SPOTLIGHT

Global FSDR and Investigations Briefing

October 2013

Articles from:

- France
- Germany
- Hong Kong
- Italy
- Ireland
- The Middle East
- The Netherlands
- Spain
- Switzerland
- The United Kingdom

Leading the way

The information you need in a complex world

EVERSHEDS

NEXT

Welcome to our new look quarterly briefing in which we seek to draw together issues of interest to our clients across our global network. Our team has over 275 lawyers worldwide working on financial institutions disputes, investigations, regulatory work and corporate defence and our aim is to bring you the highlights from some of those jurisdictions each quarter, drawing on our deep well of cross border experience and know-how. We hope you find these articles interesting, and thought provoking.

If you have any questions please do not hesitate to contact me, or one of our global key contacts.

Matthew Allen
Head of Global FSDR
and Investigations

CONTENTS

FRANCE

Banks' obligations in the fight against money laundering	3
Green light for class action under French Law	5

GERMANY

Embezzlement under Sec. 266 of the German Criminal Code	7

HONG KONG

What can businesses really expect from Hong Kong's competition law?	9
Use of personal data in Hong Kong	11

ITALY

Legislative changes introduced by the Italian 'Decreto del Fare' during the Summer	12
New rules implemented in Italy to push companies to privacy compliance	14

IRELAND

Central Bank (Supervision and Enforcement Act 2013)	15
Revised Code of Conduct for mortgage arrears	17
KBC Bank Ireland plc -v- BCM Hanby Wallace, Supreme Court, 25 July 2013	20
Commercial mediation – regulation at last – is this where we want to be?	23

THE MIDDLE EAST

Unilateral Jurisdiction Clauses	25
Enforcement of DIFC judgements outside of Dubai and the UAE	28

THE NETHERLANDS

Settlement of mass damages in The Netherlands	30
Proposal to modernise the Netherlands Arbitration Act submitted to Parliament	31

SPAIN

New challenges for banks in foreclosure proceedings	33
Current banking litigation themes	35

SWITZERLAND

Private bribery soon to be more severely punished in Switzerland?	37
Attachments under Swiss law: prohibition of 'investigative attachments' or 'fishing expeditions'	39

THE UNITED KINGDOM

Right to borrow not an 'asset' for the purposes of standard Commercial Court freezing order	41
Enforceability of refund guarantees by the English courts: when is a demand under a refund guarantee (performance bond) invalid?	43
Duties and liabilities of an agent to lenders	45

FRA

FRANCE

Banks' obligations in the fight against money laundering

France has recently seen many legal and regulatory changes[1] in its fight against money laundering. These changes have sought to strengthen the numerous existing obligations that are already imposed on French banks. A summary of the key changes is set out below.

1. APPOINTMENT OF PERMANENT REPRESENTATIVE

One of the main changes in France relates to payment and electronic money institutions which (a) have their registered offices in a member state of the European Union or in a state that is a party to the Agreement on the European Economic Area, and (b) use the services of an agent or a distributor. As of 9 May 2013, such institutions are required to appoint a 'Permanent Representative' residing in France if one of the following conditions is met[2]:

i. the annual volume of activity is above three million Euros

ii. the annual amount of the electronic money put into circulation is above five million Euros

iii. when these thresholds are not reached, if required by the French Prudential Supervisory Authority ('Autorité de Contrôle Prudentiel') following shortcomings in the application in France of the measures in the fight against money laundering and terrorist financing.

The Permanent Representative is responsible for the proper application of measures to combat money laundering and terrorist financing. The Permanent Representative also has responsibility for declaring suspicions [of money laundering and terrorist financing] to TRACFIN[3].

The payment and electronic money institutions referred to above had three months, starting from 8 May 2013, to appoint a Permanent Representative.

1 In application of the French Statute Law No 2013-100 of 28 January 2013, which adapts French legislation to European Union Law evolutions

2 Article D. 561-3-1 of the French Monetary and Financial Code, Decree No 2013-384 of 7 May 2013

3 The French agency part of the Ministry of Economy and Finance, in charge of the fight against money laundering

FRA

2. DISCLOSURE REQUIREMENTS TO TRACFIN

French banks, payment and money institutions, and electronic money institutions which (a) have their registered office in a member state of the European Union or in a state that is a party to the European Economic Area Agreement, and (b) use the services of an agent or a distributor, have a new extended obligation to declare to TRACFIN information relating to operations of fund transfers operated by means of cash or electronic money [4].

The information communicated to TRACFIN shall only contain factual and objective information such as information relating to the identification of the client or the characteristics of the operation and shall not constitute a declaration of suspicion (which may be communicated to TRACFIN separately).

The notion of "operations of fund transfers by means of cash or electronic money" will necessarily have to be clarified since this notion is very broad and inaccurate.

The thresholds which have been set and from which the information has necessarily to be communicated to TRACFIN are relatively low and shall consequently capture a large number of operations. The thresholds are:

i. 1,000 Euros per operation

ii. 2,000 Euros cumulated per client in one calendar month[5].

The communication of information to TRACFIN has to be made by electronic means within a time limit of 30 days following the month in which the operation has been paid.

These new obligations are applicable from 1 October 2013 for the threshold of 1,000 Euros, and 1 April 2014 for the threshold of 2,000 Euros.

For further information, please contact your usual Eversheds contact or:

Rémi Kleiman
Partner
+ 33 1 55 73 40 00
remikleiman@eversheds.com

4 Article L. 561-15-1 of the French Monetary and Financial Code

5 Article D. 561-31-1 of the French Monetary and Financial Code, Decree No 2013-385 of 7 May 2013

FRA

Green light for class action under French Law

After many decades of heated doctrinal discussions, class actions are about to be introduced under French law.

In May 2013, a government bill relating to consumer law was adopted by the French Council of Ministers. The government bill was debated in the French *Assemblée Nationale* in June 2013 and was adopted at first reading. The bill, after few amendments, was also adopted at first reading by the French Sénat on 13 September 2013.

At this stage, the outlines of the class actions under French law shall be as follows.

1. THE SCOPE OF THE FRENCH CLASS ACTIONS

1.1. A class action shall be introduced only by an authorised representative consumer association before the civil courts. Initially, the government bill provided that class actions had to be brought before eight 'Tribunaux de Grande Instance' (Civil Courts) specially designated. However, this proposition has been amended by the Senate and all French 'Tribunaux de Grande Instance' shall have jurisdiction to hear class actions.

1.2. The consumer association can only bring an action in order to obtain compensation for individual damages suffered by consumers placed in a similar situation, because of a breach committed by the same professional of its legal and contractual obligations in respect of:

i. the sale of goods or provision of services

ii. when these damages are the result of anti-competitive practices.

The French *Sénat* has specified that a class action can only seek compensation for pecuniary damages resulting from material damage suffered by the consumers.

FRA

2. THE PROCEDURAL STAGES OF FRENCH CLASS ACTIONS

2.1. Mediation

Before any court action, the consumer association may participate in a mediation with the possibility to obtain the homologation of the agreement by the judge.

2.2. Liability judgement

The judge rules on the professional's liability regarding the individual case presented by the association. The judge defines the consumers concerned and the damage suffered by each of them and sets the time limit in which the consumers may adhere to the group composed for the class action.

2.3. Liquidation of damages and enforcement

In case of difficulties arising during the procedure between the association, the professional or the consumers, the judge may rule on these difficulties during the group adhesion process or during the liquidation of the damages.

2.4. Simplified class action

A simplified class action has been proposed by the French Assemblée Nationale. This is applied where the identity and the number of affected consumers is known and where the consumers have all suffered the same amount of damages. In this case, the judge, after having ruled on the professional's liability, may order the professional to pay consumers directly and individually, within a time limit and conditions set by the judge.

3. THE WEAKNESSES OF THE FRENCH CLASS ACTIONS

The main weakness of the French class actions is that only authorised consumer associations can bring the action, despite the propositions made by the French Bar Representative Institutions.

The damages covered are also relatively limited since damages linked to health or food products are excluded from the scope of the French class actions.

For further information, please contact your usual Eversheds contact or:

Rémi Kleiman
Partner
+ 33 1 55 73 40 00
remikleiman@eversheds.com

GER

GERMANY

Embezzlement under Sec. 266 of the German Criminal Code

The German Federal Supreme Court (Bundesgerichtshof, BGH) has acquitted managing directors charged with embezzlement under Sec. 266 of the German Criminal Code (Strafgesetzbuch, StGB). The Court stated that the offence of embezzlement with regard to risky transaction requires proof of an intent to materialise a contemplated risk (decision dated 28 May 2013 – 5 StR 551/11).

FACTS OF THE CASE AND DECISION

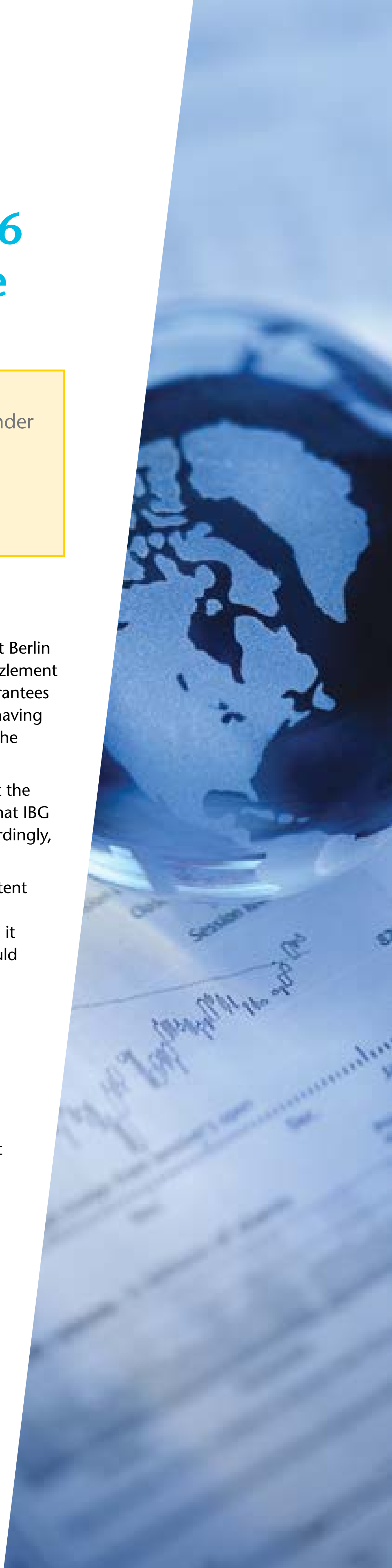
Two managing directors of Immobilien- und Baumanagement der Bankgesellschaft Berlin GmbH ("IBG") and other decision makers of the company were accused of embezzlement under Sec. 266 StGB. IBG had set up two real estate funds and took over rent guarantees for a period of 25 years. The public prosecutor's office accused the defendants of having acted in breach of duty when entering into such long-term rent guarantees since the defendants had known that the rent guarantees would result in losses.

The Berlin Regional Court acquitted the defendants finding that the defendants, at the time when they entered into the rent guarantees, did not contemplate or realise that IBG would face the risk of bankruptcy as a result of entering into these contracts. Accordingly, the requisite criminal intent under Sec. 266 of StGB was not satisfied.

The BGH confirmed the decision of the Regional Court finding that the criminal intent required to prove a charge under Sec. 266 requires that a defendant must have intended or deliberately accepted to cause detriment to the company by exposing it to specified risks. It is not sufficient that the defendant knew that the company could potentially be exposed to some risk, since risk taking forms an integral part of a market economy.

In the current case, the defendants had not been aware of the extent of the risks resulting from the rent guarantees because neither IGB's internal risk department nor the internal or external auditors considered that the existence of IBG could be threatened by IBG entering into the rent guarantees.

