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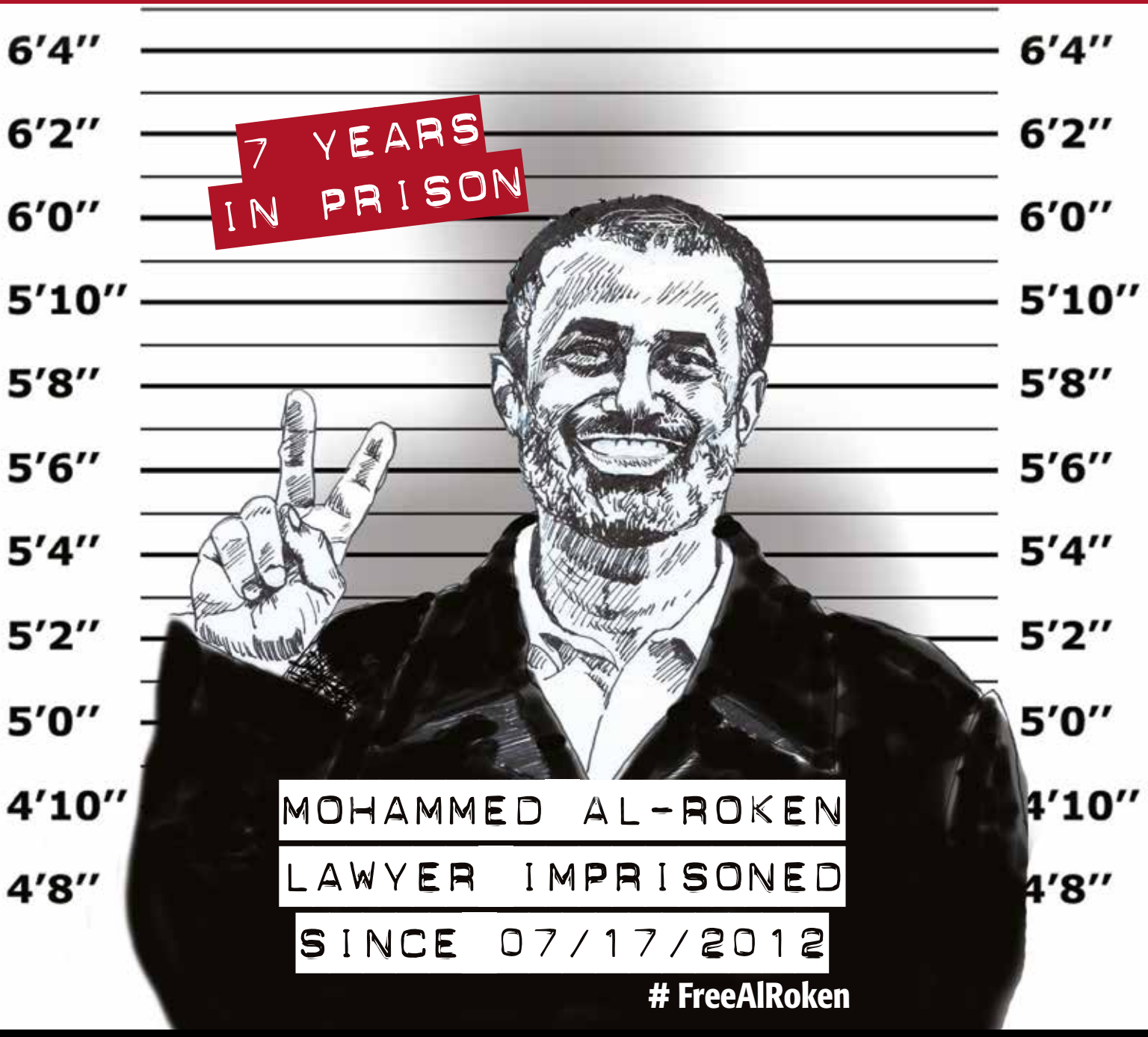

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President's Editorial

Issouf BAADHIO

The era of disruption

Less than two decades ago, the legal profession that we all practice was developed on a foundation of intangible if not immutable conventional principles and in the countries where it emerged, oath-taking was an existential focal point of our professional life, bound as it was to the values of professional ethics and the code of conduct, such as independence, probity, moderation and confraternity that required Lawyers in all circumstances to exercise tact and self-restraint towards colleagues, magistrates and clients in particular, and more generally in the city's social life.

That long, calm river of certainty and convictions has undergone a substantial change in recent years and our professional lives have been transformed, sometimes metamorphosed in the light of new professional challenges that at times lead to embarrassment and often disarray, at a time when, failing to have anticipated or taken the right decisions in time, particularly disruptive choices have been imposed on many of our colleagues.

That is how, little by little, first groupings emerged, then specialisations and, finally, a cross-border and globalising law market developed, from Sydney to Cape Town and from Shanghai to Mexico, in perfect harmony with the routine globalisation of the necessary skill-related complementarities and complexities for lawyers whose scope of action has increased greatly both geographically and technically as well as linguistically to provide legal support for investments worldwide.

This has been coupled with the rapid development of new technologies in the last decade, inducing the dosage of essential IT in our professional practice, which has henceforth become consubstantial with judicial and legal life – what's more and quite surprisingly, at a time when citizens in many countries are distrustful of the justice system.

The emergence of software capable of rendering legal decisions solely on the basis of the case-related elements provided to it, without human intervention, together with robotic legal advice platforms marks a turning point in legal practice and, in fact, compels an organization like UIA to prepare its members for the mutant future of the legal profession.

It is the very essence of UIA to take forward the struggle of training, forward planning and upgrading skills, both for its individual and collective members, in the light of the necessarily demanding and increasingly specialised professional prospects of the legal profession. Therein lies the very significance and scope of UIA's commissions, which reflect upon and discuss specialized topics in all areas of law throughout the year, along with the inexorable professional changes to be faced! The same holds true for our seminars, which conduct discussions on highly technical legal issues, throughout the year and across the five continents, preparing our members for all possible future developments.

Given this perspective, in a world where algorithms tend to take precedence over discernment, where artificial intelligence is naturally required as a major component in the life of the Law and Lawyers, it would be to the credit of a great professional organization like ours to place the necessary forecasting, forward planning, training and upgrading tools at the service of its members and the corporation, to take up the challenge of tomorrow's Advocature everywhere across the five continents.

I invite all of you to join in this dynamic of metamorphosis so as not to have to endure it wherever you are and in whatever form you practice our noble profession. It is a necessary and major investment that will enable you *in fine* to espouse the new face of the legal profession.

We are at a crossroads, and I am particularly honoured to be UIA President during this era of emerging professional disruption, which I hope will lead us to a professional future of enhanced competence, free of the alas too often observed creeping commodification of our actions and services.

The era of disruption is therefore an era of hope for the profession.

Issouf BAADHIO
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Editorial du Président

Issouf BAADHIO

L'ère des ruptures

Il y a moins de deux décennies, la profession d'Avocat que nous partageons tous, était bâtie sur un socle de principes classiques, intangibles sinon immuables, dont la prestation de serment dans les pays où elle existe faisait figure de point focal existentiel pour toute une vie professionnelle, arrimée qu'elle était à des valeurs éthiques et déontologiques, telles que l'indépendance, la probité, la modération, la confraternité qui imposaient à l'Avocat en toutes circonstances de faire preuve de tact, de modération à l'endroit de ses confrères, des magistrats, des clients et plus généralement dans sa vie sociale à la ville.

Ce long fleuve tranquille des certitudes et des convictions a connu une évolution substantielle ces dernières années et notre vie professionnelle s'en est trouvée muée, quelquefois métamorphosée à l'aune des nouveaux défis de la profession nous mettant parfois dans l'embarras, souvent dans le désarroi à l'heure où, à défaut d'avoir anticipé ou pris les décisions idoines en temps et heure, des choix particulièrement disruptifs se sont imposés à bien de nos confrères.

C'est ainsi que progressivement se sont d'abord imposés, les regroupements, puis les spécialisations et enfin l'émergence d'un marché du droit transfrontalier et globalisant de Sydney à Cape Town, de Shanghai à Mexico, en parfaite concordance avec une mondialisation devenue une évidence de nécessaire complémentarité et complexification des compétences pour les Avocats dont le périmètre d'action s'est trouvé fortement accru tant sur le plan géographique que sur le plan technique et linguistique pour couvrir les accompagnements juridiques des investissements à travers le monde.

À cela s'est ajouté ces dix dernières années le développement fulgurant des nouvelles technologies induisant dans notre pratique professionnelle une dose d'informatique essentielle désormais consubstantielle à la vie judiciaire et juridique, à un moment où, du reste, et de manière surprenante, les citoyens dans beaucoup de pays sont en état de défiance vis-à-vis de la justice.

L'apparition de logiciels susceptibles de rendre une décision de justice sur les seuls éléments du cas qui leur est fourni, sans intervention humaine, en même temps que les plateformes de conseils juridiques robotisées marquent un tournant de la pratique des Avocats et impose de fait, à une organisation comme l'UIA de préparer ses membres au devenir mutant du métier d'Avocat.

C'est l'essence même de l'UIA que de porter tant pour ses membres individuels que collectifs, le combat de la formation, de l'anticipation et de la mise à niveau au regard des perspectives professionnelles nécessairement exigeantes et pointues du métier d'Avocat. C'est tout le sens et la portée des commissions qui portent toute l'année durant des thèmes pointus dans tous les domaines du droit et des mutations professionnelles inexorables ! Il en va de même pour les séminaires qui conduisent tout au long de l'année et à travers les cinq continents des thèmes d'une haute technicité préparant nos adhérents à toutes les éventualités des évolutions à venir.

Dans cette perspective, dans un monde où les algorithmes ont tendance à prendre le pas sur le discernement, où l'intelligence artificielle s'impose naturellement comme une composante majeure de la vie du droit et des Avocats, c'est l'honneur d'une grande organisation professionnelle comme la nôtre, de mettre au service de ses membres et de la corporation les outils nécessaires, de prévision, d'anticipation, de formation et de mise à niveau pour affronter l'Avocature de demain partout sur les cinq continents.

Je vous invite tous, à vous inscrire dans cette dynamique de mutation afin de ne pas la subir où que vous soyez et sous quelque forme que vous exerciez notre noble profession. C'est un investissement nécessaire et capital qui *in fine* vous permettra d'épouser le nouveau visage du métier d'Avocat.

Nous sommes à la croisée des chemins et je m'honore particulièrement de présider l'UIA pendant cette ère de rupture naissante sur le plan professionnel qui je l'espère nous conduira vers des lendemains professionnels accrus de compétence et débarrassés de la marchandisation rampante de nos actes et prestations hélas trop souvent constatée.

L'ère des ruptures est donc une ère d'espérance pour la profession.

Bâtonnier Issouf BAADHIO
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Editorial del Presidente

Issouf BAADHIO

La era de las rupturas

Hace menos de dos décadas, la Abogacía que todos compartimos estaba cimentada sobre unos principios clásicos, intangibles si no inmutables, donde la prestación de juramento en los países donde existe era el foco principal y vital de toda una vida profesional, anclada en unos valores éticos y deontológicos, como la independencia, la probidad, la moderación y la confraternidad que obligaban al Abogado a demostrar, en cualquier circunstancia, tacto, moderación para sus compañeros, magistrados, clientes y, de manera general, en su vida social en la ciudad.

Este largo río tranquilo de certezas y convicciones ha experimentado una evolución sustancial en los últimos años y nuestra vida profesional ha conocido una transformación, cuando no una metamorfosis, con la llegada de los nuevos retos de la profesión que a veces nos ponen en apuros y a menudo nos desconciertan, en un momento en que, por no habernos anticipado o tomado las decisiones oportunas a su debido tiempo, muchos de nuestros compañeros se han enfrentado a decisiones especialmente disruptivas.

Así es como progresivamente se impusieron primero las agrupaciones, después de las especializaciones y, por último, la aparición de un mercado del derecho transfronterizo y mundializado, de Sídney a Ciudad del Cabo, de Shanghái a México, en perfecta sintonía con una globalización que evidencia ya la complementariedad y la complicación necesarias de las competencias de los Abogados, cuyo perímetro de acción se ha incrementado enormemente, tanto en el plano geográfico como en el plano técnico y lingüístico, para acompañar jurídicamente las inversiones en todo el mundo.

A ello se suma en los diez últimos años el desarrollo fulgurante de las nuevas tecnologías, que infunden a nuestro ejercicio profesional una dosis de informática esencial que es ya consustancial a la vida judicial y jurídica, en un momento en que, sin embargo, sorprendentemente, los ciudadanos de muchos países desconfían de la justicia.

La aparición de programas capaces de dictar una sentencia basándose solamente en el caso presentado, sin intervención humana, así como las plataformas de asesoramiento jurídico robotizado, marcan un giro en la Abogacía, obligando a una organización como la UIA a preparar a sus miembros para el futuro cambiante de la profesión de Abogado.

La esencia misma de la UIA, tanto para sus miembros individuales como colectivos, es encabezar la batalla de la formación, la anticipación y la modernización en relación con las perspectivas profesionales necesariamente exigentes y especializadas de la profesión de Abogado. Ese es el sentido y el alcance de las comisiones que a lo largo de todo el año presentan temas especializados sobre todas las áreas del derecho y los cambios profesionales inexorables. Lo mismo se puede decir de los seminarios que durante todo el año y en los cinco continentes tratan temas con un alto grado de tecnicidad para preparar a nuestros miembros ante todas las eventualidades de los cambios venideros.

Con esta perspectiva, en un mundo donde los algoritmos tienden a prevalecer sobre el discernimiento, donde la inteligencia artificial se impone con naturalidad como un componente capital de la vida del derecho y de los Abogados, corresponde a una gran organización profesional como la nuestra poner al servicio de sus miembros y de la corporación las herramientas necesarias de previsión, anticipación, formación y actualización para afrontar la Abogacía del mañana en los cinco continentes.

Les invito a todos a seguir esta dinámica de cambio con el fin de no sufrirla, dondequiera que estén y comoquiera que ejerzan nuestra noble profesión. Se trata de una inversión necesaria y fundamental que, en último término, les permitirá sumarse al nuevo rostro de la Abogacía.

Nos encontramos en una encrucijada y es para mí un honor presidir la UIA durante esta era de ruptura naciente en el plano profesional que, espero, nos conducirá a un futuro profesional dotado de mayor competencia y liberado de la mercantilización desmesurada de nuestros actos y prestaciones que, por desgracia, constatamos tan a menudo.

La era de las rupturas es, pues, una era de esperanza para la profesión.

Bâtonnier Issouf BAADHIO
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Message from the Editor-in-Chief

Nicole VAN CROMBRUGGHE

The times we live in often tend to make us swing between enthusiasm and worry. To a certain extent, technological progress offers unparalleled comforts, but it also leaves, or even makes others fall by the wayside. We have walked on the moon and can be legitimately proud of it, but we have learned that here too, we have left tangible traces of our passage: boots too heavy to be brought back to earth, left as waste, thereby reproducing on another sphere what we have already done too much on our own planet. Space debris of all kinds is just left in orbit, plastic invades our oceans and poisons their inhabitants, green algae invade beaches and corals are dying. Of course, one may well wonder about the reasons behind climate change and the real measure of man's influence on these changes. But it is indisputable that all of us pollute, at a small and large scale, from ordinary citizens to multinationals.

The result is that every time we take a step forward, we take three backwards, as our childhood nursery rhyme used to say.

Fearing that we may be sidelined by an evolution whose scope we barely understand and whose speed amazes us, we also seek to control life and even to create it – thus playing the sorcerer's apprentice – to annihilate sexes to the benefit of gender, to remain eternally young and to overcome death.

However, it is far from surprising that this modern world fascinates us just as much as it frightens us. This ambiguity is noted in Winfried F. Schmitz's account of a seminar recently organized in New York by UIA, devoted to Big Data in the medical field, but also in the article entitled "Protecting People from the Dark Side of 'Smart' Medical Devices" that Joseph Dehner and Michael Nitardy have written on the risks involved with connected medical devices that make it possible to communicate information on our state of health in real time and thereby ensure constant monitoring, no matter what we are doing.

These technological advances – whose importance was quickly grasped by some countries, turning them into new areas of exploration – should not make us overlook the fact that elsewhere in the world, there is a long way to go before we make enough progress in human rights protection.

For instance, some countries still practice the death penalty. Our role as lawyers in this respect is crucial, as our colleagues Takehiko Kawame and Teppei Ono remind us in their articles on the issue of the death penalty and the criminal justice system in Japan, respectively.

Similarly, armed conflicts continue to ravage various countries and undermine human rights there, as emphasized by Paulo Lins E Silva in his article, "The Impact of Internal Armed Conflicts on Human Rights", and the management of migratory movements have also raised serious questions in terms of justice and human rights, as recalled by Gustavo Salas.

In addition to all this, the real injustices too often faced by women – as W. Naigaga Kyobiika evokes in her article on new issues pertaining to gender and sexual harassment in Ugandan courts – may almost go unnoticed or become secondary. And yet, this is a problem whose importance cannot be underestimated.

Then there are all the issues that perturb our daily lives, whether they affect the family, our commercial relations, the consequences of Brexit, etc. The Juriste also echoes these, as you can see when you browse this issue.

Last but not least, let us remember the annual event that all of us wait for – the Congress, which will be held in Luxembourg, a city whose charms are too often ignored by its neighbours, I must admit, and which will not fail to enchant you. Its program is particularly attractive and the main themes will certainly stimulate lively discussions, not to mention the work of the Commissions which, as always, will provide the participants food for thought and stimulation in their legal practice.

Happy reading!

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Message du rédacteur en chef

Nicole VAN CROMBRUGGHE

Les temps que nous vivons tendent à nous laisser souvent partagés entre enthousiasme et inquiétude. Le progrès technologique offre à certains un confort inégalé mais en laisse, voire en met d'autres, sur le pavé. Nous marchons sur la lune et en tirons une fierté légitime mais nous apprenons que là aussi nous laissons des traces tangibles de notre passage : des bottes trop lourdes pour être ramenées sur terre, des déchets, reproduisant ainsi sur une autre planète ce que nous avons déjà trop fait sur la nôtre. Des débris spatiaux de toute sorte sont abandonnés en orbite, le plastique envahit nos océans et empoisonne leurs habitants, les algues vertes envahissent les plages, les coraux se meurent. On peut bien sûr s'interroger sur les raisons du changement climatique et sur l'importance réelle de l'influence de l'homme sur ces modifications. Mais il est indiscutable que nous polluons tous, à petite et à grande échelle, du simple citoyen à la multinationale.

De telle sorte qu'à chaque fois que nous faisons un pas en avant, nous en faisons trois en arrière, comme dans la comptine de notre enfance.

Craignant d'être mis sur la touche par une évolution dont nous appréhendons difficilement la portée et dont la vitesse nous sidère, nous cherchons aussi à maîtriser la vie et même à la créer, jouant ainsi à l'apprenti sorcier, à annihiler les sexes au profit du genre, à rester éternellement jeunes et à dominer la mort.

Il n'est pas étonnant toutefois que ce monde moderne nous fascine autant qu'il nous effraie. Cette ambiguïté est relevée dans le compte-rendu que Winfried F. Schmitz nous donne d'un séminaire récemment organisé à New York par l'UIA et consacré aux Big Data dans le domaine médical, mais aussi dans l'article intitulé « Protecting People from the Dark Side of "Smart" Medical Devices » que Joseph Dehner et Michael Nitardy consacrent aux risques que peuvent présenter les dispositifs médicaux connectés permettant de communiquer des informations sur notre état de santé en temps réel et donc d'assurer un monitoring constant quelles que soient nos activités.
Ces avancées technologiques, dont certains États ont su saisir l'importance et en faire de nouveaux champs d'exploration, ne doivent pas faire oublier qu'ailleurs dans le monde, les progrès en matière de protection des droits de l'homme se font encore attendre.

Ainsi certains pays connaissent toujours la peine de mort. Notre rôle, en tant qu'avocats, à cet égard est crucial comme le rappellent nos confrères Takehiko Kawame et Teppei Ono dans les articles qu'ils consacrent respectivement à la problématique de la peine de mort et au système pénal au Japon.

De même, des conflits armés continuent à secouer divers pays et à mettre à mal les droits de l'homme dans ces contrées, comme le souligne Paulo Lins E Silva dans son article « The Impact of Internal Armed Conflicts on Human Rights », la gestion des mouvements migratoires, eux aussi suscitent de graves questions en termes de justice et de droits humains comme le rappelle Gustavo Salas.

À côté de cela, les injustices, réelles, auxquelles sont encore trop souvent exposées les femmes comme l'évoque W. Naigaga Kyobiika dans son article sur les nouvelles questions liées au genre et le harcèlement sexuel dans les tribunaux Ougandais pourraient presque passer inaperçues ou secondaires. Et pourtant, il s'agit d'une problématique dont l'importance ne peut être sous-estimée.

Et puis il y a toutes ces questions qui agitent notre vie de tous les jours, qu'elles touchent à la famille, aux relations commerciales, aux conséquences du Brexit, etc. Le Juriste s'en fait aussi l'écho ainsi que vous pourrez le constater en parcourant ce numéro.

Last but not least, rappelons l'événement annuel que nous attendons tous : le Congrès, qui se tiendra à Luxembourg, une ville dont les charmes sont trop souvent méconnus par leurs voisins, je l'avoue, et qui vous enchantera. Son programme est particulièrement attractif et les thèmes principaux susciteront certainement des discussions animées, pour ne pas parler des travaux des commissions qui comme toujours offriront aux participants de quoi nourrir leur réflexion et leur pratique du métier.

Bonne lecture.

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Mensaje del Redactor Jefe

Nicole VAN CROMBRUGGHE

Los tiempos que vivimos nos producen a menudo una mezcla de entusiasmo y preocupación. El progreso tecnológico les proporciona a algunos un confort extraordinario pero a otros les deja de lado e incluso hay a quienes les condena al olvido. Caminamos sobre la luna y nos enorgullecemos de ello, pero también sabemos que dejamos huellas tangibles de nuestro paso: unas botas demasiado pesadas como para traerlas de vuelta a tierra, residuos... repitiendo de este modo en otro planeta lo que hemos estado haciendo en el nuestro. Abandonamos en órbita desechos espaciales de todo tipo, el plástico invade nuestros océanos y envenena a sus habitantes, las algas verdes invaden las playas, los corales se mueren... Por supuesto, cabe preguntarse por los motivos del cambio climático y por la magnitud real de la influencia del hombre en estas modificaciones. Pero es indiscutible que todos contaminamos en menor o mayor medida, desde un ciudadano de a pie hasta una multinacional.

Así, cada vez que damos un paso adelante, damos tres hacia atrás.

Temerosos de quedar al margen de una evolución cuyo alcance nos cuesta entender y cuya velocidad nos asombra, tratamos de dominar la vida e incluso crearla, jugando a ser aprendices de brujos, a aniquilar los sexos a favor del género, a ser eternamente jóvenes y a dominar la muerte.

Sin embargo, no resulta sorprendente que este mundo moderno nos fascine tanto como nos asusta. Esta ambigüedad queda patente en el informe que nos ofrece Winfried F. Schmitz de un seminario que organizó recientemente la UIA en Nueva York, dedicado a los big data en la medicina, pero también en el artículo titulado «Protecting People from the Dark Side of "Smart" Medical Devices», que Joseph Dehner y Michael Nitardy dedican a los riesgos que pueden presentar los dispositivos médicos conectados que permiten comunicar información sobre nuestro estado de salud en tiempo real y, por lo tanto, hacer un seguimiento constante de todas nuestras actividades.
Estos avances tecnológicos, cuya importancia han sabido entender algunos Estados, convirtiéndolos en nuevos campos de exploración, no deben hacernos olvidar que en otros lugares del mundo los progresos en materia de protección de los derechos humanos dejan mucho que desear.

Así, todavía hay países donde se aplica la pena de muerte. Nuestro papel como abogados en este sentido es crucial, tal como recuerdan nuestros compañeros Takehiko Kawame y Teppei Ono en los artículos que dedican respectivamente al problema de la pena de muerte y al sistema penal en Japón.
Asimismo, algunos países siguen azotados por conflictos armados, que vulneran los derechos humanos de estas tierras, tal como subraya Paulo Lins E Silva en su artículo «The Impact of Internal Armed Conflicts on Human Rights», y la gestión de los movimientos migratorios también plantea graves cuestiones en cuestión de justicia y derechos humanos, como recuerda Gustavo Salas.

Junto a todo esto, las injusticias reales, a las que todavía se exponen con demasiada frecuencia las mujeres, como evoca W. Naigaga Kyobiika en su artículo sobre las nuevas cuestiones asociadas al género y el acoso sexual en los tribunales ugandeses, podrían pasar casi desapercibidas o quedar en un segundo plano. Y, sin embargo, se trata de una problemática cuya importancia no se puede subestimar.
Y luego están todas esas cuestiones que agitan nuestra vida diaria y que afectan a la familia, las relaciones comerciales, las consecuencias del Brexit, etc. El Juriste se hace también eco de ellas tal como podrán comprobar hojeando este número.

Por último, pero no menos importante, recordemos el evento anual que todos esperamos: el Congreso, que se celebrará en Luxemburgo, una ciudad cuyos encantos desconocen bastante sus vecinos – he de confesarlo – y que les encantará. Está acompañado de un programa especialmente atractivo y los temas principales suscitarán sin duda animados debates, por no hablar de los trabajos de las comisiones que, como siempre, brindarán a los participantes temas de reflexión y les permitirán enriquecer su actividad profesional.

Buena lectura.

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Sofia Seminar

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Winter Seminar in Aspen, Colorado

14th UIA Winter Seminar

Hot Legal Topics in the Age of Digitalization: M&A, Corporate Law, White Collar Crimes and Dispute Resolution

Robert K. KRY
& Véronique MOISSINAC MASSÉNAT

Twenty years after our colleague Winfried Schmitz organized the first Winter Seminar in Aspen, Colorado, the conference returned to this same little old mining town, thanks to the enthusiasm of our dear friend.

From the March 31 to April 5, 2019, 38 lawyers from 16 different countries – Algeria, Belgium, Brazil, Canada, Congo, France, Germany, Israel, Italy, Japan, Luxembourg, Saudi Arabia, Spain, Switzerland, the United States, and the United Kingdom – headed off to Colorado to share presentations on how digitalization has impacted the legal practice and to enjoy Aspen's fantastic slopes. Although many of us landed after an erratic journey from around the globe, we made it, and the conference was a big hit.

Part of the magic of the Winter Seminar is its informal and dynamic nature. Half the time of each presentation is dedicated to Q & A in which other delegates can share experiences from their own practices, keeping everyone entertained and involved. And we cannot forget the time spent on skis. As our colleague Keith Oliver likes to say: Skiing is life! We took that philosophy to heart at this year's seminar.

We began the week's program on Sunday evening with an opening reception by the fireplace. We were happy to get together and to share news about the snow.

On Monday morning, we learned about new ways to address due diligence with artificial intelligence and digital data rooms. We heard perspectives from both law firms and in-house lawyers. We enhanced our own due diligence of the Colorado terrain on Aspen Mountain and then got back for tea time to discuss digitalization in corporate transaction structuring and negotiation.

On Day 2, we got even deeper into the world of artificial intelligence, discussing its role in legal compliance and workforce management. We also learned about "smart" contracts and new forms of financing like initial coin offerings. We combined that legal excursion with a bit of adventure in Aspen Highlands, slaloming between the pine trees.

On Wednesday, we switched to white collar crime and litigation, learning about criminal liability for cybercrimes and extradition in the digital era. Other speakers explained the evolving rules for jurisdiction in a digital age and data privacy issues, while we broadened our horizons with insights into the role of technology in the Saudi judicial system. Among all those topics, we found time to keep exploring the Rockies from top to bottom at Snowmass, with no reported injuries despite of the side effects of Aspen night life.

On Day 4, we turned to digitalization in alternative dispute resolution. Our colleagues explained new frontiers in online dispute resolution and the pitfalls of electronic arbitration agreements. We learned how United States litigators use artificial intelligence to make document review more efficient and keep down discovery costs. We took it easy on the slopes this day, heading to Buttermilk's forgiving trails.

Friday saw one last day of sessions, highlighting the use of artificial intelligence to resolve legal disputes and ethical rules for robots. We then headed back to Snowmass to explore the outer reaches of some of Colorado's best and most challenging terrain.

