant to apologize, remove content from their newspaper or magazine article. The difficulty faced by victims of Deepfake videos are that the material that they seek to remove may not be easily removed from the internet. Alternative steps may require plaintiffs to hire companies that specialize in removing content from the internet instead of using their resources in addressing their claim in court.

7. Don't forget about hyperlinks

Hyperlinks may be considered defamatory under Canadian law depending on the circumstances. The question to ask is whether if "read contextually, the text that includes the hyperlink constitutes adoption or endorsement of the specific content it links to."[13] If so, the posting of hyperlinks may be considered deflamatory.

8. Limitation periods may be variable

The usual limitation periods for a claim of defamation is two years from the date of publication. In a situation where the Deepfake video is published repeatedly in different websites, each publication may restart the clock on the limitation period.

Conclusion

This area of the law is ever changing. It is not a bad idea to update the lawyer's toolbox every few weeks. As always, the above information is meant for general knowledge. Please consult your legal counsel for any legal advice. P

1 IFP Editorial staff "Iraq Elections: Fake Sex Tapes Created to Taint Female Candidates" April 24, 2018, online: ifpnews.com/exclusive/iraq-elections-fake-sex-tapes-created-to-taint-female-candidates/

2 Bloomberg Editorial Board "The 'Deep Fake' Threat High-tech forged videos could wreak havoc on politics. Policy makers must be ready." June 13, 2018, online: bloomberg.com/view/articles/2018-06-13/the-deep-fake-video-threat/

3 CBS News "Expert warns of "terrifying" potential of digitally-altered video" Marche 12, 2018 online: cbsnews.com/news/experts-warn-of-digitally-altered-video-becoming-weaponized/

4 Will Knight "The US military is funding an effort to catch deepfakes and other AI trickery" May 23, 2018 online: technologyreview.com/s/611146/the-us-military-is-funding-an-effort-to-catch-deepfakes-and-other-ai-trickery/ see also: Meserole and Polyakova "The West is ill-prepared for the wave of "deep fakes" that artificial intelligence could unleash" May 25, 2018, online: brookings.edu/blog/order-from-chaos/2018/05/25/the-west-is-ill-prepared-for-the-wave-of-deep-fakes-that-artificial-intelligence-could-unleash/

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6 See New York State Bill A08155 "An Act to amend the civil rights law, in relation to the right of privacy and the right of publicity; and to amend the civil practice law and rules, in relation to the timeliness of commencement of an action for violation of the right of publicity" STATE OF NEW YORK, 8155—B, Cal. No. 586, 2017-2018 Regular Sessions, May 31, 2017.

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Cross-Border Profit Distribution of German Corporations

In two cases decided in December 2017, the European Court of Justice (ECJ) ruled that the German anti-treaty shopping rules violate European Union (EU) law.

In April 2018, the German Federal Ministry of Finance reacted and implemented the ruling of the court. The ruling has an impact on profit distributions of German corporations to foreign parent companies located in another EU country or within the scope of a directive.

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Treaty Shopping and Anti-Treaty Shopping Rules

The term "treaty shopping" (or directive shopping) originates from United States treaty law. It refers to tax structures implemented to benefit from tax relief under a treaty or benefits provided by a directive. The term "anti-treaty shopping rules" refers to national provisions by which the legislator seeks to avoid abusive treaty shopping.

Treaty shopping is particularly important in the context of reducing withholding tax. A taxpayer, who is not covered by the treaty, uses a corporation covered by the treaty and establishes it as an intermediate company. Foreign income goes directly to that intermediate company and only indirectly to the taxpayer not covered by the treaty. In this way, the taxpayer can benefit from the advantages granted by a double taxation treaty or a directive.

By Way of Illustration: German Company with a Foreign Parent

A German corporation distributes profits to its foreign parent. The domicile of that foreign parent is selected in a country where it profits from the advantages granted by a double taxation treaty and/or a directive. In this case, distributions by the German subsidiary to its parent are, in principle, exempted from capital gains tax. The shares in the foreign holding company are held by an individual not entitled to benefit from the advantages granted by the double taxation treaty or the directive. In the cases the ECJ had to decide in December 2017, the shares were held by individual residents in Germany and/or Singapore.

In the past, the German legislature has tried to prevent this practice.

According to the pertaining national legislation, the tax exemption and/or tax relief is therefore prohibited in case of abusive or merely artificial structures. This is aimed at preventing the abusive interposition of a foreign parent company. If the conditions of the respective national legislation are met, no relief from capital gains tax will be granted where the foreign parent's shareholders would not be entitled to similar benefits if they received the income directly.

ECJ Rules that German Anti-Treaty Shopping Rules Breach Union Law

These national rules of German tax law breach Union law, according to the ECJ ruling in the above referenced cases. However, said ruling was issued with respect to the previous national rules applying only to pre-2012 cases. The rules were revised effective January 1, 2012. A new case is presently pending before the ECJ for a ruling on the current version of the rules (Case number C 440/17).

Whether the ECJ will also overturn the current rules is still open. The judgment in this case is expected to be given in the near future. There is reason to assume that these rules will equally fail to meet the court's requirements and that the ECJ will find the rules inconsistent with EU law.

Breach of Parent-Subsidiary Directive of the EU Council of Ministers

The Parent-Subsidiary Directive was adopted in 1990 by the EU Council

of Ministers. It governs the taxation of profit distributions between companies of different EU member states. Its aim: removing multiple taxation of dividend distributions between related companies based in different EU member states. This is intended to help companies operate effectively within the EU.

Therefore, the directive abolishes withholding tax on distributions from a subsidiary based in one member state to its parent based in a different member state. The member states are permitted to establish national exceptions to this directive to prevent tax evasion and abuses. However, the respective rules must be proportionate and suitable to avoid tax evasion and abuses. The German rules did not meet these requirements. As a consequence, the court ruled that the German rules were incompatible with the Parent-Subsidiary Directive.

Restriction of Freedom of Establishment

The German rules also violate the freedom of establishment. The ECJ affirms an unequal treatment between a non-resident and a resident parent with respect to distributions from subsidiaries: Only in the first case (resident subsidiary distributes profits to non-resident parent) is the exemption from withholding tax dependent on additional requirements set out by national rules. According to the ECJ, this unequal treatment may, in principle, prevent a non-resident parent from operating through a subsidiary based in Germany. This entails a restriction of the freedom of establishment.

The Federal Republic of Germany asserted that this restriction of the freedom of establishment was justified. It was aimed at combatting tax evasion and circumvention and resulted in balanced allocation of the power of taxation between the EU member states. The ECJ did not accept this reasoning and criticized the specific provisions of the national legislation.

Federal Ministry of Finance Implements ECJ Ruling

In April 2018, the German Federal Ministry of Finance reacted to the ECJ judgment. Now, the following applies:

- The rules criticized by the court are no longer applied to pending cases involving applications for a refund or exemption from capital gains tax.
- For the time being, the current follow-up rules remain applicable with certain limitations.

Recommendation: Keep Rejection Decisions Against Refund of Withholding Tax Open

Applications for refunds or exemptions need to be newly evaluated against the background of the ECJ ruling and the reaction by the German Federal Ministry of Finance.

With respect to applications for refunds of, or exemptions from, withholding tax under the former legal situation (i.e., as of the 2007 assessment period), the following applies: To the extent that proceedings are still pending, a refund of withholding tax should be applied for. The Federal Central Tax Office will no longer reject such applications by making reference to the national anti-abuse provisions.

Concerning the respective applications as of the 2012 assessment period, the following applies: Until the ECJ ruling, rejection decisions against the refund of withholding tax should be challenged and kept open. P

The New Italian Code of Crisis and Insolvency: A First Glance

In the next few months, reform of the Italian bankruptcy law will be completed with the introduction of the new "Crisis and Insolvency Code" (hereinafter, the "Code"). This Code is composed of nine sections and 362 articles that organize the rules currently contained in the Italian bankruptcy law and the over-indebtedness law for individuals. The Code starts with the general principles of the crisis, then the so-called "minor" procedures, and finally the phase of the crisis which is still reversible until insolvency and judicial liquidation, which is considered the "extrema ratio."

The new Code will regulate in a comprehensive, singular and organic way, all aspects of crisis and insolvency, regardless of the legal nature of the debtor and the type of activity, thus regulating crisis situations affecting both individuals and legal entities.

The Code is inspired by the European legislation (see Commission No. 2014/135/EU, 12 March 2014 and Reg (EU) 2015/848, 20 May 2015 of the Parliament and the Council) and the principles of international commercial law elaborated by Uncitral on insolvency. Thus, the new Code may also be considered part of the evolution of legislation "from a law of morality to a law of continuity," where insolvency must represent a condition to which one should never arrive.

There are two general principles of the reform: the pursuit of the best satisfaction of creditors and the pursuit of business continuity to overcome the crisis. It is assumed that the timely disclosure of the crisis helps overcome the critical phase and is aimed at encouraging the instrument of the preliminary composition with all or part of the creditors. The liquidation procedure is an "extrema ratio" that can only be used if it turns out to be the most practical and profitable way to satisfy creditors.

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In an innovative way for the Italian legal system, the new Code introduces the ideas of alert and crisis. The alert procedure is introduced to promptly bring out the state of crisis. The state of crisis is defined as "probability of future insolvency." Insolvency is manifested by the lack of prospective cash flow to meet planned obligations.