In addition, the defendants attempted to mitigate IBG's risk exposure through preventative measures, in particular by two capital increases and the establishment of a risk control function.



PRACTICAL NOTE

Managers regularly have to make their decisions, balancing entrepreneurial chances and risks. They make forward-looking decisions based on plans and forecasts. Under German Civil Law, this fact is taken into account and the managers are granted a scope of decision-making within which liability is excluded and for which, following the US example, the term 'business judgement rule' has become widely used in Germany. A dutiful business judgement by managers of German companies presupposes that they gather sufficient information, have no conflict of interests and can trust that they act in the best interests of the company.

Both from a civil and criminal law point of view, it is thus recommended that managers document their decisions. In particular with respect to risky transactions, they should document the reasons for their decisions, including any cost benefit analysis demonstrating the projected benefit to the company from the proposed transaction. In addition, managers may also consider implementing risk control and monitoring procedures in place to mitigate against any potential adverse effects, which has been recognised as a mitigating factor in the current decision.

For further information, please contact your usual Eversheds contact or:

Carola Rathke
Partner
+49 40 80 80 94 200
carola.rathke@eversheds.de

HKG

HONG KONG

What can businesses really expect from Hong Kong's competition law?

The Competition Ordinance (the Ordinance), Hong Kong's first cross-sector competition law, was passed on 14 June 2012 and is being implemented in phases. The Ordinance will be supplemented by various guidelines, drafts of which are expected to be published by the Competition Commission (CC) in late 2014 for public consultation. Businesses will need to be compliant with the Ordinance after its full implementation, which is not expected until mid 2015.

The Ordinance is modelled closely on the competition regime that operates in the European Union with some deviations to cater for the local market economy. Merger control will only apply to holders of carrier licences under the Telecommunications Ordinance in Hong Kong.

THE FIRST CONDUCT RULE

The First Conduct Rule prohibits competitors from entering into an agreement or engaging in a concerted practice that has the object or effect of preventing, restricting or distorting competition in Hong Kong. Businesses should be particularly concerned about 'serious anti-competitive conduct', eg price-fixing, bid-rigging, market sharing and restriction of output. These are generally understood as anti-competitive activities that almost always have an adverse impact on competition and will not fall under the general exclusions available under the Ordinance.

The CC may issue a block exemption order for vertical agreements subject to conditions, but application of the First Conduct Rule is expected to have limited application in this context, eg where (i) suppliers with substantial market power are involved; or (ii) supply agreements are entered into between competitors.

THE SECOND CONDUCT RULE

The Second Conduct Rule prohibits businesses with substantial market power from abusing it by engaging in conduct with the object or effect of restricting competition. Under the 'substantial market power' test, a business with a market share below 25% is not expected to be caught by the Second Conduct Rule. Compared to other competition jurisdictions, such as the European Union, the People's Republic of China and Singapore which adopt the 'dominant position' test, the threshold in Hong Kong is much lower. This is intended to cater for the small and geographically concentrated economy in Hong Kong, where many sectors are oligopolistic with two or three major players whose conduct could have a substantial effect on competition but none of them would be considered 'dominant'.

EXTRA-TERRITORIAL EFFECT

The Ordinance applies regardless of where the anti-competitive conduct takes place or where the undertakings may be located, so long as the infringement has the prohibited effect in Hong Kong. That said, the extra-territorial investigation and enforcement by the CC and the Competition Tribunal (CT) may pose some serious challenges.

THE INSTITUTIONS

The Competition Commission – the CC is a well-funded and professional institution with wide investigation powers (including the power to require production of documents, persons to attend interviews and to conduct 'dawn raids' authorised by court warrants). It is expected to have a strong consumer agenda. The CC will act as a prosecutor and will refer cases to the CT to impose sanctions.

The Competition Tribunal – the CT takes on an adjudicative function. If (on application by the CC), it decides that there has been an infringement of the Ordinance, it may impose sanctions, including pecuniary penalties capped at 10% of the relevant undertaking's annual local turnover for up to three years and director disqualification orders. Following the determination of a contravention of a Conduct Rule by the CT, victim(s) of anti-competitive conduct may bring a follow-on action against the infringer for damages. However, the Ordinance has expressly ruled out stand-alone private actions.

LENIENCY

The Ordinance provides for a leniency regime. Details as to how it is expected to operate will be set out in guidelines to be published by the CC.

Leniency provides for immunity or reductions in fines for people coming forward with information about cartel conduct. As evidenced in Europe, this is potentially a very powerful enforcement tool because it breaks down trust between cartelists – how do you know if one of your competitors has not reported the cartel to the CC in exchange for immunity? As engaging in cartel activities is not a criminal offence under the Ordinance, there is scope for businesses who are committed to putting a stop to ongoing cartel activities to seek leniency from the CC without having to worry about attaching criminal liability to its directors or staff.

WHAT TO EXPECT IN THE EARLY DAYS OF IMPLEMENTATION?

The CC is expected to exercise its powers robustly even in its early days. If it is slow to act, scepticism among the general public that the CC is too close to the business sector may arise, and cast doubt on its determination to tackle anti-competitive behaviour in Hong Kong. Lessons can be learned from the UK, Singapore and Australia, where quick action was taken at the start of the new regime to tackle cartels.

Sectors that are likely to be targeted include construction, property development, supermarkets, food and beverages.

RECOMMENDATIONS TO BUSINESSES

This significant piece of legislation will have an impact from the start on the day-to-day trading activities and strategic commercial decision making of nearly all businesses in Hong Kong. Companies are recommended to take an active role to consider how the Ordinance and the guidelines (when they are issued) may affect them as the full implementation commencement date approaches.

Steps to be taken include:

- watching carefully for the scope of any exemptions and for consultations on the draft guidelines of (block) exemptions and leniency
- identifying areas of the business where competition risks are likely to arise
- conducting detailed reviews of the company's agreements and identifying conduct that should be changed for compliance
- rolling out high-level training to management and employees, especially drawing their attention to the fact that any discussions or arrangement with competitors will be closely scrutinised for compliance under the new law and past-business practices may no longer be permitted
- developing a competition compliance policy or updating it if one already exists
- modifying any relevant business practices and structures, eg monitoring participation in trade or industry associations which provide a forum where inappropriate discussions can take place.

By considering in advance where potential competition risks lie and preparing for compliance with the new law, businesses will be able to stay 'competitive' without falling into any pitfalls under the new Hong Kong regime.

For further information, please contact your usual Eversheds contact or:

Mark Yeadon
Partner
+852 2186 3225
markyeadon@eversheds.com

HKG

Use of personal data in Hong Kong

On 1 April 2013, the provisions of the Personal Data (Privacy) (Amendment) Ordinance 2012 (the Amendment Ordinance) came into force in Hong Kong, introducing various amendments to the existing legislation, the Personal Data (Privacy) Ordinance. The provisions in the Amendment Ordinance relate to the use of personal data for direct marketing.

The key amendments introduced by the Amendment Ordinance are as follows:

- Data users must take specified action before using personal data for direct marketing purposes (including informing the data subject of how their personal data will be used and providing them with a means to object to such use).
- Data users must not use or provide personal data to others for direct marketing purposes without gaining the data subject's consent or indication of no objection.
- Data users must notify data subjects when using their personal data for direct marketing for the first time.
- Data subjects may require the data user to cease using their personal data or providing such personal data to others for direct marketing purposes.

Failure to comply with some or all of the above requirements can result in severe penalties being imposed on the data user, including large fines and even imprisonment in certain circumstances.

As a business, the key change to note from these amendments is that if you are obtaining an individual's personal data within Hong Kong and intend to use it in direct marketing (either for your own purposes or to pass to a third party for direct marketing purposes), you must inform the data subject of how their personal data will be used and actively obtain their consent (or express notification of no objection) in respect of such use.

The consent (or notification of no objection) must be expressed, informed and freely given – lack of objection through no response, for example, would not be considered sufficient to constitute consent (or notification of no objection) for the purposes of the amended Personal Data (Privacy) Ordinance. This is a significant change from the 'opt-out' approach to direct marketing which was the case prior to the Amendment Ordinance coming into effect.

The Amendment Ordinance does not apply retrospectively and there are grandfathering arrangements in place for pre-existing personal data. This means that a data user will not be required to notify a data subject of his intention to use their personal data in direct marketing, provided that he has already obtained that data and had used it for direct marketing in relation to the same class of marketing subjects prior to 1 April 2013.

In light of the Amendment Ordinance, it is advisable that businesses take this opportunity to review their procedures and policies in respect of collecting personal data and use for direct marketing. Where consent is not currently obtained, these procedures will need to be updated in order to ensure compliance with the Personal Data (Privacy) Ordinance going forward.

For further information, please contact your usual Eversheds contact or:

Mark Yeadon
Partner
+852 2186 3225
markyeadon@eversheds.com

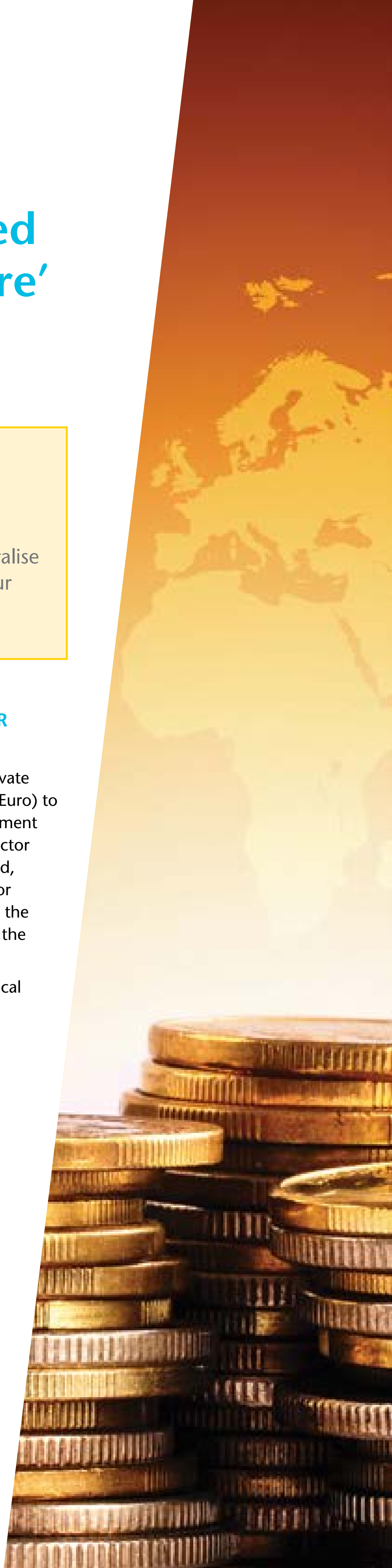
Legislative changes introduced by the Italian 'Decreto del Fare' during the Summer

Law Decree no. 69 dated 21 June 2013 as amended and enacted under Law no. 98 dated 9 August 2013 published in the Official Gazette on 20 August 2013 (the so called '*Decreto del Fare*'), introduced a series of reforms affecting different fields in our legal system. The purported aim of such reforms is to simplify and liberalise red tape for families and entrepreneurs alike. Set out below are our comments on two sets of provisions which are interesting from a foreign entity perspective.

TAX LIABILITY UNDER PRIVATE CONTRACTS (SERVICES CONTRACT OR CONTRACTS FOR WORKS) WAS REDUCED

In 2012, the Italian Legislator broadened the tax liability regime for parties to a private contract. As a result it was possible to apply fines (of between 5,000 and 200,000 Euro) to an employer who had paid a contractor without verifying beforehand the due payment of withholding taxes and value added taxes (VAT)[6] by the contractor or sub-contractor (with the relevant evidence having been provided). A contractor, on the other hand, could be held jointly liable (by the Financial Administration) with the sub-contractor who did not pay withholding taxes and VAT (applying the same limits as set out in the footnote above), unless it verified beforehand due payment thereof (evidenced by the provision of the relevant documentation).