We concluded with a gala dinner where Franz Schubiger and Francisco Ramos Romeu paid kind tribute to Winfried Schmitz, the soul of the Winter Seminar who dedicated many years to organizing intriguing seminars in great venues. Sadly, Wini announced that, after twenty years, he was retiring as chief organizer of the seminar. Fortunately, he has fostered a team to keep the flame alive and even added a new organizing committee member – and an official ski instructor – to the cause: Ángela Díaz-Bastien.

Our last words are for our friend Wini: Thank you! We look forward to many years of learning and skiing yet to come.

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Doing Business in and with Emerging Markets

How to Edge the Various Risks in Asia and Other Regions

Yoshihisa HAYAKAWA
& Motoyasu HIROSE

Japan has certainly been strengthening its presence and its recognition with the UIA, demonstrated by the sequence of big seminars held annually since 2014, including the Winter Seminar in 2017, which was the first to take place in Asia. Jointly with the Tokyo Bar Association, and supported by the Japan Federation of Bar Associations, both being leading official organizations of Japanese lawyers and UIA firm members, the UIA held a one-day seminar, coupled with a number of social events of a different nature with great success under the cherry blossoms of March 2019. Notably, the Honourable President, Mr. Issouf Baadhio (Burkina Faso) and the Immediate Past President, Mr. Pedro Pais de Almeida (Portugal), both kindly came all the way to Japan and attended the whole of the seminar.

The topic of this seminar, prepared by the Foreign Investment Commission of the UIA where the authors of this article both regularly committed themselves over the years, was *"Doing Business in and with the Emerging Markets"* with particular focus on how to hedge the various risks in different continents from the standpoint of both *investors* and *investees*, respectively. The common interests of both sides, including the comparison of the particularities of diversified jurisdictions, were addressed.

March 28, 2019 (Thursday) started with an informal workshop, organized by the UIA Japan National Committee for promotional purposes. Several UIA speakers made presentations for dozens of Japanese corporations, especially their in-house counsel that regularly tackle difficulties when investing into the emerging markets from Japan. Followed by that workshop, UIA participants paid a courtesy visit to the office of the Japan Federation of Bar Associations and then moved to the Gala Dinner at a traditional Japanese restaurant surrounded by beautiful gardens. UIA local members in Japan as well as senior officers of the Tokyo Bar Association were invited.

On March 29, 2019 (Friday), before the main seminar started, UIA participants again visited the offices of the Tokyo Bar Association. The main one-day seminar, jointly hosted by the Tokyo Bar Association, was made up of 4 sessions: (i) Asia, (ii) Africa and (iii) Latin America (investees) as well as (iv) developed jurisdictions (investors). The most interesting and unique aspect of these sessions was that all the speakers and commentators from the former three, namely, investment destinations, were, contrary to ordinary investment law seminars, requested to shed light on and develop arguments about the negative dimension of their local investment climate, accompanied by tactical ways to deal with it. The assignment given to each speaker was to throw their respective home countries in the roast! In the eyes of the audience from Japan and participants from the investors' side, it was a rare opportunity to hear native lawyers in higher-barrier jurisdictions show their true colours, a perspective which would be unavailable in law textbooks. Despite falling on the end of a business year in Japan, we successfully attracted more than 50 participants.

On March 30, 2019 (Saturday), we organized a full-day excursion to Kamakura, being the ancient capital of Japan reachable within one hour drive from Tokyo. Most of the UIA participants, including the President and immediate Past President, as well as a number of Tokyo Bar Association members were included. Kamakura was the origin of bladesmen, known as "*samurai*" who were ancient Japanese fighters.

Surrounded by cherry trees in full bloom everywhere, we departed early in the morning, visiting the Bamboo Temple, the Great Buddha and the Flower Temple with beautiful flower gardens. For lunch, we enjoyed traditional Japanese dishes at an old "folk" dwelling located in the midst of a vast green garden in the mountains. In the afternoon, we visited the biggest *Zen* Temple and the biggest *Shinto* Shrine, which were symbols of the bladesmen.

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Investment in Real Estate

European and Bulgarian Regulations

Konstantin DIMITROV

The international seminar, "Foreign Investments: Investment in real estate – European and Bulgarian Regulations," held in Sofia, Bulgaria, on April 12-13, 2019 was both successful and interesting. The seminar was organized by the UIA, the Supreme Bar Council of Bulgaria and the Sofia Bar Association. More than 80 participants took part at the event which brought together lawyers from 7 countries – Bulgaria, Italy, Greece, France, Spain, Brazil, USA and Japan. On behalf of the UIA, the seminar was organized by the Foreign Investment Commission and the Real Estate Law Commission. Their Presidents, Mr. Eduardo Lorenzetti Marques and Mr. José Antonio Pérez Breva, were speakers and moderators. The President of the Bulgarian National Committee of UIA, Ms. Katerina Gramatikova, took part as a moderator as well.

The main purpose of the seminar was to meet Bulgarian and foreign lawyers who consult with companies investing in different countries within and outside the EU as well as to share their professional experience related to the Foreign Investments in general and the problems they face in their daily work together with their ideas for possible solutions.

The Minister of Justice, Mr. Danail Kirilov, personally welcomed the participants and the guests of the seminar. Special greetings to the participants were addressed by the Executive Director of the Bulgarian Investment Agency.

The topic of foreign investment was in the focus of the first seminar day. The lawyers discussed the good investment climate, the needs and problems of investors, the procedural means for protection of overseas investments, the role of arbitration and mediation, and the opportunities for attracting foreign capital through the Bulgarian investment immigration program. The Executive Director of the Bulgarian Investment Agency, Mr. Stamen Yanev, talked about the advantages of investing in Bulgaria.

The President of the Governing Board of the Bulgarian Association of Commercial Banks, Mr. Petar Andronov, presented the role of the banking sector in support of investments and described the needs of the investors according to his professional experience. Mr. Eduardo Lorenzetti Marques, President of the UIA Foreign Investment Commission, talked about good practices in setting up International contacts between lawyers to help their professional activities. Mr. Evgeni Kanev, Doctor of Economics, Founder and managing partner of the Investment advisory company Maconis LLC, Bulgaria, described how to encourage foreign investments in Bulgaria. Mr. Borislav Boyanov, Bulgarian lawyer from Sofia, shared his personal experience about consulting with one of the biggest foreign investments in Bulgaria. Mr. Lyuben Todev, a lawyer from Sofia, talked about the Bulgarian Immigration programme. Ms. Eleonora Sergieva, a lawyer from Sofia, talked about how to improve the investment climate by changing the model of providing administrative services. Mr. Carlo de Naro Papa, a lawyer from Milan, Italy; Mr. Ivaylo Dermendjiev, a lawyer from Sofia and Mr. Borislav Belazelkov, a Judge on the Supreme Court of Cassation of Bulgaria, talked about the efficient arbitration as a vital condition necessary for a good investment climate.

The conclusions were that financial and economic incentives, only, are not sufficient to attract foreign investments unless there is real legal stability. This would include a clear legal framework, a transparent and predictable judicial system, real and consistent enforcement of the rule of law in all areas of public relations, a good infrastructure, a high quality educational system, and effective social and health systems.

The focus of the second part of the seminar was investment in real estate. Experiences were shared and a comparative analysis of the legal regime of the foreign investment regime in Bulgaria and other countries of the European Union as well as in non-EU countries was made.

Mr. Michaela Lashova, representative of Kushman and Wakefield Forton Bulgaria who came as the ambassador of RICS, presented the main trends of the office, commercial market and the industrial market on a global and local scale. Mr. Hugues Letellier, a lawyer from Paris, presented the French real estate acquisition system. Mr. Nikolaos Argyriou, a lawyer from Thessaloniki, Greece, dedicated his speech to ways to overcome crises of all kinds. They included: national regulation on real estate investment in Bulgaria, the ways of acquiring and registering real estate and the restrictions on acquisitions by foreign citizens were presented by Ms. Valia Gigova and Ms. Nora Kyuchukova, lawyers form Sofia and Ms. Emanuela Balevska, Judge in the Supreme Court of Cassation of Bulgaria. Mr. Lyubomir Vladikin, a lawyer from Sofia, presented the tax aspects of the investment in real estates in Bulgaria.

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UIAdvance Holds its First Meeting

Sebastiaan MOOLENAAR

On June 5-6, 2019, the first mid-year conference of the members of UIAdvance took place in Washington, DC.

The UIAdvance program is the association's membership option for law firms specially designed to enhance their global outreach and to provide member firms with exclusive opportunities to benefit from its unique, international network.

The 2019 mid-year conference was kindly hosted by US member Munger, Tolles & Olson. Our President-elect's law firm put together a very interesting program which was attended by lawyers from UIAdvance members in Portugal, Germany, the UK, the US, and the Netherlands. The conference was also joined by UIA President Issouf Baadhio and UIA-IROL Director Jackie Scott.

The meeting kicked off with a fascinating discussion with President Obama's former Solicitor General of the United States Donald Verrilli, who shared his experiences on how to balance being appointed by the President, and simultaneously safeguarding the independence of the US Justice Department. The group also got a very interesting client's perspective, when Northrop Grumman in-house counsel Ken Reiss explained which expectations US companies have when instructing foreign lawyers in international matters. After lunch in a well-known DC restaurant, Sebastiaan Moolenaar gave a presentation about the impact of current developments in international trade politics on the client's day-to-day business. Day 1 was concluded with a wonderful dinner in one of the local power broker restaurants.

The next day the entire group was honored to meet with Chief DC District Court Judge Beryl Howell. After attending a hearing presided by the judge, all attendants were welcomed in her chambers overlooking the Capitol, where an interesting discussion followed on judicial decision-making. The conference was concluded with a fascinating behind-the-scenes tour of the DC federal courthouse and lunch at the court restaurant.

This first UIAdvance conference delivered exactly what was promised to the members: fruitful discussions about networking and collaboration – with some tangible results already appearing – whilst having a terrific time spending time together. Participants are considering various possibilities going forward including mutual client introductions and bullet-pointed presentations on important client issues.

Everyone present agreed that the meetings added real value to business networking efforts and that it was important to continue developing this UIA-based relationship. UIAdvance members will be meeting during the Annual Congress in Luxembourg to further discuss business possibilities, and plans for the 2020 mid-year meeting are already in the works. A big thanks to all who made this meeting a success.

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Union Internationale des Avocats
International Association of Lawyers
Unión Internacional de Abogados

UIAdvance

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It's simple to do. Please contact NoeliaAlonso Morán on **+33 1 44 88 55 66** or by email at **nalonso@uianet.org**

Noelia can answer any questions and, along with the UIA team, work with your firm to enhance your firm's benefits of **UIAdvance** membership.

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Big Health Data – a Cure or a Curse?

Winfried F. SCHMITZ

Big Data is one of the most important resources of modern times. It can be used to the great benefit of people to make systems more efficient and people healthier. At the same time, it can be misused in many ways, to interfere with people's privacy, to gain control over people and manipulate them. George Orwell 1984 is watching. Lawyers are in great demand. The UIA organized an impressive seminar in New York City on June 6 and 7, 2019 to address Big Data in the area of health. 43 participants had registered. The seminar was organized under the competent leadership of Delphine Jaafar from Paris, UIA Deputy Director of Seminars, Janice Mulligan from San Diego, President of UIA Health Law Commission and Christopher Kende from New York, President of UIA Insurance Law Commission.

The participants were received in the New York offices of the law firm of Pepper Hamilton LLP on the 37th floor of the New York Times building on Eighth Avenue. In front of the seminar room, they had spectacular views on the Hudson River and Hudson Yards, the prominent new real estate development in New York City.

The seminar started with one of the keynote speakers, Andrew Grosso, partner of Andrew Grosso & Associates in Washington, D.C. He put Big Health Data into the context of artificial learning and its future potential, calling his presentation "Big Data means Artificial Intelligence". While many doctors would still practice out of the books, he predicted that in the future the top 1% people in the world will be treated based on their genome.

The first panel dealt with the topic "David and Goliath: Data Protection Laws in the Age of the Digital Person". Delphine Jaafar, Vatier Law Firm in Paris, Rupinder Singh Suri, Suri & Company Law Firm in New Delhi, Gregory M. Fliszar, Cozen O'Connor in Philadelphia, Joseph J. Dehner, Frost Brown Todd LLC in Cincinnati, Ohio, and Shigeki Takahashi, Hamani-Takahashi Law Offices in Tokyo made presentations. It became evident that the privacy laws with respect to medical records in many countries are strong.

The second panel dealt with "Intellectual Property Rights for Big Health Data: Are Data-Generating Patents a Game Changer?" Jérémy Bensoussan of Alain Bensoussan Avocats Lexing in Paris, Eliana Silva de Moraes of Silva De Moraes Advogados in Sao Paulo, and Wei Song, Professor of University of Science and Technology in Hefei, China, spoke. Jérémy Bensoussan highlighted the question to what extent artificial intelligence can be protected by copyright. The issue would be to what extent a human authorship is sufficient. Eliana Silva de Moraes described, among others, the Brazilian data protection law of 2018 as inspired by and being similar to the EU GDPR. Prof. Wei Song described the patent and copyright protection of medical research results and of medical data in China.

The third panel dealt with "Insurance and Contract Considerations in the World of Big Health Data". Joao Ribeiro da Costa of Landi, Rodrigues, Nakano e Giovanetti in Sao Paulo, Scott S. Spearing of Hermes, Netburn, O'Connor & Spearing in Boston, and Christopher B. Kende of Cozen O'Connor in New York spoke. Joao Ribeiro da Costa gave an overview of the Brazilian laws in relation to health data and cybersecurity. Christopher Kende described the increasing data breaches and crimes of cybersecurity in the US. He emphasized the best defense would be a good offense. Scott S. Spearing dealt specifically with healthcare data breaches, its exploding costs and the possible insurance coverage.

The law firm of Wuersch & Gering LLP hosted a cocktail and art reception in its offices on Wall Street in the evening. The participants of the seminar were joined by members of UIA's Governing Board and Executive Committee.

The second day of the seminar started with the fourth panel "How Telemedicine, Artificial Intelligence and Robotics are Making Medicine Edgy and Existing Laws Archaic". Janice F. Mulligan of Mulligan, Banham & Findley in San Diego, Joshua R. Cohen of DeCorato Cohen Sheehan & Federico LLP of New York, Jérémy Bensoussan as above, and Diego Saluzzo of Grande Stevens in Turino spoke. Janice Mulligan and Joshua Cohen described fascinating examples of sharing medical data in the US, its limits and future possibilities. Diego Saluzzo focused on the technological abilities as well as the legal and social hurdles of telemedicine. Jérémy Bensoussan dealt with Artificial Intelligence soft and hard laws. He described the legal issues of algorithmic transparency and fairness.

The fifth panel dealt with the subject of "The Patient: A New Medical Device?" Delphine Jaafar, as above, Elise Dufour of Bignon, Lebray in Paris, and Kyle D. Black of Buchanan Ingersoll & Rooney in Pittsburg spoke. Delphine Jaafar pointed out ethical aspects in relation to Big Data and health. Elise Dufour described Big Health Data form the perspective of the data processor. Kyle Black dealt with Big Data in relation to genetical information, genetic privacy laws, disclosure and informed consent.

The seminar ended with a presentation of the other keynote speaker Jay Wolfson, Distinguished Service Professor of Public Health, Medicine and Pharmacy of University South Florida in Tampa, Florida. He gave a very entertaining example of theatrics on the subject "Epilogue: What about Ethics?" As a concluding remark his statement may serve: "Knowing the curse is part of the cure …".

The very informative seminar was a successful cooperation of four committees of UIA (Health Law Commission, Insurance Law Commission, Biotechnology Law Commission and Privacy and Rights of the Digital Person Commission). It had a real global reach including, among others, jurisdictions of Europe, India, China, Japan, South America and the USA. It was a masterpiece of UIA seminars.

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La médiation comme instrument d'une justice moderne

Georges FEGHALI

C'est au Liban, l'un des berceaux de la civilisation humaine, et à Beyrouth, ville de dialogue, de négociations et de compromis, que le barreau de Beyrouth, a accueilli, à l'occasion de la célébration de son centenaire (1919-2019), le séminaire consacré par l'UIA à « La médiation comme instrument d'une justice moderne ». Ce séminaire a été organisé à la Maison de l'Avocat à l'initiative de la commission de médiation et prévention des conflits de l'UIA.

Ce séminaire s'est inscrit dans un contexte bien spécifique :

- sur le plan international marqué par l'expression de la volonté de la Commission des Nations Unies pour le droit commercial international, de conclure une Convention internationale dédiée à la Médiation – la Convention de Singapour – qui sera ouverte à la signature à compter du 1er août 2019 ;
- sur le plan local libanais, suite à la promulgation d'une nouvelle loi n° 82 du 18 octobre 2018 sur la médiation judiciaire.

Après tant d'années de pratiques et de formations avant-gardistes dans la région, le Ministère de la justice libanais a adopté un certain nombre de recommandations visant à garantir le succès de cette nouvelle loi, lesquelles ont été présentées et discutées au cours du séminaire.

Après un remarquable cocktail de bienvenue, à l'image du sens de l'hospitalité libanais, Messieurs les Bâtonniers de Beyrouth et de Tripoli, le Président de l'UIA, le Président du comité national libanais de l'UIA et le Président de la commission UIA médiation et prévention des conflits saluèrent l'organisation du séminaire et les efforts déployés par ses organisateurs afin d'en faire un succès.

Durant la matinée du 24 avril, les intervenants ont échangé les expériences vécues dans les pays dans lesquels la médiation est utilisée, en particulier Serbie, France, Belgique, Italie, Algérie, Maroc et Tunisie.

Tous s'accordèrent pour souligner le mécanisme efficace, moderne, rapide et peu coûteux de résolution des conflits que constitue la médiation. Tout en relevant les différences séparant médiation judiciaire et médiation conventionnelle, les intervenants ont rappelé leurs mérites respectifs et en ont présenté les spécificités et les avantages. Ils ont également mis en exergue les mesures d'accompagnement nécessaires et les écueils à éviter pour assurer son efficacité.

> La discussion et le partage de la philosophie et de la culture de la médiation par des intervenants de régions et de traditions juridiques et de pratiques différentes, ont permis aux participants à ce séminaire de puiser parmi les expériences tant professionnelles que culturelles.

Pour démontrer les succès et les défis de la médiation judiciaire, les intervenants ont abordé :

- La nécessité d'adapter les caractéristiques de la médiation à l'environnement et au contexte socio-économique ;
- L'exigence et la nécessité de la compréhension de la notion de « responsabilité » en matière de médiation ;
- La nécessité d'informer, de sensibiliser, d'expliquer, d'éviter les confusions avec les institutions voisines comme la négociation, la conciliation, l'arbitrage ;
- L'exigence d'une formation de qualité contrôlée et répondant à des standards uniformes s'adressant aux juges, avocats, travailleurs sociaux, ingénieurs, médecins ou autres ;
- La mise en place d'une autorité de régulation ;
- La mise en place de mesures incitant à faire choix de la médiation ;
- Le respect de la liberté de choix des parties ;
- La qualification et l'agrément des centres de formation et l'exigence de la formation continue ;
- La mise en place d'un cadre d'éthique et de déontologie pour tous les intervenants en médiation (médiateurs, avocats…) ;
- Les moyens de financement public pour les citoyens qui, à défaut, n'auraient pas accès à la médiation ;
- Les campagnes de promotion et de sensibilisation à la médiation, visant toutes les couches sociales dans toutes les régions ;
- La nécessité d'introduire l'enseignement des principes de la médiation et la médiation elle-même dans les programmes d'enseignement, dès le plus jeune âge jusqu'à l'enseignement supérieur.

A la fin de la matinée, les participants ont abordé le thème de la médiation judiciaire en tant qu'instrument de justice – Médiation obligatoire – afin de déterminer la ligne de démarcation entre médiation obligatoire et volontaire, entre passivité et action, entre réceptivité et prise d'initiative à même d'assurer l'efficacité de la médiation judiciaire.

C'est ainsi que les professionnels formés à la médiation – juges, avocats, experts et autres – doivent être impliqués dans la promotion de l'outil « médiation » : conférences publiques, sites Internet, campagnes publiques de promotion télévisuelles et/ou radiophoniques, publications, ouverture d'un bureau d'information spécialisé au sein des tribunaux, dépliants destinés au grand public expliquant et facilitant la

compréhension (par ex : bandes dessinées) du processus de la médiation prévu par la loi, ainsi que formation des juges et des avocats à la médiation.

La formation des avocats à la médiation vise à les rendre partenaires du projet et à éviter qu'ils ne deviennent des obstacles, comme ce fut le cas en Italie ou en Algérie. L'objet est de dissiper leur peur de devoir changer leur façon de faire faute de connaissance des avantages dont ils pourraient bénéficier par la médiation, tout en développant leur capacité à négocier, à créer et à imaginer, alors qu'ils sont habitués à attaquer ou à défendre. Sensibiliser les avocats aux avantages que peut leur apporter la médiation, sur le plan personnel en développant leurs outils d'intervention, et sur le plan professionnel en leur permettant de faire aboutir leur dossier rapidement contribue à propager efficacement la médiation judiciaire.

L'après-midi du 24 avril a été l'occasion de passer en revue les obligations et les responsabilités de tous les intervenants, qu'ils soient juges, médiateurs, parties à la médiation, avocats conseils ou encore experts.

La clause de médiation a aussi été discutée ce qui a permis d'apprendre que certains pays, comme la Belgique, imposent une obligation d'information, d'explication et de recommandation à la charge des juges et des avocats. Ont également été abordés les sujets relatifs aux principes à respecter pour la rédaction d'une clause de médiation valable tels que l'obligation de l'écrit (clause ou contrat), claire, inconditionnelle et définitive ainsi que la définition et la description détaillée du processus de médiation, le choix de la langue, du lieu, du droit de la procédure applicable, la confidentialité, la charge du paiement des frais et des honoraires, la durée de la médiation et la possibilité de son articulation avec d'autres moyens de recours (arbitrage, négociation collaborative ou procédures judiciaires classiques).

Des exemples de jurisprudences française, belge et européenne en matière d'annulation de clauses de médiation ont été soumis aux participants afin d'éclairer par la pratique les écueils à éviter pour s'assurer de la pleine efficacité de ces clauses.

Cette journée fut clôturée, selon la tradition libanaise, par un dîner organisé dans un haut lieu de la gastronomie libanaise, auquel ont assisté Messieurs les Bâtonniers de Beyrouth et de Tripoli, Messieurs les Présidents de l'UIA, le Président de la commission UIA médiation et prévention des conflits, les intervenants et les participants au séminaire.

Le lendemain, 25 avril, a été consacré au passage en revue des différents styles de médiations et de médiateurs, pour enfin se consacrer aux réflexions sur l'avenir de la médiation judiciaire au Liban, à la lumière de la promulgation de la loi n° 82 du 18 octobre 2018, par les membres du Comité chargé de l'élaboration des décrets d'application de cette nouvelle loi. Ce Comité de travail a proposé au Ministère de la Justice du Liban un projet de décret d'application incluant les mesures les plus appropriées pour garantir le succès de l'application de cette loi.

Autour d'une table ronde, les représentants des centres de médiation au Liban ont exposé leurs activités et ont présenté leurs dispositions à l'application de la nouvelle loi.

Le séminaire, qui a réuni plus de cent participants venus de treize pays différents, fut un véritable succès pour l'UIA. La discussion et le partage de la philosophie et de la culture de la médiation par des intervenants de régions et de traditions juridiques et de pratiques différentes, ont permis aux participants à ce séminaire de puiser parmi les expériences tant professionnelles que culturelles.

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Au cœur de l'Europe et au sein des institutions européennes, le Luxembourg vous réserve un 63e congrès de tout premier plan tant au niveau événementiel que scientifique.

Le 1er thème aura trait à **l'innovation et le droit** dans les services financiers, juridiques et le droit de l'espace introduit par le **Ministre des Finances Pierre Gramegna**. L'innovation bouleverse en profondeur notre société mais ne va pas sans risque. Comment la réguler sans freiner son développement tout en protégeant les utilisateurs ?

Le 2e thème principal traitera **des droits fondamentaux et de l'entreprise**. Un panel international d'exception entourera **M. Dante Pesce** qui a contribué à l'élaboration des Principes directeurs des Nations-Unies. Il décrira les obligations qui incombent aux États dans ce contexte et la responsabilité accrue des entreprises en cas de violation des droits de l'homme. Seront présentés des cas concrets de responsabilité notamment en matière de protection des données. À ce titre, l'activiste **Max Schrems** qui a défrayé la chronique judiciaire de la Cour de Justice de l'Union européenne dans son combat contre Facebook sera présent.

L'Union européenne est à la croisée des chemins. Si l'Europe est aujourd'hui le premier marché commercial du monde tout en étant l'échelon le plus pertinent pour affronter les mutations futures, elle est souvent décriée. Le congrès de Luxembourg sera l'opportunité de revenir sur le rôle des institutions européennes et du droit européen, en particulier les contrôles exercés par les institutions en matière de concurrence. Qui mieux placés pour parler de ces évolutions que l'ancienne Vice-Présidente de la Commission européenne **Viviane Reding**, les membres de la Cour de justice de l'Union européenne et de la Commission européenne. Les débats animés par des commissions de l'UIA s'annoncent passionnants.

Enfin, aucun pays, même les plus prospères, n'est arrivé à endiguer le fléau des **violences faites aux femmes**. Une session spéciale sera dédiée à ce sujet. Que l'on se trouve au niveau national, régional ou mondial, en temps de paix ou dans les zones sensibles, quelles solutions pouvons-nous trouver pour lutter contre ce mal endémique ? Quel rôle les avocats, les barreaux, les juges peuvent-ils jouer ? Cette session sera l'occasion de relayer l'initiative courageuse « Stand Speak Rise up » de son Altesse Royale la **Grande-Duchesse de Luxembourg** qui vise à lutter contre les violences sexuelles utilisées comme une arme de guerre.

Le 63e congrès de Luxembourg n'est à manquer sous aucun prétexte !

Alain GROSJEAN
Président du comité organisateur
du 63e congrès de l'UIA
Bonn & Schmitt
Luxembourg, Luxembourg
agrosjean@bonnschmitt.net

Luxembourg, cosmopolitan and welcoming capital

Luxembourg, located in the heart of Europe, is one of the smallest members of the European Union, and therefore one of the **best connected nation** to its neighboring countries. Luxembourg is an exceptional destination for business travels, notably because the city of Luxembourg is the host of many official seats of EU organisations and is a **world-class bastion of finance.**

In addition, Luxembourg has also a **thriving cultural life** with many museums, exhibitions, and entertainment for everyone. From the vineyards on the Moselle to sites marking the Grand Duchy's iron- and steel-making past to the thermal spa, the range of touring programmes will truly make your stay unforgettable.

European Convention Centre Luxembourg (ECCL) in Numbers

- One of the Europe's most beautiful Convention Centres
- Over 70.000 square meters
- Hemicycle with 646 seats
- 12 meeting rooms and 30 breakout rooms
- Room D hosted the first meetings on the creation of the EU
- The history of the ECCL is closely linked to the creation and growth of the EU
- Rented by the Council of the European Union during three months every year

Watch videos

Bienvenue à Luxembourg !

Découvrez sur notre chaîne Youtube UIA, les surprises qui vous attendent à Luxembourg et faîtes un tour de la ville avec notre dynamique comité organisateur !

El congreso de la UIA, ¿qué es?

Vivan de nuevo los momentos más destacados del congreso de Oporto y experimenten todo lo que pueden esperar de un congreso UIA.

Le Luxembourg au patrimoine mondial de l'Unesco

Depuis 1994, **les casemates, la forteresse de Luxembourg et ses vieux quartiers** qui conjuguent styles médiéval, classique et contemporain font partie du patrimoine culturel de l'Unesco.

La collection photographique **« The Family of Man »** assemblée par Edward Steichen est constituée de 503 photographies prises par 273 photographes issus de 68 pays. Décrite comme « le plus grand projet photographique jamais entrepris », cette exposition est inscrite au registre « Mémoire du Monde » de l'Unesco depuis 2003.

Enfin, **la célèbre procession dansante d'Echternach** a rejoint le patrimoine culturel immatériel de l'Unesco en 2010.

Un riche programme scientifique, de nombreuses personnalités

L'UIA et le comité d'organisation luxembourgeois ont travaillé sur un programme scientifique de très grande qualité impliquant des membres du gouvernement luxembourgeois, des représentants des institutions européennes, des acteurs importants de la société civile et des professeurs de renom.

