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Discrimination

The prejudicial treatment or consideration of a person, racial group, minority, etc., on the basis of race rather than individual merit.

Editorial

racism



President's Editorial

I Jerome ROTH

On June 16, I sent a letter to all UIC members on behalf of myself and certain members of our United States National Committee. In it we recognized the traumatic events that had recently rocked the United States. The Covid crisis and related financial meltdown ceded the headlines to the obscene killing of a Black man by a Minnesota police officer. The video of the officer kneeling on the man's neck until he died shocked a nation. The incident gave rise to protests around the globe demanding action in response to police killings of unarmed Black people and to systemic racial injustice.

I have to admit, as the Association's president during this tumultuous period, I was torn in several ways.

First, I was concerned that addressing issues raised by the killing might be deemed too "political." I have been criticized by some for veering into the "political" when I have addressed what I believe to be issues of paramount importance to lawyers, such as their response to increasing populism and nationalism. Yes, the protests had given rise to political debates throughout the United States pitting those who demand racial justice against those who emphasize "law and order". Efforts to address our past dating back to slavery run up against those who insist we cannot "change" history. Does that tension, do those opposing viewpoints, mean that I, or that the UIC, should refrain from taking a position? Must lawyers, in their quest to remain above the political fray, remain neutral on an issue as fundamental as racial inequities, including in our legal system?

The question answered itself. Lawyers must engage in the moral issues of the day. To ignore them, to turn a blind eye to inequalities, to overlook distortions in the legal system, in the name of political neutrality, is not an option. Of course, we cannot impose viewpoints on others. Each of us must chart our own course. But it is our duty to stand with lawyers and communities of all ethnic and national backgrounds to demand fair treatment, to

oppose discrimination, and to challenge inequalities that have persisted for far too long. Those are UIC values. We stand for diversity and multiculturalism. We are committed to exchanging information with and learning from those from backgrounds different from our own. We cherish collegiality and dialogue. How can we trumpet such principles but shy away from opposing injustice?

I also struggled with UIC's status as an international organization. Issues raised by the death of George Floyd are, in many ways, uniquely American. They grow from the particular history of the United States. I feared that "globalizing" the racial question we face would diminish or even excuse it as a "universal" problem, part of the human condition, rather than an American stain. And would the death of a Black man in Minnesota be relevant to UIC members around the world, to lawyers millions of miles away whose daily lives have nothing to do with his death. I also wondered if criticism of my own country to an international audience was disloyal in some way – should the reckoning we need to undertake remain with the US "family"?

My conversations with UIC colleagues gave me clarity on these concerns as well.

The more I talked to our members, the more I learnt about how the scourge of racism infects the entire world. While globalism has brought peoples together, it has also resulted in new and increased forms of discrimination. Those who marched in protest on every continent decried racism in the United States and in their own countries. To recognize that did not minimize the long road we in America must travel to live up to our ideals. It simply acknowledged that the world as a whole, and lawyers everywhere, have a responsibility to root out prejudice and inequality in our profession and our communities.

Finally, I realized we cannot speak out against violations of the Rule of Law if we

do not start at home. The Rule of Law is constantly tested – in China, by laws that raise alarm bells in Hong Kong and by treatment of dissident lawyer and the Uighur population; in Turkey where the government continues to prosecute lawyers for doing their jobs; in Poland, where the independence of the judiciary remains under assault. Covid exacerbated many of these tendencies, giving authorities an excuse to clamp down on free speech, the right of assembly, and access to justice.

But how can we speak out against these incursions if we do not face hard truths in our own societies? How can I, as an American, advocate for the Rule of Law if I do not fight for it in the United States? How can UIC and IROL strive to safeguard the Rule of Law if we do not demand it of all nations, of all members of our own association, and of our profession?

These questions also answer themselves.

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Editorial du Président

I Jerome ROTH

Le 16 juin, j'ai envoyé une lettre à tous les membres de l'UIA en mon nom et au nom de certains membres de notre Comité national américain. Nous y prenions acte des événements traumatisants qui avaient récemment secoué les États-Unis. La pandémie du Covid et la crise financière qui en a découlé ont fait la une des journaux jusqu'au meurtre obscène d'un homme noir par un policier du Minnesota. La vidéo du policier agenouillé sur le cou de cet homme jusqu'à ce qu'il meurt a choqué toute une nation. L'incident a donné lieu à des protestations dans le monde entier, exigeant que des mesures soient prises en réponse aux meurtres par la police de Noirs non armés et à l'injustice raciale systémique.

Je dois admettre qu'en tant que président de l'association pendant cette période tumultueuse, j'ai été tiraillé de plusieurs façons.

Tout d'abord, je craignais qu'aborder les questions soulevées par ces meurtres ne soit jugé trop « politique ». Certains m'ont critiqué pour touché au « politique » quand j'ai abordé des questions qui me paraissent d'une importance capitale pour les avocats, comme leur réponse à la montée du populisme et du nationalisme. Oui, c'est vrai que les manifestations ont donné lieu à des débats politiques à travers les États-Unis opposant ceux qui réclament la justice raciale à ceux qui mettent l'accent sur « l'ordre public ». Les efforts pour faire face à notre passé qui remonte à l'esclavage se heurtent à ceux qui insistent sur le fait que nous ne pouvons pas « changer » l'histoire. Ces tensions, ces points de vue opposés, signifient-ils que moi, ou l'UIA, devrions nous abstenir de prendre position ? Les avocats, dans leur quête pour rester au-dessus de la mêlée politique, doivent-ils rester neutres sur une question aussi fondamentale que les inégalités raciales, y compris dans notre système juridique ?

La réponse est dans la question. Les avocats doivent s'engager dans les questions morales d'actualité. Les ignorer, fermer les yeux sur les inégalités, négliger les dysfonctionnements

du système juridique, au nom de la neutralité politique : ce n'est pas une option. Bien sûr, nous ne pouvons pas imposer des points de vue aux autres. Chacun de nous doit tracer sa propre voie. Mais il est de notre devoir d'être aux côtés des avocats et des communautés de toutes origines ethniques et nationales pour exiger un traitement équitable, pour nous opposer à la discrimination et pour protester contre les inégalités qui persistent depuis bien trop longtemps. Ce sont-là les valeurs de l'UIA. Nous défendons la diversité et le multiculturalisme. Nous nous engageons à échanger des informations et à apprendre de ceux qui ont des origines différentes des nôtres. Nous chérissons la collégialité et le dialogue. Comment pouvons-nous claironner de tels principes tout en esquivant tout effort pour nous opposer à l'injustice ?

Je me suis également confronté au fait que l'UIA est une organisation internationale. Les questions soulevées par la mort de George Floyd sont, à bien des égards, uniquement américaines. Elles découlent de l'histoire particulière des États-Unis. Je craignais que la « mondialisation » de la question raciale à laquelle nous sommes confrontés ne l'atténue ou même ne l'excuse comme un problème « universel », faisant partie de la condition humaine, plutôt que comme une ignominie américaine. Et la mort d'un homme noir dans le Minnesota aurait-elle un rapport avec les membres de l'UIA dans le monde, avec les avocats à des millions de kilomètres de là, dont la vie quotidienne n'a rien à voir avec sa mort ? Je me suis également demandé si la critique de mon propre pays devant un public international n'était pas déloyale d'une certaine manière : la remise en cause que nous devons entreprendre doit-elle plutôt rester au sein de la seule « famille » américaine ?

Mes conversations avec mes confrères de l'UIA m'ont également permis de clarifier ces préoccupations.

Plus je parlais à nos membres, plus j'apprenais comment le fléau du racisme infecte le monde entier.

Si le mondialisme a rapproché les peuples, il a également entraîné de nouvelles formes de discriminations, qui se sont multipliées. Ceux qui ont manifesté sur tous les continents ont dénoncé le racisme aux États-Unis et dans leur propre pays. Reconnaître cela ne minimise pas le long chemin que nous devons parcourir aux États-Unis pour être à la hauteur de nos idéaux. Il faut simplement admettre que le monde dans son ensemble, et les avocats où qu'ils soient, ont la responsabilité d'effacer les préjugés et les inégalités au sein de notre profession et de nos communautés.

Enfin, j'ai réalisé que nous ne pouvions pas dénoncer les violations de l'État de droit si nous ne commençons pas par notre propre pays. L'État de droit est constamment mis à l'épreuve : en Chine, par des lois à la suite desquelles Hong Kong tire la sonnette d'alarme et par le traitement réservé aux avocats dissidents et à la population ouïgoure ; en Turquie, où le gouvernement continue de poursuivre les avocats pour avoir simplement exercé leur profession ; en Pologne, où l'indépendance du pouvoir judiciaire reste menacée. Le Covid a exacerbé nombre de ces tendances, donnant aux autorités une excuse pour restreindre la liberté d'expression, le droit de réunion et l'accès à la justice.

Mais comment pouvons-nous nous élever contre ces incursions si nous ne nous confrontons pas aux dures vérités dans nos propres sociétés ? Comment puis-je, en tant qu'Américain, défendre l'État de droit dans le monde si je ne me bats pas pour lui aux États-Unis ? Comment l'UIA et l'IROL peuvent-elles s'efforcer de sauvegarder l'État de droit si nous ne l'exigeons pas de toutes les nations, de tous les membres de notre propre association et de notre profession ?

Là encore, les réponses se trouvent dans les questions.