Due to incessant complaints by the entrepreneurs' association regarding the practical difficulties and costs arising from gathering the documentation and proving tax compliance, the Decreto del Fare excluded non-payment of VAT by the contractor and sub-contractor from the regime described above.



6 Related to compensation of the performance under the contract or sub-contract carried out by their employees.

ITA

MEDIATION IN COMMERCIAL AND CIVIL LITIGATION MADE A COME BACK

The Italian Legislator has returned to favour mediation as an instrument to deal with the increasing caseload of civil proceedings to be ruled upon by the Italian Civil Courts. Set out below is a summary of the relevant provisions of the reform.

As of 19 September 2013, an attempt at mediation is (again) a condition to proceed with a case concerning one of the following matters: (i) housing law; (ii) rights in rem; (iii) probate; (iv) leases and leasehold title; (v) bailment; (vi) business lease; (vii) compensation of damages arising from liability of medical and health entities; (viii) libel; and (ix) insurance, banking and financing agreements. Timing and costs of the mediation procedure are allegedly reduced. The procedure lasts at least three months (compared to four months which were envisaged previously). At the first meeting, the mediator presents the parties, who have to be advised by a lawyer, and outlines the scope and formalities of the procedure. The parties then decide whether to start a mediation within that period. If mediation does not start, the procedure is terminated and the parties proceed with the lawsuit. The costs of mediation will not be charged to the parties in such cases.

Minutes of any agreement reached via the mediation will be enforceable if signed by the parties' counsel: Court rubber stamping is no longer required for this to be effective.

The Court is entitled to order the parties to carry out mediation during proceedings at first or second instance. In such cases, an attempt at mediation becomes a condition to proceed with the lawsuit.

This new mediation procedure is to be tested over a four year trial period.

For further information, please contact your usual Eversheds contact or:

Daniela Murer
Partner
+39 02 89 28 71
danielamurer@eversheds.it

ITA

New rules implemented in Italy to push companies to privacy compliance

In August 2013, the Government implemented new rules by which privacy crimes have become crimes that warrant corporate ‘criminal’ liability; meaning that companies are now chargeable with administrative fines and debarring sanctions under Legislative Decree no. 231/2001.

In particular, if the breach of data protection laws consists of: (i) a case of unlawful processing of personal information; (ii) the provision of false statements to the Italian Data Protection Authority; or (iii) the inobservance of prescriptions and instructions given by the Italian Data Protection Authority, then the corporate criminal liability of the company will be applied in relation to the disputed behaviour that occurred.

In that event, companies may face: (i) a high risk of heavy fines; (ii) order to suspend their business activities; (iii) prohibition on advertising their products and services; and/or (iv) the revocation of permits and authorisations granted for their business.

These rules are still subject to confirmation, revocation or possible amendments by the Italian Parliament until mid October 2013. However, in the meantime they are in full force and are likely to affect many traders and enterprises. These rules will also apply to a wide range of cases relating to questionable use of personal data, particularly in the field of direct marketing, advertising, consumer profiling, employees and internet user monitoring.

It is highly recommended that companies pay careful attention to these rules and discuss with their lawyers their application to the companies business processes. The possibility of improving their policies and business models to adhere to the new rules should also be considered.

For further information, please contact your usual Eversheds contact or:

Daniela Murer
Partner
+39 02 89 28 71
danielamurer@eversheds.it

IRL

IRELAND

Central Bank (Supervision and Enforcement) Act 2013 (the 'Act')

The Act came into force on 1 August 2013 (with the exception of Section 72). The Act has strengthened the Central Bank of Ireland's supervisory and enforcement powers in relation to financial service providers (FSPs). These new measures include:

- increased powers of the Central Bank's authorised officers to access documents and information held by an FSP
- the Central Bank may issue a written notice to an FSP requiring it to report to the Central Bank in relation to the issues described in the notice. The FSP must appoint a sufficiently skilled reviewer to prepare the report. The reviewer must be a person appearing to the Central Bank to have the skills relating to the business of the FSP necessary to prepare an objective report on the matters concerned, and may be an auditor, actuary or lawyer engaged by the FSP
- the Act considerably increased the maximum monetary penalty that the Central Bank may impose pursuant to the Central Bank Administrative Sanctions Procedure (ASP). For example, the maximum penalty for companies is now €10,000,000 or 10% of the company's annual turnover in its last complete financial year. Previously, the maximum penalty for companies was €5,000,000. Following the Act, the Central Bank also has the power to suspend or revoke an FSP's authorisation, pursuant to the ASP.

Section 43 of the Act provides the Central Bank with the power to direct appropriate redress for customers, where:

- there have been widespread or regular *relevant defaults* by the FSP; and
- in consequence of the relevant defaults, customers of the FSP have suffered loss or damage (loss or damage is not defined in the Act).

Relevant default includes a breach of financial services legislation and Central Bank Codes.

Appropriate redress means such monetary or other redress as is specified in the Central Bank direction and (in the case of pecuniary loss) as does not exceed the amount of the loss suffered, with interest.

Prior to the commencement of the Act, in order for the Central Bank to direct appropriate redress (as described above), the Central Bank enforcement directorate would have been required to impose sanctions pursuant to the ASP, either in the form of a settlement agreement or following an inquiry. Following the commencement of the Act, the Central Bank can impose appropriate redress by issuing a direction. Although not entirely clear from the Act, such a direction could potentially be issued by a supervisory department within the Central Bank, rather than the enforcement directorate.

There is currently a lack of clarity regarding what investigative procedures and controls the Central Bank must follow before issuing a Section 43 direction and this is a significant concern.

A copy of the Act can be found at the following link:

http://www.irishstatutebook.ie/pdf/2013/en.act.2013.0026.pdf

FINANCIAL SERVICES OMBUDSMAN'S POWER TO NAME FINANCIAL SERVICE PROVIDERS

Section 72 of the Act came into force on 1 September. Section 72 grants the Financial Services Ombudsman (the Ombudsman) the power to name FSPs who have had at least three complaints against them substantiated or partially substantiated in the last financial year. The Ombudsman may publish that information in its annual report, and may disclose the number of complaints against the FSP during the relevant year. Previously, the Ombudsman had no authority to publish such information in its annual report.

CONSULTATION PAPER ON THE CORPORATE GOVERNANCE CODE

On 1 August 2013, the Central Bank published a Consultation Paper (CP 69) on proposed amendments to the Corporate Governance Code for Credit Institutions and Insurance Undertakings (the Code).

The Code became effective on 1 January 2011 and sets out minimum requirements regarding corporate governance of credit institutions and insurance undertakings. The purpose of those requirements is to ensure that robust governance arrangements are in place so that appropriate oversight of the institution is achieved.

The more significant proposed amendments to the Code which are outlined in the Consultation Paper include:

- the risk committee of the institution will be composed of a majority of non-executive directors, subject to the application of proportionality considerations which would take into account the nature, scale and complexity of an institution's operations
- a new requirement for all institutions to appoint a Chief Risk Officer
- an outline of the responsibilities of the Chief Risk Officer
- it is proposed to permit institutions with a non-calendar year financial reporting period to change the submission basis of its annual compliance statement (which is submitted to the Central Bank, as required under the Code) to that of the institution's financial year.

The Central Bank has requested comments on CP69 from interested parties by 1 October 2013.

A copy of the Consultation Paper can be found at the following link:

http://www.centralbank.ie/regulation/poldocs/consultation-papers.pdf

For further information, please contact your usual Eversheds contact or:

Norman Fitzgerald
Partner
+353 1 6644239
normanfitzgerald@eversheds.ie

Revised Code of Conduct for Mortgage Arrears

Mortgage arrears, and the resulting possibility of home repossessions, are the most recent aspect of the fallout from the Irish economic crisis.

The Central Bank has intervened recently to regulate the conduct of lenders in this area, by way of the Code of Conduct for Mortgage Arrears (the CCMA). This note is a summary of the most significant provisions of the CCMA.

The CCMA initially came into effect from 1 January 2011. It set out rules that lenders must follow when dealing with a borrower in arrears, ensuring that their treatment by lenders is fair and transparent. For example, it sets out the Mortgage Arrears Resolution Process (MARP). Under MARP, steps that must be taken by lenders include:

i obtaining a Standard Financial Statement

ii assessment of the borrower's case

iii considering options to resolve the arrears

iv considering appeals by the borrower.

Further to the recommendation of the Government's Expert Group on Mortgage Arrears, the CCMA and MARP were reviewed by the Central Bank in its Consultation Paper published in March 2013. This reviewed the operation of both the CCMA and MARP, and concluded that some existing provisions needed to be strengthened to increase protection for borrowers, that some new provisions needed to be added and that clarity needed to be provided in respect of other provisions.

This resulted in a revised CCMA coming into effect from 1 July 2013.

Some provisions to note from this revised CCMA are the following:

1 PROCEEDINGS FOR POSSESSION

Lenders may only commence legal proceedings for possession of a borrower's primary residence once the following requirements are satisfied:

i the lender has made every reasonable effort to agree an alternative arrangement with the borrower

ii three months from the date of notification to the borrower that an alternative repayment arrangement is not available/the borrower's refusal to enter into an alternative repayment arrangement has expired; or eight months from the date the arrears arose, whichever date is later

iii the borrower has been classified as not co-operating and the lender has issued the required notification.

Notably, the previous twelve-month moratorium on legal proceedings for possession under the initial CCMA has been abolished.

1.1 Not co-operating

A borrower is considered as 'not co-operating' with a lender when:

i he/she fails to make a full and honest disclosure of information to the lender that would have a significant impact on his/her financial situation, or

ii he/she fails to provide information relevant to his/her financial situation within the timeline specified by the lender (this timeline must be fair and reasonable)

iii over a three month period:

(a) i the borrower has failed to meet his/her mortgage repayments in full or he/she has an arrears balance remaining on the mortgage (where an alternative payment arrangement **has not** been entered into by the borrower)

ii if the borrower **has** entered into an alternative repayment arrangement during which he/she has failed to meet in full repayments as specified in the terms of that arrangement, and

(b) the borrower:

i has failed to make contact with or respond to any communications of the lender or a third party acting on the lender's behalf, or

ii has made contact with the lender (or third party) or responded to its communications but has not engaged in a way that enables the lender to complete its assessment of the borrower's circumstances.

A warning letter must also have been issued to the borrower stating that the institution is considering classifying him/her as not co-operating, outlining the implications of being classified as not co-operating and providing specific information on how to avoid this classification. The borrower may then only be classified as 'not co-operating' if, after a twenty-day notice period has elapsed, the borrower has not carried out the actions specified in the warning letter.

2 AMENDING TRACKER MORTGAGES

In relation to existing tracker mortgages, lenders can now offer an arrangement to distressed mortgage holders which provides for the removal of the tracker rate. Lenders must be able to demonstrate that there is no other sustainable option that would allow the borrower to keep the tracker rate, and the arrangement offered must be a long-term, sustainable solution that is affordable for the borrower. This is to cater for solutions where the only alternative would be repossession of the home.

3 CONTACTING THE BORROWER

Under the previous version of the CCMA, a lender could only contact a borrower up to three times per month. This has been replaced by the standard of 'proportionate and not excessive' contact in Provision 22 (of the revised CCMA) to allow for an approach to lender and borrower communications that is suited to individual needs and circumstances.

Under Provision 21, lenders are expected to have a board-approved communications policy in line with the requirements of Provision 22.