Parmi les personnalités qui nous font l'honneur de nous rejoindre :

- **Xavier Bettel**, Premier Ministre du Grand-Duché de Luxembourg, accueillera les congressistes UIA lors de la cérémonie d'ouverture du congrès (06/11/2019)
- **Pierre Gramegna**, Ministre des finances du Luxembourg, introduira le thème principal consacré à l'innovation et au droit (07/11/2019)
- **Viviane Reding**, Députée au Parlement luxembourgeois, ancienne Vice-Présidente de la Commission européenne, prendra la parole lors de la session spéciale sur les institutions et le droit européen (07/11/2019)
- **Dante Pesce**, membre du groupe de travail des Nations Unies sur Business et Human Rights, délivrera le keynote speech du thème principal sur Entreprises et Droit de l'homme (08/11/2019)
- **Max Schrems**, activiste militant, interviendra dans le panel de ce même thème consacré à la protection des données personnelles (08/11/2019)
- **S.A.R. la Grande-Duchesse de Luxembourg,** introduira la session spéciale traitant de la violence faite aux femmes (09/11/2019)
- **Robert Goebbels,** ancien ministre luxembourgeois, signataire pour le Luxembourg de l'accord de Schengen, accueillera les congressistes au Musée européen de Schengen (10/11/2019)

Exceptional Venues for Our Social Activities

Opening Ceremony and Welcome Cocktail (Nov. 6, 2019)

The Opening Ceremony will take place at the **Luxembourg Philharmonie,** which is one of the most prestigious concert halls in Europe, not only due to the quality and quantity of performances (more than 400 per year), but also due to its extraordinary architecture (designed by the French architect Christian de Portzamparc) and the impressive acoustics.

Informal Evening (Nov. 7, 2019)

The informal evening will be held at the **Rockhal,** a concert hall located on the former industrial site of Belval, located directly in front of the last two blast furnaces of the Grand Duchy of Luxembourg.

Gala Dinner (Nov. 8, 2019)

The gala evening will be held at the **Mudam**, the Museum of Contemporary Art of Luxembourg, designed by the famous Sino-American architect Ieoh Ming Pei. The Mudam is located in Park Dräi Eechelen, overlooking the historic center of the city of Luxembourg, and is the link between the old Fort Thüngen and the Old Town on one side, and the European district of Kirchberg on the other side. Through its collection and exhibitions, Mudam's mission is to promote the iconic art of our time.

The second UIA photo contest is open for submissions! The subject chosen by the Art law Commission is "Money" and what you associate with it. Deadline for submissions: September 30, 2019. The 10 best photos will be selected by a jury and the prizes will be presented at the Congress.

Side events

In parallel with the sessions of the UIA commissions, many side events will take place in order to facilitate networking and meetings by affinity:

Regional Lawyers' Forum: on the very first day of the Congress before it actually begins, participants are invited to attend discussions and debates focused on issues lawyers face in specific regions or by affinity of languages: Spanish-speaking lawyers' forum, Portuguese-speaking lawyers' forum, French-speaking lawyers' forum, Forum of lawyers from Central and Eastern European countries, Latin-american lawyers' forum, Arabic-speaking lawyers' forum, African lawyers' forum.

Female Lawyers' Dedicated Sessions and Events: Women lawyers in UIA congress benefit from various occasions to meet up and exchange on their professional life: the Working Session of the Labour Commission (Nov. 7, 2019) on gender diversity and other non-discrimination solutions, the UIA Women's Network Cocktail (Nov. 9, 2019), the Special Session on Violence against Women (Nov. 9, 2019).

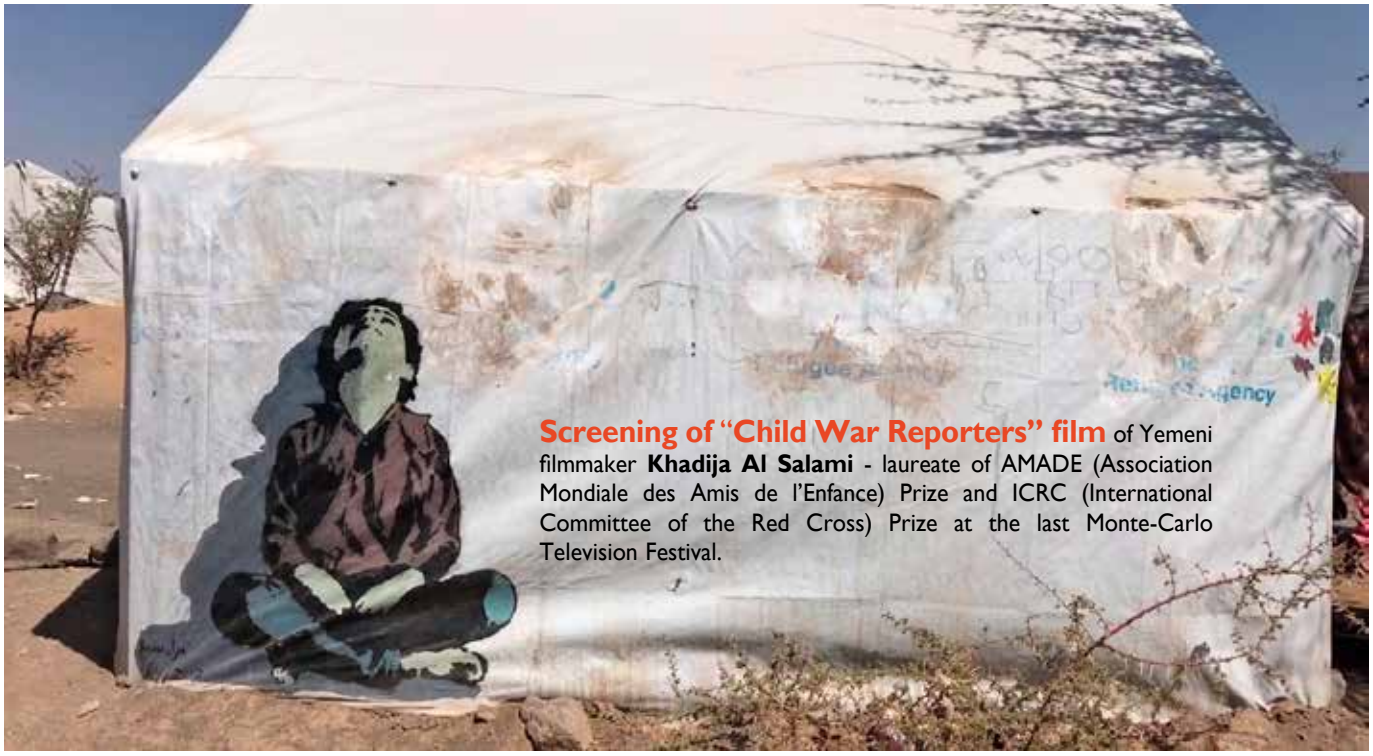
Young lawyers' happenings: Young lawyers under 35 benefit at UIA Congresses. In addition to two working sessions on issues they are facing : "Challenges for Solo Practitioners and Medium Law Firms" (Nov. 8, 2019) and "Business Sustainability" (UIA-AIJA session (Nov. 9, 2019)), special activities are planned to ensure they have fun:

- Sports activities: football game, morning jogging
- Social events: after-parties, cocktails, breakfasts

Law firms activities: UIA supports law-firm managers in their strategic, financial and human resources challenges. During the congress, a special session on "How to Increase Law Firms' Revenue" will take place on Nov. 7, 2019.

During UIA's famous "Law Firms' Speed Dating Session", law-firm representatives will give a three-minute presentation of themselves.

Finally, to add a touch of conviviality, the UIA will set up a cocktail party for law firms taking part in its UIAdvance programme.



Screening of "Child War Reporters" film of Yemeni filmmaker **Khadija Al Salami** - laureate of AMADE (Association Mondiale des Amis de l'Enfance) Prize and ICRC (International Committee of the Red Cross) Prize at the last Monte-Carlo Television Festival.

Ludovic Trarieux International Human Rights Prize 2019

The 24th Ludovic Trarieux Prize was awarded on May 27, 2019, to the Colombian lawyer **Rommel Durán Castellanos**, both the president of the Equipo Jurídico Pueblos (EJP), as well as a volunteer of the Committee for Solidarity with Political Prisoners (CSPP) in Bucaramanga. Rommel Durán faced very serious threats to his life due to his work as a lawyer and is subject to harassment, attacks, and stigmatization.

A tribute to his work will take place during the Congress on November 8.

STAND SPEAK RISE UP
TO END SEXUAL VIOLENCE IN FRAGILE ENVIRONMENTS

AN INITIATIVE OF HER ROYAL HIGHNESS THE GRAND DUCHESS OF LUXEMBOURG

Initiative Stand Speak Rise Up !

L'initiative **Stand Speak Rise Up !** a été lancée par **S.A.R. la Grande-Duchesse de Luxembourg** pour en finir avec les violences sexuelles à l'encontre des femmes dans les zones sensibles. Si les femmes ne sont généralement pas sur les lignes de front, elles sont les premières victimes civiles des guerres et du terrorisme et en sont souvent les cibles stratégiques. Ce mouvement donne la parole aux survivantes et les implique dans les solutions à élaborer que ce soit au niveau de la prévention ou de la réparation.

See website

Actividades deportivas para todos/as

¡Se han previsto actividades para que disfrute al máximo su estancia en Luxemburgo!

¡Participe a nuestro **footing** que les permitirá descubrir Luxemburgo en la madrugada antes de las sesiones de trabajo!

Defiendan los colores de la UIA participando al **partido de fútbol** organizado con nuestro colaborador Mundiavocat contra un equipo de abogados luxemburgués.

Y para descansar un poco, asistan a la **sesión de derecho deportivo** sobre las cuestiones emergentes del derecho del fútbol, entre las cuales las del nuevo reglamento de la FIFA sobre los jugadores y los agentes.

Un programa turístico de calidad y en exclusividad para los congresistas

La UIA ha previsto una serie de visitas que les permitirá disfrutar de la ciudad de Luxemburgo y de su gastronomía.

Recorrido por el centro de la ciudad (06/11/2019)

Recorrido por la ciudad baja y las Casamatas (07/11/2019): ***¡Exclusividad UIA!*** Normalmente, las Casamatas, principal atractivo de la ciudad están cerradas al público el 3 de noviembre pero en esta ocasión abrirán especialmente para la UIA. ¡Una experiencia única!

Excusión a Metz (Francia) (08/11/2019): Visita de la ciudad y del Centro de arte Pompidou-Metz

Visita a las bodegas Bernard Massard y degustación de vino (09/11/2019)

Visita al tribunal de justicia de la UE (09/11/2019) y su colección de obras de arte ***¡Exclusividad UIA!***

Velada típica en el Big Beer (09/11/2019) para disfrutar de un momento amistoso

Enlaces utiles

- www.uianet.org
- www.destinationplus-uia.com
- www.eccl.lu
- www.visitluxembourg.com
- www.luxembourg-city.com
- https://maee.gouvernement.lu/fr/services-aux-citoyens/visa-immigration.html

Partenariats

Consultez nos offres de partenariats et rejoignez les sponsors qui nous font déjà confiance.

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LOYENS & LOEFF AVOCATS À LA COUR
MOLITOR Avocats à la Cour
PETER & CLARK MULTILINGUAL COMMUNICATION
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BGL BNP PARIBAS
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El mundo del Abogado
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LEGAL MARKETING DAILY Market your law firm smarter .COM

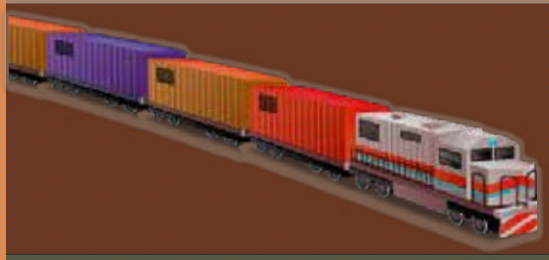
Human Rights and Protection of Lawyers
Droits de l'Homme et de la Défense
Derechos Humanos y de la Defensa

Los números de “LA BESTIA”

La tragedia humanitaria en América del Norte

Dr. Gustavo SALAS R., Ph.D.[1]

El Estado mexicano debe respetar, proteger y salvaguardar los derechos humanos de migrantes conforme se establece en la Ley de Migración.[2]



El tren conocido como La Bestia (entre 30 y 50 vagones de carga) recorre más de 2,500 km desde la frontera sur en Chiapas, hasta la frontera norte, pasando a veces por la Ciudad de México.[3]

Además de carga, este tren transporta migrantes (aproximadamente 150,000 al año) que lo abordan huyendo de Centroamérica y México, con rumbo a los Estados Unidos de América.

Numerosos son también las niñas, niños y adolescentes no acompañados que abordan La Bestia. En el año 2015: 35,000 menores en riesgo trataron de entrar a los Estados Unidos de América.[4]

Con una muy escasa participación del Estado mexicano,[5] la sociedad civil[6] hace esfuerzos por brindar alimentos, albergue, apoyo médico, psicológico y asesoría jurídica a los migrantes en su tránsito por México.

Estos migrantes enfrentan una violencia terrible[7] y pagan un precio altísimo por su traslado —más de USD $1,200[8] por persona además del cobro del “pollero” (traficante de personas) por cruzarles la frontera, que es más costoso.

En los lugares en los que la delincuencia domina, para que las mafias permitan el uso de La Bestia es necesario pagarles –a veces no solamente con dinero, sino enlistándose en algún cártel en pago de alguien más.

Los migrantes se enfrentan a: trata de personas,[9] secuestros, reclutamiento por el crimen organizado, desapariciones, asaltos, golpizas, mutilaciones (aunque estas también pueden ser producto de caídas del tren), violaciones o asesinatos, incluso a manos de diversas autoridades, como policías o agentes de migración, según el Centro de Migrantes "Hermanos en el Camino".

Un 95% sufre de alguna dificultad.[10]

Muchas migrantes centroamericanas solicitan a centros de asistencia en sus países que les administren algún método anticonceptivo de largo plazo, sabedoras de que serán violadas o sujetas a la industria del sexo, prostitución o matrimonios forzados –según informe de la CIDH.

EL PRINCIPIO DE NO DEVOLUCIÓN
(o *non-refoulement*)

En ningún caso el extranjero puede ser expulsado o devuelto a otro país, sea o no de origen, donde su derecho a la vida o a la libertad personal está en riesgo de violación a causa de raza, nacionalidad, religión, condición social o de sus opiniones políticas.[11]

La migración es irremediable por la simple razón de vecindad entre un país rico y un sector de países pobres.[12]

¿Estará la solución en un muro o mediante un verdadero plan centroamericano de desarrollo?

Este fenómeno, sumado a los extensos flujos migratorios provenientes principalmente de Honduras, tiene ya visos de tragedia humanitaria.

[1] Co-director de Derechos Humanos y Defensa de la Defensa UIA-IROL. Salas y Salas ® Cancún, México. gsr@salasysalas.org.mx

[2] El artículo 1º señala como objeto de esta ley, entre otros: regular lo relativo al ingreso y salida de mexicanos y extranjeros al territorio de los Estados Unidos Mexicanos y el tránsito y la estancia de los extranjeros en el mismo, en un marco de respeto, protección y salvaguarda de los derechos humanos.

[3] MARTÍNEZ, Óscar (de El Salvador): Desafíos del tren llamado "La Bestia". Revista Ñ. clarin.com 21/11/2014. Ídem Vid. Nota 5.

[4] GONZÁLEZ, Marcos: La crisis silenciosa de los niños migrantes no acompañados de Centroamérica; 26 de agosto, 2016. UNICEF.org. https://www.unicef.org/spanish/infobycountry/honduras_86561.html

[5] Los Grupos Beta de Protección a Migrantes de la Secretaría de Gobernación que deberían prestar asistencia a migrantes apenas existen –vid. artículo 71 de la Ley de Migración.

[6] De organizaciones como "Las Patronas" [https://www.uv.mx/iihs/files/2014/01/Veracruz-tierra-de-migrantes-num-1-dic-2013.pdf] o bien los esfuerzos del sacerdote católico Alejandro Solalinde (Premio Nacional de Derechos Humanos) con su Albergue de Migrantes Hermanos en el Camino en Ciudad Ixtepec (en el Istmo de Tehuantepec) Oaxaca –un importante centro de operaciones de la delincuencia organizada según: www.hermanosenelcamino.org.

[7] Derechos humanos de migrantes, refugiados, apátridas, víctimas de trata de personas y desplazados internos: Normas y estándares del Sistema Interamericano de Derechos Humanos. Comisión Interamericana de Derechos Humanos. OEA/Ser.L/V/II. Doc. 46/15. 31 diciembre 2015. Original: Español.

[8] ESCALADA Medrano, Paula: 'La Bestia', un tren con precios de lujo y un destino que puede ser la muerte. El Mundo. América. México https://www.elmundo.es/america/2013/08/30/mexico/1377854922.html

[9] La OIT estima que la trata de personas es un negocio de 32000 millones de dólares. BARRÓN CRUZ, Martín Gabriel: La Bestia; la tenue línea entre la migración y la trata de personas. Temas Selectos. INACIPE. México, 2013.

[10] CRUZ VÁZQUEZ, María Lucía A.: Migración en Tránsito, Pobreza y Discriminación en el Territorio Mexicano; Colección de textos sobre derechos humanos. Comisión Nacional de los Derechos Humanos; México, 2016.d p. 30.

[11] Art. 22.8 Convención Americana sobre Derechos Humanos.

[12] En el 2010 tan solo los emigrantes mexicanos a Estados Unidos de América sumaban más de 33 millones siendo estos 11 millones 873 mil emigrantes, 11 millones 215 mil migrantes de segunda generación y 9 millones 995 mil personas de tercera generación. El diferencial de salarios entre México y Estados Unidos es de 8 a 1. AYVAR CAMPOS, Francisco Javier – ARÉVALOS, Enrique Armas: El flujo migratorio en México: Un análisis histórico a partir de indicadores socioeconómicos; Revista CIMEXUS Vol. IX No.2 Julio - Diciembre 2014. pp. 84 y 88.

The Impact of Internal Armed Conflicts on Human Rights

Undeclared Children Born to Forcibly Displaced Parents

Paulo LINS E SILVA

Introduction

It is known that the current global political-social context is marked by internal and external armed conflicts geographically spread across the globe, which culminates in a complex issue for several nations: the problematic situation of refugees, and especially the present and the future of the child and the adolescent.

In honor of these people who suffer substantially from internal and even state dissension, the International Refugee's Day (June 20) was created. In Brazilian territory, likewise, it was determined that June 25 would be considered the "Immigrant Day".

Actually, in the face of these commemorative dates, we realize that there is little to celebrate and much to ponder on, especially in the sphere of the individual rights of those people who are forced to leave their own homes.

Accompanied or not by their parents, children and adolescents arrive in the destination countries in extremely vulnerable situation, often without registration or any identification document. In fact, this specific situation is not a recent problem.

In this aspect, World War II caused a migration of more than 40 million people, being the second largest migratory and asylum-seeking movement of history until today. And beyond this specific period, the post-war and the various conflicts that occurred even after the Nazi withdrawal also culminated in tens of thousands of refugees in displacement.

The atrocities experienced at that historic moment were decisive for the taking of measures and global awareness and were essential for the important progress achieved in the field of migrants' rights.

The United Nations Convention Relating to the Status of Refugees was adopted in 1951 and has been in force since 1954, while its Protocol has been in force since 1967. This is considered to be the normative basis of International Refugee Law, establishing minimum precepts for the protection of the "class".

In Brazil, the Statute in question had certain points revoked by the New Brazilian Migration Law (Law 13.445 / 2017) – which for many represented a great advance in the regulation of the rights of foreigners, since the old instrument still fomented obsolete discriminations.

With the creation of this legislation, individuals who have been forced or pressured to displace should receive shelter as refugees, whether or not they have been victims of persecution because of race, religion, political opinion, participation in social groups, nationality, etc.

It is, moreover, imperative to clarify that the concept, in the classic definition affirmed by the 1951 Convention, as well as by the 1967 Protocol, classifies refugees as *"A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."*

Notwithstanding the various diplomas dealing with refugee issues, such as the Cartagena Declaration on Refugees in force in Latin America since 1984, it is certain that the lack of registration or any identification document still precludes them from having access to rights such as education and health.

The Identification Documents for Refugees

The legal provisions existing in the Brazilian territory overlook the possibility of granting identification documents to refugee applicants, being certain that the only existing provision refers to the hypothesis of the issuance of the *employment record booklet*- which, with few exceptions, for children and adolescents have no applicability.

In Brazil, the issuance of an identification document will only be possible after the formal granting of the asylum request. Thus, only after analysis and processing of the application will it be possible to issue the National Registration of Foreigners

> It is true that all bureaucratic procedures legally envisaged do not meet the immediate demands and needs of a young or a child refugee […].

It is true that all bureaucratic procedures legally envisaged do not meet the immediate demands and needs of a young or a child refugee who are therefore left out of all the diplomas and constitutional or ordinary provisions that concern them.

If, on one hand, there is a conception in the international community based on the principle of national sovereignty, in which it is considered impossible to proceed to the Civil Registration of a refugee child; on the other hand, the various treaties and conventions to which Brazil is a signatory ratify the understanding that it is not only possible to proceed to the Registration, but it is extremely essential for the compliance of the Doctrine of Integral Protection in the field of childhood and youth.

However, it is worth noting that, like the Statute of the Child and Adolescent, Law 9.747 / 97 (Refugee Law) did not mention

either the problem of the Civil Registration of Birth of a Refugee Child.

The Problem of Civil Registration of Birth Refugees

Although there is no express prohibition in any legislation, it is understood that the Civil Registration of Birth, because it relates to the origin of the child / person, is the exclusive competence of the country of which he is a national, and therefore it is not fit to proceed to his Registration in another country, since this could represent an affront to the sovereignty of the country of origin.

From this point of view, the 4th Panel of the Brazilian Superior Court of Justice recently decided in a case involving a child from Congo in Brazilian territory that the National Registration of Foreigners is equivalent to the Civil Registration, and guarantees the full exercise of citizenship by the foreigner. However, it also understood that a refugee cannot obtain the Civil Registration instead of the National Registration of Foreigners

Upon receipt of the National Registration of Foreigners, the Congolese child became entitled to all the foreseen constitutional guarantees: education, health, housing and others, without any violation of the sovereignty of his country of origin. This is so, because the child certainly did not stop being Congolese to become Brazilian.

Thus, although our legislation overlooks the subject and this is the position of the Superior Court of Justice, we search for new visions and methods for proceeding with the implementation of the constitutional principles in force.

In fact, the Convention on the Rights of the Child, the main instrument among the ones regulating the subject, is clear in affirming the child's fundamental right to identification.

State Sovereignty, the Criteria for Recognition of its Nationals and the Guarantee of the Exercise of Basic Rights

Each country stipulates its specific rules for the recognition of its nationals, however, in a general way, most States adopt, in greater or lesser extent, the criteria of *jus sanguinis* or *jus solis*.

Just for clarification, *jus sanguinis* is an expression in Latin that means "blood right" and indicates the principle by which a nationality can be recognized to an individual according to his lineage. On the other hand, the *jus solis* means "soil right" and, in turn, indicates the principle on which the nationality of the individual can be recognized according to the place where he was born.

Therefore, the recognition of a given nationality by another State is feasible, provided that the criteria adopted by that order is respected and as long as there is compliance with these two alluded principles.

In Brazil, there is the figure of the provisional naturalization – hypothesis of special naturalization foreseen in article 116 of the Foreigner Statute that applies to cases of foreign minors who come to reside in Brazilian territory up to the age of five years old. It should be noted that children older than that can also get this benefit, provided that their special needs are proven.

The provisional naturalization system works as follows: if the foreign child has entered and permanently remained in the Brazilian territory, he may, through his legal representative, apply for this type of naturalization in the Federal Police or in the General Protocol of the Ministry of Justice. Subsequently, the tendency is that this type of naturalization become definitive.

The system of provisional naturalization is only one of several systems and possibilities that can help ensure that, in some way, basic elements are guaranteed for foreigners who arrive in Brazil in extremely vulnerable conditions.

Vulnerable conditions that often arise from the fact that the individual is forced to leave his country of origin quickly because of the risks he runs. As a result, being extremely shaken, he leaves behind important objects and belongings.

For example, the most common problem in all countries receiving a large number of refugees is precisely the lack of documentation of those in displacement.

This problem becomes even more frequent and greater when it refers to children without birth certificates. In this respect, again the discussion about a possible affront to the sovereignty of a given State arises, in cases when a birth certificate is issued by another nation to an individual who was not born in its territory and does not fit into any of the situations in which it is allowed to confer the nationality.

What is clear is the fact that in situations of risk, there is no time to regularize documents or even to think about taking them with you.

Precisely because the juridical world understands the situation of vulnerability in which the refugee is, actions were suggested for the prevalence of constitutional principles, to the detriment of mere formalities.

What is clear is the fact that in situations of risk, there is no time to regularize documents or even to think about taking them with you.

In Brazil, when the request for refugee status is made by the parents or guardians, the CONARE – National Committee for Refugees – issues a protocol that guarantees to the applicant and his / her family group access to essential public services.

Thus, according to Law 9.474 / 97, the school, for example, must enroll the child who does not have a birth certificate as long as the protocol issued by CONARE is presented.

The recent case of the Southern Region of Brazil, specifically in the city of Lajeado, where the local magistrate granted permission for a couple of Haitian refugees to marry without a birth certificate should be highlighted. In his decision, the Judge recognized as valid and effective the provision that determines as an essential

requirement for any civil marriage the birth certificate of the spouses, updated in the last 6 (six) months. However, the judge interpreted that said article would not apply in the case in question because of its special situation, wrapped in great suffering and struggle.

Under this aegis, the principles of dignity and equality of the human person were prioritized in this specific case, as well as the principles of effectiveness and affectivity, which guide Family Law, rather than giving priority to simple formality.

The Superior Court of Justice, on another occasion, emphasized that the Asylum Law is clear regarding the rights of children and adolescents dependent on refugees in Brazil.

According to such law, the Brazilian Birth Certificate is not a requirement for the recognition of the formal identity of this child or adolescent, not even for the enrollment in an educational institution or, likewise, for them to receive medical care by the public health care, in view of the existence of an equivalent document that enables such rights (National Registration of Foreigners).

All this Brazilian situation only reflects the chaotic situation affecting currently the whole world, in general.

The Current World Context of Refugees

It is not difficult to verify that the situation of pure chaos is not a Brazilian peculiarity, quite the contrary.

The United Nations High Commissioner for Refugees (UNHCR) reports that in 2016 some 65 million people have been forced to displace around the world. The number surpasses those of World War II, making it the largest forced displacement of people in history.

Children account for half of the total number of refugees around the world, which causes several serious complications. As mentioned earlier, there are numerous problems concerning documents which, as a consequence, result in countless damages to the individual's own development.

Faced with the obstacles already mentioned for the issuing of identification documents, in general throughout the world, the refugee child ends up being marginalized, obliged to grow up without basic health care, education, etc.

The UNHCR revealed that 1.1 million Syrian children are refugees due to the country's civil war which began in January 2011. This number corresponds to 52% of the people who were forced to displace in Syria. Interestingly, there are more Syrian refugee children than those enrolled and regularly attending schools in the country. In addition, 75% of children are under 12 years of age. In Syria, specifically and according to UN data, over 306,000 babies have been born refugees since the beginning of the conflict six years ago.

There is thus a situation where hundreds of children are being forced to grow up in refugee camps scattered throughout Europe and the Middle East, where they may suffer profound psychological trauma.

The current state of asylum seekers is so worrisome that the UN has already provided assistance to more than 250,000 children in Jordan and Lebanon alone.

In Syria, specifically and according to UN data, over 306,000 babies have been born refugees since the beginning of the conflict six years ago.

Actually, in face of this sad situation, the refugees end up not having any perspective of development in the country that received them, which initiates and triggers a scenario of poverty and vulnerability.

In short, the lack of documents of a refugee, especially of children, can drive them to the periphery of a society, placing them in degrading situations.

Being inserted in this context, not knowing the legislation of the country that received them, and because they do not have any favorable economic conditions at all, refugees accept any kind of work, housing or nourishment.

In order to avoid such situations, border control of States have become very strict, creating even physical and institutional walls in various legal systems.

In recent years, the lack of solidarity of the majority of the States that are members of the European Union in the assistance to refugees was evident with the adoption of measures for the restriction of their entry and the repatriation of the greatest possible number of migrants. Hungary, one of the main migrants' access countries to Europe, in addition to refusing the relocation plan, has surrounded with fences much of the border area with Serbia, has closed its borders and has responded with violence and illegal detentions of those who try to cross them.