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Editorial del Presidente

Jerome ROTH

El 16 de junio envié una carta a todos los miembros de la UIA en mi nombre y en el de algunos miembros de nuestro Comité Nacional estadounidense. En ella reconocíamos los acontecimientos traumáticos que han azotado últimamente a Estados Unidos. La crisis del coronavirus y el derrumbe financiero cedieron los titulares al despreciable asesinato de un hombre negro a manos de un agente de policía de Minnesota. El vídeo del policía hincando su rodilla sobre el cuello del hombre hasta matarlo conmocionó a toda una nación. El incidente generó en todo el planeta protestas para exigir una acción contra los homicidios de personas negras desarmadas cometidos por la policía y contra la injusticia racial sistémica.

Debo admitir que, como Presidente de la asociación durante este periodo tumultuoso, me he sentido dividido por varios motivos.

En primer lugar, me preocupaba que me tacharan de ser demasiado «político» si abordaba las cuestiones que plantea este asesinato. A veces se me ha criticado por adoptar una postura «política» cuando he tratado temas que considero de vital importancia para los abogados, tales como su respuesta al aumento del populismo y el nacionalismo. En efecto, las protestas dieron lugar a debates políticos en todo Estados Unidos, enfrentando a quienes exigen justicia racial con quienes dan importancia a «la ley y el orden». Los esfuerzos por enmendar la esclavitud de nuestro pasado chocan con quienes insisten en que no podemos «cambiar» la historia. ¿Significan esa tensión y esos puntos de vista enfrentados que yo, o la UIA, debemos abstenernos de adoptar una postura? ¿Deben los abogados, en su afán por estar por encima de cualquier debate político, mantenerse neutrales ante un tema tan importante como son las desigualdades raciales, incluso en nuestro sistema jurídico?

La respuesta cae por su propio peso. Los abogados deben implicarse en las cuestiones morales actuales. Ignorarlas, apartar la vista

de las desigualdades, pasar por alto las distorsiones del sistema jurídico en nombre de la neutralidad política, no es una opción. Naturalmente, no podemos imponer nuestros puntos de vista a los demás. Cada uno debe marcar su propio rumbo. Pero es nuestra obligación apoyar a los abogados y comunidades de cualquier etnia o nación para exigir un tratamiento justo, luchar contra la discriminación y hacer frente a las desigualdades que siguen existiendo desde hace ya demasiado tiempo. Esos son los valores de la UIA. Defendemos la diversidad y la multiculturalidad. Nos comprometemos a intercambiar información y aprender de aquellos que tienen orígenes distintos del nuestro. Valoramos el compañerismo y el diálogo. ¿Cómo vamos proclamar estos principios y al mismo tiempo evitar oponernos a la injusticia?

También he tenido dificultades con el estatus de la UIA como organización internacional. Los problemas que plantea la muerte de George Floyd son, en muchos sentidos, puramente americanos. Son el resultado de la historia particular de Estados Unidos. Temía que la «globalización» de la cuestión racial a la que nos enfrentamos la redujera o incluso la excusara como un problema «universal», inherente a la condición humana, más que como una lacra americana. ¿La muerte de un hombre negro en Minnesota sería relevante para los miembros de la UIA de todo el mundo, para abogados que se encuentran a millones de kilómetros, cuya vida diaria no tiene nada que ver con esta muerte? También me preguntaba si la crítica de mi propio país de cara a un público internacional sería en cierto modo desleal. ¿La valoración que hemos de hacer debería quedarse en la «familia» estadounidense?

Mis conversaciones con compañeros de la UIA me han arrojado luz también sobre estos temas.

Cuanto más hablaba con nuestros miembros, más aprendía sobre cómo contamina la lacra del racismo al mundo

entero. Aunque la globalización ha acercado a la gente, también ha dado lugar a nuevas y mayores formas de discriminación. Quienes se manifestaron para protestar en todos los continentes condenaban el racismo en Estados Unidos y en sus propios países. Este reconocimiento no minimizaba el largo camino que debemos recorrer en América para estar a la altura de nuestros ideales. Simplemente reconocía que el mundo entero, y todos los abogados, tienen la responsabilidad de desterrar los prejuicios y la desigualdad en nuestra profesión y en nuestras comunidades.

Por último, me he dado cuenta de que no podemos manifestarnos contra las violaciones del Estado de derecho si no empezamos por nuestro entorno inmediato. El Estado de derecho se pone constantemente a prueba: en China, por las leyes que hacen saltar las alarmas en Hong Kong y por el tratamiento de los abogados disidentes y la población uigur; en Turquía, porque el gobierno sigue persiguiendo a los abogados por hacer su trabajo; en Polonia, porque la independencia del poder judicial todavía se ve atacada. La covid ha acentuado muchas de estas tendencias, dando a las autoridades una excusa para reprimir la libertad de expresión, el derecho de reunión y el acceso a la justicia.

¿Pero cómo podemos denunciar estas incursiones si no nos enfrentamos a la cruda realidad en nuestras propias sociedades? ¿Cómo puedo, como americano, defender el Estado de derecho si no lucho por él en Estados Unidos? ¿Cómo pueden la UIA y el IROL esforzarse por defender el Estado de derecho si no lo exigimos a todas las naciones, a todos los miembros de nuestra propia asociación y a nuestra profesión?

Aquí las respuestas caen también por su propio peso.

Jerome C. ROTH
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IN MEMORIAM

Luis DELGADO DE MOLINA

Ha fallecido recientemente Luis Delgado de Molina, Presidente de Honor de UIA.

Este artículo es el eco del sentir de los presidentes de la Institución y de muchos otros que lo conocieron a lo largo de su dilatada vida.

Aun teniendo todos los atributos que corresponderían al concepto de bonhomía, lo que hoy debemos resaltar de Luis es que fue un gran abogado. Fue un abogado tan exitoso en el foro como cuando representó a la profesión en organismos y entidades.

Su conocimiento de la técnica jurídica y su brillante modo de exponerla coadyuvó a tener una Administración de Justicia eficiente. Por ello, se ganó el respeto de todos los profesionales con los que se relacionó.

La denodada defensa de la defensa que mantuvo siempre hizo que la abogacía fuera una profesión baluarte de libertades cívicas. Así lo sostuvo en las instituciones profesionales que dirigió tanto en España como en todo el mundo, lo que llevó a un robustecimiento del Estado de Derecho.

Luis Delgado de Molina, President of Honour of UIA has recently passed away.

This article is the echo of the feelings of all the Presidents of the Institution and many others who knew him throughout his long life.

Although he had all the qualities the concept of kindheartedness can involve, what we must highlight from him is the fact that he was a great lawyer who was as successful in the forum as when he represented the profession in bodies and entities.

His knowledge of the legal technique and his brilliant way of showing it helped to have an Administration of efficient Justice. Thus, he gained the respect of all the professionals whom he dealt with.

His indefatigable defense of advocacy made this legal profession a bastion of civil liberties, which he supported within all the professional institutions he managed in Spain and worldwide and led to the strengthening of the Rule of Law.

In one area or another, he always was a reference of balance, knowledge, justice

Siempre fue, en uno u otro ámbito, referente de ponderación, conocimiento, justicia y amistad. Entendía la vida con hidalguía y así lo hacía ver y sentir a los que le rodeaban.

Creemos que como presidente Luis Delgado de Molina llevó el equilibrio, bajo el principio “todo en su medida y armoniosamente”, a la gestión de UIA. Los presidentes que le precedieron y sucedieron en el cargo lo recuerdan con cariño por su hombría de bien y con respeto por su saber hacer.



and friendship. He understood life with nobility, what he made people around him see and feel.

We believe that, as President of UIA, Luis Delgado de Molina brought the balance to the management of UIA under the principle: “everything harmoniously and in the right measure”. All the former Presidents and his successors remember him fondly for

Tenemos la convicción moral de que su impronta perdurará en UIA siempre porque, aún las generaciones que no le llegaron a conocer, verán una Institución que desarrolla su actividad de modo eficaz y sin estridencia.

La perdurabilidad de la gestión es el gran patrimonio de UIA al que los presidentes, y Luis a la cabeza, han dedicado su tiempo respetando los diferentes estilos. La diversidad, potenciada por Luis, es una muestra más de la riqueza intelectual que promovió.

Tener liderazgo sin que se perciba, *auctoritas*, es lo que hoy tiene UIA en la comunidad jurídica y Luis ha sido uno de los grandes orfebres para alcanzar ese objetivo.

Donde quiera que puedas estar, querido Luis, permanecerá siempre tu recuerdo en la Unión Internacional de Abogados, que es y será sabia y fuerte por la contribución recibida de hombres como tú.

Presidentes de Honor
y Presidentes de la Unión Internacional de
Abogados.

his good repute and respectfully for his know-how.

We have the moral conviction that his stamp will remain in UIA forever as, even the generations who never met him, will see an Institution which develops its activity successfully and without stridency.

The durability of the management is the great legacy of UIA to which all Presidents, with Luis at the lead, have dedicated their time respecting the different styles. The diversity, reinforced by Luis, is one more proof of the intellectual wealth he fostered.

Having leadership without being noticed, *auctoritas*, is what UIA currently has within the legal community and Luis was one of the main goldsmiths who achieved that goal.

Wherever you may be, dear Luis, you will be always remembered by the International Association of Lawyers which is and will be wise and strong thanks to the contribution of men like you.

Presidents of Honour
and Presidents of the International
Association of Lawyer



Message from the Editor-in-Chief

I Nicole VAN CROMBRUGGHE

Covid, Covid, Covid – that's the new leitmotif of any discourse, whether private or public. And the message conveyed to people is: Protect yourselves, the enemy is within our walls. Protect yourself, for yourself and for others, in the name of the solidarity you owe to the community.