The reform regulates:

- crisis composition bodies entrusted to face the first disclosure of the critical phases, new reporting charges (through new obligations for corporate bodies and individuals) and rewards measures linked to timely disclosures;
- turn-around plans, debt restructuring agreements, preliminary composition with creditors (with continuation of debtors' business or with liquidation), along with the related institutions of complaints, appeals and revocations and precautionary and protective measures; and
- over-indebtedness of individuals and small entrepreneurs, originally excluded from bankruptcy (the subject matter acquires new organic unity and autonomy, compared to what is previously stated by Law 3/2012).

Turnaround plans and arrangements, as well as debt restructuring agreements, are also detailed.

The preliminary composition with creditors becomes the main focus of the reform. In line with the general goal of preventing insolvency and crisis, it is detailed and directly disciplined without any reference to the previous bankruptcy law and without any point of contact with the previous bankruptcy composition agreement.

In its business continuity variant, the new institution can also be configured in the case of the so-called "indirect continuity." This means that the debtor company in operation can be ruled by an entity other than the original debtor, by virtue of assignment/usufruct/rent agreements stipulated even prior to the submission of the petition to the Court, as well as by virtue of transfer of the company to one or more companies, including new ones, or any other title.

It is no longer required that the composition proposal ensure the payment of at least 20 percent of the total amount of unsecured credits as in the current bankruptcy law.

In its liquidation variant, the preliminary composition with creditors must be characterized by a "contribution of external resources that increase appreciably the satisfaction of creditors" (where this measure is quantified as 10 percent).

Even in the liquidation hypothesis, the possibility of the business continuity is not excluded, on the condition that "...creditors shall be satisfied predominantly from the proceeds produced by direct or indirect business continuity, including the sale of the warehouse."

As for the judicial liquidation, the new Code provisions recall the contents of the current bankruptcy law and are maintained by the legislator as necessary institutions, notwithstanding the general principle that liquidation should have represented a marginal regime in the new Code reformation, because it is not aimed at business continuity. The main innovations are certainly those affecting the new judicial liquidation composition, which replaces the old bankruptcy composition with creditors and which may also be filed by petition of the debtor or companies belonging to the same group, "... after one year from the sentence that declared the opening of the judicial liquidation procedure ... ," however, "… only if it foresees the contribution of resources that increase the asset's value by at least 10 percent ... ."

The new Code also introduces provisions relating to the crisis of groups of companies. The clear aim of the reform is to enhance and safeguard a unified vision of the group, to deal more efficiently with the insolvency that involves an economically single enterprise compared to the good performance of the group. The resolution of the insolvency of the individual company must not only be faced in the logic of the business continuity, but also treated as part of the total group reorganization.

The new regulation sets the conditions of what happens to the various companies in crisis or those which are insolvent within a non-insolvent group. In the event of petition of preliminary composition with creditors involving a group of companies, the new Code provides for the unity of the court bodies with the appointment of a single delegated judge and a single judicial commissioner, as well as the possibility of filing a single and unitary resolution plan of the group crisis with a single expense fund. The group resolution plan may organize intra-group contractual and reorganization operations, which are functional to the business continuity of the single companies within the group and the better satisfaction of all creditors involved.

With regards to criminal procedures, the new Code considers the criminal cases that may be committed before the insolvency procedure and delineates their possible developments in light of the opening of the crisis and insolvency procedures. Those criminal offenses are the same that already characterize the current bankruptcy procedures.

In conclusion, at a first glance, the new Code is a commendable effort to reunite, unify and make homogeneous all bankruptcy matters. However, there are some flaws that could create problems. For example, the new Code lacks any reference to privileges, still regulated by the Italian civil code and other specific laws. Indeed, this represents the loss of a good opportunity to rationalize the matter of privileges, reducing its current plethora of law provisions providing for different type of privileges with several different ranks, and avoiding any uncontrolled proliferation.

In addition, it must be kept in mind that both the companies subject to special regulations and the large companies subject to extraordinary administration, are exempted from the general treatment provided by the new Code.

This means that crises involving banks, insurance and financial companies, as well as single large groups (like the well-known cases Parmalat and Alitalia), remain entrusted to other specific regulatory measures to adapt any crisis treatment to the features of such regulated companies and groups. P

Belgium: Delaware by the North Sea?

The Belgian legal system is in a phase of important transitions. Especially in various fields of business law, waves of new legislation show an intention to turn Belgium into a sort of Delaware by the North Sea.

After major changes in insolvency law, Belgian company law is next in line for an important make-over. These changes aim at offering entrepreneurs and investors the flexibility and legal certainty that some other countries offer, e.g., the 'Flex-BV' in the Netherlands, the "Limited" in Great Britain and, of course, the U.S. Delaware companies.

A draft bill was also submitted to Parliament to set up a specialized English-speaking court with jurisdiction over international commercial disputes – the Brussels International Business Court. This draft bill is clearly aimed at positioning Brussels as a new hub for such disputes.

Both topics will be discussed below.

1) The New Belgian Companies and Associations Code (BCAC)

The purpose of the BCAC is to modernize company law on the basis of three principles: (1) far-reaching simplification, (2) additional rights and flexibility and (3) reflect predominantly European evolutions and new trends.[1] The aim is to implement the BCAC January 1, 2019.

Registered Office Doctrine

The BCAC shall apply to legal entities with a registered office in Belgium.[2]

The Center of Main Interests (COMI) doctrine, applicable today, will only apply in view of insolvency law. This means that even though the official registered office does not correspond with the actual center of main interests, the official location of the registered office is decisive in determining the applicable rights and obligations (unless in case of insolvency).

As a consequence thereof, various provisions on liability were transferred from the BCAC to the insolvency act. Although limited in nature, directors' liability as provided in the Belgian insolvency act should therefore still be kept in mind, in spite of the fact that Belgian company law does not apply.

The New Belgian BV

The Private Limited Liability Company (BVBA) has been radically changed, made more flexible and will become the most important type of company in Belgium. By changing the name of this company to a BV, legislators hope to tag along with the success of the flex-BV in the Netherlands.

The most radical change is that the concept of registered capital will disappear. As a consequence thereof, the minimum capital requirement is replaced by the "sufficient initial capital." Founders must ensure that the company, upon its incorporation, has sufficient initial capital to support the intended activities.[3] Otherwise, their liability as a founder is at stake.

In addition, within the BV, it is possible to deviate from the general rule that each share entitles the holder to an equal share in the profit. It will thus be possible to allocate a greater amount of voting rights and a higher share of the profits to a certain number of shares. This way, the Belgian BV becomes more attractive for investments in start-ups.

Limitation Directors' Liability

A clear inspiration by Delaware General Corporation Law, is the possibility to limit director's liability by means of the so-called "cap."

The principle is simple and involves a quantitative limitation of liability. The restriction applies to every (daily) director, manager, member of a board of directors or supervisory board.

The "cap" is set in function of turnover and balance sheet total of the company (capped liability of 1 million EUR if turnover = 9 million EUR and balance sheet total = 4.5 million EUR).

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The liability cap is also a clear argument in view of attracting foreign investment.

2) Brussels International Business Court (BIBC)

Another bold initiative of the Belgian Government is a draft bill to set up a specialized English-speaking court with jurisdiction over international commercial disputes, called the Brussels International Business Court.[4] The aim is to have the BIBC up and running at the latest by January 1, 2019.

Brexit and turmoil in the field of international trade and commerce has inspired the Belgian legislator to position Brussels as a new hub for disputes concerning international commercial debts and resolution of international commercial disputes.

At the same time, the hope is that the BIBC will bridge the gap between Belgian state courts and (expensive) arbitration tribunals, by offering a hybrid type of forum where:

1) the working language is English (proceedings, awards, exhibits, etc.);
2) there is a high level of expertise: chambers of three judges, presided by a professional judge and two lay judges (appointed by the President of the BIBC from a panel of Belgian and international experts in international business law);
3) procedure will be based on the UNCITRAL Model Law on international arbitration, implying flexibility in organizing proceedings;
4) no (ordinary) appeal will be possible;
5) BIBC should be self-financing, implying substantial increase in court fees in comparison to the ordinary state courts and tribunals.

The BIBC will have jurisdiction over disputes between enterprises, whereby:

1) It concerns an "international" dispute, i.e.:
   - parties are established in different countries;
   - a substantial part of the obligations must be performed in a country different from the country where the parties are established;
   - applicable law is foreign.

   Furthermore, a language different from Dutch, French or German must have been the language frequently used between the parties.
2) Submission to the jurisdiction of the BIBC is voluntary, so the parties must have accepted it before or after the arising of the dispute.

Comments on the draft bill range from *"unconstitutional"* and *"PR stunt"* to *"brilliant"* and *"master-stroke."*

The BIBC will face various challenges. Some commentators criticize the introduction of a what they call a "Trojan horse" in the Belgian judicial landscape, which they fear will move our continental legal system in the direction of Anglo-Saxon law and create two classes of jurisprudence – a more expensive one with high-quality experts for international "high rollers," and the traditional one for the Belgian "commoners."

At ORYS Advocaten we believe that, although some of the concerns raised are legitimate, the BIBC may well turn out to be the type of forum that offers the best of both worlds.

On the one hand, it will be a forum equipped to successfully handle international disputes, as it will be staffed with expert judges and financed in such a way that it has access to all necessary tools and equipment. On the other hand, considering the BIBC is a state court, it will not lack the legitimacy that the general public is increasingly demanding from international jurisprudence and business in general (think about recent problems with the EU-Canada Comprehensive Economic and Trade Agreement and the Transatlantic Trade and Investment Partnership treaties in view of provisions on international investment arbitration).