The major change introduced by the revised CCMA in relation to contact is that it permits a lender to now also make an unsolicited personal visit to a borrower's primary residence (Provision 26). This may only occur when all other attempts at contact have failed, and immediately prior to classifying a borrower as not co-operating.

At least five business days advance notice of a personal visit must be given and the visit must take place within 15 business days of the notice having been given. Requirements in relation to the content of the notice are also specified, e.g. the borrower must be given the option of meeting the lender in a local branch as opposed to in the borrower's home.

IRL

4 STANDARD FINANCIAL STATEMENTS

Lenders must use the prescribed form set out in Appendix 1 of the CCMA in collating information from borrowers in arrears or pre-arrears. Although this was provided for in the previous CCMA, the revised CCMA regulates the conduct of lenders in relation to their completion.

For example, the borrower cannot be compelled by a lender to complete a Standard Financial Statement during an unsolicited personal visit. Also, there is a new requirement for lenders to provide the Standard Financial Statement form at the earliest opportunity, and to offer assistance to borrowers with completing it (Provision 31). Under Provision 34, the lender may only set a timeline for the return of information that is fair and reasonable, which may depend on the nature of the information sought.

Another point of note is that a temporary arrangement can be put in place to prevent the arrears from worsening while the full Standard Financial Statement is being completed and assessed (Provision 38).

Overall, the new provisions introduced by the revised CCMA clears some blockages on enforcement for lenders as well as offering some protection for borrowers. For example, while borrowers benefit from the additional protection afforded by a more heavily regulated contact procedure for lenders, lenders ultimately have an enhanced ability to contact borrowers. Of particular importance for lenders is the removal of the twelve-month moratorium as this allows for proceedings for possession to be taken.

Lenders were advised by the Central Bank to take immediate steps from 1 July 2013 towards implementing any necessary changes to their systems, procedures and documents and providing relevant staff training. Lenders were also asked to provide an implementation plan to the Central Bank by 31 July 2013. This process will continue to be monitored by the Central Bank.

- The revised CCMA can be found here:

  http://www.centralbank.ie/regulation/processes/consumer-protection-code/Documents/2013%20CCMA.pdf

For further information, please contact your usual Eversheds contact or:

Norman Fitzgerald
Partner
+353 1 6644239
normanfitzgerald@eversheds.ie

IRL

KBC Bank Ireland plc -v- BCM Hanby Wallace, Supreme Court, 25 July 2013

This Supreme Court's recent judgement in this matter has raised important issues concerning the application of the defence of contributory negligence, particularly highlighting section 34 of the Civil Liability Act 1961. The judgement of the Supreme Court (the Court), handed down by Fennelly J, allowed the appeal in so far as the 2012 ruling of McGovern J in the High Court failed to make a finding of contributory negligence and remitted the case back to the High Court 'for further consideration' of that issue.

1 BACKGROUND TO CASE

KBC Bank Ireland plc (KBC) advanced commercial loans to two separate individuals, Mr John Kelly and Mr Thomas Byrne (together the 'Borrowers').

BCM Hanby Wallace Solicitors (the Defendant) acted as KBC's legal adviser in relation to the provision of the financing for each of the Borrowers and the creation of the necessary security packages for 30 properties. The loans were inter-related in many respects, and a significant feature of the case was that Mr Byrne was the solicitor acting for Mr Kelly, where he subsequently borrowed more money from the bank himself.

To enable completion of the loan transaction, the Defendant accepted undertakings from Mr Byrne (as solicitor of Mr Kelly) and failed to follow the bank's express instructions to take security over all of the relevant properties. When called upon, these undertakings were not honoured by Mr Byrne, resulting in KBC only having validly created security over three of the 30 properties.

When the Borrowers defaulted on their repayments this resulted in KBC suffering significant losses as it was unable to enforce against the majority of the intended security. Judgements were obtained by KBC against Mr Kelly for €14,435,747.44 and against Mr Byrne for €9,051,977.50. However in the High Court McGovern J found for KBC and gave judgement for €9,983,585.34 with respect to Mr Kelly and €7,710,545.16 in respect of Mr Byrne.

KBC had argued that the Defendant had not ensured that the requisite security for the loans was in place, notwithstanding having represented to KBC that all the security was properly in place. All that was available to KBC was the undertakings from the solicitor, Mr Byrne, which were dishonoured. KBC also argued that the Defendant had no authority from the bank to accept the undertakings of Mr Byrne (in lieu of perfecting the security) and that the Defendant was negligent in so doing.

2 HIGH COURT DECISION

McGovern J found for KBC making findings against the Defendant that it had been negligent in the performance of its duty of care owed to the bank, particularly regarding the completion of the security documents on the completion of each loan transaction. The Court found that KBC had relied upon assurances given by the Defendant that they would not release the funds being advanced to the Borrowers until the security was in place. McGovern J found that there was a fundamental departure by the Defendant from their instructions from the bank, and he relied upon evidence from a partner in the Defendant's firm who had conceded that KBC would not have permitted the transactions to proceed had it been aware the security was not in place.

Of particular significance in the appeal was the fact that although McGovern J accepted there was a duty of care by KBC in its own credit checks and internal procedures, he still found that the proximate cause of KBC's loss was that the Defendant's failure to comply with the bank's instructions and releasing funds to the Borrowers, when they knew, or ought to have known, that they were acting against the bank's instructions. McGovern J also accepted that although every case must be decided on its own facts that this case was "sufficiently exceptional" to dispose of the Defendant's claim for contributory negligence and he made no findings against KBC.

3 POINTS OF APPEAL

The Defendant did not appeal the finding of negligence or breach of duty and accepted the submissions by a partner in the Defendant firm justifying these findings.

The appeal was limited to challenging the High Court's findings on:

i) contributory negligence

ii) unusually to asking the Court to supplement its own language in lieu of that of the High Court, in respect of McGovern J's use of language suggesting dishonesty by the Defendant. The argument being that this was not justified by the evidence or allegations made during the High Court hearing.

The crux of the Defendant's argument in the appeal was that KBC could and should have done more when analysing the financial standing of the Borrowers and their capacity to repay the loan; and that KBC should have had its own proper internal controls in place for the taking out of adequate security. It was contended that if KBC had taken proper steps it would not have approved the loans, and the Defendant would never have been retained.

4 SUPREME COURT DECISION

The Supreme Court (the Court) found that McGovern J had focused solely on causation and the "proximate cause" of the loss. The Court also found that the learned trial judge had erred in his conclusion on the issue of contributory negligence, and that this related to his treatment of the issue of 'causation'. The Court concluded that no factual conclusion had been reached by the High Court on whether there had been contributory negligence by KBC. As such it was not appropriate for the Court to determine this matter on appeal and it must be sent back to the High Court for re-hearing. It will ultimately be a matter for the President of the High Court to determine if the re-hearing of the case is by the same judge, McGovern J or by a new judge.

On the separate issue of supplementing its own language in lieu of that of the High Court, in respect of that of the trial judge where he suggested dishonesty, the Court noted this aspect of the appeal was not advanced on legal grounds. It was however noted that an issue of "justice and fairness" did arise for the individuals behind the Defendant's firm of solicitors. The Court concluded that the High Court judgement: "cannot and should not be read as attributing any intentional dishonesty or deliberate misleading to any partners or officers of the appellant firm. No allegation of fraud was made at any time." Although the Court was prepared to provide this clarification, it did so on the express basis that in doing so it was not in any way qualifying "the essence of the serious findings of negligence".

In reaching its conclusion on contributory negligence the Court was influenced by the fact that the trial judge had found the bank to be "somewhat careless" in appraising the Borrowers and he had also referred to "lapses of the plaintiff".

The Court was satisfied that on an analysis of the law on contributory negligence that section 34 (1) and (2) of the Civil Liability Act contemplated more than one cause of loss. This was ultimately significant as to apportionment of the loss suffered on determination of the question of contributory negligence.

KBC had placed particular reliance on an earlier decision of **Conole v Redbank Oyster Company Limited**, but the Court distinguished Conole from the current case on the basis that the defendant in Conole was fully aware of the dangerous condition of the boat, but ignored it. Accordingly, the Court found that **Conole** was not analogous to the current case as this would suggest that the Defendant was aware of the financial unsoundness or dishonesty of the Borrowers when the bank entered into the lending transaction, which was not alleged.

The Court also considered submissions on the issue of professional negligence and the difficulty of rebounding blame onto the client when a professional person holds themselves out to be an expert in a particular area. Particular reliance was placed by the Court on the English text of 'Lender Claims' by Hugh Tomlinson QC; and in particular on the proposition that the position regarding lenders is different (to other professional negligence claims) as a lender is a profit-oriented business, where the claimant lender rather than the defendant (professional adviser) has the superior knowledge. Reliance was also placed on various UK precedents involving lenders who had been found to be contributory negligent for failing to conduct background and/or credit checks against potential borrowers.

The Court accepted the submissions that it was not a matter for the Defendant (as a firm of solicitors) to check the financial soundness of the Borrowers. This was significant in the finding that the judge was mistaken to absolve KBC of responsibility for contributory negligence by finding that their acts were merely a 'causa sine qua non' and not a proximate cause of the loss. It was accepted that the decision of KBC to lend to the Borrowers was also an effective cause of the loss suffered by KBC. The Court also accepted that the Defendant was entitled to rely on the European Communities (Licensing and Supervision of Credit Institutions) Regulations 1992 (S.I. No. 395 of 1992) (as amended) which placed an obligation on the bank to manage its businesses "in accordance with sound administrative and accounting principles…". Significantly this would include the provision of internal controls and reporting.

Based on all of the above, the Court concluded that the trial judge had erred in his conclusion on the issue of contributory negligence and that the issue of contributory negligence will have to be reconsidered by the High Court. The outcome of this further hearing will be eagerly awaited by lawyers and bankers alike as it may impact significantly on the expectations that lender clients can reasonably have of their legal professional advisers. In particular, it will add clarity to the responsibility that lenders themselves must bear for their own actions or inactions in conducting credit analysis and making a decision to grant loan facilities with or without impunity.

For further information, please contact your usual Eversheds contact or:

Norman Fitzgerald
Partner
+353 1 6644239
normanfitzgerald@eversheds.ie

Commercial mediation – regulation at last – is this where we want to be?

The much publicised draft Mediation Bill 2012 (the Bill) should be passed into law later this year. The Bill will codify certain recommendations of the Law Reform Commission made in their "'Report on Alternative Dispute Resolution – Mediation and Conciliation'. The Minister for Justice, Equality and Defence, Mr Alan Shatter, has said one of the main aims of the Bill is "to promote mediation as a viable, effective and efficient alternative to court proceedings thereby reducing legal costs, speeding up the resolution of disputes and relieving the stress involved in court proceedings".

The Government is now sending out a strong message that mediation is a genuine alternative and regulated dispute resolution forum. Regulation is necessary to ensure certain minimum standards are adhered to but not to over formulise a simplistic process. 'Soft touch' regulation or no regulation is no longer acceptable within Irish commerce. The codifying of minimum standards for mediation makes sense and will enhance and promote the process both nationally and internationally. Even ad hoc mediations will have to comply with the basic minimum standards articulated in the draft legislation.

The legislation will provide the basic structure within which practitioners and parties must operate. It will mark out the pitch and impose the basic rules of engagement. The process will still remain flexible enough to allow parties to resolve their own disputes using creativity and entrepreneurial flair that is not encouraged in more regulated dispute resolution fora.

The legislation will oblige solicitors to provide information and advice on mediation to clients; whereby solicitors (in particular) will have an obligation to advise clients to consider mediation before commencing civil proceedings. Clear information regarding the process, the proposed mediators and/or the mediation service providers must be made available. Estimates of legal costs of potential subsequent civil proceedings must be available before commencing litigation. Solicitors or their clients must also submit a written statement to a court before proceedings start, confirming that mediation was considered as an alternative form of dispute resolution.