The disorientation marks the trajectory of migrants and refugees seeking asylum. The lack of information, the inhuman conditions in which they are forced to wait for the analysis of the authorization request to remain in the country, the lack of knowledge of the language and the culture are just a few of the many difficulties that migrants have to overcome.

The Consequences of the Intense Global Flow of Refugees

On top of all those problems, one should also consider another question of extreme relevance: statelessness.

As the intense influx of refugees can in essence be considered as an atypical situation, in the vast majority of cases and especially in relation to states adopting the *jus sanguinis* system, parents cannot transmit the nationality to their children and the result of that is the existence of many stateless children.

The United Nations High Commissioner for Refugees, which is also responsible for helping stateless persons, verified that this problem has oscillated over the years, with improvements in some regions, while in other places the situation deteriorated.

In 1990, the number of stateless persons was extremely significant, which changed as the countries of the former Soviet Union granted citizenship to hundreds of people, especially children.

Nowadays, the estimated number of stateless people around the world is of approximately 12 million. There are already initiatives that have succeeded in reducing this problem both in Nepal and in Bangladesh. However, changes in the constitution or laws concerning the granting of citizenship in these countries or in others may put all these achievements at risk.

As South Sudan is on the path to become an independent country, the future citizenship and status of nearly 2 million Southerners living in the north of Sudan suddenly are at stake.

Curiously, in Latin America the problem of statelessness is not very expressive in terms of numbers, since the countries in our continent are less bureaucratic in this field and consequently more propitious to confer nationality to people. We are having a heavy problem of numbers of people leaving Venezuela, looking for others countries like, Brazil, Colombia, Chile and Argentina.

After World War II, in order to solve the problem of people who were forced to flee their homes, the international community created two international treaties on the subject.

The first one was the 1954 Convention relating to the Status of Stateless Persons, which determined who could be considered as stateless and established certain minimum standards of treatment for such persons.

On the other hand, the 1961 Convention was aimed at reducing cases of statelessness and created a guide for States to prevent and reduce cases through safeguards in their national laws.

As a result of all the advances in the fight against statelessness, Brazil in 2010 had only five refugees on the condition of stateless persons, which represents a number proportionately very low.

Conclusion

It is certain that, in the absence of a migration policy adequate to the magnitude of the crisis currently faced, the initiatives of civil society and some institutions committed to minimizing the suffering of those who seek shelter in foreign countries stand out.

The seriousness of the problem requires the continuous effort to transform the rhetoric of Human Rights into actions, always remembering the values acclaimed in the Universal Declaration of Human Rights, namely "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."

In short, we must not forget that migration is, above all, an international guarantee of human rights and is not limited to national security. Therefore, the migrant or refugee, instead of being perceived as a stranger or an outsider, should be accepted as the person entitled to essential rights.

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Emerging Gender Related Issues and Sexual Harassment in Ugandan Courts

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Sexual harassment refers to behavior characterized by the making of unwelcome and inappropriate sexual remarks or physical advances in both public and private settings. Public places may entail: work places, places of worship, educational institutions, markets, walk ways, and social media communications, among others. Private places include homes. Sexual harassment behaviors range from mild transgressions to physical sexual abuse or assault. Anyone can become a victim regardless of race, gender, sex, age, class, and status. The social vice has far reaching effects. A victim stands high chances of losing confidence, performing below expectations at the workplace or school, losing a job, failure to advance in educational pursuit, and sustaining physical harm. In the present Human Rights regime era, sexual harassment is explicitly declared unlawful under a number of international, regional and national contexts.

Internationally, the Convention on Elimination of all forms of Discrimination Against Women[1] (CEDAW) was adopted by the UN General Assembly in 1979. Article 5(a) of this Convention requires State parties to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. Furthermore at the continental level the Maputo Protocol[2], adopted by the African Charter on Human Rights on the rights of women in Africa under Article 2(1), (b), requires States to enact and effectively implement appropriate legislative or regulatory measures. They include prohibiting and curbing all forms of discrimination, particularly those harmful practices which endanger the health and general wellbeing of women.

Article 20 of the Constitution in Uganda,[3] which is the supreme law of the land, provides that fundamental rights and freedoms of the individual are inherent and not granted by the State. The privacy, dignity and bodily autonomy of every person in Uganda is protected and no person whatsoever has the right to unlawfully violate such right. Under Article 21 of the Constitution all persons are equal before the law in all aspects of political, economic, social and cultural life and in every other respect and therefore accordingly enjoy the protection of the law. The constitution further protects the dignity of the person under Article 24 by prohibiting any form of inhuman or degrading treatment which may take the form of sexual harassment. This right is non-derogable according to Article 44 of the constitution. Therefore all duty bearers, including employers and individuals, have a mandatory legal obligation to accord full and equal dignity of the person to women as men as per Article 33. The State is pointedly mandated to provide the facilities and opportunities necessary to enhance the welfare of women so as to enable them to advance and realize their full potential through the implementation of laws, policies, and strategies to prevent and respond to sexual harassment. The State's legal responsibility is further stretched to the protection of women and their rights, taking into account their unique status and natural maternal functions in society. This robust constitutional backbone sets the yardstick within which to uphold human dignity and shun all practices like sexual harassment. The Employment Act[4] and Computer Misuse Act[5] are some of the legislative enactments that have been used to curb sexual harassment in the workplace. The use of technology such as smart phones and social media communications have proved useful from an evidentiary perspective.

Even though sexual harassment is a crime under specific statutes, the offense is often treated with indifference and ignored as an issue of trivial concern. Victims are more often than not ridiculed and castigated for being attention seekers. For generations, a sexual claim has been believed to be a charge only advanced to taint the character of the defendant. This has resulted into coming up with laws and court room procedures that empower defendants and push victims into silence. With a world view that encourages freedom from punishment for wrongdoers, sexual harassment cases have soared to reach disturbing levels.

The State's legal responsibility is further stretched to the protection of women and their rights, taking into account their unique status and natural maternal functions in society.

Cases of sexual harassment have started flooding Ugandan Courts with a minority of defendants fetching a judgement and conviction. There is a debate as whether sexual harassment crimes are serious enough to warrant attention from public resources. How courts treat such cases and how the public reacts to them forms the basis for an interesting discussion.

In the recent times, this debate came up in the courts of law in the case of Ugandan vs Brian Isiko. Mr. Isiko was charged and convicted for 2 years of a crime involving cyber harassment and offensive communications. When the defendant appealed the conviction and sentence, Lady Justice Jane Frances Abodo quashed the conviction, stating that the judicial officer failed to follow the expected procedure when an accused pleads guilty to a charge. The matter is now before another magistrate for reconsideration. It is sufficient to say that the case, so far, demonstrates a society's reluctance to admit that sexual harassment can have serious effects on its victims and thus warrants being worthy of

judicial resources. During the first hearing of the case, victim Sylvia Rwabogo, amidst tears, narrated to court how the defendant had harassed her by sending unsolicited love messages through his mobile phone and by posting them on social media sites. She stated that she was mentally affected and feared for her life. Sylvia Rwabwogo's decision to report the case and testify was received with mixed reactions with a big part of the public wondering how a woman who was not only an adult but a member of parliament could be affected by love messages from a 25 year old boy. Many found the 2 year sentence to be very harsh and castigated the female judicial officer, Her Worship Gladys Kasamanyu, for denying this young man the chance to be in school. The public painted the defendant as a young man who was simply just making his feelings known.

This case demonstrates that courts, and more so women judges, have a role to play in advancing often neglected gender issues in a democratic society. Her Worship Gladys Kasamanyu, while passing sentence, opined that in Ugandan society it seemed normal to demean and disrespect women through making communications with sexual undertones. She stated that a sentence of two years in prison for cyber harassment and offensive communication would serve as deterrence to men who found it normal to harass women.

Since this case made it into the public arena, there has been a sudden surge of other cases of similar nature. The most popular one was where a senior state attorney, Mwesigye Samantha, alleged that he was sexually harassed by the Deputy Solicitor General, Gashirabake Christopher, for almost a decade. Like the MP case, the public has not particularly offered a calm and understanding support for the alleged victim but blamed the victim for bringing these allegations at the time when Mr. Gashirabake Christopher's name is being considered for judgeship in the Judiciary as a Justice at the Court of Appeal. Mwesigye Samantha has not yet sought help from the courts and more cases are yet to be determined.

From the foregoing this Magistrate has noted that gender stereotypes have limited the discussion concerning sexual harassment

and thus normalized the vice. The courts however, with the female judges at the forefront, have passed judgements against the vice amidst a hostile environment. The Victims who come up valiantly and stand up against perpetuators and report the vice are unsung heroes. May their strength captivate and illuminate society to take up the fight against sexual harassment.

Moving the conversation forward requires stringent measures to weed out the vice and to determine what ought to be done in order to make workplaces and other social spaces dignified, safe and free from any form of harassment. This necessitates a need to sensitize the public about what sexual harassment entails and its effects. Additionally, there is a need to teach the vulnerable members of the public that are susceptible to being victims of sexual harassment, on how to respond to communications with sexual undertones. Finally, it is important to note that not all women judges would advance cases involving gender related issues. Women judges who advance these cases do so not only because they are women but more so because they have been trained and imparted with special skills in handling cases with concerning gender issues.[6] This means that training of the judges, both male and female as well as other actors in the justice system is mandatory if courts are going to continue to satisfactorily play a role in the advancement of often neglected gender issues.

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1 Convention on elimination of all Forms of Discrimination against women.

2 Maputo Protocol.

3 The Constitution of the Republic of Uganda, 1995.

4 The Employment Act, 2006.

5 The Computer Misuse Act, 2011.

6 Bauer & Dawuni, (2016), Gender and the Judiciary in Africa, From Obscurity to Parity.

The Role of Lawyers in the New Era of the Abolition Movement in Japan

Takehiko KAWAME

Death Penalty in Japan

The Japanese government conducted a nationwide poll of the death penalty in 2014. The results are following: Of 1,826 responses, 80.3% (1,467) of Japanese citizens were in favor of the death penalty by saying that the death penalty is unavoidable or that we can't do without it, while only 9.7% (178) of Japanese citizens were against the death penalty by saying that the death penalty should be abolished (immediately or sometime in the near future). The remaining 9.9% were undecided.

The figures show that the majority of our people support the death penalty. There are certainly some issues with this national poll, but frankly, I have to admit that the abolitionists belong to a minority group in our country. Ironically and unfortunately, even a significant number of lawyers in Japan would like to support this punishment.

History of the Abolition Movement

In that given context, the Japan Federal of Bar Associations (JFBA), a nationwide association of lawyers with compulsory membership (41,000 or so), has made progress slowly. First, we have publicly expressed our position several times, gradually changing the tone of our communications.

The death penalty is a sensitive issue, specifically in Japan, where the majority of people support it. Thus, we have to take it seriously and to make every effort to pay attention as much as possible to express a specific opinion in this regard, to avoid unnecessary attacks. As a result, the Japan Federal of Bar Associations treats these issues very carefully.

In 2004, we mentioned this issue publicly for the first time, then later increased the intensity of our position to align more closely with the abolition of capital punishment.

For example, the first declaration only suggested a draft of the law in a much-limited scope, which called for a moratorium of the death penalty. However, seven years later, in 2011, we stressed the importance of bringing about nationwide discussion on the abolition of the death sentence. Finally, on October 7, 2017, we declared that we should abolish the death penalty by the year 2020, when Japan will host the UN Congress on Crime Prevention and Criminal Justice in Kyoto.

However, this statement was contentious. Most lawyers in Japan wouldn't pay much attention to this issue or instead cast blind eyes to capital punishment. The statement was approved by a majority vote, but there is still much work to do with the 52 local bar associations until they take a much more definite stand against death penalty.

Secondly, to follow this policy, JFBA thinks that we have to unite under the same banner, not only lawyers but also ordinary people. To that end, we plan to call on civil society to establish a committee to raise public awareness. This group is a kind of umbrella organization in order to make a move away from the death penalty to reach our common goal, with a wide range of persons starting from human rights activist groups going through academics and religious groups, embracing supporters of death row inmates and advocate groups of crime victims.

We hope a lot of people will join this committee, and as many people as possible will support our movement. Through June of this year, this private group is going to take out an advertisement on big news media to raise a question about the *raison d'être* of this cruel punishment.

In Japan, this taboo subject is unseen from the public, so it might be difficult for ordinary people to discuss the issue openly. Therefore, it might be beneficial to post this topic on the major news media. This communication with society must be a historical event, which may allow for deeper and more critical analysis of the death penalty by Japanese society.

Thirdly, we believe politicians should work as core members of this movement. We are going to call for cooperation among members of the Diet or Japanese Parliament in this regard. Many abolitionist countries like the UK and France are excellent examples for us to observe the very fact that the public opinion, in general, was difficult to change and that influential political leaders could take the initiative to steer progress With this historical

knowledge in mind, we invite two former ministers of justice, Mr. Seiken Sugiura and Mr. Hideo Hiraoka, into a JFBA committee, specifically the "Headquarters for Abolition of the Death Penalty and Reform of Relating Penal System". It means as much as to say that we can have substantial leverage with their help in order to make progress among the members of the Diet.

New Era of the Death Penalty

As a result of this advocacy work, progress has been made. In January, for example, influential Diet members made a press release announcing that a cross-party group would be established with the intention to discuss the death penalty. This group is not necessarily made up of solely those who favor abolition. They only aim to discuss various aspects of capital punishment. In other words, its purpose is primarily limited to study and research activities within the Diet members.

Therefore, I cannot predict whether this group will work sufficiently to successfully abolish the death penalty. It is clear, however, that this group represents a milestone in the history of criminal law in Japan. Although at one time a group of Diet members was advocating for Amnesty International, Japan has never witnessed an active and long-lasting political group focusing on the abolition of the death penalty.
Last year, the JFBA committee decided to take action with other countries and international NGO groups. On March 4, 2019, we held a symposium in Kyoto, and a Parliamentary member, Mr. Alistair Carmichael from the UK, made a speech in collaboration with the JFBA, and highlighted the importance of a political will to play a role in favor of the abolition of the death penalty. This success represents a milestone on the road to abolition.

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Moving beyond Retribution

Reviewing the Japanese Penal System before the 2020 Kyoto Congress

Teppei ONO

Les exécutions massives auxquelles a procédé le gouvernement japonais en juillet 2018 ont de nouveau suscité un débat national sur la peine de mort. Compte tenu du soutien écrasant de l'opinion publique, il sera politiquement difficile d'abolir la peine de mort sans instaurer l'emprisonnement à vie sans libération conditionnelle. Avant le Congrès des Nations Unies contre la prévention du crime prévu en 2020 à Kyoto, les sociétés civiles japonaises sont confrontées à un défi de taille: proposer une alternative adéquate à la peine de mort. Cette note passe brièvement en revue les débats en cours sur la peine de mort et la réclusion à perpétuité au Japon.

In July 2018, mass executions carried out by the Japanese government caused a great shock throughout the world. The executed prison inmates were members of the Aum Shinrikyo cult group, which had committed a deadly chemical attack in 1995. The Aum Shinrikyo cult group released sarin gas on the Tokyo underground on March 20, 1995, killing 13 people and injuring more than 6,000. On 6 July 2018, the government executed seven members who had been on death row, including the founder Shoko Asahara. The remaining six members were put to death 20 days later. This was the first time that so many prisoners had been executed in one day since the government began to make public the number of inmates executed in 1989. As the scale of the executions – 13 executions within three weeks – was the largest since the Second World War, the series of executions appeared in the headlines of much of the mass media. The mass executions aroused a national debate on the death penalty once again, and marked the end of the worst terror incident in the history of Japan.

The year 2020 will be an historically important year for Japanese penal policy. The Fourteenth UN Congress on Crime Prevention and Criminal Justice (UN Crime Congress) will be held in Kyoto, Japan from April 20 to 27, 2020. The UN Crime Congress, which is held every five years, is one of the largest UN conferences in the field of crime prevention and criminal justice. Japan will host the Crime Congress for the first time since the Congress was held in Kyoto in 1970. Japanese civil societies have been committing themselves to prepare for the upcoming Crime Congress. Their efforts to describe various aspects of the Japanese penal system will inevitably bring international attention to the host country, particularly its death penalty system.

Why does the government continue with executions? Is there any way left to end the death penalty? Some experts propose the introduction of life imprisonment without parole (LWOP) as a way to abolish the death penalty, while others are concerned that LWOP might be an inhumane punishment. This note briefly overviews the current debates over the death penalty and life imprisonment in Japan.

Why Life Imprisonment Matters

How do we end the death penalty? Human rights activists and defence counsel in Japan have been facing this difficult issue for decades. In an opinion poll conducted by the government in 2014, more than 80% of respondents supported the death penalty, and only 9.7% said it should be abolished. With this overwhelming public support, the government has retained the system of the death penalty, and has continued with executions. The survey, however, shows another important trend. When people were asked whether they would still support the death penalty if LWOP were introduced, 37.7% said it should be abolished. This means that around 40% of people would support the abolition of the death penalty so long as LWOP was introduced. As a result of the opinion survey, some lawmakers and lawyers' groups have been considering the introduction of LWOP. The Japan Federation of Bar Associations (JFBA)

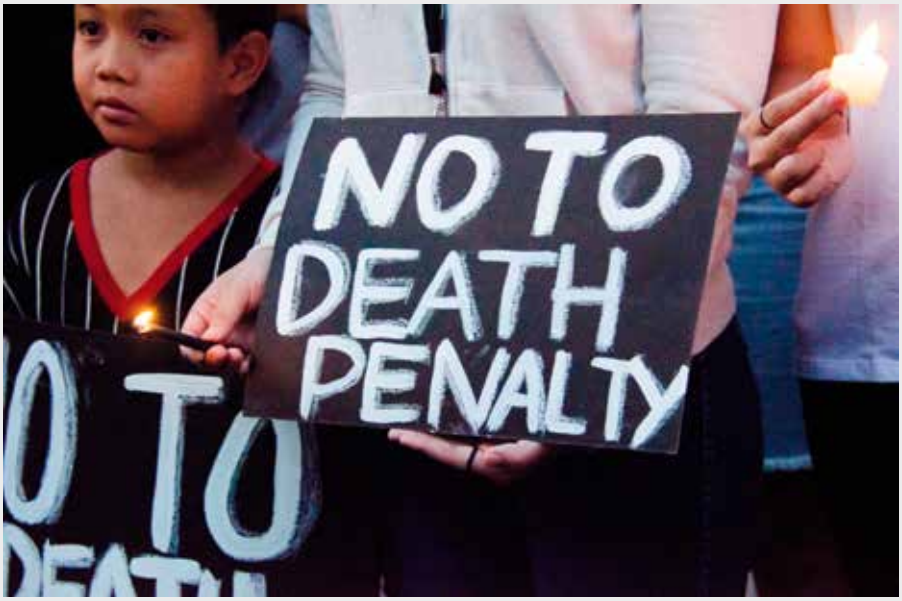
adopted a declaration in 2016 stating that it was aiming for the abolition of the death penalty by the year 2020. It additionally made mention of alternatives to the death penalty, stating that the JFBA would consider possible alternatives to the death penalty including life imprisonment without the possibility of parole. A non-partisan group of lawmakers, which was established on December, 2018, has been examining the current death penalty system as well as the possibility of introducing LWOP. They believe that LWOP will break the deadlock, making the abolition politically feasible.

Is LWOP a humane punishment in the context of the Japanese penal system? Will the right to hope be guaranteed for LWOP inmates?

Current Penal System; De Facto LWOP?

The Japanese penal code provides those sentenced to life imprisonment with the possibility of being released on parole. Nonetheless, life imprisonment in Japan is almost the same as a sentence without the possibility of parole.

The penal code stipulates that people with a life sentence may be released on parole by a parole board after they have served ten years and evince signs of substantial reformation. Although the parole board considers whether or not an inmate should be released on parole when the warden of the penal institution submits a proposal for parole, wardens hardly ever submit such proposals. The board can consider the possibility of parole without a proposal from a warden. However, this occurs only after a prisoner has served 30 years in prison. A notice issued by the Director-General of the Rehabilitation Bureau in 2009 states that a parole board may consider the possibility of parole after a prisoner has served 30 years in prison when the warden has not submitted a proposal for parole. Even if the inmate is not released on parole, the notice also states that the board may consider the possibility again after the prisoner has served another ten years. According to statistics published by the Ministry of Justice, in the past ten years the average term served by those sentenced to life imprisonment before being paroled is over 30 years, and fewer than ten of such prisoners have been paroled



each year. In 2017, only eight such prisoners were paroled, whereas 30 of them died in the same year. The average term served by the released inmates was 33 years and two months. This statistic shows that most of those sentenced to life imprisonment in Japan die in prison without realizing their hope to be free.

Step Forward from Retribution: Towards Realizing a Humane Penal System

A symbolic news story broke on May 31, 2019, which perfectly reflects the despair of those with a life sentence and their families. Mr Fumiaki Hoshino, who had a life sentence and had spent more than 30 years in Tokushima prison, died of cancer. He had been sentenced to life in 1987 for murdering a police officer, though he asserted his innocence to the last. After he had spent 30 years in prison, the parole board considered his parole for the first time in March 2019, and denied him parole without providing any reasons. His wife had devoted herself to supporting Mr Hoshino for more than 30 years, waiting for his release in the belief that he was innocent. Considering her dedicated support, her despair when she knew that he had been rejected for parole and that he would not be considered again until another ten years of imprisonment is easy to imagine. She and other supporters repeatedly requested the parole board to release Mr Hoshino immediately, as they were aware of his serious physical condition. A few months after the board's rejection, he died from his liver cancer.

What would happen if life imprisonment without the possibility of parole were introduced? Those with a life sentence would suffer from more severe despair than Mr Hoshino and his wife did. Given the overwhelming public support, it will be politically difficult to abolish the death penalty without introducing LWOP. Nevertheless, we should not tolerate any punishment that deprives prisoners of their hope of being released. Before the UN Crime Congress in 2020, Japanese civil societies face a difficult challenge of proposing an adequate alternative to the death penalty. The alternative needs to gain public support, but, at the same time, there has to be a possibility of a sentence being reduced with due process. As is often said, no one is born to be a criminal. Even the most atrocious criminal offenders can be rehabilitated. The Japanese community is required to take a courageous decision to accept and accommodate ex-offenders once they are rehabilitated. In order to bring an end to the death penalty and create a humane penal system, we need to move beyond retribution, and confront the realities of the death penalty and life imprisonment.

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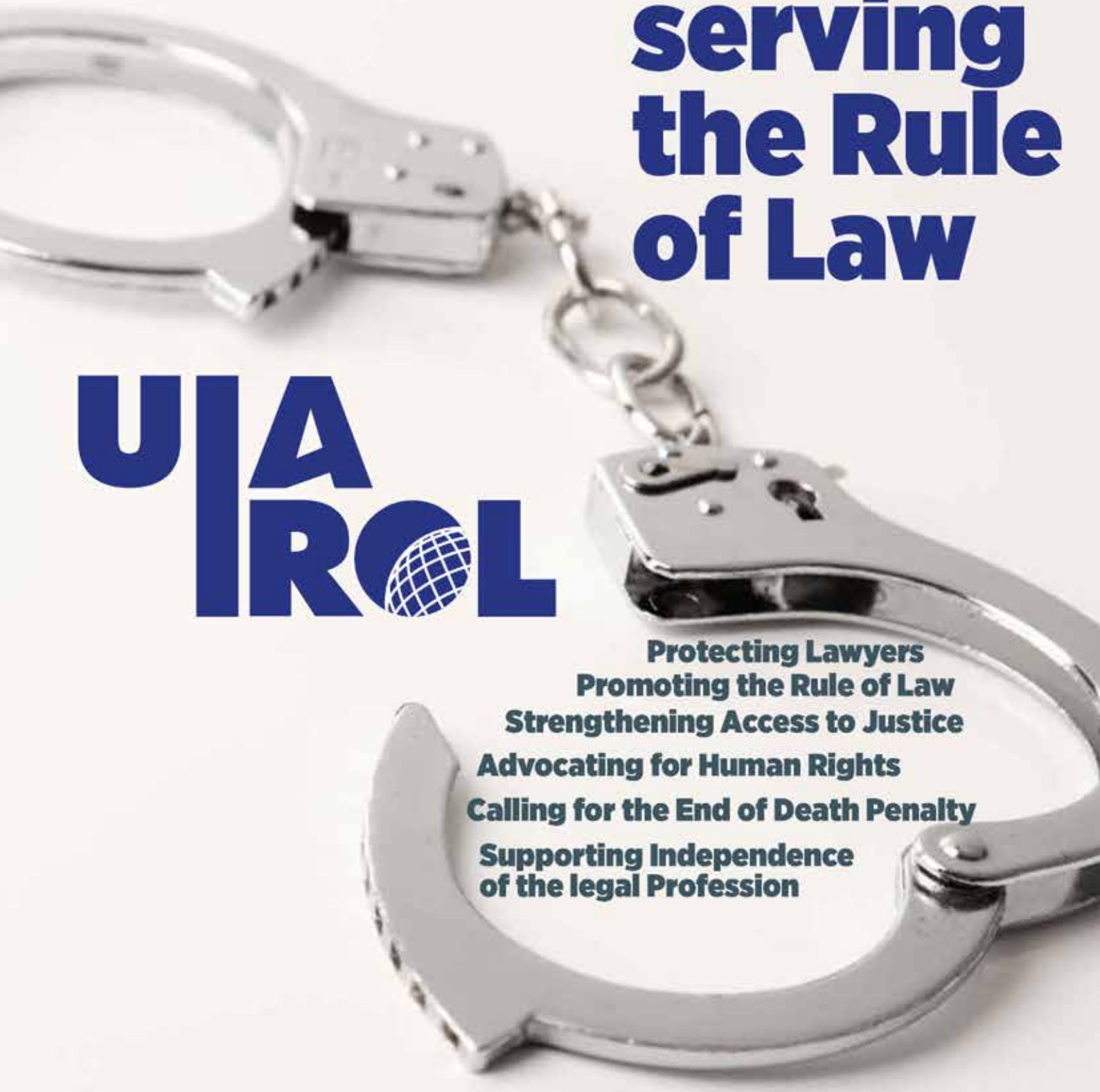

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Enquêtes internes et activité de l'avocat enquêteur en Suisse : état des lieux

Sandro VECCHIO

Introduction et généralités concernant les enquêtes internes

Toute entreprise, qu'elle soit confrontée à un litige ou qui fait face à un risque actuel ou potentiel, voire qui soupçonne des irrégularités en son sein, peut décider de confier à un tiers, notamment avocat, la mission d'effectuer une enquête interne. Celle-ci aura essentiellement pour but de clarifier les faits et d'identifier les éventuelles responsabilités et conséquences civiles, administratives ou pénales et de réagir en conséquence.

A l'heure actuelle, les enquêtes internes « privées » réalisées au sein d'entreprises connaissent un développement fulgurant. De nombreuses sociétés fiduciaires, d'audit ainsi que des cabinets d'avocats offrent ce service. Certaines entreprises ont parfois recours à un de leur département interne pour ce faire.

Lorsque l'entreprise à recours aux services d'un cabinet d'avocats, quand bien même ils ne bénéficient d'aucun monopole pour la réalisation d'enquêtes internes, seuls ces derniers – s'ils sont inscrits à un barreau cantonal en Suisse – pourront se prévaloir de leur secret professionnel absolu. Par voie de conséquence, le résultat de leurs investigations et les documents y relatifs seront en principe couverts par ce secret.

Dans le présent article, nous évoquerons uniquement les cas dans lesquels une organisation du secteur privé confie un mandat d'enquête à un avocat externe et indépendant.

Facteurs déclencheurs d'enquêtes

La décision d'ouvrir une enquête interne peut découler de nombreuses raisons. Le choix de lancer une telle procédure peut résulter de simples soupçons d'irrégularités ou d'infractions commises au sein de l'entreprise ou par l'entreprise elle-même, au travers de ses dirigeants. Ces violations peuvent être de nature administrative, pénale, pénale administrative, contractuelle, de droit du travail ou de compliance. Ce choix peut aussi être nécessaire suite à l'interpellation ou l'ouverture d'une procédure par une autorité. Une enquête peut également être diligentée suite à une dénonciation parvenant à l'entreprise par un de ses concurrents, fournisseurs, clients ou employés ou dans l'hypothèse où une procédure civile est engagée à son encontre.

Une enquête peut également trouver son origine dans un besoin de vérification, que cela soit à titre préventif ou en cas de besoin de réaliser un audit, et vérifier que les mécanismes organisationnels ou de contrôle interne fonctionnent de manière efficiente.