And meanwhile, between the holidays and Covid, we are deaf to any other information: Lebanon is on the verge of disaster? Every day, 25,000 people, including more than 10,000 children, die of hunger and its associated causes, mainly disease, the lack of drinking water and hygiene, or at the very least, a little more than 9 million deaths a year, including 6 million children under the age of five who die prematurely as a direct or indirect result of hunger... It is estimated that 854 million people in the world are undernourished and that rising prices could push an additional 100 million people into poverty and hunger... But all this seems to be a very distant reality.

My aim is certainly not to minimise the risk – according to the WHO's website, by July 23, 2020, the pandemic caused by this new coronavirus had already claimed 623,658 lives worldwide since the WHO office in China reported the outbreak of the disease in late December. That is a lot – too many, especially since this virus and its immediate and future consequences on organisms are still largely uncertain.

But let us beware of the potential perverse effects of this threat: yesterday, the enemy was a foreigner, an immigrant who had come to "enjoy" the benefits of the society that "we" have built. Today, the enemy is not the virus, which is all too invisible, but our next-door neighbour, who can infect us and bring death to our door. The media echo the often alarming findings and predictions of experts, day in and day out. Of course, it is fully justified to take the experts' opinion into account. But let us remember that as specialists – that is to say, as the dictionary says, "capable of judging something", "empowered to give an opinion on a question requiring special knowledge" – by their very nature, because of this specialisation and the potential risks

associated with their positions in terms of responsibility, they are also likely to adopt radically conservative or even alarmist positions, to be taken "with a grain of salt". Shouldn't we also question the growing tendency of our governments to shift their responsibility to these famous experts, with governments and experts passing the buck to the people, because isn't it because of their failure to abide by the rules laid down for their protection that the pandemic is witnessing such spikes, rebounds or even waves?

That being the case, the situation is difficult and complex, not to say complicated, and will no doubt continue to be so for a long time to come. Nevertheless, despite the difficulties faced, UIA is staying the course, holding its head high and sparing no effort to continue to keep in touch with its members and keep them informed. Holding the annual Congress under these circumstances is a challenge, but UIA is embarking on the adventure with determination and imagination and is counting on you to be there.

As for the *Juriste*, after an edition wholly devoted to the consequences of Covid in our sector of activity, we are returning to a more traditional version of the magazine, because Covid or not, life goes on.

You will find, in the Human Rights section of this issue, a very interesting article in which Christine Maze explains the courageous initiative taken by the Bordeaux Bar Association which, having noted a significant increase in the number of foreign minors in the Gironde (South-West of France), has set up a dedicated unit within the Bar, in order to facilitate their administrative regularisation. In the section on Legal Profession, three articles deal with important aspects of our practice: Peter Kun stresses how crucial it is to take cultural differences into account in the context of international succession, David Postolski points out the advantage of introducing a course on business law as part of continuing education and Jill Mariani examines in detail the role of notaries in preventing identity theft.

The section in the *Juriste* devoted to the Legal Practice of Law is once again rich in

information on a variety of issues: from the difference between the policies adopted by the European Union and the United States on GMOs and new plant breeding techniques (Diego Saluzzo) and the future of health science in our contemporary digital context (Barbara Gislason), to B companies whose aim is not confined to profit-making alone (José Pajares Echeverría), to tax-related subjects – whether it is the article by Anne-Manuelle Gaillet & Luca Valdameri on expatriates and retirees or the one by Constantin Neacsu on tax evasion, as well as the essential points to bear in mind when it comes to positioning staff in the European Union (Kato Aerts).

As Marc Jones puts it in the article he has devoted to the solutions adopted by English law on crypto assets, "Life Moves Pretty Fast" – and that is also the feeling you get while reading the articles by Michelle Worrall Tilton or Guido Lacchi on issues specific to our digital world.

Last but not least, let us underline what a real pleasure it was to read the articles by Esteban Carbonell O'Brien containing a very interesting proposal for innovation in bankruptcy law in Peru and by Aboubacar Fall on arbitration, as well as the vibrant plea by Jean-François Henrotte and Coco Kayudi Misamu for the rapid adoption of an Uniform OHADA Act on the protection of personal data.

Finally, I would like to take this opportunity to say again what a pleasure it is for me to work with Marie-Pierre Richard and Anne-Marie Villain, whose professionalism no longer needs to be highlighted, and with each of the members of the Editorial Board. Long live the *Juriste* and happy reading!

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Message du rédacteur en chef

I Nicole VAN CROMBRUGGHE

Covid, Covid, Covid, nouveau leitmotiv de tous les discours qu'ils soient privés ou publics. Avis à la population : Protégez-vous, l'ennemi est dans nos murs. Protégez-vous, pour vous et pour les autres, au nom de la solidarité que vous devez à la collectivité.

Et pendant ce temps-là, entre vacances et Covid, nous voilà sourds à tout autre information : le Liban est au bord du désastre ? Chaque jour, 25 000 personnes, dont plus de 10 000 enfants, meurent de la faim et des causes associées essentiellement maladies, manque d'eau potable et d'hygiène, soit au bas mot, un peu plus de 9 millions de morts par an, dont 6 millions d'enfants de moins de cinq ans mourant prématurément des suites directes ou indirectes de la faim ? On estime que 854 millions de personnes sont sous-alimentées dans le monde et que la hausse des prix risque de faire basculer 100 millions de personnes supplémentaires dans la pauvreté et la faim ? Tout cela ne semble plus qu'une réalité fort lointaine. Il ne s'agit certes pas de minimiser le risque : d'après le site de l'OMS, le 23 juillet 2020, la pandémie causée par ce nouveau coronavirus avait déjà fait 623 658 morts dans le monde depuis que le bureau de l'OMS en Chine a fait état de l'apparition de la maladie fin décembre. C'est beaucoup, c'est trop, d'autant que ce virus et ses conséquences immédiates et futures sur les organismes sont encore largement incertaines.

Mais prenons garde aux effets pervers potentiels de cette menace : hier, l'ennemi, c'était l'étranger, l'immigré venu « profiter » des avantages de la société que « nous » avons bâtie. Aujourd'hui, l'ennemi, c'est non pas le virus, réalité par trop invisible, mais notre voisin de palier, susceptible de nous contaminer et de nous apporter la mort. Les médias se font journellement l'écho des constats et prédictions, souvent alarmants, des experts. Bien sûr, il est justifié de tenir compte de l'avis des experts. Mais souvenons-nous qu'en tant que spécialistes, c'est-à-dire comme le précise le dictionnaire, « aptes à juger de quelque chose », « habilités à émettre un avis sur une question exigeant des connaissances spéciales », ils sont également, par nature, en raison même de cette spécialisation et des risques potentiels liés à leurs prises de position en termes

de responsabilité, susceptibles d'adopter des positions radicalement conservatrices voire alarmistes, à prendre 'avec un grain de sel'.

Ne faudrait-il pas aussi s'interroger sur cette tendance croissante de nos gouvernants à se défaire de leur responsabilité sur ces fameux experts, gouvernants et experts renvoyant la balle à la population, car n'est-ce pas en raison de ses défaillances dans le respect des règles qu'on édicte pourtant pour sa protection que la pandémie connaît sursauts, rebonds voire vagues ?

Cela étant, la situation est difficile et complexe pour ne pas dire compliquée et le sera sans doute encore longtemps. Malgré tout, en dépit des difficultés rencontrées, l'UIA maintient le cap, la tête haute et ne ménage pas ses efforts pour continuer à garder le contact avec ses membres et à les informer. Organiser le Congrès annuel dans ces circonstances est une gageure mais l'UIA se lance dans l'aventure avec détermination et imagination et compte sur vous pour être au rendez-vous.

Quant au Juriste, après une édition entièrement consacrée aux conséquences du Covid dans notre secteur d'activité, nous revenons à une version plus traditionnelle car Covid ou pas, la vie continue.

Vous trouverez dans la rubrique droits de l'homme de ce numéro un article très intéressant dans lequel Christine Maze expose l'initiative courageuse prise par le Barreau de Bordeaux qui, devant l'augmentation sensible du nombre de mineurs étrangers en Gironde (Sud-Ouest de la France), a créé en son sein, un pôle dédié, afin de faciliter leur régularisation administrative.

Dans la rubrique profession d'avocat, trois articles relevant des aspects importants de notre pratique : Peter Kun souligne ainsi combien il est crucial de tenir compte des différences culturelles dans le cadre d'une succession internationale, David Postolski relève l'intérêt de l'introduction d'un cours de droit entrepreneurial dans le cadre de la formation continue et Jill Mariani détaille le rôle des notaires en matière de prévention du vol d'identité.

La section du Juriste consacrée à la Pratique du droit est une fois de plus riche d'informations sur des sujets variés : de la différence entre les politiques adoptées par l'Union

Européenne et les Etats-Unis en matière d'OGM et de nouvelles techniques de sélection végétale (Diego Saluzzo) et de l'avenir de la science de la santé dans notre contexte digital contemporain (Barbara Gislason), aux entreprises B dont le but n'est pas exclusivement lucratif (José Pajares Echeverría), à des sujets de nature fiscale qu'il s'agisse de celui consacré par Anne-Manuelle Gaillet & Luca Valdameri aux expatriés et retraités ou de l'article de Constantin Neacsu en matière d'évasion fiscale en passant par les points essentiels à garder à l'esprit lorsqu'il est question de positionner du personnel sur le territoire de l'Union Européenne (Kato Aerts). Comme le dit Marc Jones dans l'article qu'il consacre aux solutions adoptées par le droit anglais en matière cryptoassets, "Life Moves Pretty Fast" et c'est aussi le sentiment lorsqu'on lit les articles de Michelle Worrall Tilton ou de Guido Lacchi consacrés à des problématiques propres à notre univers digital. Last but not least, soulignons le plaisir particulier que nous avons eu à lire les articles de Esteban Carbonell O'Brien contenant une très intéressante proposition d'innovation en matière de droit de la faillite au Pérou et d'Aboubacar Fall en matière d'arbitrage ainsi que le vibrant plaidoyer de Jean-François Henrotte et Coco Kayudi Misamu en faveur de l'adoption rapide d'un acte uniforme OHADA sur la protection des données à caractère personnel.