If managed properly, the hybrid BIBC might prove to be a new model for the future.

Both the new Belgian Companies and Associations Code and the Brussels International Business Court, are important legislative initiatives that have the makings to profoundly alter the business and investment climate in Belgium. Although the legislative process is not yet finished, and a number of issues will need to be resolved, these initiatives should be applauded, as they demonstrate a real desire to show the world that Belgium is open for business. P

1 Draft bill re. Introduction of the Belgian Companies and Associations Code and containing various provisions, *Parl.Doc.* Chamber of Representatives 2017-2018, nr. 3119/001, 7-8.

2 Art. 2:139 Draft bill.

3 WYCKAERT, M. en VAN BAELEN, B., "Wie is er bang van de kapitaalloze BV?", in WYCKAERT, M. (ed.), *Vennootschapsrecht (THEMIS)*, Brugge, Die Keure, 2017-2018, 37.

4 Draft bill re Founding of the Brussels International Business Court, *Parl.Doc.* Chamber of Representatives 2017-2018, nr. 3072/001, 1-260.

The Shipper Pays Twice

A multi-link chain of subcontracting, where the shipper concludes a contract with one carrier, and the transport services are performed by a second or even a third subcontracted carrier, is a widely spread situation in the Spanish market of transport services.

The Law of Land Transport in Spain was amended in 2013. The introduction of the so-called right to "direct claim" was one of the most important changes for the carriers. The carriers were waiting for this amendment for a long time, and the shippers did not want to put up with it at all. The "direct claim" is intended to ensure – or at least to increase the chances of – the final carrier in the subcontracting chain (the one who performed the transportation with the help of its own infrastructure) receives the payment for services provided.

For that purpose, the legislature decided to grant the final carrier the right to claim not only against the shipper, but also against any of the carriers precedent in the subcontracting chain. Although it's been five years since the reform came into effect, due to the multiple questions of interpretation that arose, the consolidation of the amendment has begun recently – namely, when this rule began to be applied in judicial practice.

1. The Shipper as a Guarantor of Payment

In 2017, the Spanish Supreme Court finally clarified one of the most important aspects of the interpretation of this rule: the court concluded that the shipper was not exempt from liability to the final carrier by meeting his payment obligations to the intermediate carrier.

In accordance with this interpretation, payment of the services of the first carrier does not relieve the consignor of the obligation to pay for the services of the third carriers that were subcontracted. Moreover, such payment is not even partially taken into account. Thus, in practice, this means that the shipper may be required to pay twice, acting as a kind of "guarantor" for the payment of the services of the ultimate carrier who carried out the transportation.

It is important to note that this regulation is imperative, which means that the exclusion of its application by the parties does not have legal force and would be declared invalid by the court. Therefore, we recommend that, in order to avoid unpleasant surprises, consignors and carriers involved include in the contract a prohibiting subcontracting clause. Thus, they will be able to avoid the possible position of the "guarantor" of obligations to third carriers in the contractual chain.

Unfortunately, a number of issues still have not received concrete, consistent interpretations from the Spanish courts. In particular, there are still several issues important for the practical effectiveness of the regulation, such as the statute of limitations and the impact of the bankruptcy procedure of the intermediate carrier that seem to be insufficiently defined.

2. Application of Statutory Limitations Period

Regarding the statutory limitations period, first of all, it should be noted that the Law of Land Transport does not contain a statute of limitations. Consequently, there are doubts as to whether the statute of limitations established in the Law on the Contract for Transport Services or the general provisions contained in the Civil Code should apply.

At the moment, most of the judicial practice tends to the interpretation that the right of "direct claim" is not an independent substantive right, but only a procedural tool, and, therefore, the rules applicable to all other claims arising from the contract for transportation services should apply. Though, it is paradoxical: after all, there are no contractual relations between the final carrier and the consignor.

The Law on the Contract for Transport Services establishes the limitation period of one year. The clock is ticking the countdown "after three months from the date of the

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conclusion of the contract or from the moment when the claim could be presented if such an opportunity comes later."

While the term of 15 months from the date of the conclusion of the agreement does not raise doubts, it is not so clear when the "opportunity of claim" arises: from the moment an outstanding invoice hasn't been paid or from the declaration of the bankruptcy of the intermediate carrier?

What if the shipper was a debtor to the intermediate carrier, who, at the same time, started the process of bankruptcy? Would the court accept the direct claim in this case? Would the payment of the services by the shipper to the first carrier have a different treatment if it was made in frames of the process of bankruptcy? The law is silent on this.

3. Intermediate Carrier's Bankruptcy

Nevertheless, until now, it has not been clear how the intermediate carrier's bankruptcy process affects the possibility of a direct claim by the final carrier. We can see two scenarios here:

1. A consignor who has fulfilled its obligations to the first carrier.
2. The consignor-debtor who has not paid for the services of the first carrier.

If the shipper has fulfilled its payment obligations to the intermediate carrier, which subsequently began the bankruptcy process, the success of the direct claim is beyond doubt. In this case, the claim against the consignor is based solely on its role as a "guarantor" to the final carrier, in accordance with the aforementioned interpretation of the Supreme Court, and has no binding to the bankruptcy estate.

However, many questions arise from the situation where the shipper did not fulfill the payment obligations to the intermediate carrier. In this case, his debt should be considered a receivable in the bankruptcy estate, and, in accordance with the principle of *par conditio creditorum*, all creditors of the intermediate carrier (including the final carrier) must be in equal conditions and can make claims only in the bankruptcy proceedings, but not outside it.

In connection with the above, most national courts continue to deny the admission of direct claims if the bankruptcy procedure has already been commenced, or to suspend the consideration of direct claims admitted before the intermediary carrier begins bankruptcy proceedings until its completion.

In our opinion, this practice should soon change, as it runs counter to the interpretation proposed by the Supreme Court. We find it difficult to justify the restriction of the right of direct claim by the presence of the shipper's receivables, since, if the "guarantor" is required to pay twice, it can equally be obliged both to pay off the debt in the bankruptcy proceedings (thus avoiding the violation of the principle of equality of creditors) and to fulfill its obligations of the "guarantor" to the final carrier.

Nevertheless, the regional courts have not yet adapted their practice to the new interpretation suggested by the Supreme Court, which may lead to the following tricky situation: an intermediate carrier that fails to fulfill the payment obligations begins a bankruptcy procedure. In this regard, the court does not admit the direct claim of the final carrier against the shipper-debtor while the bankruptcy proceedings are pending. Meanwhile, the limitation period is not suspended and expires before the bankruptcy proceedings are finalized. As a result, the final carrier loses its right to direct action.

Based on this situation, we can conclude that the final carrier should not postpone the filing of a direct claim. In the context of uncertainty of judicial practice, it is better to hurry up and file the direct claim, preventing the possible commencement of bankruptcy proceedings (in the worst case, the consideration of the claim will be suspended) than being late with the filing. In most cases, the bankruptcy procedure lasts much longer than the statute of limitations of the direct claim; that's why the final carrier risks losing his right to claim the payment of the provided services directly from the shipper. P

Franchise, Distribution and Agency in Europe

There are several options to expand your business in the Netherlands or Europe. For example, you can incorporate a Dutch legal entity (see our article in *The Primerus Paradigm*, Fall 2016, for more information). Another way to enter the Dutch market is to appoint a local European distributor, agent or franchisee. They have the knowledge of the local market and customs that could jump-start your business. It will allow manufacturers to do what they are good at: producing products and upholding the good reputation of the brand. Especially, if you want to do business abroad, the local knowledge of agents, distributors and franchisees can be beneficial.

In this article, we will discuss the differences between and advantages of distribution, franchise and agency in the Netherlands, a country providing access to all European markets. We will deal with important issues, such as the termination of the contracts and liability resulting from these contracts. We will also take a closer look at several hot topics, including pricing arrangements and online sales (geo-blocking).

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Appointing a Distributor, Agent or European Franchisee

Distributor agreements

A distributor is a separate entity buying goods or services from the foreign entrepreneur and selling them at its own risk to clients throughout Europe or in a specific European country (e.g., the Netherlands). The foreign entrepreneur will only have to agree upon a distribution agreement with the distributor but doesn't need a subsidiary in the Netherlands or any other European country. However, by selling products to a distributor, your business may be liable to tax in the Netherlands. Then you will have to register with the Tax and Customs Administration. Entry in the Commercial Register is not required.

There is ample freedom in concluding these agreements. There are no specific legal regulations for distributor agreements in the Netherlands. However, there are restrictions as to price fixing (see next page). Specific rules for termination of these agreements are based on case law. In principle, no compensation is due, but often a notice period will apply.

Agency agreements

Foreign business owners can also choose to appoint an agent (a corporate or natural person). This agent will mediate between the foreign company and possible new clients in the Netherlands and Europe and conclude contracts on behalf of the client (principal). The entrepreneurial risk will, therefore, remain with your own company. The agent will normally receive a commission for each new client he gains for the entrepreneur. You may agree that the agent will guarantee that customers he or she brought will pay their bills. You can thus prevent the agent from bringing insolvent customers in order to receive a higher commission.

If the entrepreneur agrees with the new client, there will be a written contract between these parties. If your business is liable to tax in the Netherlands, you will have to register with the Tax and Customs Administration. Entry in the Commercial Register is not required.