Fraudes auxquelles sont confrontées les entreprises

En liminaire et eu égard plus spécifiquement aux fraudes commises au sein de l'entreprise, il est important de rappeler qu'aucune entité ou organisation n'est à l'abri et que ce phénomène est en constante augmentation.

Les risques de fraude interne sont des risques opérationnels majeurs auxquels les entreprises doivent faire face. La fraude interne peut prendre de nombreuses formes et peut notamment être rendue possible du fait des pressions internes exercées sur les cadres et le personnel (besoin de résultats, objectifs à réaliser par les employés, etc.) ou à l'externe (volonté d'obtenir de nouveaux marchés, complexités administratives, etc.).

D'une manière générale, on identifie trois types principaux de fraudes, selon la définition de *l'Association of Certified Fraud Examiners (ACFE)*. Il s'agit de la corruption, du détournement d'actifs et des manipulations comptables.

Il existe toutefois de nombreux autres cas de fraudes. Il s'agit notamment des fraudes informatiques, en matière d'assurance ou de mise sur le marché de produits médicaux ou alimentaires, de manipulations boursières, de vols commis par un employé au détriment de l'entreprise ou de ses collègues, de harcèlement sur le lieu de travail, de non-respect de procédures internes, etc.

La fraude peut globalement être définie comme un moyen de répondre à un objectif d'enrichissement personnel par tout moyen, au détriment des dommages que l'on peut faire subir à l'entreprise (*occupational fraud*), ou au profit de celle-ci (*corporate crime*).

Selon le rapport 2018 de l'ACFE, les entreprises perdent chaque année des milliards du fait des fraudes dont elles sont victimes. En Suisse, selon une enquête du cabinet PricewaterhouseCoopers, 41% des entreprises se sont déclarées victimes de fraude en 2016, contre 39% en 2018, le détournement d'actifs étant le type de fraude le plus fréquemment constaté (51% des cas). Enfin, toujours en 2018, 27% des organisations suisses interrogées ont indiqué avoir été « invitées » à payer des pots-de-vin.

Dans le présent article, nous ne traiterons pas de la question des moyens devant être mis en œuvre pour détecter les irrégularités ou les fraudes mais nous nous concentrerons uniquement sur les processus implémentés une fois celles-ci détectées.

Les fraudes peuvent avoir des conséquences catastrophiques : amendes et autres sanctions pénales et administratives, risque réputationnel, chute du cours du titre pour les entreprises cotées en bourse, pertes de marchés, perte de confiance des actionnaires, des investisseurs et des clients, faillite, etc.

Responsabilité de l'entreprise

Sans entrer ici dans le détail des qualifications juridiques des manquements qui peuvent être commis par l'entreprise elle-même, ses cadres ou ses employés ni des conditions

de punissabilité, il convient de rappeler que toute personne morale peut être reconnue comme responsable, non seulement au niveau civil et administratif, mais également au niveau pénal.

Pour ce qui est de la responsabilité pénale de l'entreprise, consacrée à l'art 102 du code pénal suisse, celle-ci est toutefois subsidiaire à celle des individus (cadres ou employés) à qui l'infraction pourrait être personnellement imputée. Il sied de préciser à ce propos que le chef d'entreprise peut être tenu pour responsable des actes de ses subordonnés à condition qu'il ait commis une faute en demeurant passif alors qu'il aurait pu éviter la commission d'une infraction. Ainsi, l'entreprise sera reconnue responsable des infractions commises si, en raison d'une organisation déficiente, une violation ne peut être imputée à une personne physique déterminée.

L'avocat enquêteur : avantages et limites

L'avocat mandaté par une entreprise aux fins de réaliser une enquête interne devra essentiellement clarifier l'état de faits en effectuant divers actes d'instruction, identifier les problématiques juridiques en découlant, conseiller l'entreprise sur la manière de gérer la situation et la suite à donner à l'affaire et, en tant que de besoin, indiquer à l'entreprise comment agir ou se déterminer dans les cas où l'enquête aura été ordonnée par ou suite à l'interpellation d'une autorité. A la fin de l'enquête, l'avocat devra, le cas échéant, rédiger un rapport, lequel indiquera, si nécessaire, les mesures devant être prises.

Confier la réalisation d'une enquête interne à un avocat offre l'avantage principal de pouvoir conserver une certaine maîtrise de l'utilisation qui pourra être faite des conclusions de ladite enquête, notamment grâce au secret professionnel dont bénéficie l'avocat ayant diligenté le processus.

Le fait d'avoir recours à un technicien du droit permettra également de réaliser l'enquête de manière efficace, dans le respect des limites juridiques posées à son pouvoir d'action (cf. infra). Le recours à une personne externe à l'entreprise permettra aussi d'obtenir des conclusions indépendantes, complètes et impartiales. En effet, en confiant une telle enquête à

une personne interne à l'entreprise, celle-ci ne pourra s'assurer complètement qu'un résultat efficace sera atteint, l'enquêteur interne pouvant avoir une vision partiale et ne pas obtenir des informations « neutres », notamment du fait que les employés de l'entreprise oseront plus difficilement se confier à lui, craindrons des sanctions éventuelles ou que leurs révélations ne soient couvertes par aucun secret.

D'une manière générale, l'avocat inscrit au barreau et qui agit comme enquêteur, agit, selon la jurisprudence, de manière dite « typique ». Partant, dite activité est couverte par le secret professionnel absolu de l'avocat. Toutefois, pour que son activité en tant qu'enquêteur reste considérée comme « typique », il est nécessaire que les tâches effectuées par l'avocat dans le cadre de l'enquête correspondent à des tâches spécifiques de l'avocat. Tel est le cas lorsque l'avocat, en réalisant son enquête, procède à des mesures d'instructions diverses en vue de clarifier un état de fait, en analyser les conséquences, notamment juridiques et conseille l'entreprise sur la suite à donner.

Toutefois, lorsque l'avocat, dans le cadre de son enquête, se substitue à l'entreprise pour réaliser des obligations qui incombent uniquement à cette dernière, notamment de *controlling* et d'audit en matière de lutte contre le blanchiment d'argent et dont elle doit rendre compte elle-même aux autorités, la jurisprudence considère que l'avocat n'agit plus de manière typique et ne peut ainsi plus opposer son secret professionnel.
Cela étant, si dans une telle hypothèse, l'avocat a fourni dans un premier temps, soit avant le début de son enquête, des conseils juridiques à l'entreprise, la jurisprudence considère qu'il s'agit d'un mandat « mixte », la partie réalisée en amont de l'enquête étant couverte par le secret professionnel.

Par voie de conséquence et à l'exception de l'hypothèse évoquée ci-dessus, lorsque l'avocat agit de manière typique dans le cadre de la réalisation d'une enquête interne, il est au bénéfice de son secret professionnel absolu et peut ainsi opposer ce secret – qui couvrira les documents et informations recueillis durant l'enquête ainsi que le rapport d'enquête – à tout tiers et autorité administrative, civile et pénale.

Pouvoirs et limites d'action de l'avocat réalisant une enquête interne

Le droit suisse contient de nombreuses règles et garde-fous devant être respectés lors de la réalisation d'une enquête interne. Ceux-ci sont notamment contenus dans le code civil, le code des obligations, le code pénal, les codes de procédure civile et pénale et dans la loi sur la protection des données. Certaines lois cantonales peuvent également trouver application.

Il est aussi important de rappeler que l'avocat effectuant une enquête ne dispose pas de pouvoirs de police et n'est pas au bénéfice de droits plus étendus que ceux d'un citoyen lambda.
Ainsi, l'enquêteur ne pourra notamment

pas procéder à des actes coercitifs ou violant la sphère privée des individus, sous peine de commettre des infractions réprimées par le code pénal suisse. Ces infractions sont notamment les suivantes : les menaces (art. 180), la contrainte (art. 181), la séquestration (art. 183), l'accès indu à un système informatique (art. 143bis), la violation de secrets privés (art. 179), l'écoute et l'enregistrement de conversations (art. 179bis et ter), la violation du domaine secret ou privé au moyen d'appareils de prise de vue (art. 179 quater), la soustraction de données personnelles (art. 179 novies en relation avec la loi sur la protection des données) et l'usurpation de fonctions (art. 287).

L'avocat enquêteur ne pourra notamment pas, en application de son obligation de diligence (art. 12 LLCA), influencer les témoins ou autres personnes interrogées. Dans ce cadre, il sera recommandé de leur envoyer une convocation écrite en les informant de leur droit de ne pas y donner suite et en indiquant dans quel contexte elles seront entendues. Bien entendu, et sans vouloir ici entrer dans le détail, ces auditions devront faire l'objet d'un procès-verbal relu et contresigné par les personnes entendues et présentes lors de l'audition.

Il tombe également sous le sens qu'une personne soupçonnées et visée par l'enquête pourra être assistée d'un avocat. La personne faisant l'objet de l'enquête bénéficiera également du droit d'être informée de l'ouverture d'une enquête à son égard, du fait que des informations seront collectées sur elle, du droit de participer aux actes d'enquête et de son droit de ne pas s'auto-incriminer.

Déroulement de l'enquête

Le déroulement de l'enquête dépendra essentiellement de la problématique à laquelle est confrontée l'entreprise et devra être adapté au cas par cas.

En cas de situation de crise nécessitant des actions immédiates, l'enquêteur devra, si nécessaire, immédiatement sauvegarder les documents essentiels pour l'enquête, toujours dans les limites exposées plus haut. Par ailleurs, et dans l'hypothèse où une enquête judiciaire est diligentée en parallèle, l'avocat devra rester attentif au risque de se voir reprocher une entrave à l'action pénale s'il dissimule ou détruit (intentionnellement) des documents. Dans tous les cas, l'avocat pourra avoir accès aux documents professionnel des employés, ceux-ci étant liés par une obligation de rendre compte et de restituer ce qu'ils reçoivent dans le cadre de leur activité (art 321^{b} CO). En contrepartie, l'obligation de l'employeur de protéger la personnalité de ses employés ne permettra pas – sous réserve des cas où des soupçons sérieux laissent présager que des éléments nécessaires à l'enquête s'y trouvent – d'avoir accès à des documents personnels privés de ceux-ci s'ils n'ont aucun lien avec l'exécution par l'employé de ses obligations envers son employeur.

Indépendamment des cas d'urgence, les principales mesures à prendre en vue de la clarification des faits objets de l'enquête, sont notamment l'identification, la conservation et l'examen de documents (physiques et électroniques) et autres moyens de preuve, l'audition des personnes concernées, voire la mise sur pied de mesures de surveillance et de contrôle.

bénéficie ce dernier (art. 328 CO) et devra être effectué de manière proportionnée.

Les auditions ne pourront intervenir qu'avec l'accord de la personne concernée et l'avocat ne pourra ni forcer la personne à s'exprimer ni – ce qui tombe sous le sens – la retenir contre son gré. Dans l'hypothèse où la déposition de la personne concernée doit être, par la suite, utilisée dans le cadre d'une procédure, il est nécessaire de pouvoir démontrer, sous peine que les procès-verbaux y relatifs soient déclarés irrecevables ou inexploitables, que l'audition s'est déroulée notamment sans contrainte, recours à la force, menaces, promesses, tromperie ou tout autre moyen susceptible de restreindre les facultés intellectuelles ou le libre arbitre et ce, même si la personne concernée a consenti à leur mise en œuvre.

Comme indiqué plus haut, il est interdit d'enregistrer ou d'écouter des conversations, qu'elles soient en direct ou téléphoniques. Pour pouvoir procéder à ces actes, les personnes qui font l'objet d'écoutes doivent

Le droit suisse contient de nombreuses règles et garde-fous devant être respectés lors de la réalisation d'une enquête interne.

Si l'enquêteur doit avoir accès aux locaux de l'entreprise et aux documents professionnels de l'employé, il y sera autorisé, celle-ci ayant, par principe, donné son accord et l'employé n'ayant aucun droit sur ceux-ci. Autre est la question de savoir si l'enquêteur pourra avoir accès à des documents privés des employés. En droit suisse, l'employeur n'a pas le droit de consulter des documents privés de ses travailleurs sans leur accord. En cas de refus, il sera plus prudent pour l'enquêteur de faire appel aux autorités de poursuite (le cas échéant pénales) afin qu'elles procèdent à leur saisie.

Toutefois, dans l'hypothèse où l'enquête ne concerne pas des faits donnant lieu à une infraction pénale, nous partons du principe que l'entreprise peut accéder à tout ce qui concerne l'activité professionnelle de l'employé (documents et place de travail notamment). Un tel accès devra toutefois respecter les droits de la personnalité dont

avoir été préalablement avisées que, dans le cadre de leurs appels professionnels, leurs conversations sont susceptibles d'être enregistrées. Pour ce qui est des appels privés, seul un intérêt prépondérant de l'entreprise (commission d'une infraction pénale notamment) pourrait, le cas échéant, justifier un enregistrement ou une écoute par l'employeur. Ce point reste toutefois délicat et nous n'entrerons pas dans le détail dans le présent article.

Le fait de filmer ou prendre des photos d'employés sur leur lieu de travail n'est pas autorisé sans leur accord.

L'entreprise a un accès intégral aux emails professionnels de ses employés et est en droit de leur interdire d'utiliser leur messagerie professionnelle à des fins privées. Si l'employé ne respecte pas cette obligation, l'employeur pourra, en cas de besoin de l'enquête, y avoir accès et les conserver à des fins de preuve et, le cas

échéant, de remise aux autorités (sous réserve de leur éventuelle exploitabilité, sujet sur lequel on ne s'attardera pas dans cet article).

Pour ce qui est de l'utilisation d'Internet par les employés, on rappellera en liminaire que l'installation de logiciels espions est interdite. Par ailleurs, et d'une manière générale, l'entreprise peut sans aucune motivation, refuser à ses employés d'utiliser Internet à des fins privées sur leur lieu de travail. Toutefois, quand bien même une telle utilisation aurait été autorisée, la surveillance individuelle et de manière permanente de l'activité d'un employé sur Internet est en général prohibée par le droit suisse, sous réserve des cas d'atteinte aux intérêts de l'entreprise ou de commissions d'infractions pénales. Dans ces hypothèses, on pourra considérer qu'il existe un intérêt prépondérant de l'employeur lui permettant d'effectuer une surveillance individuelle (art 13 LPD).

Toutes les mesures qui précèdent, outre qu'elles doivent respecter les limites posées par le droit pénal, doivent également rester dans celles notamment posées par les principes généraux de la protection des travailleurs des art. 28ss CC et 328 CO, de la législation sur le travail et de la loi sur la protection des données.

Clôture de l'enquête et rapport final

A la fin de son enquête, l'enquêteur remettra à l'entreprise un rapport résumant les opérations effectuées, les faits constatés et leur analyse et conséquences et, en tant que de besoin les recommandations ou plans d'actions. Dans ce cadre, l'avocat devra veiller à ce que ses constatations factuelles soient mises en perspectives avec des développements juridiques afin de garantir que le rapport puisse, en tant que besoin, être couvert par son secret professionnel et qu'aucun tiers ne puisse demander à pouvoir le consulter sans l'accord de l'entreprise. Etant précisé que rien n'empêche a priori cette dernière d'en remettre un exemplaire caviardé afin de conserver certains éléments confidentiels. Partant, seule l'entreprise pourra ainsi décider du cercle des destinataires du rapport d'enquête

En guise de conclusion, il faut garder à l'esprit que l'avocat qui effectue une enquête interne au sein d'une entité privée, devra prendre les mesures nécessaires dans le cadre du processus d'enquête afin de s'assurer que les résultats de ses investigations et les documents y relatifs puissent être couverts par son secret professionnel.

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Protecting People from the Dark Side of "Smart" Medical Devices

Joseph DEHNER & Michael NITARDY

Imagine a device the size of a small band aid that not only constantly monitors your heart rate, but also constantly communicates with other devices you wear and use on a daily basis. As a result of this monitoring and communication ability, the device records your heart rate, along with the exact date, time, and location of the specific heart rate reading. Because the device is connected to your smartphone, which is connected to all your other "smart devices" (your television, computer, refrigerator, automobile, thermostat, home security system) an application that runs in conjunction with the device can correlate your heart rate with your daily activities.

With this combined information, a program that assembles the data will know your standard heart rate throughout the day. It will know your heart rate when you are watching television, playing on your smartphone (including specific apps there), exercising, sleeping, driving, doing other things. This standard heart rate information will help determine what activities place your heart rate in an abnormal range. It will alert you when you begin activities similar to those that placed you in the abnormal range before and when your heart rate jumps out of the normal range for a specific activity.

The potential health benefits are enormous. The device has tremendous utility for both your personal health care and society at large. The device records fountains of personal data. Not only could the device warn you when you start an activity that historically puts you in an unhealthy range, but it could also use the data to warn others of such risks. If you have a cardiac event, the device would record that. Combining this with other information recorded from other individuals, the device could assist in developing guidelines for behavior. It could spot trends. Medical interventions could be shaped. Lives could be saved.

But what about other uses? What if the device stops you from taking part in activities you enjoy? What if your health insurance provider has access to this information and raises your insurance rates because you are seen as a risk? What if the information is used to exclude you from coverage altogether? What if the information is used to sell you other healthcare devices or services that you don't want or need?

Being able to record one piece of data over and over again about something like a heart rate may not seem invasive or problematic.

Technology for the widespread use of such devices is here. In late 2017, the U.S. Food and Drug Administration approved the marketing and distribution of Abilify MyCite, a pill designed not only to treat schizophrenia and forms of dementia but also to track whether the medication is being taken as prescribed. The pill uses minute sensors embedded inside the pill that communicate with a wearable patch, which communicates with an application that usable on smartphones. Health care providers can access the information through a web-based portal to monitor that the medication is being used as prescribed.

Medication compliance is a vital part of treating mental disorders. Individuals with disorders such as schizophrenia have notoriously low compliance rates in taking medication. The ability to monitor whether someone is complying with treatments can improve and save lives. Given the benefit and the use of data gleaned by such technology, the arrival of such technology is both applauded and expected.

As we rightly expect such technological advances to improve our quantity and quality of life, we should not disregard the potential downside. While the technological advancements may not shock us anymore, the privacy implications should.

Medical Devices and Information About Our Bodies

The IoT "is the network of physical objects than contain embedded technology to communicate and sense or interact with their internal states or the external environment." (*Gartner, Inc.*) The IoT relies on vast amounts of technology that can be placed in everyday objects to measure or sense data through the technology, to communicate the measurements and data

wirelessly via the internet, and then store or communicate that data for use and analysis.

It is only natural that medical devices are rapidly joining the ranks of items that contain IoT capabilities. As laid out in the scenario above, there is obvious utility in constantly monitoring certain aspects of our health. Doing so can lead to timely intervention of potential health incidents and to the cataloging of vital data that can create health breakthroughs. Items currently on the market include diabetic monitoring, asthma monitoring, and medication compliance monitoring, to name a few.

Being able to record one piece of data over and over again about something like a heart rate may not seem invasive or problematic. The issue arises when, because of our ability to measure and record *everything*, we can piece together *everything* we do throughout the day. If someone can know my heart rate throughout the day, along with everything else I do throughout the day, and compare that to multiple days, months, and years of my life, someone would be in a position not only to know a great deal about me but to be able to predict my future behaviors.

How it May Be Misused

Just as it is hard to predict accurately the next technological breakthrough, it is difficult to predict the many ways privacy rights will be impacted by the new technology. Generally, the collection of health and activity data can result in at least three categories of misuses:

1) The collecting violates the person's privacy by collecting data without consent or a legal reason to do so;

2) The collecting or processing entity misuses the person's data to influence unfairly the person's behavior; and

3) The collecting or processing entity misuses the person's data to harm the person physically or financially.

Violating our privacy

The right to privacy is recognized as a fundamental human right in Europe and must be seen as an aspirational universal human right, though different societies will give it different boundaries and protections. The very fact that an entity collects such information implicates privacy rights.

If a person's information is collected without the person's informed consent or some other legal basis, a privacy right is affected, even in the absence of statute or regulation to enforce the right.

In our heart rate monitor example, consent may be implicitly given by continuing to use the product after receiving a privacy policy provided by the device manufacturer or a privacy policy posted with an app that works with the device. This begs the question of whether the policy provides sufficient information for the user to give informed consent on the types of information being collected and whether the manufacturer has a way to obtain further consent if the device receives an update that allows it to start collecting additional types of information.

Staying with the heart rate monitor example, the information collected about my heart rate when combined with information about my daily activities can have tremendous financial implications.

Misusing data to influence our behavior

Even if informed consent is obtained at first (or another legal justification for collection exists), how can we be sure that a data processor or controller will not use the collected information for purposes not contemplated when consent was given, or the information was otherwise lawfully acquired? For example, what if the controller or processor wants to share the information with a third-party and the controller or processor does not provide the user notification of such possible uses when obtaining the consent? What if the third-party then matches the information with additional information it has collected about the user? What if the information is then used to screen the users out of certain consumer or business transactions?

Staying with the heart rate monitor example, the information collected about my heart rate when combined with information about my daily activities can have tremendous financial implications. For example, insurance companies might be able to put me into a more specific risk category. The information could conceivably be purchased by multiple insurance companies and used to increase my insurance rates so that I have no cost-effective alternatives.
But what if the company that collects the information wants to influence my daily activities like "Big Brother"? The information could be used in a way that the organization thinks is for my own good but really violates my autonomy. For example, the information could be used to direct me away from legal activities. The information gleaned from the device and other "smart information" could "determine" that certain of those legal activities unnecessarily increases my heart rate or increases my chances for a health care incident. The data could be used to influence me (subtly or otherwise) to buy items that I don't want or need by using my own health data against me. When I am at my most vulnerable and anxious, the program could suggest certain relaxation devices or calming therapies whenever my heart rate spikes.

Misusing the data to harm us physically or financially

This category may seem the most far-fetched but is a definite possibility depending upon the identity of the controller or processor of the information, especially if bad actors obtain the information with the intent of harming individuals. For example, the heart monitor program could be modified no longer to alert me when my heart rate enters a dangerous range. The controller or processor could use its knowledge of my health situation to steer me into expensive health care programs or treatments that it owns or controls.

Is there a way to protect this data so that these undesirable outcomes are less likely?

How it is (or May Be) Regulated

While the potential benefits to collecting and analyzing large amounts of data about our bodies are astounding, the potential misuses are significant. At a minimum, laws that regulate collection and use should address the three areas of potential misuse outlined above. In theory, this could be accomplished by providing consumers notice about the information to be

collected and used before the collection begins. Protections could be provided by requiring additional notices to consumers when this information changes or when the information is shared with third parties. Adequate protection should provide consumers the ability to revoke consent or "opt-out."

Next, we discuss two legal frameworks designed to provide some of this protection. The first, the European Union's General Data Protection Regulation ("GDPR") became operational in May 2018. The second, the California Consumer Privacy Act ("CCPA") becomes effective on January 1, 2020.

GDPR

The GDPR regulates processing of personal information for data subjects located in the European Union. It focuses on the activities of controllers and processers of personal data and restricts the processing of personal information unless certain criteria are met. Article 5 of the GDPR lists certain principles that inform all the other regulations. The principles include that the personal data shall be processed "lawfully, fairly, and in a transparent manner in relation to the data subject" and "collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes[.]"

In order for data to be processed lawfully, there must be a legal basis on which the information is collected and processed. The GDPR includes several grounds through which a controller or processor can lawfully process a data subject's information, including obtaining the data subject's affirmative consent.

Article 13 of the GDPR requires that at the time of data collection from the data subject, the controller must provide the data subject with certain information, including:

- the identity and the contact details of the controller and, where applicable, of the controller's representative;
- the purposes of the processing for which the personal data are intended as well as the legal basis for the processing;
- the recipients or categories of recipients of the personal data, if any;
- the fact that the controller intends to transfer personal data to a third country;
- the period for which the personal data will be stored;
- the right to request from the controller access to and rectification or erasure of personal data or restriction of processing concerning the data subject or to object to processing as well as the right to data portability; and
- the right to lodge a complaint with a supervisory authority.

If the controller or processor intends to use the collected information to create a profile on the data subject in order to take part in automated decision-making, then the controller must provide that information to the data subject at the time of collecting the information and must also provide the data subject "meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject."

In addition to these requirements, the GDPR requires that if the controller decides to process the personal data for a purpose other than that for which the personal data was collected, the controller shall provide the data subject with that further information.

In order for data to be processed lawfully, there must be a legal basis on which the information is collected and processed.

As applied to our heart rate monitor example, when followed by controllers and processers, these requirements should guarantee that before the company/controller starts collecting my information via my use of the device, I receive notification of all the information above and can then choose whether to use the monitor. I would then expressly consent, or opt-in to my information's being used as outlined by the controller.

If the controller were to sell or otherwise transmit my information to a third party that was not identified in the prior notice, I would be notified by the controller. At that point, I could revoke my consent to the collection and use of my information.

CCPA

As currently enacted, the CCPA will provide California consumers certain rights regarding their personal information, including the type of information collected by our heart rate monitor.

Under Section 1798.100(b) of the CCPA, " a business that collects a consumer's personal information shall, at or before the point of collection, inform consumers as to the categories of personal information to be collected and the purposes for which the categories of personal information shall be used." The provision continues that " [a] business shall not collect additional categories of personal information or use personal information collected for additional purposes without providing the consumer with notice."

Under Section 1798.110 of the CCPA, a consumer may request that a business that collects the personal information disclose to that consumer information including:

- the categories of personal information it has collected about that consumer;
- the categories of sources from which the personal information is collected;
- the business or commercial purpose for collecting or selling personal information;
- the categories of third parties with which the business shares personal information; and
- the specific pieces of personal information it has collected about that consumer.

Pursuant to Section 1798.115, similar information must be provided by a company that sells consumer information. Importantly, the CCPA provides consumers the opportunity to "opt-out" of having the consumer's personal information sold.

Applying these provisions to the three areas of potential misuse means that a person using our heart rate monitor would have to be notified "at or before the point of collection. . . the categories of personal information to be collected and the purposes for which the categories of personal information shall be used." In addition, if the business wants to collect additional information from the monitor

that was not in the initial notice, the company would have to provide additional notice to the consumer.

The CCPA does not provide for a specific "opt-in" consent like the GDPR. Under the CCPA, it is assumed that if a consumer gets the notification referenced above and proceeds (or continues) to use the service or device, then consent is implied. The CCPA does, however, provide consumers a way to opt-out of having the information sold to a third-party.

Conclusion

The Internet of Things' expansion into healthcare will have many privacy implications. The two legal frameworks discussed briefly above demonstrate how society's demand for more information can be reconciled with privacy concerns by providing consumers "up-front" notice of a company's collection practices. A notice should include the types of information collected and how that information is to be used, shared or sold. The framework should provide avenues for consumers to "opt-out" of the process or to revoke consent. Finally, any change in the process should be accompanied by additional notices to the consumer so the consumer can exercise the ability to "opt-out".

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Restructuring Families

In Defence of the Collaborative Process Regarding the Fate of Children[1]

Jennifer BROCKINGTON-BELLI

Introduction

An apt interdisciplinary statement in today's society is that lawmakers cannot legislate at a speed sufficient to keep up with the pace at which the world is evolving.

As the goalposts are ever moving, family law is one of the fields where this change is most notable.

The law cannot provision exactly for each individual situation. Nor should it – it is not its role to do so, but that of judges. They can make use of their judicial discretion to implement statute, rules and regulations adequately in each case.

Even so, partly because of ever-increasing workloads, judges do not systematically have the time or tools necessary to find a made-to-measure solution that fits the exact needs of each family.

do have, they will generally prefer not to entirely absorb through payment of lawyers' and, possibly, court fees.

According to my observation in my practice with families, the general sentiment seems to stray further and further afar from wishing for an expensive, destructive divorce, which will leave long standing consequences, both financially and emotionally.

Therefore, I believe that family lawyers' role should increasingly tend towards facilitating a serene and cost-effective resolution to the restructuring of each family they are required to work with upon the separation of the parental couple.

The focus of this article will be the benefits of such a collaborative approach as concerns the fate of children following the separation or divorce of the parents from the point of view of Swiss law, specifically regarding

Parental responsibility exclusive to one of the parents is to remain an exception.

Indeed, the circumstances of individuals, of families, are becoming increasingly complex and diverse, as are the number of possible ways to organise children's everyday lives, including when their married or unmarried parents happen to have separated.