In a similar way barristers will also have to advise clients of mediation and certify in writing that mediation has been considered as an alternative form of dispute resolution. This is a positive outcome and will ensure that the parties to the dispute understand the options and alternatives open to them before heading down the expensive road of litigation.

The legislation will also cover when mediation might take place and will emphasise that mediation is available at the election of the parties themselves or where offered as an option by the courts. Where there is court intervention the legislation provides for a mediator to submit a report on **the outcome** of the mediation to the court, **but not** what occurred at the mediation. As such, the legislature has seen the necessity to continue to respect the sanctity and need for confidentiality in the process, save where the parties jointly agree otherwise. This will also extend to the communications during a mediation process remaining confidential and not being admissible in court, save in exceptional circumstances.

Sensible and simple obligations wil be imposed on mediators to outline before the process begins their terms of engagement, the process and costs involved. Similarly information regarding the mediator's qualifications, the code of practice to which s/he adheres and the confidentiality of the process must be supplied. The voluntary nature of mediation remains absolute and there is a duty imposed upon the mediator to explain this to the parties from the outset. Mediators must also identify at the outset any potential conflicts of interest that they may have.

Mediators are given certain protections, and permitted to withdraw from the process, without explanation, at any time. Mediators are also given immunity from suit save where there is bad faith or similar egregious behaviour.

The aim of the process remains to resolve the dispute in the shortest possible amount of time, and other third parties, such as qualified lawyers or experts, may assist those involved.

The possibility that a mediator may take on the role of Conciliator (on request), moving from a facilitator to the party making the ultimate recommendation of the parameters for settlement is also adopted into the legislation. Otherwise the mediator should not make proposals to resolve the dispute.

This proposed part of the legislation is not without problems as it may be overly dogmatic on the role of the mediator. We wholly endorse the concept that the mediator is a facilitator but to regulate this may remove important aspects of flexibility which exist today in commercial mediations. The essence of commercial mediation is that it remains a party driven process. As such, the parties must be in a position where they can take the mediator to task for overstepping the mark – this in our opinion is not a job for the legislature. As such we believe the jury is out on this proposed aspect of the Bill.

The Bill further allows a future discretion to the Minister for Justice to prepare and publish a code of practice. This would include providing for ethical standards and minimum qualification requirements and should only be exercised by the Minister with caution, to avoid over regulation. Only time will dictate on the need for this code of practice.

The Bill recognises that the nature of any agreement reached in mediation remains a matter for the parties alone to determine and only when agreement is reached is there an enforceable contract between the parties.

The legislation also addresses what factors a court might consider when awarding costs at a trial if parties have refused to participate or attend mediation.

In summary this is a positive step in the right direction but only if the regulation remains consistent with the commonly accepted goals of mediation providing a viable, effective and efficient alternative to court proceedings.

For further information, please contact your usual Eversheds contact or:

Norman Fitzgerald
Partner
+353 1 6644239
normanfitzgerald@eversheds.ie

Unilateral jurisdiction clauses

This article examines unilateral jurisdiction clauses, the effect of a recent decision of the French Cour de Cassation on English law and in the UAE and provides some practical guidance on the action a lender could take based on the current state of the law.

WHAT IS A UNILATERAL JURISDICTION CLAUSE?

Unilateral (or 'one-sided' or 'split') jurisdiction clauses often appear in loan agreements and are intended to restrict the borrower's right to sue in a particular forum but allow the lender to retain the right to commence proceedings in any forum.

These clauses give flexibility to lenders to bring proceedings in the jurisdiction where the defendant's assets are based and offer comfort regarding its ability to enforce a judgement and/or arbitral award in that jurisdiction.

ENFORCEMENT ISSUES

Whilst the English courts have upheld the enforceability of these clauses (as have the Dubai International Financial Centre (DIFC) Courts), clauses of this nature can be problematic in that some courts have found them to be offensive from a public policy perspective and, therefore, unenforceable.

For example, the Russian courts have reached this conclusion in the case of CJSC Russian Telephone Company v Sony Ericsson Mobile Telecommunications Rus LLC [2012]. More recently, the French courts have also cast doubt on enforceability of these clauses under European law.

FRENCH COUR DE CASSATION JUDGEMENT

In the case of Mme 'X' v Banque Privée Edmond de Rothschild (2012)[7], the French Cour de Cassation ruled that a unilateral jurisdiction clause in an agreement entered into between a French consumer and a Luxembourg bank was unenforceable. The court held that such a clause was 'potestative' in its nature (ie where performance is subject to or dependent on an event which one of the contracting parties has the power to make happen or prevent) and was unenforceable under French and EU law.

The Rothschild decision is controversial in that the Cour de Cassation dismissed the jurisdictional challenge outright (without referring it to the ECJ) on the basis that the clause itself violated Article 23 of the Brussels Regulation.

7 *Mme 'X' v Banque Privée Edmond de Rothschild No 11-26.022*; 26 September 2012

PRACTICAL EFFECTS – ENGLISH LAW

Until such time as the ECJ considers this issue, it remains to be seen what practical effect this decision will have in the UK. For the time being, the effect is mitigated given that unilateral jurisdiction clauses have traditionally been enforceable under English law[8].

The recent and robust judgement of the commercial court in the Mauritius Commercial Bank v Hestia Holdings Limited and Another [2013][9] should also offer lenders comfort that these clauses will be valid under English law. The court went so far as to hold (obiter) that even more one-sided clauses than the one considered[10], would be unlikely to violate the equal access to justice provisions contained in Article 6 of the European Convention on Human Rights.

PRACTICAL EFFECT – UAE (MAINLAND)

In theory, where a bank obtains an arbitration award pursuant to a unilateral jurisdiction clause, the bank should be able to enforce that award in the UAE pursuant to the New York Convention[11].

However, whilst the enforceability of unilateral jurisdiction clauses is untested in the UAE courts, a defendant could seek to frustrate enforcement by relying on public policy arguments where such a clause has been invoked by the bank.

Article 5 of the New York Convention provides that recognition and enforcement of an arbitral award may be refused if the competent authority in the country, where recognition and enforcement is sought, finds that the recognition or enforcement of the award would be contrary to the public policy of that country.

Similarly, where the clause in question gives the bank the choice of two different courts (as opposed to the choice between litigation and arbitration) the same issues will arise.

Articles 235 of the Civil Procedures Code[12] provides for the enforcement of foreign judgements in principle. However, in practice, foreign court judgements can be difficult to enforce in the UAE. Notwithstanding the absence of a treaty between the foreign country and the UAE which allows for reciprocity[13], the UAE courts can refuse to enforce a judgement on the ground that it violates public policy.

It is, therefore, possible that a borrower (against whom enforcement is being sought) could succeed in showing that it was unfair for the bank to have had the exclusive right to have the dispute determined in a particular court. In this regard the UAE court may accept an argument that the borrower was in an unfair bargaining position and may refuse to enforce the judgement on the grounds of public policy.

8 See *Three Shipping Ltd v Harebell Shipping (2004)* and *Law Debenture Trust Corporation v Elektrim Finance BV and Others (2005).*

9 *Mauritius Commercial Bank Limited v Hestia Holdings Limited & Sujana Universal Industries Limited [2013] EWHC 1328 (Comm)*

10 *Ibid* at paragraph 43

11 *1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards - the "New York" Convention*

12 *UAE Civil Procedure Code, Federal Law No. 11 of 1992*

13 *A treaty of reciprocity exists between the GCC countries (UAE, Kuwait, Bahrain, Saudi Arabia, Oman and Qatar)*

PRACTICAL EFFECT – UAE (DIFC)

Whilst there are no apparent decisions of the DIFC Courts regarding the enforceability of an option clause allowing one party to refer disputes to litigation instead of arbitration, unilateral jurisdiction clauses have been upheld in the DIFC[14].

A lender should be comforted (given the DIFC's reliance on English law and the UK courts history of upholding such clauses) that if the forum for dispute resolution is the DIFC Court or DIFC LCIA, a borrower is unlikely to be successful in arguing that unilateral jurisdiction clauses are unenforceable.

Whist the Mauritius Commercial Bank decision will not be binding on the DIFC Court, the DIFC Court is likely to treat the decision as persuasive which will assist lenders further in the DIFC.

This will not however preclude a borrower from relying on the decision in Rothschild (for persuasive effect) to argue that there should be a change in approach adopted by the DIFC courts.

WHAT ACTION COULD A LENDER TAKE?

Based on a preliminary analysis of the current state of the law in this area, the lender has a number of options when deciding whether to include unilateral jurisdiction clauses. Three possible approaches are as follows:

The 'cautious' approach

Choose not to include unilateral jurisdiction clauses at all and instead seek to negotiate an exclusive law, jurisdiction and forum for dispute resolution being either litigation or arbitration. Whilst this offers little flexibility when seeking to enforce an award, the lender is afforded certainty when engaging in the process.

The 'assertive' approach

Incorporate unilateral jurisdiction clauses but in the knowledge that the clause may be challenged as part of any formal dispute in certain jurisdictions (including France, Russia and (possibly) the UAE by way of example).

The 'case by case' approach

Consider on a case by case basis on the validity and enforceability of unilateral clauses in the jurisdiction where the borrower is domiciled and where the borrower's assets are located and tailor the clause accordingly. For example, specific steps could be taken to avoid using such clauses in French, Russian and (possibly) UAE transactions.

For further information, please contact your usual Eversheds contact or:

Ben Bruton
Partner
+971 4 389 7009
benbruton@eversheds.com

14 See *Khorafi et al v Bank Sarasin-Alpen Ltd and another* (CA No.003/2011) and *Injazat Capital Limited and Injazat Capital Technology Fund Limited v Denton Wilde Sapte & Co* (CFI No.019/2010)

Enforcement of DIFC judgements outside of Dubai and the UAE

The United Arab Emirates (UAE), and in particular Dubai, provide an effective forum for dispute resolution in the Middle East. Dubai has both a civil law 'onshore' regime and the common law 'offshore' jurisdiction of the Dubai International Financial Centre (DIFC).

The DIFC is a financial 'freezone' and is permitted by UAE law, to enact its own legal and regulatory framework for all civil and commercial matters. The DIFC Court itself is an English language court based on the common law legal system, with rules of procedure drawn from the Civil Procedure Rules of England and Wales. This offers international companies doing business in the region the type of familiar and efficient process that they would expect in an established common law jurisdiction such as the UK.

Traditionally, the jurisdiction of the DIFC Court and DIFC LCIA[15] was limited to circumstances where there was a connection to the DIFC, such as a territorial or transactional connection. However, since the introduction of Dubai Law No. 16 of 2011 (the "DIFC Law"), the jurisdiction of the DIFC has been extended meaning that businesses can now opt into the jurisdiction of the DIFC by agreement in the event a dispute arises or by drafting DIFC jurisdiction clauses into their agreements.

However, for many disputes in the region, determining jurisdiction is often the easy part, with enforcement of any judgement or award outside the DIFC presenting greater challenges. However, a party looking to enforce a DIFC judgement or award in Dubai should have confidence that this will be effective. Article 7(3) of the DIFC Law provides that a DIFC Court judgement, order or decision may be sent directly to an execution judge and 'converted' into a judgement of the Dubai Courts providing certain conditions are met[16]. This means that a DIFC Court judgement is given the exact same status and enforced in the same manner as a Dubai Court 'onshore' judgement.

This progressive theme of enforcement continues in Article 7(2) of the DIFC Law which arguably provides for 'direct' enforcement of DIFC judgements and awards within the rest of the UAE. Traditionally, a party seeking to enforce a judgement or award of the DIFC outside of Dubai but within the UAE would follow the 'referral' procedure outlined in Article 221 of the Civil Procedures Code[17].