Enfin, je tiens à réitérer tout le plaisir que j'ai à travailler avec Marie-Pierre Richard et Anne-Marie Villain dont le professionnalisme n'est plus à souligner ainsi qu'avec chacun des membres du comité de rédaction

Longue vie au Juriste et bonne lecture !

Nicole VAN CROMBRUGGHE
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Mensaje del Redactor Jefe

I Nicole VAN CROMBRUGGHE

Covid, covid, covid, el nuevo leitmotiv de todos los discursos, públicos o privados. Aviso a la población: protéjanse, el enemigo está entre nosotros. Protéjanse ustedes y protejan a los demás, por la solidaridad que deben a la colectividad.

Y ahora, entre las vacaciones y la Covid, volvemos a no oír el resto de las noticias: ¿que el Líbano está al borde del desastre? ¿Que cada día, 25 000 personas (más de 10 000 son niños), mueren por hambre, enfermedades, falta de agua potable e higiene, lo que supone como poco algo más de 9 millones de muertos al año, de los que 6 millones son niños menores de cinco años que mueren prematuramente por las secuelas directas o indirectas del hambre? ¿Que se calcula que 854 millones de personas están infraalimentadas en el mundo y que la subida de los precios puede llevar a 100 millones de personas más a una situación de pobreza y hambre? Todo esto parece solo una realidad muy lejana.

No es cuestión de minimizar el riesgo: según la web de la OMS, el 23 de julio de 2020, la pandemia causada por este nuevo coronavirus ya había dejado 623 658 muertos en el mundo desde que la oficina de la OMS en China constataste la aparición de la enfermedad a final de diciembre. Es mucho, demasiado, sobre todo porque todavía no conocemos bien este virus y sus consecuencias inmediatas y futuras en el organismo.

Pero debemos tener cuidado con los posibles efectos perversos de esta amenaza: ayer el enemigo era el extranjero, el inmigrante que venía a «aprovecharse» de las ventajas de la sociedad que «nosotros» habíamos construido. Hoy el enemigo no es el virus, una realidad demasiado invisible, sino nuestro vecino de al lado, susceptible de contagiarnos y provocarnos la muerte. Los medios de comunicación se hacen eco a diario de las constataciones y predicciones de los expertos, a menudo alarmantes. Por supuesto, está justificado tener en cuenta la opinión de los expertos. Pero, como especialistas —es decir, «aptos para juzgar algo», «habilitados para emitir una opinión sobre una cuestión que exige conocimientos especiales»— hemos de recordar que son también, por esta misma especialización y por los riesgos potenciales asociados a la

responsabilidad de sus posicionamientos, susceptibles de adoptar posiciones radicalmente conservadoras, e incluso alarmistas, que debemos tomar «con pinzas». ¿No habría que interrogarse también sobre esta tendencia creciente de nuestros gobernantes a delegar su responsabilidad en los famosos expertos – gobernantes y expertos que pasan la pelota a la población – pues, acaso no es por sus brechas en el respeto de las reglas dictadas para protegerla por lo que la pandemia experimenta sobresaltos, rebrotes e incluso oleadas?

La situación es difícil y compleja, por no decir complicada, y lo será sin duda durante mucho tiempo todavía. No obstante, a pesar de las dificultades encontradas, la UIA sigue su rumbo, con la cabeza bien alta y no escatima en esfuerzos para mantener el contacto con sus miembros e informarles. Organizar el Congreso anual en estas circunstancias es todo un reto, pero la UIA se lanza a la aventura con determinación e imaginación y cuenta con ustedes para acudir a la cita.

En cuanto al *Juriste*, tras una edición totalmente dedicada a las consecuencias de la covid en nuestro sector de actividad, volvemos a una versión más tradicional porque, con o sin covid, la vida continúa.

En este número encontrarán dos artículos de sumo interés dedicados a los derechos humanos. En el primero, Christine Maze expone la valiente iniciativa emprendida por el Colegio de Abogados de Burdeos que, tras constatar el sensible aumento del número de menores extranjeros en el departamento de Gironde (en el Sudoeste de Francia), ha creado una sección con la ayuda de las autoridades del departamento, para facilitar su regularización administrativa. El segundo, redactado por Henri Carpentier, nos recuerda la suerte nada envidiable que corren aquellos compañeros perseguidos, juzgados, condenados o asesinados por el mero hecho de ejercer su profesión.

En la sección Abogacía, tres artículos sobre aspectos importantes de nuestra práctica: Peter Kun destaca la importancia de tener en cuenta las diferencias culturales en una sucesión internacional, David Potolski señala el interés de introducir una clase de derecho empresarial en el marco de la formación

continua y Jill Mariani detalla el papel de los notarios para la prevención de la usurpación de la identidad.

La sección del *Juriste* dedicada al Ejercicio del derecho presenta, una vez más, valiosa información sobre diversos temas: de la diferencia entre las políticas adoptadas por la Unión Europea y Estados Unidos en materia de OGM y las nuevas técnicas de selección vegetal (Diego Saluzzo) y del futuro de la ciencia de la salud en nuestro contexto digital contemporáneo (Barbara Gislason), a las empresas B, cuyo fin no es exclusivamente lucrativo (José Pajares Echeverría), pasando por temas de naturaleza fiscal, ya sea el dedicado por Anne-Manuelle Gaillet & Luca Valdameri a los expatriados y jubilados o el artículo de Constantin Neacsu en materia de evasión fiscal, así como los aspectos esenciales que debemos recordar cuando hay que colocar personal en el territorio de la Unión Europea (Kato Aerts). Como dice Marc Jones en el artículo que dedica a las soluciones adoptadas por el derecho inglés en materia de *cryptoassets*: «Life Moves Pretty Fast», y esa es también la sensación que despierta la lectura de los artículos de Michelle Worrall Tilton o de Guido Lacchi dedicados a las problemáticas propias de nuestro universo digital.

Last but not least, cabe destacar el gusto especial con el que hemos leído los artículos de Esteban Carbonell O'Brien, que contiene una interesante propuesta de innovación en materia de derecho concursal en Perú, y de Aboubacar Fall en materia de arbitraje, así como el vibrante alegato de Jean-François Henrotte y Coco Kayudi Misamu a favor de la aprobación rápida de una ley uniforme OHADA sobre la protección de los datos personales.

Este es mi último editorial, ya que mi mandato llegará muy pronto a su fin. En esta ocasión, deseo subrayar el placer que ha sido para mí trabajar con Marie-Pierre Richard y Anne-Marie Villain, cuya profesionalidad no necesito recalcar, así como con cada uno de los miembros del comité de redacción. ¡Larga vida al *Juriste* y feliz lectura!

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AROUND THE LEGAL WORLD IN THREE DAYS



UIA
2020
VIRTUAL
CONGRESS

UIA News
Actualités de l'UIA
Novedades de la UIA





UIA 2020 VIRTUAL CONGRESS

Around the Legal World in Three Days

SAVE THE DATE
OCTOBER 28-30
#UIAVirtualCongress



The UIA 2020 Congress will be an **entirely virtual event!**

It will take place on **October 28, 29 and 30, 2020**, at various times during the day to take account of the many time zones in which our Congress participants are located.

What to Expect

The UIA 2020 Congress will take place online on 4 channels which will replace – virtually – the different meeting rooms of an in-person Congress.

- Live panel discussions covering a wide range of legal topics
- Practice tips
- Real-time moderation with question and answer sessions and live chats
- Unlimited access to 30+ videos on demand during and after the Congress
- Virtual exhibit hall
- Multi-location cultural tours and events

Connect with the global legal community, increase your network, and learn about current legal issues – all from your home or office anywhere in the world!