The Dutch Civil Code contains specific rules for the termination of agency agreements. Thus often goodwill compensation will have to be paid for customers the agent has brought. An agent may also be considered as an employee – if the work performed is sufficiently independent – in such cases the rules of Dutch dismissal law will apply.

Franchise agreements

Lastly, you can choose a franchise agreement with a European-based company. This company or franchisee will be allowed to use the formula, logo and knowledge of the foreign franchisor to sell products or services. The foreign entrepreneur will receive compensation

from the Dutch or European company, which also bears the economic risks. In franchising, the business owner (franchisee) concludes an agreement with the owner of a trade formula (franchisor). This type of agreement is not provided for by legislation. You don't need to have a company in the Netherlands, but if you want to start a chain of stores it will be more practical to establish a Dutch branch. That way you will have more control of your brand.

There is a European code of conduct regarding franchising and also a Dutch Franchise Code; both have no legal status but are self-regulatory within the industry. They define which information the franchisor and franchisee have to provide to each other before the conclusion of a franchise agreement. The codes also provide franchisees with the right of consent regarding decisions of the franchisor that may impact their businesses, and it is laid down that franchisors and franchisees have to make arrangements about online sales. However, nothing is provided as to the content of these arrangements.

Hot Topics

E-commerce

Buying and selling products and services over the internet is increasingly important. This e-commerce also has consequences for the way a foreign company can do business in Europe, especially if it has already appointed a European distributor, agent or franchisee. Under Dutch law, the manufacturer is allowed to sell its products in the market of the distributor, agent or franchisee. However, manufacturers, distributors, franchisees or agents can make other arrangements in their contracts, for example, agreeing that a manufacturer is not allowed to actively sell products in the agreed upon territory.

In the distribution agreement, parties can agree that distributors, franchisees or agents are not allowed to start an online shop to sell the products of the manufacturer or only under certain conditions. A typical condition is that distributors, franchisees or agents should take technical precautions so that active sale of products outside the agreed upon territory is prevented.

Geo-blocking

After December 3, 2018, it will no longer be allowed to prevent the sale of products to persons in other European Union (EU) member states (geo-blocking). However, delivery abroad may be prohibited, so customers will have to pick up their products. This is another move forward toward a "Digital Single Market," free movement in e-commerce, without borders. Geo-blocking does not apply to:

- copyright protected products, such as e-books, music and films;
- financial and audio-visual services;
- transport and healthcare services; or
- social services.

Pricing arrangements

Distribution agreements often contain arrangements about the price the distributor has to pay for the purchase of the products or services of the supplier. These arrangements are not unlawful pricing agreements and, therefore, can be made.

Sometimes supplier and distributor or franchisee also make arrangements regarding the resale price. This is the price at which the distributors or franchisees sell their products or services to their buyers. For arrangements regarding the resale price, strict requirements are in place. The supplier is allowed to impose a maximum resale price or give a recommended price for resale. However, arrangements made on minimum prices or fixed resale prices are considered to be unlawful pricing agreements.

Conclusion

There are many options to sell your products in the Netherlands and the EU without you having to take all risks in an unknown market and culture. Distribution, franchise or agency agreements may be especially good alternatives to establishing a company in the EU. P

Workplace 4.0 in the Digital Era

Laptops, smartphones, Bluetooth and online services have fundamentally changed the world of work. While Austrian legislature has traditionally attempted to balance the needs of the employee with the wishes of the employer, this balance is being tipped to one side as a result of increasing digitalization.

The expectation of a person's constant ability to be contacted, presence on social media, or the quantity of data that companies hold are all at odds with leisure time, privacy and data protection.

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However, does increasing digitalization not have some advantages, too? Mobile working leads to increased flexibility and can – if time is divided appropriately – create a better quality of life for employees. Always being reachable via mobile phone and email can indeed increase stress levels, but it can also create greater efficiency and quicker results, which can in turn lead to increased customer satisfaction and personal success.

In this regard, it is important to seek a sustainable balance, in both human and economic terms, between the desire for maximum profits and the protection of employees' rights. As a result of the shifting of boundaries, or work/life blending, some situations are now far removed from those covered by traditional employment law. For example, a model of employment, such as "crowd working," could undermine the protection of employees and social security. In addition, digitalization goes hand-in-hand with new ways to keep an eye on employees, which raises several issues in terms of the protection of employees' data.

The contradictory nature of new technologies is especially exemplified by mobile working. On the one hand, it provides the employee with a new kind of flexibility in terms of how to use their time, but on the other, there is the risk that the employee's private life will clash with ever-growing professional demands. This often leads to an increase in mental stress, and, consequently, illness. Often, a person's private life and professional life cross over without the person realizing. According to a new survey, more than two-thirds of employees are reachable during their leisure time, and around 50 percent check and draft professional emails in their free time, "because it is expected." New stresses, such as "fomo" (fear of missing out), are cropping up because many people are afraid of missing something important on social media.

In any case, it is certain that the onward march of digitalization will make its mark on every single person's workspace in the near future. From a positive perspective, digital working materials offer people the option of mobile working, at flexible times – which generally benefits a person's work/life balance.

However, it is not only the upcoming generations that need to be prepared for this new "freedom," which needs to be secured with clear guidelines: a large proportion of today's workforce will also need to prepare themselves for it. Namely, it is important to note that employees more and more are taking on the role of "employee entrepreneurs" (aka, "entreployees" from the German *Arbeitskraftunternehmer*), under the strapline of alleged autonomy. The "subjectification of work" means that everyone is expected to carry out the best work they can. Employees are supposed to steer work processes themselves, determine what their work consists of, plan their own working hours, divide up their workplaces and the necessary resources, or even make decisions on necessary collaboration. Often, instructions are only given when objectives are being agreed on. These processes would not be possible without the use of mobile digital techniques. They go hand-in-hand with flexibility,

but also the acknowledgement that the effort employees are required to put in at work according to labor law is being increasingly superseded by objectives and "success."

In the world of work 4.0, training is of great importance, and, as a result, employees should make use of it. This is particularly the case given the increase in the use of digital and automated techniques to replace human labor. According to current studies, the risk of being replaced by a computer is at its most acute for manufacturing jobs. However, employees will remain irreplaceable in the future for any job that needs creativity, innovation and a human touch. In all these areas – no matter if someone is a teacher, a chef, an architect, a healthcare worker or anything else – coming to grips with new technologies and being trained in IT skills and IT security will be key to ensuring that a person has choice in the market and can do a satisfying job.

However, training should also take place in terms of personal organization. It is fair, and in the interests of everyone in the long term, that employees are aware of what the digital world of work has to offer. This also includes learning techniques that can consciously be used to ensure distance in negotiations, when drawing up contracts, and in daily life, given the breaking-down of boundaries as described above. Even some of our clients are companies who have deliberately taken a step back from digitalization to ensure long-term happiness in the workplace, and who promote this approach.

In addition to the de facto obligation of the employer to protect its employees, it will also be the duty of legislators to take into account the rapid changes of the digital, mobile world of work when drafting employment law. Areas of law such as the Working Time Act, the Labor Constitution Act or the Equality Act need to be updated. Ensure that you are ready to meet the legal challenges posed by the world of work 4.0.

Electronic Payment Schemes in Brazil: A Legal Perspective

Introduction

Electronic payment schemes are system platforms which enable the electronic settlement of payments through electronic channels (i.e., credit cards), and are booming in Brazilian financial markets after being regulated by Federal Law No. 12.865, dated October 9, 2013.

The settlement of electronic payment schemes is not a prerogative of financial institutions. Any corporation can settle such schemes, provided they comply with regulations issued by Central Bank of Brazil (BACEN).

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Electronic payment schemes cannot collect funding from the general public as regular financial institutions are allowed to. In addition, electronic payment schemes have limited permission to use the clients' funding. They are only allowed to invest such funding in federal bonds and coordinate the custody of the funds.

Electronic payments activity should not be confused with cryptocurrencies such as Bitcoin. Unlike cryptocurrencies, electronic currency is backed up in Brazilian official currency Real (R$).

Federal Law No. 12.865/2013, was further regulated by BACEN, which issued specific regulations on the matter: (i) Circular No. 3.680/2013 (e-wallets); (ii) 3.681/2013 (risk assessment criteria); (iii) 3.682/2013 (payment's arrangement); and (iv) 3.885/2013 (payment institution).

BACEN's regulations segregate the players in this market in: (i) payment arrangements settlor; and (ii) payment institution.

Payment Arrangements

A payment arrangement is a system which operates a commercial transaction payment clearing platform. Payment arrangements dictate electronic purchaser-to-merchant payments, debiting the payer's account with immediate transfer to the receiver.

On a traditional electronic payment model transaction, the payment arrangements are known by brand (i.e., Visa and Mastercard). The brands' systems operate payment and as part of the business model, guarantee the payments to the sellers.

BACEN regulations have provided for two different payment schemes: (i) closed (three points), when the arrangement settlor acts as a third-party intermediary between the cardholder and the merchant; and (ii) open (five points), when the arrangement settlor hires a third player (payment institution) as intermediary between payers and receivers.

The number of participants in an open payment arrangement, generally, is five, which are: merchants (receivers), acquirers, brands, issuers and the cardholders. In addition to the main five members of the payment arrangement, two more players can be included in the flow. In the relationship between issuer and the cardholder, it is possible to have a retailer or any other company with a high capillarity structure to act as a payment's card issuer. The relationship between acquirer and merchants can be incremented with the inclusion of a subacquirer with a higher capillarity or a better technology to offer, such as the Payment Service Provider (PSP), Independent Sale Organization (ISO) and Value Added Reseller (VAR).