Article 7(2) could avoid this process as it provides that where the subject matter of execution is situated outside the DIFC (for example another Emirate), judgements and awards rendered by the DIFC Court or the DIFC-LCIA should be executed by the competent entity having jurisdiction outside the DIFC, in accordance with the procedures and rules adopted by that entity. Although the position remains untested, it is arguable that DIFC judgements and awards could be sent for direct execution by another competent entity within the UAE.

15 *DIFC London Court of International Arbitration*. Note - this article focuses on enforcement of DIFC Court judgements. However, the process for enforcement of DIFC LCIA awards is identical save for the preliminary step of having an DIFC LCIA award converted into a DIFC Court judgement.

16 Judgements, Orders and Awards will only be enforced by the Dubai Courts if the judgement, order or award is final, appropriate for enforcement and translated into Arabic.

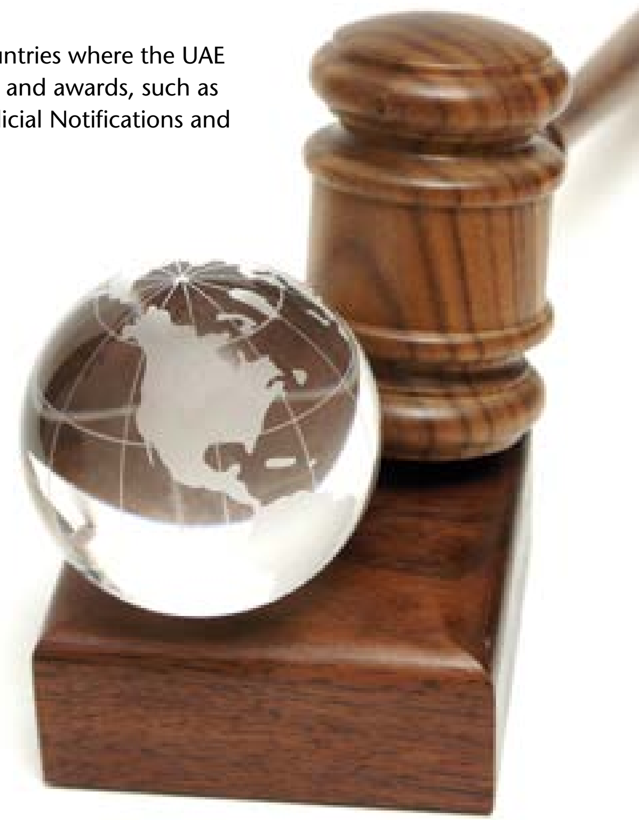
17 *Article 221 of UAE Civil Procedure Code, Federal Law No. (11) of 1992*

A party seeking to enforce its DIFC judgement or award outside of Dubai but within the UAE can be hopeful that these changes could remove the potentially costly and time consuming step of referral outlined in Article 221. The recent Memorandum of Understanding between the DIFC Court and the UAE Federal Ministry of Justice should offer a party additional comfort in this regard. However, cases of enforcement of DIFC judgements and awards in the UAE (but outside of Dubai) are few and far between and the lowest risk approach may be to continue to follow the tried and tested route of a referral under the Civil Procedures Law.

A party should also have confidence in enforcing its DIFC judgement in countries where the UAE has entered into regional treaties for reciprocal enforcement of judgements and awards, such as the GCC Convention for the Execution of Judgements, Delegations and Judicial Notifications and the Riyadh Arab Agreement for Judicial Cooperation.

Given that a DIFC judgement is given the same status as a Dubai Court judgement and provided that the terms of that treaty are complied with, there should be little reason, in theory at least, why enforcement of a DIFC judgement or award would not be possible in, for example, Bahrain, Qatar or Saudi Arabia.

There are as yet no reported cases of a DIFC judgement or award being enforced outside the UAE. This is largely down to the fact that the DIFC Court is still in its infancy and has seen a comparatively small number of disputes. That said, with the DIFC's continued efforts to develop, and as parties increasingly opt into its jurisdiction, it is likely that the developing 'enforcement-friendly' principles outlined above will be tested, resulting in increased certainty and procedural efficiency for parties wishing to resolve disputes in the region.



For further information, please contact your usual Eversheds contact or:

Ben Bruton
Partner
+971 4 389 7009
benbruton@eversheds.com

Settlement of mass damages in The Netherlands

The Dutch Collective Settlement of Mass Claims Act (WCAM) came into force in 2005. The WCAM allows the Amsterdam Court of Appeal to hold that an agreement for the settlement of mass claims is binding for all class members who do not opt out. The WCAM was amended slightly in July 2013. This amendment provides for, among other things, the introduction of a court hearing before parties actually enter into legal proceedings and some technical points of improvement.

Under the WCAM, mass settlements have meanwhile been concluded in relation to mass tort and contract claims with regard to securities lease products (the Dexia case)[18], misleading financial information of a listed company (the Shell case)[19] and claims against auditors and the public supervisory authorities of a bankrupt life insurance company (the Vie d'Or case)[20].

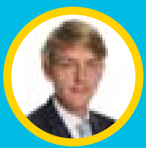
In its decision of 12 November 2010 (Converium), the Amsterdam Court of Appeal decided that it has jurisdiction in the event of an international class action, even though it concerned potential claims by predominantly non-Dutch claimants against Swiss (insurance) companies. A US class action was also already settled and approved by the US Court for all US persons who had purchased Converium securities on the Swiss Stock Exchange.

The Amsterdam Court of Appeal attached particular weight to the fact that the settlement agreement was entered into by a Dutch foundation and that this foundation would be responsible for the distribution of the proceeds of the settlement agreement.

The Converium case is the first time that the Amsterdam Court of Appeal approved a settlement regarding securities of a company that is not based in the Netherlands and whose securities are not traded on an exchange in the Netherlands.

At least in principle all EU member states, as well as Switzerland, Iceland and Norway, will have to recognise the Amsterdam Court of Appeal's ruling as binding.

For further information, please contact your usual Eversheds contact or:



Jurjen De Korte
Partner
+31 20 56 00 66 4
jurjendekorte@eversheds.nl

18 CA of Amsterdam 25 January 2007, LJN AZ7033

19 CA of Amsterdam 29 May 2009, JOR 2009/197

20 CA of Amsterdam 29 April 2009, NJ 2009/448

Proposal to modernise the Netherlands Arbitration Act submitted to Parliament

The current Netherlands Arbitration Act (NAA) was enacted in 1986. On 16 April 2013, the Minister of Justice presented a draft amendment of the NAA to Parliament. If enacted, the amended NAA will be closely aligned to the UNCITRAL Model Law, and at the same time, bring a number of welcome innovations and modernisations. Some key aspects of the draft amendment are as follows.

ELECTRONIC ARBITRATION

A number of changes to facilitate internet-based arbitration are proposed (for example, electronic submission and internet-based hearing of parties, experts and witnesses).

CONSUMER PROTECTION

The draft amendment proposes to protect consumers against arbitration clauses contained in general conditions. A consumer who is confronted with a request for arbitration based on general conditions may opt out of arbitration within one month.

CHALLENGE OF ARBITRATORS

The current NAA allows a party to challenge the appointment of an arbitrator in a state court even if the arbitration rules provide for the right to challenge an arbitrator at an arbitration institute or appointing authority. Under the proposal, parties would be allowed to exclude the jurisdiction of the state court to hear challenges, and to agree to bring challenges before an independent third party, such as an arbitration institute or appointing authority.

INTERIM MEASURES

The draft amendment proposes to introduce the possibility of enforcing an arbitral order (interim measure) through the state courts. This would allow such orders to be enforced as an arbitral award in the Netherlands.

DEPOSIT OF THE ARBITRAL AWARD

The current NAA requires arbitrators to deposit a copy of the arbitral award at the state court of the place of arbitration, which terminates the mandate of the arbitrators and triggers a number of strict deadlines (for example, to seek rectification or setting aside). Although this requirement served a useful purpose, foreign arbitrators were often not aware of it, causing unnecessary complications. The deposit of an arbitral award is now proposed to become an opt-in requirement, which should reduce such problems.

SETTING ASIDE PROCEDURE

The procedure for setting aside an arbitral award would become shorter under the proposals. While it must now be initiated before the District Court, it would under the new procedure be initiated at the Court of Appeal (thereby removing one full court step). It is also proposed that the parties can agree to exclude a further appeal to the Supreme Court.

REMISSION

It is proposed that the Court of Appeal will be allowed to refer a matter back to the arbitral tribunal in order for it to rectify a defect that would otherwise cause the arbitral award to be set aside (even if none of the parties requested it).

LIMITED REVIVAL OF JURISDICTION OF THE STATE COURTS

The current NAA provides that the jurisdiction of the state courts revives in full following the setting aside of an arbitral award. The draft amendment proposes to limit the revival of jurisdiction of the state courts to only those instances where the setting aside is based on the lack of a valid arbitration agreement.

MEASURES IN AID OF FOREIGN ARBITRATION

The draft amendment proposes to further develop the ways Dutch state courts may take measures in aid of domestic and foreign arbitration (these measures include: attachment of assets located in the Netherlands; urgent relief measures; the hearing of witnesses and experts; site visits and disclosure of documents).

For further information, please contact your usual Eversheds contact or:

Jurjen De Korte
Partner
+31 20 56 00 66 4
jurjendekorte@eversheds.nl

ESP

SPAIN

New challenges For banks in foreclosure proceedings

The new Spanish Anti-Eviction Law (Law 1/2013 - May 14th) introduces new measures to protect debtors in the judicial process and gives them additional options to oppose claims filed by banks. The changes will involve new challenges for financial institutions. This article looks at the most relevant changes.

• THE INITIAL PETITION (ART. 575.3 LEC)

The initial petition may change its structure and content and should become a document of great importance in which several issues must be explained in order to ensure the success of the claim. For example, the bank should explain if the home mortgaged is the debtor's main residence in accordance with the mortgage deed (Art. 21.3 of the Mortgage Law).

Furthermore, the initial petition should explain in detail the formula used by the banks to calculate normal and late payment interest. If not, the judge could dismiss the claim.

Finally, the initial petition must explain that the mortgage loan deed does not contain any unfair or abusive clauses, or those that could be considered as such have not been implemented, or such clauses do not form the basis of the foreclosure nor have they determined the amount claimed. If the banks do not act in this manner, there is a risk that the court could dismiss the claim.

• REJECTION OF ENFORCEMENT DUE TO ABUSIVE CLAUSES (ART. 552.1 LEC)

The new law allows the court to deny the enforcement of a bank's claim if it considers any clause contained in the mortgage loan deed to be abusive. It is therefore important to clarify the absence of such clauses in the initial petition. In light of this, the court will allow the parties a period of five days for motions. This period will cause considerable delay in the procedure (eg if the court should serve against a non-resident debtor).

• OPPOSITION BY THE DEFENDANT TO THE ENFORCEMENT PROCEDURE (ART. 557.1.7º)

This modification is, without a doubt, the main novelty contained in this law, and allows defendants to immediately suspend the proceedings by alleging the abuse of any clause in which the claim is substantiated. In those cases it will be necessary to have a public hearing (trial) prior to the final decision.

The Anti-Eviction Law also established an automatic one-month suspension of all proceedings that had already begun to allow defendants to put forth any of the new grounds of opposition. This period ended on 17 June 2013 and resulted in an extremely high number of oppositions.

- **SUSPENSION OF EVICTION IN CASES OF SPECIAL VULNERABILITY AND SOCIAL EXCLUSION (ART. 1, ANTI-EVICTION LAW)**

  Debtors can now suspend eviction for two years if they can prove they are vulnerable or near the threshold social exclusion. Evidence of this would need to be verified in advance.