Substantive programme



3 main themes

Each plenary session will include expert presentations as well as a formal debate of a specific proposition -- with an opportunity for the audience to weigh in:

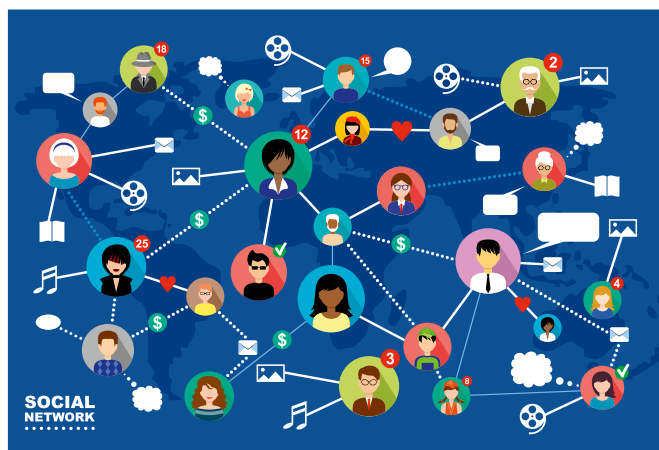
- **Does Third Party Funding Help or Harm International Arbitration – Contrasting Perspectives of Parties, Arbitrators and Funders**
October 28 - 4.00 pm - 5.20 pm*
- **Have Traditional Court Systems Seen Their Day: Time for a New Model?**
October 29 - 1.30 pm - 2.50 pm*
- **Confronting Issues of Systematic Racism in the Legal System: The Role of Lawyers Around the World**
October 30 - 1.00 pm - 2.20 pm*

15+ working sessions

This year, UIA commissions will foster debate on pressing legal issues across different areas of the law, including:

- Public Private Partnerships
Administrative and Regulatory Law on October 29
- The Art Market Goes Digital
Art Law on October 30
- Crowdfunding
Banking and Financial Law / Real Estate Law on October 29
- Limiting Liability – What's The Risk?
Contract Law / Litigation / International Sale of Goods on October 29
- The Potential Impact of Covid-19 on Law Firms
Corporate Law and Mergers & Acquisitions / Management of Law Firms on October 29
- Post-Brexit Relations between the EU and the UK: Living Happily Ever After?
EU Law on October 30
- Practical Questions on Environmental Protection to Consider in Foreign Investment
Environment and Sustainable Development Law / Foreign Investment on October 29
- New Challenges in Family Law post Covid-19
Family Law on October 30
- Covid-19 and the Future of IP, IT and Fashion Litigation
Fashion Law / Information technology Law / Intellectual Property on October 30
- Human Rights in the Covid-19 Era
Human Rights on October 29
- Global Immigration – A Means to Advance Racial Equality?
Immigration and Nationality Law on October 30
- New Internet Businesses Models that are Revolutionising Labour Concepts and Relationships
Labour Law / Start-ups and Venture Capital on October 30
- Whistleblowers
Media Law on October 30
- Deceptive and Unethical Practices in Mediation: How to Prevent, Identify and Overcome Them
Mediation and Conflict Prevention on October 30
- Specialised Courts for International Commercial Disputes: an Efficient Model?
Private International Law / Transport Law on October 29

... and more!



12 special sessions

- Regional Forum Sessions

October 28

On the first day of the Virtual Congress, participants are invited to attend discussions and debates on legal issues in specific regions or by language groups: Asian Lawyers' Forum, African Lawyers' Forum, Arabic-Speaking Lawyers' Forum, Forum of Lawyers from Central and Eastern European Countries, French-Speaking Lawyers' Forum, Latin American Lawyers' Forum, Portuguese-Speaking Lawyers' Forum, and Spanish-Speaking Lawyers' Forum

- Young Lawyers' Session
- UIA Women's Network Session
- Collective Members' Forum
- UIA-ABA Joint Session

Cérémonie d'ouverture

28 octobre - 15h00 - 15h50*

Plusieurs personnalités se succéderont pour accueillir les participants au congrès et leur souhaiter de fructueux travaux. C'est en outre lors de la cérémonie d'ouverture que sera remise la cinquième édition du Prix État de Droit UIA / LexisNexis, qui récompense une personne ou une organisation pour sa contribution au développement de l'État de Droit au sein de la communauté juridique.

Ceremonia de clausura

30 de octubre - 17:30 - 18:15*

La entrega de la presidencia del actual Presidente, Jerome Roth, al Presidente Electo, Jorge Martí Moreno, será un momento significativo en el transcurso de la ceremonia de clausura. Entre otros momentos importantes, se hará entrega del premio de la comisión del año, que recompensa el trabajo científico y todas las actividades desarrolladas a lo largo del año, y del premio del comité nacional del año.



Frequently Asked Questions

When should I register?

Registration will open on August 24, 2020. For the most up-to-date information, please visit www.uianet.org.

How much will the Virtual Congress cost?

Registration fees for the Virtual Congress will be significantly lower than for an in-person Congress:

	Until September 30, 2020	From October 1, 2020 onwards
UIA Member Standard (categories 1 and 2 as per the UIA list)*	€ 300	€ 350
UIA Member Emerging country (categories 3 and 4 as per the UIA list)*	€ 200	€ 250
Non-Member	€ 400	€ 450

* The list is available on the UIA Website: www.uianet.org, membership section

When will live programming take place?

All scheduled times for UIA 2020 Virtual Congress live programming are listed in Central European Time (CET) (Paris). In a different time zone? No worries. Although all content will be broadcast live, we will also record all sessions and make them available to participants so you will not miss anything regardless of your time zone!

How long will Congress content be available to access?

All registered attendees will be able to access on demand content until at least two weeks after the Virtual Congress.

One of the best things about attending the UIA Congress is networking and meeting new colleagues – What plans are in place for the virtual format?

We will be providing an exciting virtual experience! The Congress platform will enable both formal presentations and casual conversation among colleagues using a variety of technologies, including an interactive chat box. Our Congress partners will also be available to interact directly with participants in the virtual exhibit hall.

For more information, please contact the UIA team at uiacentre@uianet.org

* All times are listed in Central European Time (Paris)



La médiation internationale

27^e Forum mondial UIA des centres de médiation : un grand succès à Milan, Italie

I Fabienne VAN DER VLEUGEL

La médiation constitue une méthode efficace de résolution de conflits, si son initiation et sa mise œuvre sont gérées de façon adéquate. Sans nul doute, les chefs d'entreprises sont intéressés par cet outil qui respecte leur vision pragmatique et le souci de l'efficacité.

Au cours de la médiation, les parties en conflit – les « parties médiées » – ont l'opportunité de fixer elles-mêmes la solution définitive du conflit qui crispe leurs relations. C'est elles qui décident d'initier le processus, de le maintenir actif et de profiter de cette occasion qui leur est donnée, pour définir et construire de toutes pièces la solution exceptionnelle qui répond à leurs attentes et qui sera adaptée aux circonstances pour purger – définitivement – leur litige.

Il n'est pas nécessaire, pour qu'il y ait médiation, que la procédure judiciaire ait été entamée. Si la médiation est initiée en cours de procédure judiciaire, la poursuite de la procédure judiciaire n'est que suspendue, et les parties en conflit pourront reprendre, si elles le souhaitent, le chemin du Palais de Justice, pour confier au juge compétent le soin de trancher le litige. Ce sera toujours leur choix. Personne ne pourra les blâmer de préférer une solution judiciaire, publique, fixant une solution en droit, par rapport à une solution négociée confidentielle.

La pratique de la médiation est, par définition, internationale : les litiges frappent tout type de sociétés, quel que soit le lieu de leur siège social, et toute personne, quel que soit son lieu de vie.

Le thème de la médiation est, en outre, intergénérationnel : il bouscule la vision traditionnelle que l'on peut avoir de la gestion des litiges. Les parties médiées, en présence du médiateur – neutre, indépendant et impartial – se parlent, se concertent, et parviennent, de façon parfois surprenante et inattendue, à fixer leur solution, à purger les frictions les crispant, voire parfois à maintenir des relations

professionnelles en adaptant et corrigeant d'une façon adéquate, et concertée, ce qui aura été identifié comme correspondant aux causes réelles ayant fait naître le conflit.

L'international et l'intergénérationnel : ce sont deux notions que le Forum mondial UIA des centres de médiation veille à combiner à chaque rencontre organisée.

Tous les 9 mois, le Forum mondial UIA des centres de médiation réunit des médiateurs, chefs d'entreprises, étudiants, professeurs, chercheurs, juges et avocats qui étudient leurs pratiques professionnelles respectives donnant un essor au développement de la médiation. Le Forum a déjà été organisé dans de multiples pays du continent européen, aux États-Unis, à Singapour, toujours avec un succès grandissant.

Le 27^e Forum organisé à Milan, Italie, les 17 et 18 janvier 2020, a été auréolé d'un beau succès, avec presque 90 participants venant de 25 pays différents, et de tous les continents.

Marina Tavassi, présidente de la cour d'appel de Milan, Stefano Azzali, secrétaire général de la cour d'arbitrage de Milan, et Francesca Maria Zanasi, présidente de la commission des affaires internationales du Barreau de Milan ont aimablement participé à la séance solennelle d'ouverture, en partageant avec la salle leur enthousiasme de voir le Forum organisé en Italie.

Dès la 1^{re} session, consacrée au développement de la médiation en Italie, la dynamique habituelle du Forum – professionnalisme, écoute, et participation – ont marqué la

Intégrer, au sein d'entreprises et d'organisations, un système de management de conflits internes, relève d'un réel changement de culture.



salle. Stefano Pavletic, médiateur CCPIT, Nicola Giudice, département médiation de la cour d'arbitrage de Milan, Angelo Santi, avocat médiateur de l'UNAM (Unione Nazionale Avvocati per la Mediazione) et Adriana Capozzoli, avocat et professeur à l'Université de Florence, ont résumé la façon avec laquelle la médiation a pu s'imposer en Italie, suite à la loi de 2010. Ainsi que Nicola Giudice le mentionnait d'une façon imagée : « [...] nous ne sommes pas encore sur le sommet de la montagne, mais nous grimpons et nous y arriverons [...] ». La phase expérimentale est passée : aujourd'hui, la médiation constitue réellement un service différent et alternatif, offrant des avantages indéniables de flexibilité, adapté aux besoins des parties, répondant aux exigences de confidentialité et de rapidité. En outre, osons l'affirmer : si le processus de médiation est reconnu et bien ancré, il peut, à long terme, améliorer la compétitivité du pays en attirant les investissements étrangers.