Payment arrangements can operate payments domestically or cross-border, depending the territory of the transaction or card (local or international).

The payment arrangement can be purchase oriented if the payment scheme liquidates purchase transactions (i.e., Mastercard and Visa), or it can also be settled to operate cash transfers (i.e., PayPal).

The payment arrangement can be (i) without a specific purpose, when the payment is allowed in different merchants with no corporate or brand connection (i.e., Visa and Mastercard); or (ii) with a specific purpose, when the payment is allowed only

in a specific company/service and those with the same visual identity (i.e., store's gift card, franchising and public services).

Payment arrangement can establish a: (i) pre-paid payment's account (i.e., pre-paid cards); (ii) postpaid payment's account (i.e., credit cards); (iii) prompt deposit account (i.e., debit card); or (iv) episodic relationship, situation in which a payment flows through one system on behalf of another market player.

BACEN regulates the activities of the payment arrangements operating in Brazilian territory, and the following arrangements are exempted from BACEN previous authorization to operate: (i) with a limited purpose; and (ii) those in which the players, jointly, reach a total payment flow less than R$ 500 million or a number up to 25 million transactions, both accumulated in the last 12 months.

Payment Institution

Payment institution is the player integrating one or more payment arrangements, which has as its main or secondary activity, alternative or cumulatively: a) services of allocation and withdrawal of the funds maintained in a payment's account; b) execution or providing tolls to increase the payment service more efficiently, including the transfer of funds from or to a payment's account; c) management of payment's account; d) payment's instrument issues; e) registration of payment instrument's acceptance; f) fund remittances; g) exchange of physical currency into an electronic coin, and vice-versa, registration and management of the electronic coin transaction; h) other activities allowed by BACEN.

BACEN classifies the payment institutions in three models: (i) electronic coin issuer or pre-paid issuer, whose activity is to manage the receiver user's account and then exchange the funds into electronic coin, used to make pre-paid payments. (ii) postpaid payment's instrument issuer, whose activity is to manage the receiver's account and to offer the possibility of postpaid payments to the payer; and (iii) acquirer, whose activity is not user's account management, but registration of merchants to accept a specific payment method and also liquidate the payments as a creditor against the card issuer.

Payment institutions are regulated by BACEN, but BACEN's previous authorization to operate is needed when the total payment flow exceeds R$ 500 million within 12 months, or the amount of R$ 50 million in escrow funds into the pre-paid payment's accounts. It mitigates the systemic risk and encourages new players to enter into this commercial market, boosting competition and diversification.

Some payment institutions act as e-wallet managers. Their activity is basically the coordination of the custody of their clients' funds and provision of the electronically efficient transfers. Transactions are processed electronically by accessing a website or mobile app.

A very important aspect of the acceptance of e-wallets in Brazil is that the clients' funds be segregated from assets and liabilities of the payment institutions' assets and therefore not subject to the credit risk of the payment institution, including bankruptcy and corporate reorganization.

The Future of Electronic Payment Methods

Electronic payment methods have dramatically improved in Brazil after Federal Law No. 12.865/2013 and the regulation issued by BACEN. Such legal and regulatory framework has increased the safety of transactions and enhanced competition in the Brazilian financial market.

Brazil has developed a state-of-the-art regulation, updated from time to time, combining legal safety to players and users, without prejudice to innovation of new services and the inclusion of new players in the market.

Recently, BACEN has regulated the incorporation and activities of Direct Credit Companies, allowing smaller structured companies such as Fintechs to act in the credit market, including the financing of final users' assets of the payment institutions. In addition, crowd funding companies were also allowed to operate through electronic platforms, subject to BACEN's overview.

BACEN's objective is to open the electronic market to as many players as possible. According to the regulator, the development of this market in Brazil will cause the inclusion of a significant part of the population and will increase the competition in the financial market, which is highly concentrated.

From our point of view, these governmental initiatives will cause the growth of this market in a dynamic and safe environment. P

Colombian Corporate Governance Rules in the OECD's Era

On May 30, 2018, in Paris, Angel Gurría, as Secretary-General of the Organization of Economic Co-operation and Development (OECD), and Juan Manuel Santos, as Colombian President, signed an agreement that made Colombia the 37th member of this organization. These signatures represented the end of a path initiated on June 25, 2013.

In order for Colombia to be accepted as a permanent member of the OECD, it was necessary, in addition to the adoption of the International Financial Reporting Standards back in 2009, to fulfill the so-called "roadmap" issued on September 29, 2013. The objective of this document, which contained recommendations of each of the 23 OECD's committees, was to assure the other members of Colombia's compliance to OECD standards, through changes to its public policies, when necessary.

Within the recommendations of the committees in the so-called Corporate Governance in Colombia issued back in 2017 are some recommendations regarding the adoption of measures, for both public and listed companies, to guarantee the applicability of corporate law best practices, observing the five principles included in the "G20/OECD Principles of Corporate Governance."

According to these principles, the main recommendations for Colombia were:

1. assure the existence and maintenance of a regulatory framework that guarantees the protection of shareholders rights, both minor and foreign shareholders, and the equalitarian treatment;

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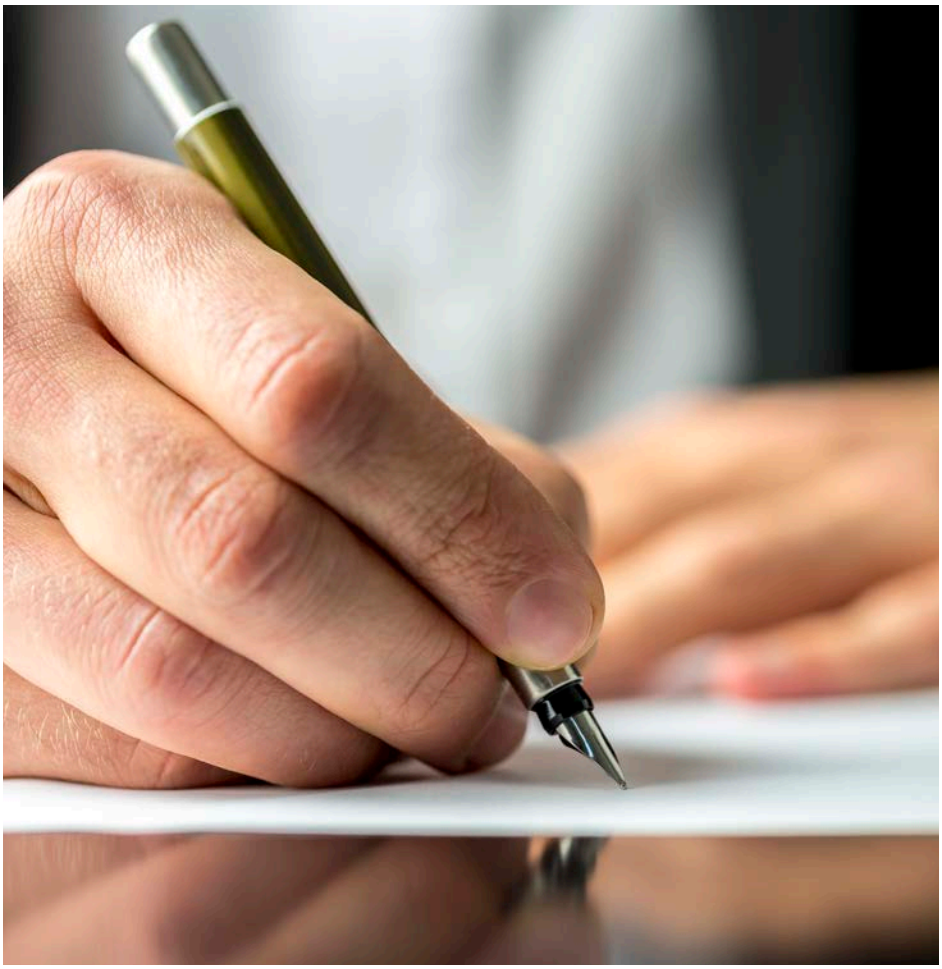

2. information transparency according to the International Financial Reporting Standards;
3. establish the effective separation of the state roles as regulator, in the first place, and shareholder in the second, especially in the field of market regulation and state-owned companies;
4. assure a competitive environment where public and private companies can interact without market distortions; and
5. acknowledge and enforce the duties and rights of the stakeholders considered in the Colombian provisions, as well as the duties and responsibilities of the members of the board of directors.

On a more specific level, there are additional recommendations including:

1. the Colombian legal framework should enhance fair and transparent markets, with an efficient resources allocation;
2. strengthening the basis for the promotion of transparent markets is necessary;
3. allowing the minority shareholders effective participation in the shareholders meeting and in its decisions should be an objective of the legal framework;
4. eliminating the alternate directors system is desirable;
5. increasing transparency information regarding company directors, including, for example, both their employments and the participation in other boards of directors should be pursued;
6. Colombian government should approve provisions to grant regulatory powers to the Financial Superintendence, over holding companies of financial conglomerates; and
7. in order to secure a different treatment in the roles of both regulator and shareholder of the state, in public companies, removing the ministers of the public companies' boards of directors is necessary.