Hence, the parents together are likely to be the best placed to know what is most likely to be an optimal new structure and way of operating for their own family and children. Therefore, it is best for them to elaborate an agreement setting this out rather than, in case of a disagreement, to relinquish this power to the judge.

In addition to the challenges above, nowadays, expendable cash within middle and lower class families can be sparse, if not non-existent. What available monies people

parental responsibility of the child as well as the residence of and contact with the child.

Before we *bona fide* get into our subject, a few preliminary notes are in order.

Firstly, the following contribution is not aimed at comprehensively setting out the current state of the law and jurisprudence in Switzerland in the field of family law, nor regarding the fate of children in separation. That is too vast a field for this piece.

Instead, the objective is to highlight arguments showing that divorcing or separating parents would be best advised to be led through a collaborative process rather than embark on a path of metaphorical war before the courts. This is even more true considering the recent evolution of the

Swiss law where the situation of children is concerned.

It is interesting to note that this applies to both families in which the parents are married and those who have chosen not to marry. This is not only because Swiss legislators have aimed to make the treatment of children born of unmarried parents equal to that of the issue of a married couple, which it historically was not. It is also quite simply because, in the event the parental couple's separation, whether married or unmarried, the child's fate and their relationship with both parents has to be either agreed amongst them or will be decided by the judicial authority.

The law dictates that any decision regarding the child's fate is to serve their best interest. This has of course always been central to rulings when it came to children. Now, more than ever, it is set out in the law.

Furthermore, the benefits of a collaborative solution regarding the financial aspect of caring for children and their upbringing will not be examined. The subject is vaster than the scope of this contribution, specifically considering the relatively recent amendments to the Swiss law on the aspects of child maintenance as of the 1st of January 2017.

Additionally, the concepts and terms used in the text below are to be understood according to those applicable in Swiss law, rather than, for example, UK Law.

As a last introductory note, it is important to emphasize that it is of course not always possible to proceed in a consensual way. The child's best interests, wellbeing or safety may be put at risk by one of the parents. In that case, the intervention of child protection services, as well as a judge, and recourse to robust judicial protective measures (possibly by the other parent or the authorities) are imperative.

This is not addressed below. The aim here is to examine the scenario in which both partners are fit to be entrusted with their parental rights and duties, and set out the reasons why they should succeed in putting their interpersonal conflict aside in order to find an optimal approach towards their child's upbringing.

I. Parental Responsibility

On the 1st of July 1,2014, article 296 of the Swiss Civil Code (hereafter "CCS") was amended to state that, whilst underage, a child remain the joint parental responsibility of their father and mother.

Previously to this change in the law, the child of married parents was subject to joint parental responsibility whilst the marriage lasted. After a divorce, it was generally granted to the parent who lived with the child on a daily basis.

If the parents were unmarried, unless they applied together to be granted joint parental responsibility, the mother was sole holder of it (former art. 298 and 298a CCS). If no agreement was possible, parental responsibility could be switched from one parent to the other by a judge if such a change was in the child's best interests.

As from July 2014, joint parental responsibility became the principle, under law, as the child's best interests are now assumed to be served by both parents practising this duty and right together.

Parental responsibility exclusive to one of the parents is to remain an exception.

The *Tribunal fédéral* (hereafter also: Swiss supreme court) has stated several times since the law was changed that joint parental responsibility now stands as a principle. Thus awarding or maintaining parental responsibility in the hands of only one of the parents must stand as the exception. Such an exception is justified where there is a particularly severe, profound and lasting conflict between the parents or they are persistently unable to communicate with one another, a fact which is a threat to the child's wellbeing[2].

As stated above, that conflict must be particularly serious. The *Tribunal fédéral* considered, for example, that an acute conflict between parents regarding the right to contact between the child and the parent they do not live with, their residence or even their maintenance, were insufficient grounds to assume it was impossible for the parents to collaborate in order to exercise joint parental responsibility[3].

Interestingly, in this same case[4], the *Tribunal fédéral* recalled that the parents have the duty to cooperate between them and make all efforts that can reasonably be expected of them to communicate efficiently. They must keep the child away from any parental conflict.

A collaborative approach on an everyday basis is therefore even engraved, so to speak, in the law. Until their offspring reaches adulthood (18 years old in Switzerland), they are legally obligated to work together to protect the child's best interests. Good communication and collaboration between the parents is also crucial as parental responsibility encompasses more components of a child's upbringing than ever before.

Simultaneously as the law changed regarding the principle of joint parental responsibility in the case of unmarried parents, the nature of the said responsibility was extended. Elements of the child's life that were previously related to issues of custody and decided by the parent the child lived with became included in parental responsibility.

Indeed, the new legislation left aside the notion of "custody" as formerly understood. It reduced the scope of the French term "*garde*" to the daily upbringing of a child and the putting into practice of one's rights and duties related to everyday care and supervision (i.e. residence)[5].

In the current state of the law, parental responsibility includes making the necessary decisions as to educating and caring for the child, deciding their place of residence, ensuring their appropriate upbringing (thus safeguarding their physical, mental and moral development), religious upbringing and representing the child.

> The collaborative process, or the importance for separating parents to refrain from waging war on one-another is also apparent regarding the quality of the future relationship they must build.

In regards to our focus, one provision among others is worth pointing out. The law directly states that if needed, the parents must agree in such a way as to safeguard the child's best interests to makes changes to the system within which their parental responsibility operates, the child's residence, or contact with the other parent and maintenance.

It is only if the parents fail to agree that the court or child protection authority is to make a decision on those points. This article is coherent with Swiss law's general logic that the parents must make decisions related to the child's upbringing together and the judge or child protection authority only intervenes if they have failed to do so.

The *Tribunal fédéral* regularly repeats that the protection of the child's best interests fundamentally rules parental rights arrangements; parents' interest must be secondary[6].

This means that, on every single component of parental responsibility and as long as their child is underage, parents holding joint parental authority will have to make decisions together in such a way as to protect their offspring's best interest.

The collaborative process, or the importance for separating parents to refrain from waging war on one-another is also apparent regarding the quality of the future relationship they must build.

Indeed, even if a parental couple ends up locked in a judicial duel, this will at some point end, and, save for exceptional cases, they will still have to work together when it comes to their child's daily upbringing, assuming they have been granted joint parental authority.

The only difference is that their starting point for that parental relationship, if it is to work in the child's best interests, will be a lot further from where it should be once they no longer have the support of lawyers and judges.

Legal battles leave scars, which can embitter the parents' relationship, making a client's contacts with someone they have no choice but to have in their life deeply unpleasant in the long run. This seems fundamentally adverse to the child's best interests. So, if the parents start from a point of being at extreme odds, sometimes only out of principle because they are so resentful of one another, they might constantly need to have recourse to a judge or child protection authority intervening.

Not only will that be exceedingly costly for them, as well as not allowing for immediate resolution of issues, but once again, it can only be adverse to a child's optimal development to have parents constantly challenging one another's parental abilities in a court of law.

Such an outcome is wholly unsustainable.

On the contrary, if the parents have been encouraged to and succeeded in building a healthy co-parenting bond, regardless of the status of their relationship as individuals, this will make the joint everyday management of their child's upbringing much more efficient, not to mention pleasant, and thus favourable to a positive development of their issue.

If the parents are locked in a bitter dispute over their separation, it is a well-known fact that the children will ultimately become collateral damage in such a situation.

II. Residence and Contact

Beyond their personal comfort as a co-parent, the relationship a client is to build with their child is at stake. If the parents are locked in a bitter dispute over their separation, it is a well-known fact that the children will ultimately become collateral damage in such a situation.

In addition to this, children are likely to have difficulty maintaining a good relationship with both parents if said parents behave in an acrimonious manner towards one another. This also applies in cases where the child has their main residence with one of the parents and regular contacts, including visitation, with the other.

The consequences of the parental conflict can affect the relationship between the child and their parent who does not live in the same household. Indeed, the Swiss supreme court has recently stated that court-ordered contact between a parent and their child to which said child is opposed are in the long term likely to have a negative impact on their relationship with the parent in question. Therefore, if a child capable of forming their own opinion strongly opposes contact with one parent, the *Tribunal fédéral* ruled that ordering this is adverse to the child's best interests and a violation of their personality rights according to Swiss legal doctrine[7]. According to this jurisprudence, in the event where a profound resentment exists towards one of their parents on the child's part, a judge will not be able to forcefully order contacts between the two.

Far from producing the intended result of leaving the parent's ex-partner worse off or "punished" in the wake of the separation, a lack of collaborative can in such a context cause a rift with their child, one which a judge will not necessarily be able to help repair by taking the necessary measures. Such a situation is a prime example of the merits of a collaborative process: the more serene and positive the relationship between the parents, the more likely they are to respectively abide by their parental duty of encouraging the creation of a strong and healthy bond between their child and co-parent.

It is also worth noting that according to current jurisprudence, the alternate residence of the child with each of the parents can be ordered despite one of the parent's opposition to it[8]. This did not use to be the case.

Similarly, to the exception preventing joint parental responsibility from being granted, the judge will only assess an alternate residence to be unachievable if the animosity between the parents prevents them from cooperating sufficiently well and the child's wellbeing would be threatened by such a custodial agreement[9]. Of course, if the parents' respective homes are too far apart, or the child's stability is at risk, alternate residence cannot be granted. But the point is, refusal by one parent of the child's residence being shared is no longer sufficient to prevent this.

This is another point on which parents will be best advised to work together on restructuring their child's life in an optimal and mutually agreed way. One can only imagine how distressing it would be to have living arrangements imposed on oneself, and having this fundamental decision regarding offspring made by a third party judge or child protection authority who is innately unable to take into consideration the client's family's individual circumstances as they would themselves.

Conclusion

There are of course many more merits to the collaborative process, and those briefly observed above could be examined more in depth, but this goes far beyond the scope of this article.

It could be said that this contribution has done nothing more than state the obvious. Most people, if asked objectively, will of course agree that where children and couple separation are concerned, proceeding consensually is best.

However, the people whom family lawyers receive in their office are for the most part usually going through a very painful stage of their lives. This can of course makes tackling family issues in an objective and methodical manner more challenging.

Even regardless of any emotional torment they are facing, clients finding themselves recently or mid-breakup are at the very least having to rethink the future they had envisioned and facing tangible change in their everyday life as well as that of their children. Having to collaborate on a daily basis with the other parent is, in that moment, sometimes the last thing they want to do.

It is my strongly held belief that the lawyer's role should also be, if at all possible, to bring those clients back from that metaphorical ledge and guide them towards a collaborative process by explaining its merits in order to assist them in building a sustainable and durable new family structure.

Of course, some people have already achieved this mind-set in the context of their separation themselves. In that case the lawyer's role will be one of guiding the client through the mandatory content of their agreement regarding their child best interests according to the applicable law.

As a closing note, let us quickly look at another, more global advantage of the collaborative process. To allow for child arrangements to be agreed between the parents and ratified by the courts, both members of the parental couple are obligated to converse and exchange with their soon to be ex or ex-partner or spouse on a range of potentially divisive subjects, specifically in a time as sensitive as that of a break-up.

Where will the children live? Where will they receive their schooling or education? What about religious education, if any? What are the reasonable costs of their everyday upkeep? Should the parent with whom they live exclusively educate them, or will a professional child-minder be involved?

If they manage, with the support of legal counsel, to collaborate in answering those questions at the height of sensitivity and possibly anger, the parents will be better equipped to continue doing so after the end of judges' and lawyers' involvement than if they have fought a judicial fight to their metaphorical deaths.

This is important because the parents will have to continue answering those questions. The romantic couple may have ended, but the parental couple will and must live on, for up to 18 years depending on the age of the children involved at the time of the split.

The evolution of Swiss law is increasingly closing the door of possibilities for one parent to dictate their wishes regarding the child to the other, as is the legislative background in many neighbouring countries and even the United States. Lawyers have an opportunity to lead this positive change and must seize it.

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1. This article emphasizes Swiss Law.

2. Arrêt du Tribunal fédéral 5A_34/2017 dated May 4, 2017, c. 4.1 and arrêt du Tribunal fédéral 5A_744/2016 dated March 28, 2017, c. 6.1 as referenced by REISER, *Droit de la famille,* in Demi-journée "Marathon" de formation continue, April 21st 2018

3. Arrêt du Tribunal fédéral 5A_455/2016 dated April 12, 2017, c. 5, ref. by REISER, *Op. cit.*

4. Arrêt du Tribunal fédéral 5A_455/2016 dated April 12, 2017, c. 5, ,ref. by REISER, *Op. cit.*

5. MEIER/STETTLER, *Droit de la filiation*, 5e ed 2014, n. 462 p. 308 and n. 466 p. 311, as ref. in ATF 142 III 617, c. 3.2.2.

6. ATF 142 III 617, c. 3.2.3 and references.

7. Decision of the *Tribunal fédéral* 5A_369/2018 dated August 14, 2018, § 5.1 and 5.2 as ref. in REISER, *Droit de la famille*, in Demi-Journée "Marathon de formation continue", May 11, 2019.

8. Decision of the *Tribunal fédéral*, 5A_17/2017 dated October 25, 2017, c. 2.1.1 in REISER, *Op. cit.*, April 21 2018.

9. Decision of the *Tribunal fédéral*, 5A_17/2017 dated October 25, 2017, c. 2.1.1 in REISER, *Op. cit.*, April 21, 2018

¿Qué será de los litigios transfronterizos en caso de Brexit sin acuerdo?

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¿Qué será de los litigios transfronterizos en caso de *Brexit* sin acuerdo?

Ante las múltiples incertidumbres que plantea el *Brexit*, el Ministerio de Justicia del Reino Unido ha publicado recientemente una guía dirigida a profesionales jurídicos en la que se detalla, en caso de que el Reino Unido abandone la Unión Europea sin acuerdo, el tratamiento que deberá concederse a todos aquellos procedimientos judiciales transfronterizos en los que exista un elemento británico. Asimismo, en esta guía se fijan las bases de las reglas sobre la ley aplicable a las obligaciones contractuales y no contractuales.

En las presentes líneas intentaremos aclarar – al igual que ha hecho el Gobierno británico con la publicación de esta guía – los efectos que se seguirían de que el Reino Unido abandonara Europa de manera abrupta y sin acordar con la Unión Europea los términos de sus futuras relaciones.

1. Jurisdicción, reconocimiento y ejecución de resoluciones judiciales

Actualmente, y mientras el Reino Unido permanezca en la Unión Europea, la jurisdicción, el reconocimiento y la ejecución de las resoluciones judiciales se regulan por (i) el Reglamento n.° 1215/2012 del Parlamento Europeo y del Consejo, de 12 de diciembre de 2012, relativo a la competencia judicial, el reconocimiento y la ejecución de resoluciones judiciales en materia civil y mercantil (el "Reglamento Bruselas I bis"), y (ii) el Convenio relativo a la competencia judicial, el reconocimiento y la ejecución de resoluciones judiciales en materia civil y mercantil, firmado en 2007 (el "Convenio de Lugano II").

Los referidos instrumentos se aplican para decidir tanto la jurisdicción como el reconocimiento y ejecución de resoluciones judiciales en aquellos casos en los que el domicilio del demandado se encuentra en un Estado miembro de la Unión Europea (Reglamento Bruselas I bis) o en los que el domicilio de cualquiera de las partes se encuentra en cualquier Estado miembro de la Unión Europea o en uno de los cuatro Estados de la EFTA – Islandia, Liechtenstein, Noruega y Suiza – (Convenio de Lugano II).

> Sin embargo, el Reino Unido no ha sido parte firmante de ninguno de esos instrumentos como Estado individual, sino que es parte en ellos por ser miembro de la Unión Europea

De acuerdo con sus respectivas exposiciones de motivos, tanto el Reglamento Bruselas I bis como el Convenio de Lugano II tienen como fin facilitar el acceso a la justicia – gracias al principio de reconocimiento mutuo de las resoluciones judiciales y extrajudiciales en materia civil – y reconocer y establecer un procedimiento rápido para garantizar la ejecución de las resoluciones judiciales.

Sin embargo, el Reino Unido no ha sido parte firmante de ninguno de esos instrumentos como Estado individual, sino que es parte en ellos por ser miembro de la Unión Europea. Por ello, en caso de que finalmente se produzca el *Brexit* sin mediar acuerdo, tanto el Reglamento Bruselas I bis como el Convenio de Lugano II dejarán de aplicarse a aquellos asuntos en los que el domicilio del demandado, o el de cualquiera de las partes, se encuentre en el Reino Unido.

En tal caso, los instrumentos de derecho internacional privado que pasarían a regular tanto la jurisdicción como el reconocimiento y la ejecución de las resoluciones judiciales en materia civil y mercantil serían, en principio, cada uno de los acuerdos internacionales que el Reino Unido haya celebrado en tal sentido con otros países y, en su defecto, las normas de derecho internacional recogidas por el derecho interno de cada una de las jurisdicciones del Reino Unido.

1.1 Asuntos iniciados en el Reino Unido

En un intento de frenar el caos que pudiera suponer dicha situación, el Gobierno británico ha publicado un reglamento interno sobre jurisdicción y resoluciones en materia civil – *The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 No. 479* – (el "Reglamento n° 479"). Dicho reglamento, que entraría en vigor

el día de la salida de la Unión Europea por parte del Reino Unido, además de derogar formalmente el Reglamento Bruselas I bis y el Convenio de Lugano II – así como todos los instrumentos internacionales que les precedían –, establece un régimen transitorio para los asuntos iniciados con anterioridad a su entrada en vigor.

De acuerdo con las reglas contenidas en el Reglamento n° 479, los tribunales de Inglaterra y Gales seguirán aplicando las normas de jurisdicción existentes – es decir, las contenidas en el Reglamento Bruselas I bis – a los casos iniciados en Inglaterra o Gales, pero no concluidos, con anterioridad a la pérdida por el Reino Unido de su condición de Estado miembro de la Unión Europea. De igual forma, se seguirán aplicando las reglas sobre reconocimiento y ejecución de resoluciones judiciales existentes en procedimientos iniciados en un Estado miembro de la UE o de la EFTA y no concluidos en la fecha de salida, así como en los casos en los que se haya obtenido una resolución judicial en dichos Estados con anterioridad a la fecha de salida y se solicite su reconocimiento o ejecución con posterioridad a esa fecha en el territorio del Reino Unido.

Como adelantábamos, a aquellos casos iniciados en el Reino Unido con posterioridad a su salida de la Unión Europea les serán de aplicación los convenios internacionales suscritos por el Reino Unido y, subsidiariamente, el derecho interno de cada una de las jurisdicciones (incluyendo, por supuesto, el *common law*).

En materia de jurisdicción, uno de estos convenios internacionales es el Convenio de la Haya de 2005 sobre Acuerdos de Elección de Foro (instrumento al que el Reino Unido ya ha presentado su adhesión como Estado parte); mientras que el reconocimiento y la ejecución pasarían a regirse por leyes tan remotas en el tiempo como la Ley sobre administración de justicia – *Administration of Justice Act* – de 1920 o la Ley sobre reconocimiento recíproco de resoluciones extranjeras – *Foreign Judgments (Reciprocal Enforcement) Act* – de 1933.

1.2 Asuntos iniciados en otro Estado miembro de la Unión Europea

Por lo que respecta a aquellos asuntos iniciados con anterioridad a la fecha de *Brexit* en cualquier otro Estado miembro de la Unión Europea y en los que el demandado tenga su domicilio en el Reino Unido, seguirán siendo de aplicación las reglas sobre jurisdicción aplicables actualmente en la Unión Europea (es decir, el Reglamento Bruselas I bis).

Sin embargo, para aquellos procedimientos de iguales características que se hayan iniciado con posterioridad a la fecha de salida deberán aplicarse las normas de derecho internacional privado sobre jurisdicción del Estado al que pertenezcan los tribunales a los que se haya sometido el asunto.

Finalmente, en cuanto al reconocimiento y ejecución de una resolución judicial británica en la Unión Europea, esta podrá ser ejecutada automáticamente cuando se haya obtenido el exequátur con anterioridad a la fecha de salida del Reino Unido. Sin embargo, y al igual que ocurre con las normas sobre jurisdicción, cuando se solicite con posterioridad a la fecha de *Brexit*, el reconocimiento y ejecución de una resolución judicial británica en un Estado miembro de la Unión Europea quedará sujeto a las normas nacionales del Estado miembro en el que se pretenda que esta resolución judicial despliegue efectos.

2. Ley aplicable

Las normas actuales que regulan la ley aplicable en los asuntos de derecho internacional privado en materia civil y mercantil en la Unión Europea y, por tanto, en el Reino Unido son (i) el Reglamento (CE) n.° 593/2008 del Parlamento Europeo y del Consejo, de 17 de junio de 2008, sobre la ley aplicable a las obligaciones contractuales (el "Reglamento Roma I") y (ii) el Reglamento (CE) n.° 864/2007 del Parlamento Europeo y del Consejo, de 11 de julio de 2007, relativo a la ley aplicable a las obligaciones extracontractuales (el "Reglamento Roma II").

Con el mismo afán por preparar al Reino Unido ante su inminente salida de la Unión Europea, el Parlamento británico ha recogido las normas sobre la ley aplicable a aquellos asuntos de derecho internacional privado en materia civil y mercantil sobre los que resuelvan los tribunales del Reino Unido en el borrador de Reglamento sobre ley aplicable a obligaciones contractuales y obligaciones no contractuales – *The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019*. En virtud de este reglamento, se modifican los Reglamentos Roma I y II de forma que operen como derecho interno tras la salida del Reino Unido de la Unión Europea, como ya anticipaba la ley aprobada por el Parlamento británico en junio de 2018 a tal fin – *European Union (Withdrawal) Act 2018*.

De forma adicional, este instrumento conserva las normas del Convenio de Roma de 1980 sobre la ley aplicable a las obligaciones contractuales – instrumento predecesor del Reglamento Roma I – ya previstas en la legislación británica sobre ley aplicable a los contratos – *Contracts (Aplicable Law) Act 1990* – para los contratos celebrados entre 1991 y 2009.

De esta forma, tras la salida del Reino Unido, los tribunales británicos aplicarán las normas contenidas en el Reglamento sobre ley aplicable a obligaciones contractuales y obligaciones no contractuales de 2019, conservando las normas contenidas en los Reglamentos Roma I y II o en el Convenio de Roma de 1980. Por el contrario, los tribunales del resto de los Estados miembros seguirían aplicando la normativa europea – los Reglamentos Roma I y II –, dado que ambos instrumentos son de aplicación independientemente de que la ley aplicable sea la de un Estado no miembro o la de un tercer Estado.

Como conclusión, hemos de señalar que esta guía es una buena iniciativa por parte del Gobierno británico para intentar aclarar un escenario repleto de incertidumbres. Como reflexión, nos preguntamos en qué lugar deja el *Brexit* al Reino Unido en su particular batalla por situar al derecho inglés como estándar de mercado, y anticipamos cambios al respecto.

Todos hemos oído a Teresa May decir: "*Brexit means Brexit*". Sin embargo, nadie parece tener claro lo que *Brexit* significa. Tendremos que esperar aún para ver si el Parlamento británico consigue ponerse de acuerdo.

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LE RAPPORT ANNUEL 2018 EST DISPONIBLE

L'UIA présente dans ce rapport le résumé des activités, événements et actions en faveur des droits de la défense qui se sont déroulés au cours de l'année passée.

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La insolvencia del distribuidor como causal de rescisión o modificación del contrato

Prof. Dra. Jenifer ALFARO BORGES

When we analyze contracts characterized by the trust that parties deserve reciprocally and/or in which the trust that inspires one party with respect to the other is a necessary condition to celebrate and maintain its validity, insolvency is showed as a cause of termination *ipso jure* or, at least, as a just cause for termination. It is necessary to consider that the distributor can be the only channel of commercialization of the product, with crucial relevance not only for the sale itself but also for the maintenance of the value of the brand and the positioning of the product in its sector. If we add that the ineffective performance of the contract by the insolvent generates damages that exceed the parties, projecting themselves on complex networks that involve third parties, an escape valve becomes essential. On the other hand, the role that a contract plays in a company can reach critical levels: in a distribution company the distribution contract is the core of its value. With this, if the bankruptcy system (bankruptcy or as it is denominated) gives priority to the maintenance of the value of the running business, either for its intrinsic value for the stakeholders or as an asset to sell for the payment to creditors, the decision to allow the termination of the distribution contract can be difficult. In this regard, the Uruguayan bankruptcy law establishes the invalidity of the termination clause based in bankruptcy or insolvency, leaving no much room for the principal to terminate the distribution contract. This article analyzes the application of various bankruptcy actions to the distribution contract, even terminated before the declaration of the distributor's bankruptcy.

Introducción

No son aislados los supuestos en los cuales una empresa de distribución tiene en el contrato mismo de distribución como el núcleo de su valor. Claro está que ello puede englobar derechos de propiedad intelectual, generalmente licencias de uso de marcas o patentes o más modernamente incluso de nombre de dominio y espacios en redes sociales (la titularidad debería ser la excepción en tanto de buena fe el registrante en cada mercado debería ser el principal – en su caso el distribuidor en nombre del principal –).

Se trata de ejemplos clásicos de contratos *intuito personae*, en los que el factor confianza suele verse reforzado por diversas cláusulas contractuales. No olvidemos además que se trata de contratos de coordinación empresaria, que posicionan al distribuidor en un rol que puede ser fundamental para el principal: puede ser su único o más importante canal de venta. Para los clientes –sean otros comerciantes o los consumidores, dependiendo de la modalidad de distribución de que se trate-, el distribuidor puede ser la cara visible del principal en el mercado.

Podemos preguntarnos si la distribución de productos identificados con marcas no aporta otro mecanismo de protección del distribuidor, en tanto le permitirá oponerse a que otro venda mercadería con dicho signo.

Es por ello que la insolvencia del distribuidor no resulta indiferente para el principal, que con la desmejora de la imagen del primero se ve afectado en su reputación y en sus ventas. Aun peor podrá ser la situación ante un concurso declarado, salvo en aquellos concursos que logran tramitarse con poca noticia de los clientes, sobre todo por la poca alteración del servicio.

Aún mayor es el nivel de impacto cuando el distribuidor insolvente integra una red de distribución: si partimos de la base de que el mercado al cual se proyecta la actuación de la red no distingue entre los titulares de cada establecimiento viendo al todo como un solo proveedor de productos o servicios, fácilmente concluiremos que la ineficiencia de un eslabón perjudicará gravemente al resto. Ello sin tener presente que el resto de los eslabones (los demás distribuidores) no están vinculados con el insolvente mediante contrato, en tanto el contrato de distribución (con efecto vinculante entre las partes) sólo obliga a principal (otro de los eslabones) y distribuidor (cada uno de los distribuidores se vincula con el principal pero sin contratos entre ellos).

Si el distribuidor insolvente es exclusivo constituye el canal de salida de la mercadería al mercado con lo cual el inadecuado cumplimiento del contrato de distribución puede afectar además el valor de la marca de producto o servicio, perjudicando su posicionamiento y por ende el de la empresa de la cual es titular el principal. En estos casos a la rescisión como medida extrema, puede sumarse una opción intermedia: eliminar la exclusividad (es decir mantener la distribución pero no exclusiva).

Esas situaciones no han sido contempladas por la Ley uruguaya de Concursos y Reorganización empresarial (LCU), Ley 18.387, que se ha ocupado sí de proteger el valor de la empresa en marcha poniendo obstáculos a la rescisión de contratos en los que existan obligaciones pendientes de cumplimiento por parte del concursado.

1. La cláusula de exclusividad y la eficacia de los contratos de distribución

1.1. La cláusula de exclusividad y la cláusula de no competencia

Corresponde diferenciar entre lo que puede llamarse exclusividad en varios sentidos. Por un lado la exclusividad a favor del distribuidor, implicando un campo de actuación excluyente de otros operadores. En este sentido el pacto refiere a un territorio determinado. En otro sentido, conocido como cláusula de no competencia, nos referimos a la exclusividad que obliga al distribuidor para con el principal, determinando con mayor o menor alcance

(absoluta – de cualquier otro producto, por ejemplo – o relativa – puede ser de productos del mismo ramo –, respectivamente), la prohibición de comercializar otros productos.

Este trabajo apunta al análisis de la exclusividad a favor del distribuidor, es decir, de aquella que constituye obligación para el principal y derecho para el distribuidor.

1.2. La cláusula de exclusividad no obliga al tercero ajeno al contrato

De los artículos 1291 y 1292 del Código Civil uruguayo resulta que los contratos sólo obligan a las partes y sus sucesores a título universal o singular. Según el artículo 1293 del mismo código dispone que "Los contratos no pueden oponerse a terceros ni invocarse por ellos, sino en los casos de los artículos 1254 y 1256."