La 2^e session consacrée aux approches innovantes en matière de médiation, a donné l'opportunité à Danielle Hutchinson, avocat médiateur Resolution Resources (Australie) d'expliquer le fonctionnement très innovateur de la plateforme MyDRHub : instrument permettant d'établir le diagnostic d'un conflit et les méthodes pour fixer des pistes de solution. Jill Goldson, médiateur en matière familiale (Nouvelle Zélande) a submergé toute la salle d'émotions intenses en exposant ses méthodes de travail impliquant la participation des enfants dans les processus de médiation qu'elle met en place, en leur permettant d'avoir la parole, d'exprimer leurs sentiments pour que les parents prennent conscience de l'impact que leurs propres disputes peuvent avoir sur leurs enfants. L'enfant parle et est entendu (Therapeutic Family Facilitation - TFF), dans un espace de confidentialité, pour fixer des solutions pérennes.

Brigitte Bouvier, BBMT Avocats, médiateur CEDR, et fondateur d'Avomarc a organisé la 3^e session avec Christian Hausmann, avocat médiateur, sur un sujet fort attendu : le besoin de la médiation en Afrique, et la réponse apportée par l'OHADA. La volonté de légiférer est réelle, les décisions pour mettre en œuvre la médiation sont concrètes, mais la mise en œuvre du tout requiert du temps. Le texte date de novembre 2017, les délégations des 17 États Parties sont impliquées : le nombre réel de médiations à gérer ne peut qu'augmenter.

Christian Hausmann, qui a participé à ces travaux, n'hésite pas à faire allusion à un système de médiation universelle – plus que de simple médiation conventionnelle. Les pays doivent collaborer pour initier et faire perdurer la prise de conscience de la nécessité d'organiser mieux et plus encore la médiation : permettre aux personnes de ne plus subir le litige, mais de tirer avantage de leurs conflits est tout un art.

Le 4^e sujet du Forum a été consacré aux systèmes de *conflict management* avec d'autres éminents orateurs : Pete Swanson, Conflict Management and Prevention, Federal and Mediation and Conciliation Service (FMCS), Washington D.C., États-Unis ; Paul Latreille, Sheffield University Management School, UK ; Corina Bølsterli Maier, Coach et médiateur cbm Office for Mediation, Coaching and Supervision, Allemagne) et David Thaler, Senior Advisor, FMCS. Du point de vue américain, le médiateur est perçu comme étant un connecteur. Le FMCS, constitué en 1947, est une agence indépendante, dont les missions consistent à accompagner et aider pour assurer la mise en place de systèmes de

Un *challenge* permanent.

Dr Renate Dendorfer-Ditges, avocat arbitre médiateur Ditges Partnerschaft mbB et Galyna Yeromenko, avocat médiateur et fondateur de Ukrainian Mediation Center (UMC) nous ont éclairé sur les éventuels risques d'abus au cours du processus de médiation. La médiation requiert la bonne foi des parties médiées. Mais, comment interpréter le comportement de certaines personnes en cours de médiation. D'ailleurs, doit-on vraiment chercher à interpréter ? Le médiateur est-il là pour « moraliser » ? Les participants au Forum ont pu analyser des cas pratiques imaginés, en groupes de travail plus restreints, et échanger leurs points de vue. Il en est ressorti que, d'une façon générale, très peu de cas flagrants de mauvaise foi ont pu être identifiés. Les parties médiées réellement impliquées dans le processus de médiation veulent une solution et restent volontairement dans le processus. Certes, elles ont besoin de réflexion pour y arriver, elles analysent autrement une même situation avec le temps qui passe, et s'offrent une vision

Les centres de médiation doivent encore œuvrer pour que l'accompagnement délivré soit recherché plus spontanément par les parties médiées.

management de conflits intégrés et adaptés, permettant l'identification des points provoquant des difficultés récurrentes, et la définition de mécanismes de prévention. La volonté de mettre en place de tels systèmes internes, participe sans aucun doute à la prise de conscience des avantages des processus de médiation et, en général, des méthodes alternatives de résolution des conflits. D'une façon générale, les systèmes de management de conflits permettent de légitimer des approches bien plus stratégiques, et non plus uniquement basées sur l'idée de simples négociations et transactions. Intégrer, au sein d'entreprises et d'organisations, un système de management de conflits internes, relève d'un réel changement de culture. En quelque sorte, les conflits sont positifs, s'ils sont correctement gérés. Ils peuvent aussi assurer la confrontation des idées et participer à l'amélioration d'une situation – le tout consiste à fixer un système bien calibré autorisant l'échange rationnel et construit des idées, et ne les étouffant pas.

différente du conflit qu'elle commence à analyser avec un recul. Cela n'a rien à voir avec la mauvaise foi. L'évolution de ce comportement fait, justement, partie de la recherche de la solution.

Le dernier sujet de la première journée du Forum a été consacré aux opportunités et obstacles pour la médiation en *business* et le *management* des conflits. Monique Van de Griendt, médiateur Dialogue BV (Pays-Bas) et Pasquale Orrico, avocat Arlenghi Agostini Avvocati and Mediator (Milan), ont animé ensemble cette session très interactive, et analysé les résultats d'une étude menée aux Pays-Bas, sur le développement de la médiation, en comparant ensuite avec la pratique en Italie : expertise du médiateur, qualité et coût du processus, rôle des avocats et des juges, efficacité.

La journée du samedi a commencé avec un sujet passionnant : les pratiques et bénéfices des systèmes de règlement des différends,

au sein des industries et sur les continents. Georges Hanot, médiateur et fondateur Con-Sent ADR, président de Belgian Supply Chain Initiative, Shirli Kirschner, dispute system designer, médiateur (Australie) et BC Thiruvengadam, avocat et médiateur Bangalore International Mediation, (Inde), nous ont éclairé sur ce sujet qui sort de l'ordinaire en nous faisant part de leurs diverses expériences personnelles. Le conflit n'est pas un problème en soi, s'il est perçu comme étant une opportunité d'amélioration du futur, et qu'il conduit à fixer des systèmes de solution permettant de mieux gérer les difficultés. BC Thiruvengadam a notamment décrit aux participants, images à l'appui, le système du Panchayath dans les villages en Inde, conduisant à la gestion des conflits locaux d'une façon non judiciaire et privée.

La session animée par l'exceptionnel Ross W Stoddard III, avocat médiateur (Texas, États-Unis) nous a tous empli d'une énergie positive et enthousiasmante. Ross avait intitulé sa session: « *Seeing the glass as half full not half-empty, use any impact of mediators' optimism during the mediators' process* », pour nous expliquer à quel point le comportement, l'attitude, la personnalité, les mots, le discours, le sourire, le regard du médiateur a un impact sur la gestion du conflit, le comportement des parties médiées, l'atmosphère des lieux. Le médiateur peut – et doit – veiller à ce que les choses soient perçues de façon positive pour aider les parties médiées à avancer, à restaurer et maintenir le dialogue, et à négocier en gardant une volonté constructive. Ross nous rappelle que « *Everything is linked on how you say it!* ». Tout peut dériver pour un moins que rien. Veillons à remplacer dans nos paroles le mot "difficulté" par "défi", le mot "mais" par "et".

Gérard Kuyper, associé Alterys, médiateur et président bMédiation (Belgique) a analysé et expliqué, dans une session fort bien construite et très pertinente, comment le médiateur peut améliorer – ou non – la qualité et la performance des négociateurs. De multiples clés alimentant le succès d'une médiation sont à la portée des médiateurs s'ils restent consciencieux et rigoureux dans leur travail d'accompagnement.

Au cours de la 4^e session, David Lutran, avocat médiateur Lutran & Associés (Paris) ; Joséphine Hage Chahine, avocate



(Paris) ; Catherine Peulvé, avocat médiateur (Paris) et Ettore Maria Lombardi, avocat et professeur à l'Université de Florence, ont souhaité ensemble donner un éclairage sur la convention de Singapour, perçue comme étant un outil d'accélération du développement de la médiation internationale en droit des affaires. Le sujet est d'actualité et mérite qu'on s'y attarde. Nul doute que ce thème déclenche d'autres échanges et discussions dans des conférences à venir.

La 5^e session à propos de la médiation en Chine et les récents développements qui y sont nés était tout aussi passionnante que toutes les autres sessions précédentes du Forum. Stefano Pavletic, Antonietta Marsaglia, médiateur CCPIT et Chun Wai Ling, chairman du Hong Kong Mediation Council ont, ensemble, donné un résumé instructif de la situation, en indiquant que le système de la médiation est suffisamment bien introduit à ce jour en Chine, pour qu'il puisse s'y ancrer petit à petit d'une façon efficace et pérenne. Le temps permettra de démontrer l'efficacité du processus. Les centres de médiation doivent encore œuvrer pour que l'accompagnement délivré soit recherché plus spontanément par les parties médiées.

Le dernier sujet du Forum, traité par Raffaella Maria Pileri, In Mediazione SRL, Roberta Regazzoni, cour d'arbitrage de Milan, Georges Hanot et Pasquale Orrico ont initié de multiples échanges et discussions avec les participants, qui ont pu de la sorte repartir avec des idées nouvelles pour construire leurs offres de services, améliorer la structure de leurs associations, peaufiner leurs stratégie de développement de la médiation dans leurs pays respectifs.

Ces 2 jours de Forum ont été, à nouveau, riches en débats, discussions, échanges, connexions, et ont participé aux enrichissements personnels, culturels, professionnels des participants.

La médiation reste un sujet d'actualité, une pratique en constant devenir, un outil pragmatique conduisant à des solutions « sur mesure » que les parties médiées peuvent fixer en tout type de matière et pour toute sorte de litige, qu'il soit de nature familial, commercial, industriel, lié au droit des affaires, au droit immobilier. Tous les 9 mois, le Forum aide à l'amélioration de vos techniques, dans un environnement professionnel et international.