Given the importance that the Colombian government gave to the possibility of entering the OECD as a permanent member, some changes have been included in local legislation as part of the effort to comply with the recommendations listed above. Some of the most important initiatives were:

1. The adoption of the "Colombian Best Practices Code," through the approval of the "Circular Externa," September 28, 2014, issued by the financial superintendence. This code is generally applicable to listed companies.

   The code, based on the principle of "comply or explain," contains 33 measures with more than 148 recommendations on subjects such as:

   - rights and equalitarian treatment to shareholders;
   - shareholders assembly, functions and participation of shareholders;
   - board of directors – duties, responsibilities, compensation etc.;
   - control architecture; and
   - information transparency – financial and non-financial.

   Within the changes incorporated in this version of the code, with respect to the one approved back in 2007, are:

   - board of director dynamics;
   - internal control and risk management;
   - board of directors' and administrators' differences and compensation; and
   - corporate law recommendations for financial sector companies and financial conglomerates.
2. The issuance of the general policy of the state-owned companies through the approval of the CONPES 3851 of November 23, 2015, by the national Council for Economic and Social Policy. The scope of this initiative is to enhance the corporate law standards applicable to state-owned companies to guarantee a more effective approach of the board of directors.

   This provision seeks to avoid an interference between the public shareholder and the board of directors in the field of company activities.

   Additionally, based on this policy, it also issued the Decree 1411 of 2017, which created an inter-sectorial commission for the use of public Assets, CAPP, so called after the Spanish initials.
3. Finally, in 2017, Law 1870 was issued, in order to strengthen the mechanisms of supervision of financial institutions and financial conglomerates. This law included rules related to:

   - adequate capital requirements for financial conglomerates;
   - establishing the criteria to assess if a third party makes up part of a financial conglomerate and/or it is linked to the financial holding;
   - creating new limits, or updating existing ones, regarding risk exposition and concentration;
   - attribute new functions to the financial superintendence to execute comprehensive and consolidated supervision of the financial conglomerates with the idea of identifying the beneficial owner in the center of the regulation.

The OECD found the actions implemented by the Colombian government satisfactory to assure, among other things, compliance with the corporate governance standards and, as a result, Colombia is now a permanent member of the organization. The challenge for the country is to continue with this effort in order to create a strong legal framework that allows stakeholders protection of their interests in a fair market.

Cross-Border Non-Disclosure Agreements: How Enforceable?

In March 2018, the *Washington Post* reported senior White House staff signed confidentiality agreements stipulating that officials could face monetary penalties if they disclosed confidential White House information to the press or others and that these were intended to remain in effect after the current President is no longer in office. A draft copy of the agreement would have subjected violators to penalties of $10 million, payable to the federal government for each and any unauthorized revelation of "confidential" information.

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This is perhaps the latest high-profile example of the widespread use of a non-disclosure agreement (NDA), including for business, personal and other purposes.

This article highlights some of the issues in the enforceability across borders of breaches of NDAs. The first part will consider the ability to impose "penalties" for breaches of NDAs and how (as an example) that is treated under Australian law. The second part will outline some of the available remedies for breaches of NDAs, weighing up whether parties in their NDAs should provide for resort to Court or arbitral enforcement. The third part of this article will examine the ability to enforce foreign judgments relating to breaches of NDAs and outline practical considerations for interested parties. With the size of transnational trade and a push for transparency in international commercial transactions, it is more important than ever to get your NDA right.

Penalty or Liquidated Damages?

Under both U.S. and Australian law, this distinction is important, as in both jurisdictions a provision in a contract which seeks to impose a penalty upon a contracting party is unenforceable. Generally, a contractual requirement for the wrongdoer to pay more than compensation (or a genuine estimate of compensation) in the event of their breach, will be a penalty.

The relevant law in Australia can be summarized as follows:[1]

- genuine pre-agreed pre-estimates of loss for breach are prima facie enforceable as claims for liquidated damages whereas penalty clauses are void or unenforceable leaving claimants to rely on proof of actual damages;
- whether a clause is a penalty or not is a question of legal construction as at the contract date (not the date of breach) and the parties' private intentions are not relevant; and
- agreed damages provisions are prima facie effective, and the onus is on the promisor to establish that the clause is a penalty.

In Australia whether a clause is to be categorized as a penalty or as a genuine pre-estimate of damages is a test "of degree and would depend on a number of circumstances" including:

- any degree of disproportion between the agreed sum and the loss likely to be suffered by the claimant, that is, how "oppressive" is the clause on the party in breach; and
- the nature of the relationship between the parties becomes relevant with regard to the unconscionability of the claimant in seeking to enforce the clause.

If determined by the courts to be "extravagant," "unconscionable" or "exorbitant" in amount in comparison with the *greatest* loss that could be conceivably proved, the agreed sum would likely in Australia be a penalty.

While the treatment of liquidated damages varies among different state jurisdictions within the U.S., the U.S. courts generally consider at least two elements:

- whether the harm caused by any breach is difficult to calculate; and
- whether the amount of liquidated damages is reasonable in proportion to actual or anticipated harm.

If not, it is a penalty which is against public policy and therefore the clause is unenforceable.

Remedies and Enforcement

Remedies for a breach of an NDA include either:

- injunctive relief, desirable in cases of anticipatory breaches or to prevent future breaches; or
- damages, or recovery of a genuine pre-estimate of damages, where there has been an actual breach.

The decision of where to seek enforcement of these remedies is an important business and strategic consideration. First, the party seeking to enforce the NDA must decide in what country they will seek enforcement. While this is intrinsically related to the express law governing the contract, and any choice of venue clause, it may be subject to a forum non conveniens challenge, which allows courts to dismiss a case where another court, or forum, is much better suited to hear the case. Second, any enforcement through the courts immediately brings the breach into the public realm. Third, where a remedy is granted in one jurisdiction, there is no guarantee that it will be recognized or enforced in another, that is, if damages are awarded by a court in the U.S., there is no guarantee that an Australian Court would enforce that judgment (and vice versa).

Enforcement of Foreign Judgments

While obtaining a judgment in your favor for breach of an NDA is a step in the right direction, it is not necessarily the full solution for all relevant jurisdictions. This hinges on the enforceability of foreign judgments in domestic jurisdictions. For example, in Australia the statutory regime for the recognition and enforcement of certain foreign court judgments is under the *Foreign Judgments Act 1991* (Cth) (FJA). Notably however, there is no general statutory mutual enforcement between the U.S. and Australia. When seeking to enforce a U.S. Court judgment in Australia claimants must resort to the common law principles for enforcement.

In short, four conditions must be satisfied for a foreign judgment to be recognised and enforced in Australia as common law:

- the foreign court must have exercised an 'international' jurisdiction that Australian courts recognize;
- the judgment must be final and conclusive;
- the parties must be the same; and
- the judgment must be for a fixed sum (although certain non-money judgments may be enforceable in equity).

Arbitration

Interestingly, while there is a gap between the U.S. and some countries including Australia in statutory enforcement of court judgments, due to the operation of the New York Convention, to which the U.S. is a signatory, there is far wider recognition of arbitral awards including between the U.S. and Australia. Between signatory countries, a foreign court is obliged to recognize the award, except in certain circumstances. Accordingly, for a cross-border situation, it may be advantageous to consider arbitration as a dispute resolution mechanism.

Conclusion

It is clear that it is of increasing importance to consider the practical enforceability of cross-border NDAs. We must not forget that ultimately remedies and enforcement vary from jurisdiction to jurisdiction. An analysis of each relevant jurisdiction is appropriate. P

1 *Dunlop Pneumatic Tyre v. New Garage & Motor Co Ltd* [1915] UKHL 1 (Lord Dunedin).

The New Amendment to the Taiwan Labor Standard Act

On January 10, 2018, the Legislative Yuan, ROC, Taiwan passed an amendment of the Labor Standard Act (LSA). The amendment provides flexibility to the employer regarding four areas of employment law, including overtime, shifts, annual leaves and fixed off-days. The amendment went into effect on March 1, 2018. The Ministry of Labor then made several administrative rules to further illustrate application of the new LSA. This article summarizes the key points of the amendment, as well as looks at the important administrative rules of relevant issues.

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Overtime

Regarding the regulation of work overtime, the employer can now raise the monthly maximum overtime under certain conditions. The amendment of Paragraph 2 of Article 32 of the LSA allows a business to raise the monthly maximum overtime from the original limit of 46 hours for an employee to 54 hours, upon obtaining the consent of the labor union or consent through a meeting between the employer and employee. The total overtime hours for three months remains no more than 138 hours. This relaxation of the restriction on maximum overtime hours should be communicated to the local competent authority for recording if the business has more than 30 employees.

In addition, overtime hours and payment for attendance on a rest day are now calculated on the basis of actual work time. The old LSA favored the employee in overtime hours and payment for attendance on a rest day. According to the old rules, the employee's attending hours of work on a rest day were measured in a way that any hours less than four hours were calculated as four hours; any hours more than four hours but less than eight hours were calculated as eight hours; and any hours more than eight hours but less than 12 hours were calculated as 12 hours. The amendment of Article 24 of the LSA removed the provision of the old Paragraph 3, stating that the employee's attendance on a rest day should be measured by the actual time of work on that day, which is also the new way applicable to the summation of overtime hours under Paragraph 2 of Article 32 of the LSA.