- **SUSPENSION OF THE EXTRAJUDICIAL SALE PROCEDURE**

  When the public notary considers that any of the clauses contained on the mortgage loan deed could be considered abusive, they will inform the parties in order to allow the debtor to file a claim asking for the mortgage to be voided. This notification will warn debtors that, if they do not file a claim, the extrajudicial sale procedure will continue.

Moreover, the Anti-Eviction Law includes the possibility of the public notary automatically suspending proceedings if the debtor proves that it has filed a claim against unfair and abusive clauses.

For the reasons set out above, foreclose procedures have changed radically. They are now truly complex procedures in which banks will only be able to enforce on the mortgage deed where it can demonstrate that it is fair to do so, which is likely to cause banks greater delay and difficulties when seeking to enforce the terms of a mortgage deed.

For further information, please contact your usual Eversheds contact or:

Antonio Bravo
Partner
+34 91 42 94 333
abravo@evershedsnicea.com

ESP

Current banking litigation themes

Recently, there has been a great increase in the number of banking judicial proceedings brought in the Spanish courts. Traditionally, these proceedings consisted of recovery litigation ie proceedings started by banks against their own clients. Nowadays, however, the courts are facing a new scenario. A large number of claims are now being brought by clients against banks alleging mis-selling of their financial products. There has also been a considerable increase in criminal proceedings brought against former bank directors for negligence in the management of banks as well as several fraud investigations undertaken by regulatory authorities (notably CNMV and the Bank of Spain). A summary of these actions is set out below.

CLAIMS AGAINST BANKS FOR THE MIS-SELLING OF PREFERRED SHARES (*PARTICIPACIONES PREFERENTES*) AND OTHER TOXIC PRODUCTS

In Spain, the sale of 'preferred shares' (participaciones preferentes) by financial institutions to clients (small savers with little or no knowledge of the product that they were purchasing), has resulted in a large number of mis-selling claims. These 'shares' have been categorised as "complex and high risk instrument because the capital may be lost" (Report 2011 on Investor Claims issued by the CNMV). In spite of their complexity and risk, they were offered by financial institutions, mainly savings banks, as an alternative to sight deposits. When financial institutions sold these products to their clients it is alleged that they did not warn them that the preferred shares were a high risk product that may make them vulnerable to loss.

It is believed that more than 30 billion Euros were invested by clients in preferred shares, mainly by savings banks that were rescued by the Spanish government (Bankia, CAM and Caixa Catalunya). It is estimated that the volume of loss to the financial institutions clients is around 70% of their total investment. This, understandably, has produced an avalanche of claims.

Many of the financial institutions that issued these products have been offering exchanges to their clients. The exchange offered is for an alternative product which would limit the client's losses. These exchanges were made in order to try to maintain a good relationship with their affected clients.

However, some financial institutions, specifically those rescued with public funds, were prohibited from offering this solution. The prohibition stemmed from the Memorandum of the European Commission dated July 24 2012 (the Memorandum). The Memorandum restricts financial institutions who were given State aid to take on losses of the holders of preferred shares.

ESP

SPANISH BANKS' FRAUD INVESTIGATIONS

Spanish prosecutors have launched fraud investigations against a number of former executives of Spanish banks.

Spain's highest court (Audiencia Nacional) has begun an investigation for fraud, embezzlement and stock price manipulation against 33 officials. This includes Rodrigo Rato, the former chairman of Bankia and managing director of the IMF from 2004 to 2007.

Another recent example is Caixa Catalunya. Caixa Catalunya is a nationalised savings bank, 53 of its former officials are under criminal investigations for potential fraud in relation to their pension plans.

REPOSSESSION PROCEDURE

Spanish Law on repossession procedures has recently been under review. Debtors are now able to use the defence that there are abusive clauses in mortgage agreements in order to avoid repossession by banks. As a result, banks are now seeing the traditionally quick and simple procedure of repossession, turning into a long and drawn out process as many borrowers allege abusive conditions in their contracts and claim the nullity of the repossession title.

For further information, please contact your usual Eversheds contact or:

Antonio Bravo
Partner
+34 91 42 94 333
abravo@evershedsnicea.com

SUI

SWITZERLAND

Private bribery soon to be more severely punished in Switzerland?

Swiss law prohibits both public and private bribery. While public bribery involves an undue advantage given or promised to a public official, private bribery concerns the private sector. A good example of private bribery is where a supplier pays a bribe to an employee of a potential client, to make sure the latter signs a contract with him. In this sense, the prohibition of private bribery aims at protecting trust and loyalty in business relationships by sanctioning the breach of private-law duties.

Unlike public corruption offences which are regulated in the Swiss Criminal Code (the SCC) and are automatically pursued, bribery in the private sector is regulated by the *Unfair Competition Act* (the "UCA"). It is also, for the time being, pursued under criminal law only on a complaint. Criticisms have arisen from both internal and international sources regarding these two important differences.

First, the fact that private bribery is regulated by the UCA implies a link between the offence and the notion of unfair competition which would not exist if the offence was in the SCC. As a result, only an act of unfair competition, which means an act likely to favour or to disadvantage a company in its struggle to acquire clients or to increase or decrease its market share, is punishable.

Conversely, when the relevant act does not influence the acquisition of a market because it occurs after the conclusion of a contract, or when it takes place within the context of a monopoly, it is not punishable since it does not interfere with competition.

For example, if the above-mentioned supplier, once the contract has been signed, pays a new bribe to his client's employee responsible for quality control to turn a blind eye to the quality of the delivered goods, this act would not be punishable, precisely because the contract has already been signed. This loophole has also been pointed out as particularly problematic in Switzerland with regards to the numerous international sports federations the country is home to, such as the International Federation of Association Football (FIFA) or the International Olympic Committee (IOC).

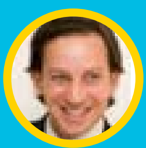
There are doubts whether, in its current form, the offence of private bribery would cover corrupt acts which may occur in the awarding of major sporting events such as the Football World Cup or the Olympic games, as competition between applicant cities or countries does not fall within the notion of competition under the UCA. In view of the important financial implications inherent to these awarding proceedings, there is though an obvious public interest to prosecute such corruptive acts.

The second major criticism concerns the fact that the offence is only pursued on a complaint. Indeed, even though the provision on private bribery has been in force in Switzerland for more than six years, studies suggest that not one condemnation has been pronounced so far. Only a small number of cases are currently pending, which seems to indicate that the condition of a complaint is an excessive obstacle to prosecution.

In order to address these criticisms and to strengthen its legislation on private bribery, the Swiss government prepared a preliminary draft amendment to the SCC which inserts the offence of private bribery into the SCC and removes the condition of a complaint.

The offence of private bribery is now proposed to be automatically pursued. This preliminary draft was submitted to the cantons, political parties and other relevant organisations for consultation on 5th September, 2013. Accordingly the first feedback received on the consultation, was that the draft was in general favourably received. The insertion of private bribery into the SCC was almost unanimously accepted, while the question of the condition of a complaint was challenged. The Swiss government will now decide on the next steps in the legislative process (submission of the draft to the parliament for examination and vote with or without amendments) imminently.

For further information, please contact your usual Eversheds contact or:



Grégoire Mangeat
Partner
+41 22 81 84 50 2
gregoire.mangeat@eversheds.ch

SUI

Attachments under Swiss law: prohibition of 'investigative attachments' or 'fishing expeditions'

One of the main conditions to obtain a civil attachment in Switzerland is for the claimant to credibly demonstrate the existence, on Swiss territory, of the assets owned by the debtor that he, or she wants to be attached. If the claimant fails to show that such assets exist in Switzerland, the judge must refuse to order the attachment. From this condition, Swiss jurisprudence deduced the prohibition of attachments that are not requested to protect the claimant's interest, but are actually used to obtain information regarding the debtor and its financial situation, the so-called 'investigative attachments', or 'fishing expeditions'.

In order to obtain an attachment, the claimant must therefore not only credibly demonstrate that they have a civil claim against the debtor, but must also give the judge enough indication that the assets to attach are located in Switzerland.

Where bank accounts are concerned, the claimant must credibly demonstrate that the debtor is the owner of an account with the bank to which the attachment order will be addressed. In more specific terms, if the claimant does not indicate the precise account numbers, they must at least expose the reasons why they think that the debtor's assets are deposited with the banks indicated. They must also provide the Tribunal with written documents to show this.

A claimant who indicates several banks without any precise or specific suspicions about the existence of attachable assets with those banks will not obtain the attachment. The claimant will be considered to be acting with only the intention to obtain financial information on the debtor, their request for the attachment therefore amounts to a mere fishing expedition. The fact that assets are indeed discovered, by way of attachment – one could say 'by accident' – does not 'heal' the initial investigative nature of the request. Such an attachment, if it was granted, must be released.

The prohibition of investigative attachment was recently successfully invoked within the framework of an attachment proceeding before the Geneva Tribunals. The case was opposing a Swiss enterprise who had obtained the attachment of more than CHF 7 million owned by one of its foreign clients, deposited in a Geneva bank.

After numerous appeals from both sides, the Geneva Court of justice ordered to release the attachment on the Swiss enterprise's client's assets. This was on the grounds that the attachment was investigative: the claimant had indicated in its request the name of four important Swiss banks where the assets had to be attached, but he had not given any explanation on why the client's assets would be there, nor provided the Tribunal with any written document showing it.

The Court of Justice noted that it was only "by accident" that assets were discovered in that bank allowing the attachment order to be executed, since the claimant had no clue that those assets actually existed and were located in that bank. Therefore, the Tribunal considered that the attachment was investigative. The fact that those assets were eventually discovered in the bank could not 'heal' this initial investigative nature. The attachment had to be released.

After the claimant appealed this decision, the Swiss Supreme Court gave its final decision in April 2013, after three and a half years of intense proceedings. It rejected the appeal and confirmed the Court of Justice of Geneva's decision to release the attachment.

For further information, please contact your usual Eversheds contact or:

Grégoire Mangeat
Partner
+41 22 81 84 50 2
gregoire.mangeat@eversheds.ch

Right to borrow not an 'asset' for the purposes of standard Commercial Court freezing order

JSC BTA Bank v Ablyazov and others [2013] EWHC 867

SUMMARY

The Court of Appeal has considered whether the contractual right to draw down under an unsecured loan facility qualifies as an 'asset' for the purpose of the standard Commercial Court form of freezing order and whether the exercise of such right by directing the lender to pay the sum drawn down to a third party constitutes 'disposing of' or 'dealing with' an 'asset', prohibited by the freezing order. The Court of Appeal concluded that in the context of the freezing order the right to draw down on the loan agreement was not an 'asset'.

BACKGROUND

On 9 August 2009, a freezing order was made against the defendant, Mr Ablyazov. At paragraph 4, the freezing order prevented the defendant from disposing of, dealing with or diminishing the value of his assets. Paragraph 5 further provided that: (i) this applied to all of the defendant's assets whether or not they were in his own name and whether or not the defendant asserts a beneficial interest in them; and (ii) assets include any asset which the defendant has power, directly or indirectly, to dispose of, or deal with as if it were his own.

After the freezing order was made, the defendant entered into four loan facility agreements. Each agreement provided for facilities totalling £10million to be made available to him. The loan facility agreements enabled the defendant to direct that payments be made directly to third parties, which he did in respect of the entire amount under each loan agreement to fund his legal expenses. The claimant applied for a declaration that, in the event the loan facility agreements were valid, the rights under the agreements were assets for the purpose of the freezing order, arguing that all "choses in action" should be construed as assets otherwise the effectiveness and repute of the freezing order would be undermined. The judge held that the defendant's rights under the loan facility agreements were not assets for the purposes of the freezing order and that directing the lender to make payments was not disposing of or dealing with an asset. The claimant appealed.