Le prochain Forum aurait dû se tenir à Sydney en Australie, les 4 et 5 septembre 2020. En raison de la pandémie mondiale, il sera organisé virtuellement (voir article dans ce numéro du *Juriste International* en pages 11/13). Nous vous y attendons nombreux. Le programme, en cours de finalisation au moment de l'écriture du présent article, est particulièrement innovateur. Il s'agira aussi de profiter de cette 28^e rencontre professionnelle de haut niveau pour sensibiliser les étudiants – nos futurs décideurs et chefs d'entreprises – sur le sujet de la médiation, pour entendre leur vision de l'avenir et leurs idées modernes sur la résolution des conflits.

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Digital Presence: Now You See Me, Now You Don't



Annual Business Law Forum in Amsterdam, January 2020

**I Olivier NICOD
& Hugh REEVES**

1. Introduction

In this article, we will first summarize this year's excellent Annual Business Law Forum and its various panels. Given the diversity of the panels and the challenging questions which the speakers brought up, we are also taking this opportunity to offer some thoughts and guidance on how best to work with clients who are active internationally but in a primarily digital form, through the internet, rather than through a traditional physical form.

Indeed, through what one might call a "digital presence", modern businesses can connect with customers in faraway places and without needing any local offices or a "physical presence" abroad.

This digital world in which we live has unlocked a myriad of possibilities for new business models. It does come with teething pains too, though. Obviously, it is in these businesses' best interests to benefit from a digital presence, though they will – understandably – not be overly keen on ensuring legal compliance in such a global manner. How to best proceed in such cases? Are our laws up to speed? Where do we, as lawyers, fit in? These are but a few of the questions which arise in the current legal and technological landscape.

2. Overview of the 11th UIA Annual Business Law Forum

The eleventh Annual Business Law Forum took place over the course of two days in late January 2020, in Amsterdam. President elect Jerome Roth and Congress Director

Sebastiaan Molenaar warmly welcomed the participants in the south Amsterdam offices of the Benelux law firm AKD in order to discuss this year's theme of "*Geography and the Digital World*".

Under this somewhat enigmatic leitmotif, we were invited to discuss a wide-ranging set of topics and tackle legal issues in matters ranging from private international law and consumer protection, to cross-border taxation issues, via M&A processes and competition law aspects.

As a result, the participants got acquainted through various panels with the increasingly complex legal landscape that applies to digital commerce and the seemingly vanishing borders in this new Internet dominated world.

2.1. Transnationalism and the Internet: legal concepts under stress

In a first panel, moderated by James Rosener, Professor Gilles Cuniberti treated the attendees with a detailed and clear presentation on the regulation of conflicts of jurisdictions and the solutions that private international law offers. Most interestingly, he highlighted that, despite evolutions in the EU legal landscape, most issues of private international law do remain unchanged. This is typically the case in regards to the choice of laws and the assessment of the competent jurisdiction. Prof. Cuniberti nonetheless warned that the traditional solutions, such as those pertaining to the determination of the location of a tort, now give rise to risks. Indeed, it is for instance difficult to define where, in a matter of tort

law, an IP rights infringement occurred. The same challenges arise in the current context of worldwide access to global websites.

Alain Alberini, with great foresight, noted that non-national settings, such as the supranational dispute resolution scheme of the Uniform Domain Name Dispute Resolution Policy (UDRP), can lead to a problematic parallel application of rules of Civil law and Common law. In a UDRP context, this is – strikingly – the case of trademarks, as parties based in a Civil law country can invoke protection of unregistered trademarks (an eminently "Common law" concept), something they would not be able to do in a dispute before their local courts.

2.2. M&A Issues in Cross-Border Transactions Involving Digital Platforms

Panelists Francisco Luis Soler Caballero, Laura de Jong, and Federico Torzo, practicing in Spain, the Netherlands and Italy, respectively, highlighted recent developments in cross-border M&A transactions involving digital platforms.

Indeed, they all noted that these digital platforms frequently lack any clear assets or substance. Rather, their value resides in the data which these platforms collect, as well as the other immaterial elements, such as the intellectual property rights and the know-how. This has a noticeable impact not only on the valuation of the target companies in a M&A transaction, but also on how lawyers must conduct their due diligence activities.

2.3. Financial and other Services on the Internet – Scope of Applicable Regulations and State Intervention

Olivier Nicod moderated a compelling panel on the theme of “*Financial and other services on the Internet – Scope of applicable regulations and State intervention*”. Panelists Thomas Goossens (Switzerland), Silvestre Tandeau de Marsac (France) and Travis Gering (USA) shared their views on the legal pitfalls stemming from the use of the Internet and smart devices in the banking and financial services sector.

Although jurisdictions have significantly different rules, the panelists underlined the general trend of local lawmakers to increasingly regulate the offering of financial services to investors located in their jurisdiction.

Switzerland is a recent illustration of this trend. Except for insurance products and investment funds, the cross-border offering of financial services was not regulated before 1 January 2020. Since then, Swiss lawmakers adopted a very broad legislation applicable to such offerings, including for digital platforms having no physical presence in this country.

In France, the trend to extend the scope of French law to cross-border financial activities was also underlined, in particular if the website of the platform is presented in French, the server is located in France or displaying a “.fr” top-level domain, the website is used for canvassing, advertising or promoting products for France and/or the platform is offering services via a third party in France. More generally, French jurisdiction and French law could apply if it induces a doubt in the mind of the Internet user as to his or her precise geographical location.

In the USA, this trend has been growing since the 1930s and the US regulations do not only apply to investors located on the US territory, but also to US persons, which include, among others, green card holders. The panelists discussed various exceptions to the application of the laws of their jurisdictions or the obligation to obtain an authorization, e.g. institutional investors, the number of investors targeted, the amount invested, the currency to be used, the number of days of the offering of investments, etc.

Furthermore, they underlined the necessity for digital platforms to carefully assess and monitor the persons to whom they offer financial services and to put in place the necessary restrictions to comply with evolving applicable laws.

The panelists further stressed that regulators tend to broaden the scope of their jurisdiction. They touched on recent decisions from US authorities on foreign banks using US dollars and on the very broad remit of such authorities with respect to sanction lists. This was also the opportunity to discuss a decision from French regulators ruling that they had jurisdiction on an English bank trading securities of a Belgium issuer because such a trading had an effect on the trading of securities issued by a French company. Although this decision is not final, it is a very good example of the general trend of regulators willing to intervene when they consider that a conduct may have, directly or indirectly, an impact in their jurisdiction or on their policy.

2.4. Taxation of Digital Commerce: The Digital World Goes Tax

Taxation was the clearest example of the difficulties for the rule of law to adequately adapt to the digitalization of international commerce.

In the tax panel, moderated by Martí Adroer Tous, speakers Mayra Lucas (France), Margriet Lukkien (Netherlands), Riccardo G. Cajola (Italy) and Slawomir Luczak (Poland) put their finger on the central challenge of digital platforms from a taxation viewpoint: the (frequent) absence of physical presence, thus allowing digital businesses to trade worldwide in a streamlined manner and without needing local offices in every country in which they are (digitally) present. Because taxation generally flows from the place of the tax subject's physical presence, taxation in many jurisdictions is proving virtually impossible. Despite this, digital presence allows the generation of large revenues from customers in those jurisdictions. This leads to an incentive to find a functional global solution to properly levy taxes on the digital economy.

To tackle this thorny issue, a variety of approaches are possible. Several jurisdictions currently choose to interpret

the notion of “*permanent establishment*” as comprising a server presence. The EU is aiming at a fairer taxation of the digital economy through a digital services tax and a definition of what would constitute a digital permanent establishment. Decision-making and consensus has so far proven complex and elusive in the EU context, as noted by Margriet Lukkien. Mayra Lucas offered insights into the proposed OECD's approach which also rethinks the nexus rules - so as to move away from a pure physical presence approach - as well as the profit allocation principles.

2.5. Recent Competition Issues Arising from New Technology

Competition law issues arising from new technology include amongst others (i) the somewhat paradoxical fact that many businesses provide their services free of charge, or so it would seem (as the income is coming not from the users but from a third party), (ii) the use of data (and refusal to grant third party access to said data) as a form of abuse of a dominant position, or (iii) collusion through the use of pricing algorithms. Gerhard Fussenegger (moderator, Austria), Beatrice Stange (Germany), Aleksandra Dziurkowska (Poland), Jeremy Heep (USA) and Robert Hardy (Netherlands) explained that these novel issues may frequently be new wine in old skins, as could be the case of the use of pricing algorithms leading to collusion and price fixing.

Interestingly, the EU has opted for a rather proactive regulatory approach while the USA is loathe to move away from the application of the traditional principles and cautious in its interventions on dynamic markets. Despite this diverging philosophy, both the EU and the USA are focusing on the issues posed by online platforms' use of data and whether this results in a situation of reduced competition and requires any regulatory intervention.

2.6. Liability of Companies & Managers: Online Communications, Telecom Restrictions, Information Requests and Lawful Intercepts

Anthony Rosen (UK), Raoul Grifoni Waterman (Netherlands) and Hugh Reeves (Switzerland) delved into matters of telecommunications legislation in a panel on

online communications, telecommunication restrictions, information requests and lawful intercepts.