According to Article 32-1 of the LSA, when an employer extends the work in accordance with Paragraphs 1 and 2 of Article 32, the employer shall calculate the hours of compensatory leave based on the hours of work performed, as the employee chooses to take compensatory leave with the consent of the employer. However, whether the compensatory leave paid by the employer should be included in the average salary calculation remained a question. The Ministry of Labor on June 21, 2018, issued Lao-Dong-Tiou 2 Zi No. 1070130882 letter, stating that the average salary is calculated by the total amount of salary paid in the six months prior to the calculating-base day, divided by the days of work subject to Paragraph 1 of Article 32-1 of the LSA. As a result, whether the compensatory leave paid by the employer should be included in the average salary calculation depends on whether such compensatory leave has taken place in the six months prior to the calculating-base day.

Shifts

Regarding the regulation of shifts, the rest time between each shift shall be 11 hours so the employee can get enough rest. The amendment of Article 34 of the LSA maintains that the rest time between

each shift shall be 11 hours. However, the new law sets forth an exception, allowing the business to change the rest time by no less than a consecutive eight hours upon obtaining the consent of the labor union or consent through a meeting between the employer and employee. This relaxation of the restriction on the maximum overtime hours should be communicated to the local competent authority for recording if the business has more than 30 employees. According to "Labor Standard Act Practice FAQ" issued by the Ministry of Labor on March 5, 2018, the situation in Article 34 refers to enterprises adopting the "shift system" of labor and is limited to the situation when there is a change in work shifts. For example, in the situation that the previous shift is the early shift, and the next shift is replaced by the noon shift. This Article does not apply to the "non-shift system" or the shift system without changing the shift.

Annual Leaves

With respect to annual leaves, if the employee has any untaken annual leaves by the end of the year, or by the termination of the employment for whatever reason, the employer shall monetize it and make the payment of salary. However, the amendment of Paragraph 4 of Article 38 of the LSA allows the employer and the employee to carry forward the untaken annual leaves to the following year by negotiation, and temporarily halts monetizing it into salary. Whether the employer can defer annual leaves without the agreement of the employee is unknown. The Ministry of Labor on April 11, 2018 issued Lao-Dong-Tiou 2 Zi No. 1070130382 letter, stating that the matter of deferring annual leaves may be determined by negotiation and discussion between the employer and the employee. However, such deferring of annual leaves should not be made without mutual consent of the employee and the employer. It is illegal for the employer to unilaterally defer annual leaves to the next year without the approval of the employee.

Arbitration

As for the fixed off-day, the old law provided the employee with one fixed off-day and one rest day per week. In other words, the employer cannot have the employee work consecutively for more than six days, in absence of any legitimate cause. The new law relaxes these restrictions. The amendment of Paragraphs 4 and 5 of Article 36 of the LSA affords the employer adopting the flexible work time on the basis of four weeks, the leeway to move the fixed off-day in the period of seven days subject to the following three criteria:

1. the business is the specific occupation as stipulated by the Ministry of Labor subject to the approval of the competent authority governing the industry in the central government;
2. the adjustment to the fixed off-day requires the consent of the labor union. If the business does not have a labor union, then consent by a meeting between the employer and employee is required; and
3. an employer with more than 30 employees shall notify the local competent authority for recording.

Conclusion

In conclusion, the new amendment to the Taiwan LSA has opened a new chapter of the law regarding the fundamental protection of employee rights with respect to overtime, shifts, annual leaves and fixed off-days. Due to its detailed and complicated legislative language, the amendment inevitably leads to some questions from the practical perspective. As a result, further elaborations and interpretations are expected to fill the gap of this part of law in the future.

Personal Data Protection in Malaysia

The Malaysia Personal Data Protection Act 2010 (PDPA 2010) was enacted and came into effect on June 10, 2010, to protect the rights of anyone who shares or provides personal information to an organization (data subjects). In short, PDPA 2010 governs the relationship between the data user/data processor and the data subject. Under PDPA 2010, a data user/data processor is defined as a person or organization who processes the data. Section 2 of the PDPA provides that it is applicable to a person who processes, controls or authorizes the processing of any personal data in respect of commercial transaction. Under Section 4 of the PDPA 2010, personal data is defined as any information in commercial transactions that relates directly or indirectly to a data subject/individual.

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Requirements Under PDPA 2010[1]

PDPA 2010 embraces the following principles:

1. General Principle[2]

Consent is the backbone of this principle. Generally, a data user cannot process personal data about the subject without his or her consent.[3] This means that if the data subject or anyone subscribes to the data provider, then the data provider must get the consent from the data subject first. However, the law does provide certain exceptions[4] where consents are not necessary. The exceptions are described under section 6 (a) to 6 (f) of the PDPA 2010.

2. Notice and Choice Principle[5]

In addition, the data user must also comply with the Notice and Choice Principle. Under this principle, notice is the elemental backbone. A data user must inform the data subject by written notice as outlined in Section 7 of the PDPA 2010 on several matters, such as the purpose for which the personal data is being used. The notice must be given as soon as practical as stated in Section 7(2) of the PDPA 2010. The notice must be either in Malay or English, and the data subject must be given clear and readily accessible means to exercise his choice.[6]

3. Disclosure Principle[7]

Subject to Section 39 of the PDPA 2010, personal data cannot be disclosed for any purpose other than the purpose for which the personal data was to be disclosed at the time of its collection. Furthermore, personal data cannot be disclosed for any other purpose than the one directly related to the purpose aforementioned.[8] Personal data also cannot be disclosed to any party other than a third party of the class of third parties under PDPA 2010.[9]

4. Security Principle[10]

The security principle addresses the responsibility of the data user to take care of the personal data of the data subject. A data user must take practical steps to protect the personal data from any loss, misuse, modification, unauthorized or accidental access or disclosure, alteration or destruction. The data user shall also ensure that the data processor provides sufficient guarantees in respect to the technical and organizational security measures on how the data processing is to be carried out and take reasonable steps to ensure compliance with those measures.[11]

5. Retention Principle

PDPA 2010 provides that the personal data processed for any purpose shall not be kept longer than is necessary for the fulfilment of that purpose.[12] Also, when the personal data is no longer required for the purpose for which it was to be processed, the data user shall take every reasonable step to ensure that all personal data is destroyed or permanently deleted.[13]

6. Data Integrity Principle[14]

Under this principle, a data user shall take reasonable steps to ensure that the personal data is accurate, complete, up-to-date and not misleading by having regard to the purpose, including any directly related purpose, for which the personal data was collected and further processed.

7. Access Principle[15]

This principle requires that a data subject shall be given access to his personal data held by a data user and he must be able

to correct that personal data where the personal data is inaccurate, incomplete, misleading or not up-to-date, except where compliance with a request to such access or correction is refused under this Act.

Non-Compliance with the PDPA 2010

Non-compliance by a data user of any of the principles constitutes an offense under the PDPA and is liable to a fine not exceeding 300,000 Ringgit Malaysia (RM300,000.00) or imprisonment for a term not exceeding two years or both.[16]

Malaysia's PDPA 2010 and European Union's Global Data Protection Regulation

The main difference between these two laws is the interpretation of the word "personal data," where under Global Data Protection Regulation (GDPR) it is described as any information relating to an identified or identifiable natural person. Meanwhile, PDPA 2010 confines 'personal data' to any information in respect of commercial transactions.[18] The other distinction between the PDPA 2010 and GDPR is on the exemption. PDPA 2010 specifically listed the exemptions under Section 45 of the PDPA 2010, including prevention or detection of crime or for the purpose of investigations, apprehension or prosecution of offenders and the assessment or collection of any tax or duty or any other imposition of a similar nature. Meanwhile, in Chapter 9 of the GDPR, it provides for provisions relating to specific processing situations including freedom of expression, public access to official documents, public interest and processing data in context of employment. PDPA 2010 is only applicable in Malaysia, while GDPR provides protection to European Union (EU) citizens no matter where their data travels.[19] Any company, anywhere, that has a database that includes EU citizens is bound by its rules. The last difference between these two laws is on the penalty imposed. A fine not exceeding 300,000 Ringgit Malaysia (RM300,000.00) or imprisonment for a term not exceeding two years or both will be imposed in case of not complying with PDPA 2010, while breaches to GDPR can cost companies up to 20 million Euros or up to 4 percent of the breacher's annual global turnover.[20]

Conclusion

The enforcement of the PDPA 2010 indicates that Malaysia is serious in protecting personal data. Non-compliance with the principles listed under PDPA 2010 will cause the data provider to face the penalty imposed under the PDPA 2010. Even though the penalty imposed by the PDPA 2010 is far lower than the one imposed by GDPR, Malaysia is on the right track toward protecting the personal data of the data subject. It changes the landscape of data protection in Malaysia, with respect to the confidentiality of the data. P

1 Section 5 of the PDPA 2010
2 Section 6 of the PDPA 2010
3 Section 6(1) of the PDPA 2010
4 Section 6(2) of the PDPA 2010
5 Section 7 of the PDPA 2010
6 Section 7(3) of the PDPA 2010
7 Section 8 of the PDPA 2010
8 Section 8(a) of the PDPA 2010
9 Section 8(b) of the PDPA 2010
10 Section 9 of the PDPA 2010
11 Section 9 (2) (a), (b) of the PDPA 2010
12 Section 10 (1) of the PDPA 2010
13 Section 10 (2) of the PDPA 2010
14 Section 11 of the PDPA 2010
15 Section 12 of the PDPA 2010
16 Section 5(2) of the PDPA 2010
17 Article 4 of the GDPR
18 Section 4 of the PDPA 2010
19 Article 3 of the GDPR
20 Article 83 of the GDPR

Primerus Fights Hunger

Primerus is coming together – locally and globally – to fight hunger.