Por tanto los contratos se tornan ley entre las partes, no obligando a los terceros.

Partiendo de ese principio, el pacto de exclusividad contenido en un contrato de distribución solamente obliga a una de las partes para con la otra. Nos referimos a un pacto no oponible.

La consecuencia es que la conducta del tercero no podría calificarse como incumplimiento de una obligación emergente del contrato y, en definitiva, no sería generadora de responsabilidad contractual.

2. La exclusividad de la distribución y la exclusividad en el uso de la marca

En mercados en los cuales las marcas constituyen más que signos distintivos del producto (concepto jurídico), llegando a constituir una plusvalía de la mercadería, no puede dejarse de lado que los contratos de distribución suelen incluir previsiones sobre la utilización de las marcas involucradas.

Sin duda de la marca surge un derecho de exclusiva que, acuerdo mediante, beneficiará al distribuidor (incluso mediante la concesión de una licencia) Podemos preguntarnos si la distribución de productos identificados con marcas no aporta otro mecanismo de protección del distribuidor, en tanto le permitirá oponerse a que otro venda mercadería con dicho signo.

La respuesta es el concepto de agotamiento del derecho: con la primera puesta legítima del producto en el mercado, el derecho que confiere la marca se agota, no rigiendo para posteriores ventas. El artículo 12 de la Ley uruguaya de marcas, Ley 17.011 dispone que "No podrá impedirse la libre circulación de los productos marcados, introducidos legítimamente en el comercio por el titular o con la autorización del mismo, fundándose en el registro de la marca, siempre que dichos productos y su presentación, así como sus envases o sus embalajes que estuvieren en contacto inmediato con ellos, no hayan sufrido alteraciones, modificaciones o deterioros significativos."

Dependiendo del alcance que cada legislación da al agotamiento (nacional, regional o internacional), el mismo se verificará con la primera venta en el mercado nacional, regional o internacional. Uruguay ha adoptado el más amplio, el agotamiento internacional.

> El contrato de distribución no ingresa en ninguno de los supuestos previstos, aun cuando puede haber sido el marco dentro del cual se otorgaron compraventa de bienes muebles.

Por lo tanto, el distribuidor exclusivo no podrá impedir mediante acciones marcarias, la venta de un producto adquirido a un empresario habilitado (al titular de la marca o su licenciatario)[1].

Las mismas consideraciones pueden realizarse respecto de las patentes de invención (y modelos de utilidad), en cuanto a aquellos contratos de distribución de productos protegidos con patente (o modelo de utilidad) o resultantes de procedimientos patentados.

3. Rescisión del contrato de distribución desde la perspectiva del principal

3.1. Rescisión del contrato de distribución

3.1.1. Rescisión por insolvencia o declaración de concurso

3.1.1.1. *Cláusula de rescisión por insolvencia o concurso*

Si estamos ante contratos celebrados en vigencia de la LCU, la cláusula que establece la rescisión del contrato por insolvencia o declaración de concurso del distribuidor, será nula (art. 68 numeral 5). En la ponderación de derechos entre co-contratante e intereses de la masa pasiva (pueden sumarse la consideración de otros *stakeholders* involucrados con el mantenimiento de la empresa), la LCU se pronuncia por estos últimos. Se deja de lado toda consideración a la pérdida de confianza de parte de un contratante que basó su decisión de contratar justamente en ese factor.

3.1.1.2. *Rescisión a instancias del síndico o el concursado con el interventor*

De acuerdo con LCU, al deudor concursado se le limita la legitimación para disponer y obligar a la masa designándosele un interventor cuando se trata de un concurso voluntario (se declaró a su solicitud) con activos suficientes para cubrir los pasivos, y se le suspende la legitimación para disponer y obligar a la masa designándosele un síndico si es un concurso necesario o voluntario sin activos suficientes. En caso de designación de un síndico la empresa se distribución pasará a ser administrada por un sujeto diferente a aquel en cuyas condiciones personales el principal depositó su confianza (y es un auxiliar del Juez que no conoce a la empresa)

El articulo 68 numeral primero dispone que "El síndico o el deudor con la autorización del interventor, tendrá la facultad de rescindir unilateralmente el contrato, notificando este hecho a la contraparte, dentro del plazo establecido para que los acreedores presenten la solicitud de reconocimiento de sus créditos."

Es claro, por tanto, que basta la mera declaración unilateral de voluntad notificada al principal, para que opere la rescisión del contrato de distribución, generándose en su caso el derecho a una reparación de los perjuicios causados. Ese crédito por daños y perjuicios generados por la rescisión del contrato por parte del síndico (o el concursado con el interventor) es

calificado por la LCU como concursal (art. 68 num. 3), es decir que cobrará según el resultado del concurso como aquellos titulares de créditos nacidos antes de la declaración concursal.

No se prevé que la contraparte del distribuidor concursado disponga de igual facultad.

3.1.1.3. *Rescisión a instancias del principal*

Según el artículo 68 numeral 2 de la LCU, dentro del plazo de verificación de créditos, "la contraparte del deudor podrá exigir, según los casos, al síndico o al deudor y al interventor, que manifiesten si resolverán o no el contrato. En este caso, si no ejercieran la facultad de resolución dentro de los cinco días siguientes a la recepción del requerimiento, ya no podrán ejercitarla con posterioridad, salvo que el Juez apruebe un convenio que no implique la continuación de la actividad profesional o empresarial del deudor o disponga la liquidación de la masa activa."

Es decir que el principal (quien ha otorgado la distribución) no tendrá más margen que impulsar una decisión de rescisión por parte del síndico o del concursado con el interventor, la cual raramente llegara atendiendo a que seguramente será prioridad mantener vigente el contrato de distribución (como valor fundamental de la empresa concursada).

Sin embargo, el numeral 4 del artículo 68 de la LCU agrega que "En caso de no optarse por la resolución del contrato cuando el cumplimiento del contrato por parte del deudor implique riesgo manifiesto y grave para la otra parte, ésta podrá solicitar al Juez que rescinda el contrato o que se garantice suficientemente el cumplimiento del mismo."

El primer planteo que surge es respecto a la verificación del requisito "riesgo manifiesto y grave para la otra parte". Es difícil considerar que lo cumple el argumento de la pérdida de confianza de parte del principal que es esencia del negocio, o el peligro del muy probable alejamiento de la clientela, o el hecho de que el concurso implica que la red de distribución de la mercadería del principal queda bajo la órbita de un tercero – el sindico – que generalmente desconoce el rubro.

Porque si bien en todo concurso la clientela del concursado se puede alejar, resulta que en los contratos de distribución, en mayor o menor medida y con diferente alcance (con los matices a los que se alude más adelante), la clientela del concursado es la clientela del[2] principal. Por lo tanto de mantener el contrato de distribución, se puede estar generando un impacto no solamente en el concursado distribuidor sino también en el principal, e incluso en otros distribuidores de la red.

Si tenemos además presente que en la actualidad es tan importante prestar un buen servicio para el mantenimiento de la clientela como el conferir y mantener el valor de los intangibles, no se podrá sino concluir que la insuficiencia de recursos podrá impactar en las ventas.

Otro planteo incluso más difícil de resolver es la suficiencia de la garantía a brindar a la contraparte del concursado, nuestro principal. Basta ver los riesgos señalados, y se identificará la dificultad del tema.

3.1.2. Rescisión por liquidación de la masa activa

Según el artículo 170 de LCU "Será además justa causa para la resolución anticipada de los contratos celebrados por el deudor con obligaciones total o parcialmente pendientes de ejecución. El crédito correspondiente a la indemnización por los daños y perjuicios que cause la resolución, fijado por el Juez, tendrá la consideración de crédito concursal".

Por tanto, dispuesta la liquidación de la masa pasiva (dando paso a la venta de activos en principio mediante subasta), generalmente luego de la celebración de la Junta de Acreedores, el principal estará habilitado para obtener la rescisión del contrato (se tratará de una rescisión y no de la resolución propiamente dicha). Una solución que puede llegar tardíamente y que resulta además, totalmente desventajosa también para la masa pasiva que pocas chances tendrá de satisfacer su crédito a partir de la venta de una empresa de distribución sin derecho de distribución.

3.1.3. Modificación del contrato por suspensión de la exclusividad

Se trata de una solución que puede equilibrar los intereses en juego, en tanto ampara al principal permitiéndole continuar operando con otros canales de venta (incluso de forma directa) mientras se resuelve la situación del distribuidor y al mismo tiempo mantiene vigente el contrato de distribución a favor de la empresa concursada. Sin embargo no está previsto por la normativa uruguaya actual.

Podría sostenerse que la suspensión de la referida exclusividad puede cumplir el rol de garantía suficiente a ofrecer en caso de que, al amparo del artículo 68 num. 4, la contraparte (en este caso el principal) alegue que existe un "riesgo manifiesto y grave" de incumplimiento por el distribuidor.

4. Desde la perspectiva de la masa pasiva

Tanto si hubiera mediado rescisión del contrato de distribución como en caso contrario, en el proceso licitatorio por medio del cual se procede a la liquidación de la empresa en bloque, la empresa de distribución perderá su esencia y por tanto todo o prácticamente todo su valor. Sucede que incluso sin mediar rescisión la naturaleza intuito personae del contrato de distribución en cualquiera de sus modalidades, impedirá que opere una cesión legal de contrato (no establecida por la LCU) Por tanto el adquirente dependerá de sus propias condiciones para obtener del principal el mantenimiento del vínculo original o uno nuevo, lo cual implicara que dependerá de la importancia de la estructura empresarial que se vende si vale la pena resultar adjudicatario. Puede ser el caso tanto considerando estructuras físicas necesarias o útiles para el desarrollo de la actividad, como el mantenimiento de los recursos humanos de la empresa (que no se asegura con la venta en bloque pero suele estar entre las ventajas de la continuación).

Otro planteo incluso más difícil de resolver es la suficiencia de la garantía a brindar a la contraparte del concursado, nuestro principal. Basta ver los riesgos señalados, y se identificará la dificultad del tema.

Cuando el principal logra la rescisión del contrato de distribución (generalmente ante la liquidación de la masa activa), puede apropiarse de la clientela generada por el distribuidor (incluso aquella que se logró mantener durante el concurso). Debe evaluarse si puede entenderse que la calificación legal de la liquidación de la masa activa como justa causa de rescisión del contrato, habilita al principal de lo que entiendo es la obligación de "compensar" por la clientela generada por el que fue su distribuidor. En caso contrario, el síndico estará habilitado para reclamar la referida compensación.

5. Acciones concursales tendientes a revivir un contrato de distribución rescindido

5.1. Rehabilitación del contrato de distribución rescindido

Desde la perspectiva del Derecho uruguayo al menos, debemos excluir estos contratos de la acción de rehabilitación del contrato, cerrada a "los contratos de mutuo pagaderos en cuotas de capital o de intereses, las compraventas a crédito de bienes muebles o inmuebles, las promesas de enajenación de inmuebles a plazos, los arrendamientos y los créditos de uso que hubieran caducado por incumplimiento del deudor de la obligación de pagar el precio y/o de realizar los pagos periódicos comprometidos, …". El contrato de distribución no ingresa en ninguno de los supuestos previstos, aun cuando puede haber sido el marco dentro del cual se otorgaron compraventa de bienes muebles.

5.2. El contrato de distribución como un contrato revocable de pleno derecho

De acuerdo con el artículo 81 de la LCU son revocables de pleno derecho los "Actos de aceptación por el deudor de cualquier clase de requerimiento resolutorio de contratos, dentro de los seis meses anteriores a la declaración de concurso." Por lo cual el principal puede enfrentarse al concurso de un ex distribuidor que fue declarado en concurso dentro de los 6 meses de haber aceptado la resolución del contrato de distribución, y lejos de resultarle ajeno, podría ser el mecanismo para hacer renacer el vínculo.

La acción revocatoria, que puede ser entablada por los acreedores ante la omisión del síndico, tiene como efectos: "1) Condenará al demandado a reintegrar a la masa activa los bienes o derechos indebidamente adquiridos, con sus frutos. 2) Si los bienes o derechos no se encontraran en su patrimonio, lo condenará a entregar el valor que hubieran tenido al salir del patrimonio del deudor o en cualquier otro momento posterior, si hubiera sido mayor, más el interés legal."

La situación del principal se agravaría si le resulta aplicable el articulo 87 numeral 6, en tanto "Si se hubiera probado que el demandado conocía el estado de insolvencia del deudor en el momento de la realización del acto o de la omisión, perderá el derecho a cobrar su crédito en el concurso."

Conclusiones

- Las particularidades de la empresa de distribución hacen que el concurso de acreedores no confiera suficiente protección a los intereses del principal ni a los intereses del distribuidor concursado.
- El principal no está amparado para lograr la rescisión del contrato de distribución (hasta tanto se llegue a la etapa de liquidación de activos) e incluso tendrá dificultades para exigir que se le garantice en forma el cumplimiento, atento a que los peligros que son comunes a este supuesto[3] deben calificar como riesgo grave y manifiesto para el principal.
- Cabe recordar que el distribuidor es parte de la red de distribución del principal, lo cual frente a los clientes, les da una identidad común: el desprestigio de uno, impacta en la imagen del otro (e incluso en otros distribuidores de la red). En igual sentido, la perdida de clientela del distribuidor concursado, repercute directamente en el principal que puede tenerlo como su única conexión con ese mercado (un distribuidor exclusivo). Es por ello que requiere de respuestas que la LCU no le brinda.
- La exclusividad a favor del distribuidor para operar en un territorio puede agravar los perjuicios que su defectuoso cumplimiento del contrato genere al principal: afectará sus ventas o asimismo el valor de la marca involucrada y su posicionamiento empresarial en el mercado. La LCU no prevé una solución directa, que puede

llegar a partir de una negociación forzada por la exigencia legal de garantizar el cumplimiento si se verifica riesgo manifiesto y grave de incumplimiento o de la interpretación de que suspender la exclusividad puede ser la garantía que el principal tiene derecho a exigir.

- Para la masa pasiva la pérdida del derecho de distribución como consecuencia de la rescisión o aún por la ausencia de norma que impongan una cesión legal de contratos con la venta en bloque[4], conlleva a que el principal pueda apropiarse gratuitamente de la clientela que generó el distribuidor: puede cuestionarse si cuando la LCU establece que la liquidación de la masa activa es justa causa de rescisión del contrato, se libera al principal de la obligación de compensar por la clientela desarrollada por la labor del distribuidor.

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1 O comprado a otro empresario de la cadena de comercialización, si el agotamiento ya se había verificado antes.

2 No se hace referencia a la titularidad (incluso porque en el Derecho uruguayo no es un bien).

3 Dejando de lado casos específicos.

4 No significa esto que lo postulemos.

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Cuestiones actuales de derecho concursal: ley procesal de quiebras vs. ley concursal[1]

Esteban CARBONELL O'BRIEN

Que, con motivo de visitar el hogar del recordado maestro del Derecho, Don Carlos Fernandez Sessarego, en el apacible distrito de Miraflores, Lima, Perú, pudimos verificar su gran sapiencia en temas ajenos, particularmente al Derecho Civil.

Su amplia visión del Derecho, amparada principalmente en la filosofía y la lógica, nos llevaron a consultarle respecto a temas ligados a nuestra especialidad: Derecho Concursal o de la Crisis empresaria. Saltó en su memoria, el texto que reproducimos y que nos permitimos – *gracias a su anuencia, poder comentarlo* – desprendiendo como adelanto, su gran actualidad a pesar del paso inexorable del tiempo. Empecemos con la tarea.

"…1.- Introducción.-2.- Fundamentos de la declaración judicial de quiebra.

El artículo primero de la ley 7566 declara, en efecto, que el objeto del procedimiento de quiebra debe ser la realización de los bienes del deudor con la finalidad de "proveer al pago de sus deudas" en los casos y forma determinados por la propia ley. La experiencia de veinticinco años de vigencia de la Ley Procesal de Quiebras nos muestra que los dispositivos de la ley no permiten, en el curso de su aplicación por los verdaderos actores del Derecho, alcanzar esta pragmática finalidad señalada por el artículo primero de una ley que no hace honor a tan concreto propósito".

Que, debemos precisar que la ley de quiebras aludida fue derogada por el D.L. 26116 del año 1992, luego de interminables debates que dieron luz a una nueva normativa, incluso un abrupto cambio de fuero, vale decir, se sustrajo la actuación del concurso, del ámbito judicial y paso a uno de carácter administrativo.

Posteriormente, incluso hubo sendas enmiendas a través del D. Legislativo 845 (1997) y la finalmente con las Leyes 27.809 (2002), 28.709 (2006) Decreto Legislativo 1050 (2008) y Leyes 30.201 (2014) 30.353 (2015). Con ello, se buscaba evitar lo que el maestro Fernandez manifestó hace más de setenta años, siendo el fin de nuestra actual normativa, la protección o tutela del crédito y no en estricto, el mero pago de créditos a resultas de la enajenación del patrimonio del deudor, el cual muchas veces, es incipiente o inexistente.

Sin embargo, vemos con tono realista que dicha finalidad en tiempos modernos, no se cumple, repitiéndose la historia. Probablemente, los actores han cambiado pero la escena dramática revela que la imposibilidad de honrar obligaciones patrimoniales, se vuelve reiterativa. Estamos acaso en un mundo ideal? Un mundo ajeno a la crisis empresaria es casi imposible. A nuestro juicio, ello se repetirá como un disco sin fin por generaciones enteras, quedando la prevención como remedio y el uso del concurso en momento oportuno, generando éste, un ambiento idóneo para la negociación, con el múltiple abanico de acreedores y el deudor, como gran generador de nuevas oportunidades.

Prosigue el maestro señalando: *"En efecto, no es fenómeno común el que los acreedores obtengan, como resultas del procedimiento de quiebra, el pago de sus deudas. En las hipótesis más favorables se consiguen tardíos porcentajes que, con frecuencia, no cubren ni un monto equivalente a los intereses devengados por los capitales debidos por el fallido. El cúmulo de reparos a que se hace merecedora la ley 7566 y algunos de los órganos de la quiebra, justifica el anhelo de reformar o sustituir la ley vigente por un conjunto de normas que remuevan, aunque sea n parte, los obstáculos que en la actualidad determinan el desprestigio del procedimiento".*

Con lo acontecido el legislador buscó generar un nuevo clima de negocios, que permita arribar a acuerdos satisfactorios a la luz de un nuevo concurso de acreedores. Ello se da con la dación de la nueva normativa de concursos en el Perú, sumado al nacimiento de una institución de carácter técnico: INDECOPI. Organo de tutela del concurso y sus procedimientos. Sea a través, de su Comisión de procedimientos concursales – CCO que es el órgano encargado de tramitar los distintos procedimientos destinados a afrontar la crisis de un deudor, ya sea por el incumplimiento de pago o pérdida de su patrimonio. Frente a ello, el deudor debe sortear múltiples problemas de índole administrativo, logístico, financiero y económico, que le permitan presentar una propuesta idónea, eficiente y veraz.

Pues a través de un procedimiento concursal se busca generar un ambiente idóneo y se lleve a cabo una negociación entre acreedores y deudor

Y prosigue manifestando lo siguiente: *"Y decimos que "aunque sea en parte" por qué no ignoramos que existen inconvenientes inherentes a la naturaleza de la quiebra que impedirán, en cualquier circunstancia, obtener un dispositivo jurídico plenamente satisfactorio. No perdemos de vista las opiniones de ilustres juristas, como Bolaffio y Renouard, cuando afirman que en una quiebra todos pierden y que la sabiduría consiste en moderar al máximo el sacrificio de las partes."*

En efecto, recordemos que la instauración de un novedoso sistema concursal en el Perú opera luego de la dación del D.L. 26116, aunque sus enmiendas superan las reales expectativas del ciudadano de a pie. Siguen luego de un poco más de veinte años, las falencias y en estricto por la actuación por parte de los actores, muchas veces tardía.

Pues a través de un procedimiento concursal se busca generar un ambiente idóneo y se lleve a cabo una negociación entre acreedores y deudor. Así se pueden alcanzar soluciones orientadas a conseguir el máximo valor del patrimonio en crisis y por tanto, las soluciones más eficientes para la extinción

de las deudas, pero reiteramos con énfasis, de manera oportuna, pues muchas veces, la oportunidad es tardía y ello conlleva, que la única salida sea la liquidación del patrimonio y de la misma empresa, resultando estériles cualquier esfuerzo, incluso contra la propia voluntad de los acreedores.

Ello, porque la actual normativa concursal prevé apremios, como por ejemplo, el enunciado en el artículo 24.2 de la Ley 27.809 que señala expresamente: *"a) Para una reestructuración patrimonial, el deudor deberá acreditar, mediante un informe suscrito por un representante legal y su contador público colegiado, que sus pérdidas acumuladas, deducidas las reservas, no superan al total de su capital social pagado.. b) De no encontrarse en el supuesto del inciso a) precedente, el deudor sólo podrá solicitar su disolución y liquidación, la que se declarará con la resolución que declara la situación de concurso del deudor".*

Con ello, se confirma que toda alternativa debe ser adoptada de modo oportuno, lo contrario opera en una inexorable salida de la empresa del mercado.

Y agrega para reforzar nuestro anterior comentario: *"Es defecto frecuente de los juristas, fuertemente impregnados de una formación exclusivamente racionalista y en medios jurídicamente no muy desarrollados, el perder la vista el objeto mismo de la Ciencia del Derecho, como es la propia conducta humana en su interferencia intersubjetiva, e inclinarse a un mero estudio de legislación positiva comparada con prescindencia del análisis socio-económico que resulta de ser el contenido materia de la regulación legal*".

La falta de promoción de las posibles bondades del procedimiento concursal o en casos extremos, el mal uso de éste, provocan la falta de interés que a la larga genera incertidumbre en el mercado y sus agentes. Por ello, se justifica de la existencia de un órgano rector y muy técnico. Sin embargo luego de dos décadas, vemos el desgaste del INDECOPI y la nula renovación de sus autoridades, lo que hace visible un cambio generacional con urgencia. Nuevos aires que refresquen el caldeado ambiente político en vísperas del inicio del Bicentenario de nuestra patria.

Nuestra idea se ampara en el siguiente comentario: "*Las deficiencias de la ley Procesal de Quiebras, y de sus órganos, sobre todo en lo referente a la morosidad y onerosidad del procedimiento, ha obligado a los acreedores, en la mayoría de los casos, a aceptar arreglos extra-judiciales desfavorables a sus intereses, pues, sin una debida justificación y adecuada investigación de causales, están forzados a escoger entre una demanda de quiebra – que supone el olvido de sus créditos- o un convenio "amigable", de delitos que se mantienen en la impunidad".*

Los convenios extra-judiciales – que se ven forzados a aceptar los acreedores – confieren, en la mayoría de los casos, apariencia legal a situaciones antijurídicas. Los acreedores deben admitir del insolvente la presentación de pasivos dolosamente confeccionados, en los que al lado de sus auténticos créditos, se configuran obligaciones ficticias. Y están compelidos a admitir, también sin mayor análisis, activos disminuidos en perjuicio de sus propios intereses. A esta situación los empuja los vacíos y deficiencia de la ley concursal. El clamor contra su permanencia, en los términos de que está vigente, se encuentra plenamente justificado.

Los convenios extra-judiciales – que se ven forzados a aceptar los acreedores – confieren, en la mayoría de los casos, apariencia legal a situaciones antijurídicas.

Y prosigue señalando: *"La reforma o sustitución de la actual Ley 7566 supone no sólo enmendar los errores o deficiencias en cuanto al procedimiento mismo de la quiebra sino también, y principalmente, en lo referente a los convenios o concordatos judiciales y extra-judiciales.*

Aunque por la índole misma del Derecho existirá siempre libertad para contratar al margen de las disposiciones legales – en lo que no está prohibido por ellas – es conveniente regular más minuciosamente el convenio extra-judicial a fin de permitir al deudor comerciante de buena fe aliviar una precaria y transitoria situación de desequilibrio económico con miras a su recuperación, sin pérdida del crédito indispensable para seguir operando, y , al mismo tiempo, evitar a los acreedores las dificultades inherente al juicio de quiebra, por más acertadas que sean sus disposiciones."

En ese orden de ideas, el legislador buscó – infructuosamente – arribar a una salida ordenada frente a la crisis del deudor, que encontrándose en etapas distintas de endeudamiento, cesación de pagos e insolvencia, las cuales suponen una imposibilidad parcial o total de afrontar obligaciones de índole pecuniario, respectivamente, debían ser solucionadas por un instituto rector como el concurso de acreedores.

Y prevé también lo siguiente: *"Sin embargo, resulta sumamente difícil, en la práctica, precisar por el Juez o por los acreedores de obligaciones no vencidas, el estado de desequilibrio económico-originario del estado de insolvencia como supuesto para una declaración judicial de quiebra. Por lo general, conviene a los intereses de los deudores – ilusionados con superar la crisis o de mala fe, – el ocultar su verdadera situación, la misma que permanece en el secreto de la economía privada.*

En cambio, la cesación de pagos – que es frecuentemente la manifestación externa del desequilibrio económico – ofrece a los acreedores y al Juez la ventaja de su objetividad como fundamento de la declaración de su objetividad como fundamento de la declaración judicial de quiebra, simplificando la labor del Juez. Lo que cuenta, para las legislaciones que han adoptado el sistema de la cesación de pagos como base para la declaración judicial de quiebra, no es la condición intrínseca de insolvencia, sino el dato externo de la imposibilidad de pagar obligaciones a sus respectivos vencimientos."

Esta fórmula fue recogida en la vigente legislación concursal peruana al instaurar dos procedimientos a saber: el procedimiento ordinario y el preventivo, los cuales están orientados a las dos situaciones patrimoniales descritas anteriormente, las mismas que se diferencian por el estadio financiero del deudor, delimitado por un tenue línea pero que la doctrina ha logrado separar magistralmente.

Por ende, el órgano rector del procedimiento concursal previa a la declarar el inicio del concurso, sea a pedido de cualquier acreedor o del propio deudor (concurso necesario o

voluntario) no sólo en el caso límite de la cesación de pagos, ante el hecho consumado del vencimiento de obligaciones – que demuestren, en forma clara y terminante, el estado de desequilibrio económico que permitirá, en su oportunidad, el atender por el deudor el pago de sus compromisos, debe verificar de manera fehaciente, el real estado patrimonial del deudor para evitar desnaturalizar el uso del instituto.

De este modo se evita que el deudor utilice medios ruinosos o fraudulentos como sería la venta de mercaderías a precios por debajo de su valor comercial en plaza – en perjuicio de sus acreedores tenedores de obligaciones vencidas, impidiendo, a tiempo, una perjudicial disminución del activo y atenuando, en todo caso, los efectos de la quiebra.

Y el maestro agrega a nuestro comentario lo siguiente: *"El Juez (hoy el INDECOPI) ante la evidencia de la extremidad del hecho de vender mercaderías a precios ínfimos o del envío de circulares por el deudor confesando su imposibilidad de pagar – o ante cualquier otro medio que manifieste fehacientemente estado de desequilibrio económico – se encontraría facultado para declarar la quiebra pedida por cualquier acreedor, noticiado de la existencia de hechos evidentes que demuestran el estado de insolvencia del deudor.*"

Consideramos pues que el interés social estará mejor protegido si se permite, a cualquier acreedor, pedir la declaración judicial de la quiebra ante la evidencia de hechos externos que denoten insolvencia de parte del deudor, con anterioridad al vencimiento de obligaciones. Una quiebra declarada oportunamente impedirá al insolvente "prepararla" con anticipación. Evitará que continúe contrayendo obligaciones, con las funestas consecuencias de arrastrar a situaciones difíciles a otros comerciantes, las mismas que pueden convertirse en otros caso de falencia que produzcan quiebras en cadena. Evitará, asimismo, que el insolvente de mala fé, al disponer de tiempo suficiente, abulte dolosamente su pasivo, otorgándole todas a formalidades legales del caso.