The principal issues that fell to be determined were whether (i) a contractual right to draw down under an unsecured loan facility qualifies, either generally or in particular circumstances, as an 'asset' for the purpose of the freezing order; and (ii) whether if the right to draw down is an 'asset', the defendant's exercise of the right by directing the lender to pay the sum drawn down to a third party constitutes 'disposing of' or 'dealing with' an asset which is prohibited by the freezing order.

GBR

DECISION

There are three legal principles governing the court's approach to freezing orders: (i) the purpose of a freezing order is to stop the injuncted defendant dissipating or disposing of property which could be the subject of enforcement if the claimant goes on to win the case it has brought, and not to give the claimant security for his claim; (ii) jurisdiction to make a freezing order should be exercised in a flexible and adaptable manner so as to be able to deal with new situations and new ways used by "sophisticated wily operators" to make themselves immune to the courts' orders or deliberately to thwart the effective enforcement of those orders; and (iii) freezing orders because of their penal consequences and the need for the defendant to know where he stands, should be clear and unequivocal, and strictly construed. There is a tension between the first two principles and the third as a strict construction of the freezing order may leave it open to a defendant to potentially reduce the amount that would be available to the claimant at the conclusion of the proceedings.

The court concluded that the rights to draw down under the four loan facility agreements were choses in action. They were not, however, as a matter of construction, assets within the meaning of paragraph 4 of the freezing order. Unlike a debt, such as a credit balance in a bank account, the right to draw down under the loan agreements was simply a personal, cancellable, non-assignable loan facility. The power to deal with the chose in action was subject to the lender's consent and to the lender not cancelling the facility. These are not generally features of an ability to deal with or dispose of an asset "as if it were his own". Freezing orders should be strictly construed. The defendant and third party must be able to know where they stand. The term 'choses in action' was not used in the freezing order, and the terms 'dispose of' and 'deal with' did not naturally convey the exercise of a right to borrow. The wording used in the freezing order did not identify that all choses in action fell within the scope of the term 'asset'. If the freezing order was to treat rights of this type as an 'asset' additional words in the freezing order were required. The appeal was dismissed.

COMMENT

"This case serves as a reminder that freezing orders will be strictly construed and how important it is for practitioners to consider the scope of the wording of a freezing order and to ensure that it is drafted using clear and unequivocal wording to cover the given situation and leave no doubt as to what the defendant can and cannot do."

For further information, please contact your usual Eversheds contact or:

Anthony Davies
Partner
+44 292 047 7348
anthonydavies@eversheds.com

Enforceability of refund guarantees by the English courts: when is a demand under a refund guarantee (performance bond) invalid?

Sea-Cargo Skips AS v State Bank of India [2013] EWHC 177 (Comm)

SUMMARY

The High Court has considered the validity of a written demand under a refund guarantee (also known as a performance bond or demand guarantee). A refund guarantee is typically used in connection with high-value goods and services and is designed to ensure that a third party delivers goods or services in accordance with the terms of the underlying contract and within the timeframes specified. Where there is an event of default by the third party, the beneficiary of a refund guarantee can call on the issuer of the refund guarantee (usually a bank) to provide a specified sum by way of guarantee. This effectively protects the beneficiary from certain losses which may flow from a third party default.

In this case, the Court looked at a written demand for payment under a refund guarantee issued by the State Bank of India and ruled that the demand did not trigger a payment obligation on the issuer as it was ambiguous and therefore invalid. The Court explained that the demand did not need to repeat precisely the words of the refund guarantee, however it had to be clear to the issuer, on the face of the document, that the demand was compliant with the terms of that guarantee. A demand that does not conform to the requirements laid out in the refund guarantee does not trigger an obligation on the issuer to pay the sums demanded.

FACTS

Sea-Cargo Skips AS (the Buyer) entered into a contract to purchase a shipping vessel from Bharati Shipyard Limited (the Builder). In connection with the contract, the Buyer was issued with a refund guarantee from the State Bank of India (the Bank) under which the Bank had an "irrevocable and unconditional" obligation to pay the Buyer following written confirmation that the following event had occurred:

*"the vessel or the construction thereof is delayed with more than 270 days as set out **in the contract article IV 1(E)**, which entitles the buyer to cancel the shipbuilding contract and receive repayment of the advance payments..."*

Article IV 1(E) of the contract effectively entitled the Buyer to cancel the contract in the event of a 270 day delay in stages 2-4 of the construction of the vessel (the construction of the vessel being in distinct stages). Separately, contract article IV 1(C) of the contract provided a separate right to cancel the contract if delivery of the vessel was delayed by 270 days or more.

After a considerable qualifying delay by the Builder, the Buyer cancelled the contract and sought a refund from the Bank (in respect of certain advanced payments made by the Buyer to the Builder under the contract) under the terms of the refund guarantee. The notice from the Buyer read (in part):

"We confirm that the vessel has not been delivered by the delivery date of 30 June 2011 or within 270 days of the same... and the buyer has exercised its rights to cancel the Contract."

The Bank argued that the demand was not in the prescribed form and therefore the payment obligation under the refund guarantee did not arise. The Buyer claimed that the Bank was obligated to pay and that strict compliance with the form of the demand was not necessary provided the substance of the demand was conveyed.

GBR

DECISION

The Court ruled that the Buyer's demand was invalid as it was not in the form required by the refund guarantee. Specifically, the demand was deficient as it:

(a) did not contain a specific reference to contract article IV 1(E) as expressly required in the refund guarantee

(b) did not state that the Buyer was entitled to repayment of the advance payments from the Builder as specifically required in the refund guarantee

(c) referred to a delay in "delivery of the vessel" as opposed to the delay in reaching stages 2-4 of construction of the vessel. Accordingly, on its face it was not clear if the delay described in the demand was a delay of the type described in contract article IV 1 (E) or contract article IV 1 (C). The demand was ambiguous and the Court followed Siprox1 in holding that an ambiguous demand cannot be compliant. The Court also commented that even if the demand had specifically referred to a delay in reaching stages 2-4 of the construction of the vessel, this would not be sufficient as the demand would need to refer specifically to contract article IV 1 (E) of the contract.

COMMENT

"The decision suggests, in strident terms, that care should be taken when drafting a demand for payment under a refund guarantee. The comments made by Mr Justice Teare highlight the importance of "slavishly" following the language in a refund guarantee when making a demand under such guarantee. Put another way, it is crucial that any demand under a refund guarantee conforms with the requirements in the refund guarantee in all respects. If any elements are missing, this could defeat the claim for payment."

Siporex Trade v Banque Indosuez [1986] 2 Lloyds Rep. 146

For further information, please contact your usual Eversheds contact or:

Anthony Davies
Partner
+44 292 047 7348
anthonydavies@eversheds.com

GBR

Duties and liabilities of an agent to lenders

Torre Asset Funding Limited & anr v The Royal Bank of Scotland Plc [2013] EWHC 2670 (Ch)

SUMMARY

The High Court considered standard clauses in a facility agreement and intercreditor deed relating to events of default, the agents duties to tell lenders on the occurrence of an event of default and the duty to pass relevant information to lenders.

The court held that: (i) even where an agent participated in events that constituted an event of default, the agents duty to notify the lenders arose only when it was aware or notified of a default; and (ii) unless financial information provided by a borrower to an agent was provided explicitly for the purpose of circulation to lenders, the agent was not obliged to share it.

BACKGROUND

In early 2007, the defendant, the Royal Bank of Scotland Plc (RBS), arranged and underwrote a complex, multi-tiered securitisation for Dunedin Property Industrial Fund (Holdings) Limited (Dunedin). The claimant, Torre Asset Funding Ltd, invested in a junior subordinated mezzanine level of the portfolio and RBS acted as agent to those lenders (the Junior Lenders). Each tier of lending was documented by a facility agreement between the lenders and Dunedin, and an intercreditor deed between all lenders (the Finance Documents).

In July 2007, an RBS employee noticed a mistake in Dunedin's interest payment and cash flow projections. Dunedin then sent to RBS a revised cash flow spreadsheet that involved rolling up the interest on one tier of the subordinated mezzanine debt until maturity. If this corrective action was not taken, it was likely that Dunedin would fail to meet interest payments on all tiers of the debt.

In October 2007, a business plan and restructuring proposal, incorporating the rolled up interest on the tier of subordinated mezzanine debt, was produced by Dunedin and reviewed by the super-senior and the senior lenders. However, the business plan was not circulated to the Junior Lenders at that time.

In December 2007, RBS sought consent from the Junior Lenders to implement the plans on the basis that the proposed changes were necessary to facilitate the borrower's ability to meet the business's capital expenditure needs. The consent was refused by one of the Junior Lenders. As a result Dunedin was unable to pay its debts and an administrative receiver was appointed. This resulted in recovery of half the senior debt, but no mezzanine returns.

The claimant alleged that: (i) when Dunedin supplied the cash flow spreadsheet in July 2007, this was an event of default and RBS had failed in its duty to inform the claimant of the events of default; (ii) the reports provided in October 2007 amounted to an 'annual budget' and RBS had failed to disclose this to the Junior Lenders as contractually obliged; and (iii) in December 2007 RBS had made a negligent misstatement in relation to the reasons why consent had been sought from the Junior Lenders by stating that it was for reasons of releasing money for capital expenditure on the property portfolio.

DECISION

The High Court dismissed the claim, and found that:

i the email correspondence, conversations between RBS and Dunedin and the document provided during July 2007 did constitute an event of default (as did the discussions with the super-senior and senior lenders on rescheduling the debt in October 2007). The anticipated inability to service the debt could not be regarded as an ordinary or expected incident of Dunedin's business, or an insignificant aspect of its financing arrangements. However, as the Finance Documents stated that RBS was only to inform the Junior Lenders when it became aware of an event of default, and as neither RBS or Dunedin believed that an event of default had actually occurred, at this time, RBS owed no duties beyond those in the Finance Documents

ii The Finance Documents did oblige Dunedin to put forward an annual budget to RBS for approval and circulation. RBS, however, did not act in breach of its duty in failing to treat the business plans and cash flow spreadsheet as a proposed annual budget as Dunedin did not put them forward as such. RBS was therefore not required to circulate them. RBS's obligations under the Finance Documents were "solely mechanical and administrative". RBS was not under an implied obligation to pass on financial documentation to the Junior Lenders. Nor was RBS under an implied obligation to consider what additional information should be sought from Dunedin. The implied duty was inconsistent with RBS's express duties which were set out in the Finance Documents

iii RBS' explanation given in December 2007 to gain the Junior Lenders consent was held on the facts to be materially inaccurate and misleading. However, the claim failed by reason of the limits on the scope of duty of care owed. RBS only assumed an obligation to exercise reasonable care to protect the claimant from loss which resulted from the claimant giving their consent to the rolling up of the interest on the subordinate mezzanine debt. The rolling up of the interest had caused no loss to the Claimant.

COMMENT

"The courts are unwilling to imply duties which place further obligations on agents. The judgement serves as a reminder to practitioners and demonstrates the importance of ensuring that contractual arrangements between agents and lenders are clear, as to the obligations of agents.

Standard agent exculpation clauses in facility agreements which are designed to protect agents quite clearly work. This, with the narrow scope of a duty of care owed by an agent who makes a negligent misstatement should serve as a warning to lenders to how little they should expect from agents who perform a "solely mechanical and administrative role."

For further information, please contact your usual Eversheds contact or:

Anthony Davies
Partner
+44 292 047 7348
anthonydavies@eversheds.com

EVERSHEDS

www.eversheds.com

ELIT.760 10/13