Why hunger?

Consider these statistics: In 2016, 815 million people, or 11 percent of the world's population, were hungry – up 38 million from the previous year. This marked the first increase in global hunger after more than a decade of decline. Also consider that $75 USD will provide a family with one United Nations World Food Programme food box, containing food for a family for an entire month and $15 USD gives a one-month supply of food to a hungry child.

Why Primerus?

Primerus is founded on the Six Pillars – the six values that every Primerus member commits to following in their daily practice of law. The sixth pillar is community service. Primerus firms around the world have always committed tremendous time and resources to giving back to their communities. In 2017, a group of Primerus members set out to organize an effort that would allow Primerus firms to unite in their community service efforts by combating hunger locally and globally. Primerus has also created a Community Service Board to coordinate the society's community service efforts into the future.

According to John Y. Pearce of Primerus member firm Gordon Arata Montgomery Barnett in New Orleans, Louisiana, the Primerus Fights Hunger initiative was created with the hope of bringing the global family of Primerus together under the purpose of community service.

"Primerus Fights Hunger is a platform within the Primerus membership to create a collective, in addition to an individual, approach to community service," he said. "It focuses the attention of our members to assist others with need, who because of their circumstances might not be able to help themselves."

The hope is that by partnering together, Primerus firms will be able to "build on the works of individual members in an effort to identify and impact in a more meaningful way a common international need," Pearce said.

His firm is participating, and he urges all Primerus firms to do the same.

What can firms do?

Primerus invites member firms to do two things:

- **Organize a local food drive.** Already, firms in many cities have embraced this effort, donating many pounds of food to local non-profit organizations.
- **Support global hunger assistance.** Commit to making a contribution to the United Nation's World Food Programme equivalent to the cost of least one billable hour.

Primerus members also may join the effort at the 2018 Primerus Global Conference in Boston by attending the two-hour volunteer activity packing and sorting food at the Greater Boston Food Bank. This will be the first time Primerus members from around the world have gathered for a joint community service project.

What can clients do?

We invite interested clients to join the Primerus Fights Hunger effort by making a contribution to the United Nation's World Food Programme. P

To learn more, visit primerus.com and click on Fight Hunger.

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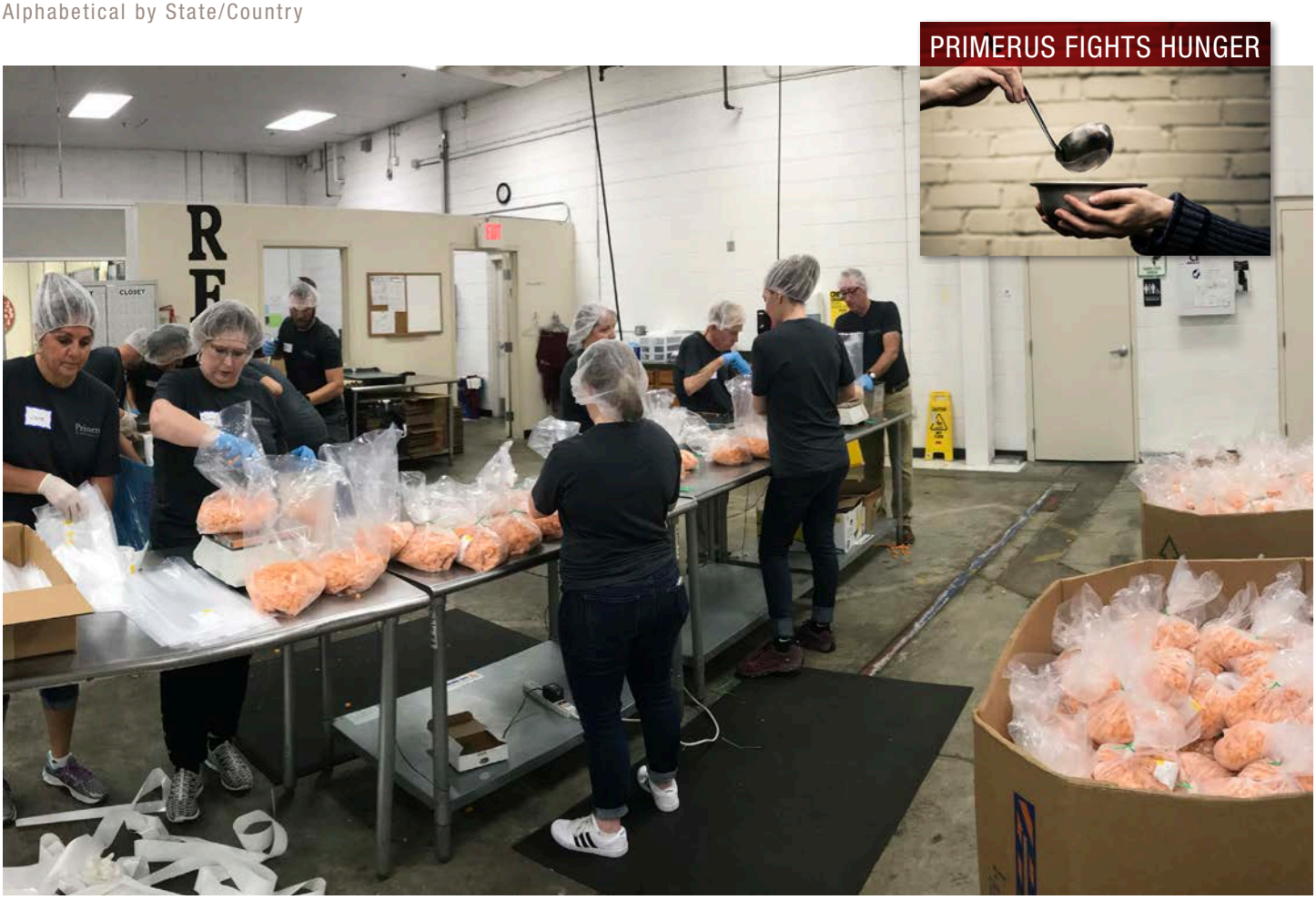

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Primerus Business Law Institute (PBLI)

Goodman Allen Donnelly in Virginia

2018 Law Firm Locations – International Society of Primerus Law Firms

United States

Alabama
Arizona
California
Colorado
Connecticut
Delaware
District of Columbia
Florida
Georgia
Hawaii
Idaho
Illinois
Indiana
Kansas
Kentucky
Louisiana
Maine
Maryland
Massachusetts
Michigan
Minnesota
Missouri
Montana
Nevada
New Jersey
New Mexico
New York
North Carolina
Ohio
Oklahoma
Oregon
Pennsylvania
Rhode Island
South Carolina
Tennessee
Texas
Utah
Vermont
Virginia
Washington
West Virginia
Wisconsin
Wyoming

Argentina
Australia
Austria
Belgium
Belize
Brazil
British Virgin Islands
Canada
Cayman Islands
Chile
China
Colombia
Costa Rica
Croatia
Cuba
Cyprus
Denmark
Dominican Republic
France
Germany
Honduras
Hong Kong
Hungary
Italy
Kenya
Malaysia
Mexico
Netherlands
Nicaragua
Nigeria
Panama
Perú
Puerto Rico
Singapore
Spain
Sweden
Switzerland
Taiwan R.O.C.
Turkey
Ukraine
United Kingdom

2018-2019 Calendar of Events

Scan to learn more about Primerus.

September 25-26, 2018
2018 HADA Seminar and Golf Outing
Colorado Springs, Colorado
Primerus will be an exhibitor.

October 17-21, 2018
Primerus Global Conference
Boston, Massachusetts

October 21-24, 2018
Association of Corporate Counsel Annual Meeting
Austin, Texas
Primerus will be an exhibitor and corporate sponsor.

November 8-9, 2018
Primerus Defense Institute Fall Seminar
Chicago, Illinois

January 24-25, 2019
Primerus U.S. Southeast/South Central Regional Meeting
Birmingham, Alabama

January 30, 2019
Primerus Europe, Middle East & Africa/ Association of Corporate Counsel Europe Seminar
Brussels, Belgium

February 21-22, 2019
Primerus Defense Institute Transportation Seminar
Austin, Texas

February 27-March 3, 2019
Primerus Plaintiff Personal Injury Institute Winter Conference
La Romana, Dominican Republic

March 13-15, 2019
Primerus Young Lawyers Section Conference
Denver, Colorado

April 4-7, 2019
Primerus Defense Institute Convocation
Boca Raton, Florida

May 2-4, 2019
Primerus International Convocation
Miami, Florida

May 12-14, 2019
Association of Corporate Counsel Europe Annual Meeting
Edinburgh, Scotland
Primerus will be an exhibitor and corporate sponsor.

June 20, 2019
Primerus U.S. Western Regional Meeting
Boise, Idaho

June 27, 2019
Primerus U.S. Midwest Regional Meeting
Louisville, Kentucky

October 9-12, 2019
Primerus Global Conference
San Diego, California

October 27-30, 2019
Association of Corporate Counsel Annual Meeting
Phoenix, Arizona
Primerus will be an exhibitor and corporate sponsor.

There are other events for 2019 still being planned which do not appear on this list. For updates please visit the Primerus events calendar at primerus.com/events.

For additional information, please contact Chad Sluss, Senior Vice President of Services, at 800.968.2211 or csluss@primerus.com.

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