Y agrega: *"Si largos y penosos resultan los procedimientos de nulidad y reivindicatorios, más grave resulta interponer las acciones de anulabilidad previstas por el art. 75 de la Ley de Quiebras para los casos de pagos o actos o contratos a título oneroso ejecutados por el deudo comerciante – a contar desde la fecha de cesación de pagos y hasta el día de la declaratoria de quiebra – por que en estas eventualidades se requiere, por mandato legal, de una probanza asaz difícil a cargo del actor; demostrar que aquel que contrato con el fallido tenía conocimiento de su estado de cesación de pagos".*

A todos los inconvenientes indicados – *que no desaparecerían pero si se atenuarían con la nueva fórmula para el inicio del CONCURSO* – hay que añadir que en la práctica resulta tarea ardua para el INDECOPI proponer la fecha de cesación de pagos. Y a esta dificultad agregase muchas veces la carga procesal de dicha institución, limitándose a declarar que será "a la brevedad posible" Y a menudo este acontecimiento se dilata en extremo, impidiendo la pronta interposición de las acciones de nulidad o anulabilidad que franquea la ley.

La fórmula propuesta, en síntesis, estaría encaminada a poner, rápido atajo a situaciones de insolvencia, sin que sea necesaria la verificación de la efectiva cesación de pagos y siempre que existan manifestaciones externas que la demuestren fehacientemente. De este modo podría evitarse, en algunos casos, el que prosperaran actitudes antijurídicas de parte de deudores de mala fe y se propendería, mediante el mayor rigor de la disposición a adoptarse, a una moralización del comercio, tan requerida por las entidades representativas del gremio.

Que, asimismo, el texto del artículo 19 de la ley concursal señala que el juez puede declarar ineficaz y en consecuencia, inoponibles frente a los acreedores del concurso, los gravámenes, transferencias, contratos y demás actos jurídicos, sean a título gratuito u oneroso, que no se refieran al desarrollo normal de la actividad del deudor, que perjudiquen su patrimonio y que hayan sido realizados o celebrados por éste dentro del año anterior a la fecha en que se presentó su solicitud para acogerse a alguno de los procedimientos concursales, fue notificado de la resolución de emplazamiento o fue notificado del inicio de la disolución o liquidación.

Y el maestro ampara ello en lo siguiente: "Más, la aspiración de moralización en *referencia para una mayor eficacia, debe necesariamente contar con la diligente actividad investigatoria de los Jueces Instructores a fin de precisar, como lo señala el art. 176 de la ley, "si el fallido, o cualquiera otra persona, son responsables de algún delito relacionado con la quiebra", a fin de sancionar debidamente. Máxime que en el caso de la quiebra se vulnera en mayor grado el interés social."*

Por ello, a nuestro juicio y en suma el instituto del CONCURSO se cierne como una nueva oportunidad frente a la crisis del deudor. Dicha herramienta debe ser usada en el momento oportuno y de la manera adecuada permitirá aliviar la avería en transición o desaparecer por fortuna la misma, creando una nueva fase en el mercado. Como el ave fénix, renacer de las cenizas. Sin embargo, la actual legislación concursal no es la panacea y requiere de cambios urgentes que permitan solventar el verdadero espíritu del instituto, siendo que el Proyecto de Ley N° 3076-2013, hoy Ley 30.201 de mayo del 2014, pudo incorporar el manejo más pulcro por parte del organismo regulador otorgándole mayores facultades o en defecto de ello, retornar su manejo a cargo de los actuales juzgados comerciales, un asunto que venimos proponiendo en cuanto foro, seminario o Congreso académico somos invitados, pero que por razones de espacio, no podremos desarrollar en esta oportunidad.

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1. Con motivo del artículo publicado por Don Carlos Fernandez Sessarego, en la Revista de Jurisprudencia peruana N° 170, Año XVI, marzo 1958

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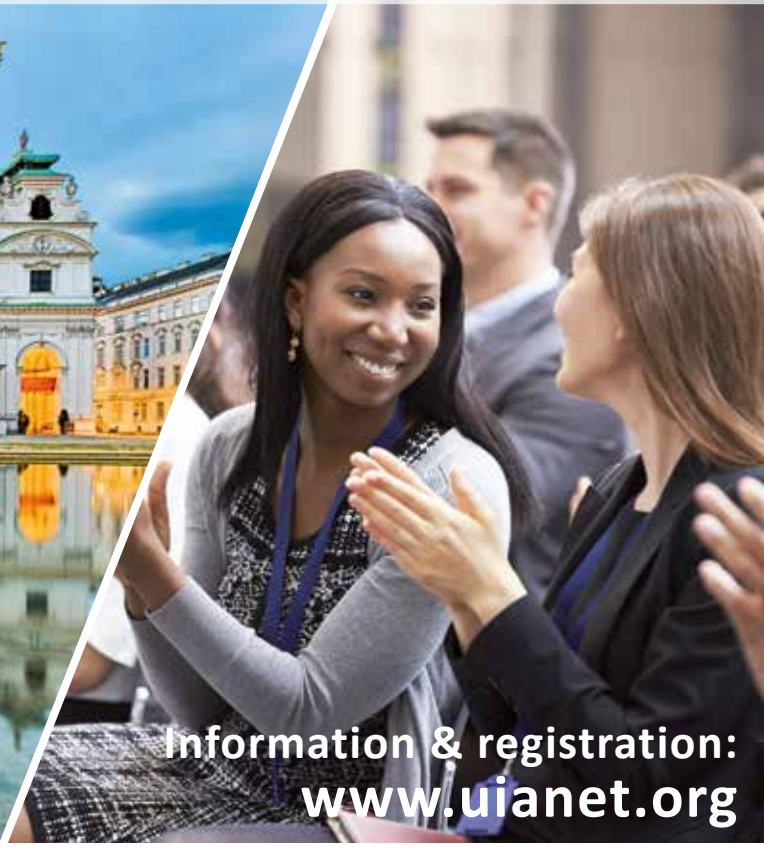

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Brazil is Back (! Or ?)

Eduardo LORENZETTI MARQUES

In the last twenty years, Brazil has always been in the media and in investors' radar as matter of interest. From Lula's election and the following years of economic growth, social inclusion, huge increase of foreign investment, the conquer of an international status of leadership, being part of BRICS and hosting important international events (World Cup and Olympic Games amongst others) to Mrs. Dilma Rousseff impeachment, the worst economic crises of its history, the loss of the investment grade, Lula's arrest and the election of Mr. Jair Bolsonaro (that some know as the tropical Trump) where is Brazil now? Is it still in economic and political crises? Is Brazil a trustful partner for foreign investment?

With this article I try to tell a short (and approximative) Brazilian economic and political history and to catch up with the lastest important events to give an update about the current state-of-the-art regarding foreign investment in Brazil.

Brazilian childhood and adolescence

"Giant by nature" says the Brazilian national anthem. In fact, Brazil is a very big country being 5th in dimension and in population, but, besides that, this country has always shown other points of attraction: enormous natural resource, peaceful population with no ethnic conflict, moderate weather, no natural disasters, and low political risks.

Brazil took part in the two World Wars, always on the winner side, and became an important founding member of the UN (Brazil is the country in charge of the opening of the Annual General Assembly Meeting), OAS, Mercosur and, later, the WTO and G20. Actually, after the Second World War and gradually along the 70's, 80's and 90's Brazil consolidated its position as an important international player and a big industrial and agricultural economy: in the last 50 years Brazil has always been amongst the biggest 20 economies and in the last 25 amongst the top 10.

Brazil Becomes a Promising Young Adult Country…

When Lula started his mandate as Brazilian president in January 2003, he received from his predecessor Fernando Henrique Cardoso, a country in a very good shape: low inflation and unemployment, public counts in order, rule of law and independence of judiciary achieved, democracy and freedom of expression as constitutional untouchable values, etc. As far as foreign investment is concerned, Brazil had already modernized its legislation and practice in this field and was a founding member of the WTO and G20, had created the Mercosur, had executed many bilateral international treaties concerning the avoidance of bi-taxation, judiciary cooperation and the protection of the foreign investor. Even more important, in its pure national legislation and practice, it had eliminated the need of national partners in Brazilian corporations and any restriction for foreign investments in general and had also allowed dividends to be sent abroad with no taxation nor red tape. Finally, privatization was in its way and Brazil had already become a top investment receiver.

Lula's election was a beautiful moment in Brazil history with worldwide repercussions. A former worker, a poor man, with no university degree, coming from trade unions environment and a leftwing party was elect in the country known by the worst income distribution in the World and widespread corruption.

His mandates were great, especially the first one, since he managed to implement a strong policy of helping the poorest which boosted the internal market and indirectly benefitted industry and foreign investors. Privatization was kept going, the economy growth was in good pace and inflation and unemployment low.

Soon Brazil became the 7th economy in the World, acquired the investment grade by all the international agencies, consolidated its role as absolute leader in South America, won the right to host the Olympic Games and the World Cup, became a founding partner of BRICS and officially started its campaign to receive a permanent seat (without veto right) in the Permanent Council of the UN.

Lula's election was a beautiful moment in Brazil history with worldwide repercussions.

As far as promoting foreign investment through new legislation and treaties is concerned, Brazil did little in this period. Lula basically kept what his predecessor had done and continued, in slow pace, privatization and the liberalization of economy. But Brazilian economic numbers and international image was so sexy that

Economist Magazine Cover in 2009

everybody simply wanted to invest in Brazil, no matter how difficult or risky it could be: foreign investment income jumped from US$20 Billion to US$40 Billion and after to US$80 Billion/ year.

… But with Problems and Difficulties as in any Adult Life

As mentioned, Lula's first mandate was great, but not so much the second one. Politically, he was hit but corruption scandals, in the internal economy by the exhaustion of his economic model and internationally by the 2008 financial crisis. His successor, Dilma Rousseff, not only inherited these problems, but was politically less able and charming than Lula, thus in her first mandate those problems became even more accentuated and she lost political support. Furthermore, Chinese consumption was diminishing with direct effect in Brazilian exports. Things became politically unbearable, when you put in the picture growing inflation and unemployment, slowing growth economy and the involvement of her party in the biggest corruption scandal of the Western World (the car wash scandal). Dilma Rousseff was impeached in August 2016 and replaced by her Vice President Michel Temer.

Lula's economic mistakes, that were worsen by Rousseff, together with a less generous international environment and the political crises and social unrest which led to the impeachment had a terrible impact in Brazilian economy. The Brazilian economy shrank 8% between 2015 and 2016 years, unemployment, inflation and public debit increased, foreign investment slowed and the country lost its investment grade. From 7th Economy in the World it fell to the 9th position.

Economist Cover in 2013

The Present and The Future

Michel Temer had little political support and concentrated his efforts on managing to stay in power to the end of his mandate. Nevertheless, he was able to realize a very important labor reform. In the style of Macron, the reform capsized labor legislation and practice with direct effect on decreasing the number of lawsuits and reducing trade unions power.

In 2018 second semester Brazil had new presidential elections which were contaminated by polari zation. On the left side, Brazilians had a well-known and prepared candidate, Mr. Fernando Haddad, but that was seen as a ghost candidate for Lula, who was in prison, condemned by corruption. On the right side, Brazilians had a less known and prepared candidate, often expressing politically incorrect views, but that promised a new way of doing politics and had no involvement with corruption.

Bolsonaro was elected on October 28, 2018, by more than 55% of voters, which means almost 58 million votes in Brazil. He took power on January 1, 2019 with great expectations by the Brazilian society, since he promised a new way of doing politics, combating corruption, fighting for the efficiency of the public sector, cutting public expenses, continuing privatizations and with a very liberal economic agenda. Six months passed and little was achieved, basically due to his inability to negotiate with parliament. Six months is very little, but a general feeling of frustration is in the air and he is losing popularity.

The fact is that the breakthrough that Brazil had in the first decade of this century put it in a position that is consolidated now, no matter the sort of politicians that may be President. Brazil may not be the 7th economy in the World anymore, but it is the 9th. It may not growth 5, 6 or 7 points per year, but it will grow 1, 2 or 3 points. It has acquired an important international presence as absolute leader in South America and member of BRICS and G20. Above all, it is a country with strong institutions, where the rule of law, freedom of the press and independence of the Judiciary is fully implemented. Foreign investors are not discriminated in any legal aspect and are treated as nationals. In San Paulo, its business capital, you can find a sophisticated net of service providers from technology to media services. Law firms in San Paulo are among the best in the world and you can find many national full-service law firms of hundreds of lawyers, just as in New York or London, or excellent smaller or medium-sized firms. Above all it is still a big developing economy, full of needs and opportunities.

> [Brazil] is a country with strong institutions, where the rule of law, freedom of the press and independence of the Judiciary is fully implemented.

In this sense, I would like to finalize this article underlining a few recent relevant opportunities regarding Brazil:

Aviation: Brazil has the biggest aviation market in Latin America and one of the largest in the world. That was one of the last economic sectors with restrictions to foreign investment. Bill 2724/2015: approved by the Chamber of Deputies (21.05.2019) increases the limit of foreign participation in Brazilian airline companies from 20% to 100%. It should become law in the next few weeks.

US$980 million in auctions from four airports (Porto Alegre/RS, Salvador/BA, Florianópolis/SC, and Fortaleza/CE) and US$1.2 billion from other 12 airports in the Northeast, Midwest and Southeast, in the last 2 years. Additional airports are expected to be auctioned by 2020.

Ports: US$670 million in auctions from 10 ports (Paraíba, Espírito Santo, and

Pará). Other 4 port terminals (Santos/SP, Paranaguá/PR, and Pernambuco/PE) are waiting for concessions auctions in the next months.

Oil and gas: US$5.5 billion in oil and gas auctions in the last two years. Petrobras' business plan for 2019-2023 projects is USD 84.1 billion in investments in areas such as exploration and production, refining, and natural gas.

Mercosur: Mercosur and the EU have been negotiating and important Trade Agreement for more than 20 years. It should come into force this year and should boost commerce and investment between the two trading blocks. Argentina and Brazil have just announced studies to unify their currencies in a further step of regional integration.

Depreciation of Brazilian Currency: although exchange rates are very difficult to predict, most international financial adviser believes that the Brazilian currency (Real) is too devaluated and as soon as the Mr. Bolsonaro manages to implement the reform in the pension scheme and put the public counts in better shape it should regain its value rapidly. Thus, it is likely that foreign investment made at this moment should also take profit of a near future valorization of the Real.

Jair Bolsonaro Brazilian president and Mauricio Macri the Argentinian president

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When Law, Politics, Economics and Ethics Collide

A Canadian-made Crisis

Linda JULIEN

This article is an examination of current political issues and a legal analysis, based on Canadian law, and a combination of personal, political and historical knowledge and experience. There are also a variety of general sources and documents which were consulted, including the Canadian Constitution, and the Criminal Code of Canada (2018 September Amendment) which allows for Deferred Prosecution Agreements "DPA." A DPA relates to the possible legal treatment of corporate wrongdoing in Canada and is identified in the new regime as "Remediation Agreements." Also, this article was crafted from diverse media and corporate material, Parliamentary information, Canadian Government material on the DPA, and pertinent information from the Department of Justice Canada Minister's Transition Book, as well as a Supreme Court case about the separation of powers principle.[1]

Federal politics in Canada became riveting at the beginning of 2019, when the following events and circumstances took place, illustrating how entangled "Law-Politics-Economics and Ethics" can be, even in a great parliamentary democracy like Canada's. The purpose of this article is therefore to highlight those points of Law-Politics-Economics and Ethics, which collided together and created the perfect storm for a formidable Canadian Governmental crisis. After giving a summary relating to these points, a number of legal questions will be raised. Your answers, thoughts and ideas can certainly be shared and can also be part of an appreciated broader discussion.

SUMMARY OF THE CRISIS and its Political and Legal Ramifications

At the hearth of this Canadian political crisis are the interactions between mainly two political figures, a major corporation and new legislation. The political figures were: Canada's Prime Minister, being the Right Honourable Justin Trudeau and the then Minister of Justice and Attorney General, being the Honourable Jody Wilson-Raybould (JWR). There was also the coming into law of a new concept: the Deferred Prosecution Agreement (DPA) by amendment to the Canadian Criminal Code (in Sept. 2018) and another party, being a major International engineering Canadian based giant corporation, the "corporation", who was caught up in an old bribery affair relating to engineering contracts in Libya under the Khadafi regime, some 10 years ago and more. The inquiries identified bribes believed to be associated with corruption and, if confirmed, would violate Canadian law. Hence, with prosecution considered, said corporation was confronted with possible harsh consequences, including:

1) being fully scrutinized, which could entail important penalties,
2) having to renew its management,
3) rethinking its structure and governance,
4) making guarantees as to the future,
5) being exposed to severe bad publicity,
6) having an adverse impact on its reputation,
7) having high management officers and identified decision-makers resign or sued for criminal misconduct,
8) seeing the value of the corporation shrink and,
9) possibly, having the firm excluded from bidding, for up to 10 years on Canadian federal public procurement contracts. These contracts can be worth millions and billions of dollars. The negative economic effects for such a corporation, if found guilty, can impact and cause serious prejudice to its employees and retirees, and all the businesses it deals with, and adversely impact the likely long term viability or not of said Canadian based corporation.

In the meantime, as the corporation case was still open, said corporation lobbied the new Federal Government, as did other corporations (thinking about their own future), in order to mitigate the consequences of their legal predicament.

Their hopeful solution was the known concept of Deferred Prosecution Agreements, which was promoted and defended, and it was stressed that most western countries, including the United States, the United Kingdom, Germany, and France had adopted it and applied it to their own corporations.

From all of those third parties' interventions, as well as from its own legal opinions, what ensued was a Government decision to bring forward the needed legislation allowing for the inclusion into Canadian law of this type of agreement. Thus, after public and political consultations, the related Bill amending the Canadian Criminal Code came into effect in September 2018.

At said time, the Minister of Justice, in her official capacity, was responsible for said legislation and the scope of its application. The Prime Minister was obviously supportive of said legislation. Hence, everything fell into place, or so we thought.

The Specifics of the Case and the Minister of Justice/ Attorney General

In early 2019, most Canadians were curious when they learned about the small federal cabinet shuffle our Prime Minister made following the resignation of the senior Minister heading the Treasury Board. This had a domino effect (albeit of limited scope) on some acting Ministers, until it resulted in the then Minister of Justice and Attorney General, Minister JWR, being replaced by a newly named Minister (the Honourable David Lametti). This caused a major surprise. Minister JWR had had significant media attention when initially nominated. At the time, her 2015 nomination had been applauded because she was the first Indigenous person named to this high-ranking position in Canada. Furthermore, she was a woman, and also a lawyer, and had been the British Columbia Regional Chief of the Assembly of First Nations. She was what we could describe as a very high-profile individual in everyone's eyes. Her presenting herself as a candidate for the Liberal Party of Canada in the 2015 Federal election, had received rare high praise. JWR was elected as Member of Parliament and then was immediately nominated Minister of Justice, with rave reviews for both herself and the Prime Minister. Therefore, her 2019 new nomination (considered a demotion), as Veterans' Affairs Minister, perplexed most and raised eyebrows.

Because of JWR's notoriety, the press started speculating about reasons why such a decision was made and why would this very important Minister simply accept such a demotion. Speculations went wild, and somehow a connection was made between her role and responsibilities as Attorney General of Canada, in relation with another affair concerning sensitive legislation passed in the fall of 2018. That Bill confirmed an amendment to the Canadian Criminal Code now allowing for Deferred Prosecution Agreements (DPAs) in Canada.

Then, to add more drama to the reality show, the demoted Minister of Justice and Attorney General suddenly decided to resign from her new cabinet position, as Minister of Veterans' Affairs, in February of 2019. This was immediately followed by another senior Cabinet Minister resignation, in solidarity with her colleague. This meant two senior female Cabinet Ministers resigned from their important Cabinet positions within the actual Government. And, if that additional shock wasn't deemed enough to qualify the whole affair as toxic, feminist groups and First Nations groups came out in support of the first Indigenous Canadian to hold Canada's top justice "job", and denounced what they considered an unethical and unacceptable attack against JWR who, now, took on the image of incarnate righteousness in the face of adversity. She was now considered bravely standing up against the Prime Minister who was believed to have put (either directly or indirectly through his staff) undue pressure on her, in her role as Attorney General, to apply a DPA to the corporation referred to herein above.

Then, to everyone's surprise, the now "independent Member of Parliament and ex-Minister of Justice" declared publicly she had much more to say about the circumstances of what happened. She then added that, if the Cabinet and Ministerial secret and client-attorney privilege (remember that as Attorney-General of Canada, the Canadian Government was then her client) to which she was still bound, would be lifted, she could tell her own story.

From this, outcries, demands, statements, accusations and speculation fused from all Opposition Parties, the media, and diverse groups all of which put the actual Government under extreme pressure to respond, and give its version of the referred to events. Finally, the Government relented, and lifted its privilege right, allowing the past Minister of Justice and Attorney General, JWR, to testify before a Parliamentary Committee, and give her side of the story and circumstances.

> In Canada, corporate crime, also called white collar crime, can be subject to criminal prosecution.

From this Parliamentary exercise, came astonishing statements from JWR. She publicly denounced the Prime Minister and his staff for exercising a pressure campaign on her to favour the application of a DPA to the specific matter, relating to the earlier mentioned engineering firm, back in 2018.

The past Attorney General and Minister of Justice further fuelled the fire when she brought forward an explosive tape she had made of a private conversation she had with the Privy Council Clerk, who is the highest ranking civil service officer in Canada, who was totally unaware of this recording. The tape, she claimed, supported her assertion that inappropriate pressure had been put on her to allow for a DPA. The other interpretation was that indeed a conversation about the topic took place, but was not inappropriate. When asked if the Prime Minister had, in her opinion as past Minister of Justice, acted illegally, the former Minister of Justice then, however, declared he had not. As a result of this, after the taped conversation was released, the Privy Council Clerk resigned his position. The Prime Minister's right-hand man, friend and first secretary had also resigned previously

to the Privy Council Clerk. . In addition, the Opposition Parties in the Canadian Parliament now called for the resignation of the Prime Minister himself, as they were accusing him and his office of inappropriate interference in the independent due prosecution assessment process initiated against the referred to engineering firm. The past Minister of Justice and Attorney General, herself, denounced again what she perceived as undue interference from the Prime Minister's office, in what she considered to be her sole discretionary prosecutorial powers.

All in all, this made for the 2019 Parliamentary Crisis herein described.

The ECONOMICS and the Engineering Firm

The major Canadian international engineering and world-wide project management corporation involved in this Crisis has tens of thousands of employees around the world, including some plus 3,000 jobs in the Province of Québec, alone, and close to 10,000 jobs in all of Canada. These are high paying competitive jobs. This firm operates around the world in sectors such as oil and gas, mining and metallurgy, infrastructure, energy (hydro/nuclear), and has developed recognized international expertise. Its 2018 revenues were more than 10 billion dollars.

About the Prime Minister

When asked about his involvement in this case, the Prime Minister answered he wanted to be able to say to Canadians that he did everything he could to save the corporation and plus 9,000 Canadian jobs. The Prime Minister had no qualms indicating that his Government favored an arrangement with the referenced corporation, through a DPA, to make sure said firm would not lose jobs for its employees or prejudice retirees or affect sub-contractions (none of which were involved in the alleged foreign corruption case) because of a harsh criminal sentence, if it came. Furthermore, if ever the corporation was prohibited, under Canadian law, from bidding for some 10 years on lucrative procurement projects, it could move out of Canada and thus thousands of jobs could be lost for Canadians.

As Prime Minister of Canada, the R.H. J. Trudeau reiterated that it was part not only of his mandate, but an obligation of his mandate, to ensure the wellbeing of Canadians and to protect the Canadian economy. This included the "Caisse de Dépôt et Placement's" investment, as the major Québec pension fund, in the engineering firm. In the Prime Minister's assessment, all of that justified making representations, in that regard, to the Minister of Justice and Attorney General to make sure she had the full picture or scope for the decision she had to make. He considered it a duty of his and not undue interference. The Prime Minister, however, insisted that the final decision as to applying a DPA or not, was totally that of the Attorney General (or her representatives and the Director of Public Prosecutions).

> Under the British system, although the three branches are recognized and distinct, we cannot say they are totally separate […].

Also, it should be remembered that the initial criminal allegations against the corporation went back more than 10 years, and the management officers that were then targeted for wrongdoing had been completely replaced, and new management and governance measures put into place within the firm. The underlying question here was to determine what benefit could result from prosecuting a corporate entity whose top echelons had been completely gutted and replaced, save for deterring misconduct.

It is noteworthy that in June 2019, a Québec court judge ruled that there is enough evidence against the engineering corporation to be tried on fraud and bribery charges following an extended preliminary inquiry into accusations filed by federal prosecutors in 2015.

The LAW and ETHICS

In Canada, corporate crime, also called white collar crime, can be subject to criminal prosecution. However, the intricacies of the new corporate world, its structures, various fund-raising methods, multiplicity of parent corporate links, mobility of cash and diverse entities, make it highly challenging to investigate wrongdoing, often around the world, making the whole affair time consuming and certainly resource intensive. Therefore, other ways of being more effective entail considering other avenues to punish wrongdoing, minimize the negative impact on innocent people, including workers and retirees, and also protect a business against economic dire consequences. This is how and why the Canadian Government considered the merits of implementing a DPA system not only for a corporation but generally. In analysing the appropriateness of applying DPAs in Canada, questions about the ethics of making such a decision had to be considered. Was it ethical? Was it in the public interest in the circumstances?

The famous Deferred Prosecution Agreements (DPAs)

A DPA is a voluntary agreement which is negotiated between a prosecution authority, being the applicable federal Director of Public Prosecutions, and an accused, such as a firm accused of corporate wrongdoing, i.e. bribery. Under a DPA, the criminal prosecution is suspended for a determined period of time, perhaps 5 years. During this time, the accused must comply with the terms and conditions of the agreement. If the agreement is fully respected, the charges will be withdrawn at the expiration of the time period agreed upon and no criminal conviction will follow. The agreement terms might include paying a fine, replacing management, implementing new governance, and opening accounting books for an audit. If there is no compliance or only partial compliance, the charges against the accused may be reactivated. This way, wrongdoing is identified, condemned and sanctioned, by fines, remediation measures, possibly imprisonment if applicable, and prohibitions to bid, to name a few. But the result is mitigated in a way, which minimizes the negative effects on those who are not

responsible for the misconduct, offenses, and wrongdoing.

- **Applicability of a DPA**
- With regard to the act itself, here are some pertinent clauses.

1. Details of process and criteria to benefit from DPA, are publicly available.
2. Publication of terms of the DPA is made. The Court approves and supervises compliance efforts. The Court approving the DPA must supervise how the agreement is respected.

A British Parliamentary Model

For those who may not know, Canada is a Constitutional Monarchy. The head of State is Her Majesty Queen Elizabeth II. She is represented in Canada by the Governor General. The head of Government is the Prime Minister. The political structure has 3 levels of Government or jurisdictions: Federal, Provincial and Municipal, and each has 3 branches: the Executive, the Legislative and the Judiciary.

Under the British system, although the three branches are recognized and distinct, we cannot say they are totally separate, because the Executive power, which includes the Prime Minister and his Cabinet, comes from the elected Members of Parliament. Members of Parliament have Legislative power (including the nominated Senate) and the Ministers, who are of the Executive Branch, act and sit in Parliament as Members of Parliament, being the Legislative Branch. In addition, the Minister of Justice is an ex-officio Attorney-General. This means the Government becomes the Attorney-General's client. In this scenario, there is obvious mingling of powers and there can be obvious conflicts of interest.

In fact, as demonstrated herein, constraints and problems came to light in the case at hand, when both the Prime Minister and the Minister of Justice and Attorney-General had to deal with conflicting roles and obligations, all the while keeping in mind the law, the separation of powers' principles, hierarchy, the exercise of discretionary powers, political pressures, public perception, their voting base expectations and the consequences of their decision-making on the general population or certain groups.

RESULTING QUESTIONS

An overview of the whole affair consequently raises some of the following questions:

a) Does the British Parliamentary system allow for true separation between the Executive and Legislative powers? What about the Judiciary powers?

b) How broad is the Executive power when dictating conduct to its Ministers?

c) Should the function of Minister of Justice and Attorney-General be separated and become distinct?

d) Can the Attorney-General act in a way that disregards the interests of the Government, its own client?

e) How can you show solidarity with your cabinet members, as a Minister, but also act independently?

f) When new legislation is enacted under the Minister of Justice, can said Minister refuse or omit to be informed or briefed as to applicability of new legislation?

g) Did the Prime Minister disregard justice principles, or did he only express his own opinion about favoring a DPA? Was his involvement regarding the Attorney-General, directly or indirectly, inappropriate interference or illegal conduct or simply concern for Canadian employees and retirees and the Canadian economy?

h) Should Law-making ignore the economic or human consequences of its decisions, can it?

Finally, what is the purpose of LAW, if not driven to serve the people.

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1. Secession of Québec, S.C.C. aug. 20, 1998, par. 15.

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