Telecommunications legislation has recently started to play a more central role as many new technology companies, in one way or another, provide telecommunications services, sometimes unbeknownst to them. Moreover, recently revised telecommunications surveillance legislation across the globe not only defines telecommunications services broadly, but sometimes also empowers the competent national authorities to request information from companies not physically present in their jurisdiction. Anthony Rosen mentions for instance that under UK law, a foreign-based provider of telecommunication services would nonetheless have to comply with requests from a UK authority based on a “reasonably practicable” test.

In other words, the legislation around telecommunications and its surveillance requires the storage of a relatively high amount of information as well as compliance with telecommunication surveillance requests emanating from the authorities. Therefore, new technology companies are always well advised, according to the panelists, to assess the compliance of their activities with the laws of the jurisdictions in which they are not only physically but also digitally present.

2.7. Compliance for Multinational Companies: Cybercrime, Unfair Competition, Privacy and Data Security Across Borders

The diversity of legal and regulatory requirements naturally stimulates business’ needs for strong compliance practices.

Dominik Suoniemi (Geodis representative), offered valuable advice on how internationally active companies can attain compliance with the legal requirements in the many jurisdictions in which they are present. In particular, he reminded all attendees that compliance is not (only) a matter of up-to-date internal policies, but is strongly reliant on sound corporate culture, internal training and awareness.

Both Jeremy Heep (USA) and Fernando de la Mata (Spain) echoed this advice and highlighted the growing need for a strong compliance company culture, especially

given the latest legal developments around privacy, data security and cybercrime. Jeremy Heep also flagged the strong enforcement measures that the American DOJ can implement in matters of antitrust violations and, consequently, the mitigating virtues of proper internal compliance programmes.

2.8. Online Sales of Retail Goods and Services – Digital Consumers, Businesses and the Law

The final panel, held by Francisco Javier García Pérez (Spain) and Gavin Llewellyn (UK), revolved around the online sales of retail goods and services in a context of digital consumers and businesses.

The speakers relied on a captivating two-pronged approach to help the participants understand the challenges found in the online retail business. Gavin Llewellyn, discussing branding of companies active online, showed the strengths and limitations of exclusive distribution methods for producers of branded goods. Indeed, a contractual set-up through a distribution agreement allows the producer to retain some control, though it remains difficult for the producer to simply prohibit online sales on its contracting retailer’s reliance on third-party online market places. Conversely, online retailers looking to use certain third-party trademarks as search engine keywords or metatags need to proceed with caution if they do not want to face a trademark infringement claim from the third-party trademark holder.

Francisco Javier García Pérez informed the participants on EU rules that apply to online platforms. In particular, he discussed requirements for the contents of the terms and conditions that the online platforms use. Of particular interest however, was his analysis of the rules around geo-blocking under EU law. Geo-blocking is a technical means of limiting access to online spaces or the differentiation of an online provider’s offering based on the geographical origin of the customer. This tool is problematic from an EU law standpoint as it goes against the EU’s digital single market strategy. EU rules on geo-blocking prohibit the blocking or limiting access to online interfaces for reasons relating to the nationality, place of residency or establishment of the potential customer. That said, there are many limitations to the scope of this prohibition as it does not

cover for instance purely internal transactions, electronic communication services, healthcare services, to name but a few.

3. Implementing Good (Legal) Practices to Enhance One’s Digital Presence

Thanks to their diverse approaches, the panelists enlightened us on the challenges of doing business in a digital and cross-border context and provided us with some valuable food for thought.

With the Internet, businesses big and small, can roll out their activities online and worldwide in the blink of an eye. In that sense, a digital presence is the promise of speed and simplicity: what used to take unthinkable amounts of time, money and manpower now requires little else than a computer connected to broadband Internet access and a comfortable chair. Yet the reward stays the same: access to global markets.

Technically, deploying a business internationally has never been easier. Can the same be said from the legal standpoint, ie is compliance with national/regional legislation easier today than in those pre-Internet days of yore?

In general, no, it is not. True, compliance might be in some ways easier today. Legislation is often harmonized on an international or a regional level, as is the case with EU legislation. In addition, national interests in reducing barriers to world trade has also led to a watered down legislation opposing or hindering globalization. Moreover, despite rules against geo-blocking and other discriminatory behaviour, companies are still free to set up distribution networks and decide on their market deployment strategy.

There are however several considerations that show that companies looking to further their digital presence do face legal hurdles. Firstly, this is in part because of the increasing technicality and specialization of laws. Indeed, no international deployment is nowadays possible without, for instance, ensuring compliance with data protection and privacy legislation, a legal field of arguably much lower relevance in the past. Also, certain legal domains, such as telecommunications legislation, used to apply only to a very limited subset of

actors and has become, nearly overnight, an unexpected yet mandatory consideration for many businesses.

A second reason is the fact that businesses cannot pick and choose the jurisdictions in which they will be digitally present as easily as they could have done in the traditional brick-and-mortar context. Accessing a French Internet platform from Spain is indeed a simple process and the French party would possibly fail to lawfully prevent customers in Spain from accessing its platform, in no small part due to the EU rules against geo-blocking. In the same way, the France based business would struggle to argue against the (at least partial) applicability of Spanish legislation should Spanish residents acquire products or services or in any other way use this French platform.

Thirdly, as highlighted during the business forum through the various panels, businesses face a fragmented legal landscape. Not unlike a pack of cigarettes out of which the individual cigarettes stick out more or less far, the applicable laws are at varying degrees of maturity relative to the digitalization of businesses. For instance, where the experts and the legislators are still in active policy discussions around revising the tax law space to more effectively tax international sources of revenue of digitally present actors, financial services specialists seem quite comfortable with the current set of rules and their applicability in our digitalized environment.

So, with the advantages of a global digital presence comes a greater and swifter legal exposure and a need to proactively seek compliance globally. In other words, with great power comes great responsibility. And one cannot, in a legal context, discuss power and responsibility without touching on competition law matters and, more generally, enforcement. Indeed, assuming as mentioned above that a global legal compliance is an arduous task, one may wonder if it is a necessary one, or can businesses take their chances hoping that no enforcement action will follow their lack of compliance? Could these businesses validly argue that their digital presence is not legally significant and that the true measure must generally remain a physical presence? Put differently, should we not treat new technology companies, active globally over the Internet, differently than traditional brick-and-mortar providers of goods and services?

Here again, the answer to these questions is in general negative. A full global compliance is hardly realistic, yet businesses would still be well advised to mitigate as many legal risks as possible. Indeed, be it in the USA or in Europe (supposedly all around the globe), authorities appear keen to retain all enforcement powers. In this respect, any argument according to which an actor is “only” digitally present seems to be carrying less and less weight with authorities. Competition authorities have already expressed their willingness to enforce competition law in this digital age, remaining unphased by arguments such as: “We’re a [name country] tech company and not active on your market”, “But the services are provided free of charge”, “It’s only some algorithm”, or “Nothing wrong with having some data and jealously watching over it”. The threat of US class actions or antitrust enforcement and – albeit to a significantly lesser extent – EU consumer protection law enforcement must rightly discourage many businesses from attempting a “now you see me, now you don’t” strategy under which they would for instance claim that digital presence in no way equates physical presence and that only authorities from states in which they have a physical presence should have any kind of enforcement rights.

The panelists taught us a few lessons that will always be good reminders for us lawyers attempting to soundly assist our clients in a fast changing world:

- Firstly, it has never been as important as it is now to understand what our clients’ businesses are about. Indeed, when billions are invested through M&A transactions to acquire companies (e.g. digital platforms) with no physical assets, no real estate and novel business models, and when software companies happen to fall under telecommunications surveillance legislation, there is a need for forward-thinking, curious (yet cautious) lawyers.
- Secondly, transversal thinking should be the name of the game. Contemplating legal pitfalls in areas with which one may not be familiar is certainly not every lawyer’s priority. Yet, because of the growing legal complexity and the very real consequences of a breach of the law, it has become essential to have some awareness of the challenges that may arise from legal domains alien to us.
- Thirdly, we must keep in mind that, despite many harmonized rules on the international level and similar practices in foreign

jurisdictions, there remains strong risks that the legal solution that works in one country will – perhaps unexpectedly – go against the laws of another country. There is no one-size-fits-all legal solution. In this respect, the ease with which businesses can implement their international digital presence might make us lawyers forget that we are still working with an ancient system that is very much lagging behind the technological reality in terms of its globalization.

- A fourth lesson is that any strategy whereby a company looks to avoid legal exposure in any given jurisdiction solely by invoking its lack of physical presence is not a prudent way of doing business. Indeed, this “now you see me, now you don’t” approach is at best cavalier and at worst self-destructive. We indeed see that we are moving towards a strong assimilation of the digital existence and the physical one.
- The last lesson learned is truly a positive one. There is such a plethora of new technological developments and such a strong ripple effect on the laws in virtually every area, that practicing the law will remain extremely stimulating.

4. Conclusion

To summarize, the strengths of this year’s Annual Business Law Forum were the quality of the speakers and the different viewpoints they put forward. This wealth of contributions is a rare occurrence and offered these writers much food for thought.

Digital presence, if not (yet) a clear legal notion, is a reality. Digital businesses that up until recently might have felt shielded behind national borders will have to face diverging opinions from many national or regional authorities around the world. Conversely, everyday legal practice has had to adapt, and will need to continue to do so: if our clients evolve, then so should we.

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Le 28^e Forum mondial UIA des centres de médiation sera virtuel

I Fabienne VAN DER VLEUGEL

4-5
sept. | 2020

Le 28^e Forum Mondial UIA des centres de médiation devait se tenir à Sydney en Australie ces 3 et 4 septembre 2020.

Compte tenu de la crise mondiale liée au Covid-19, la ville de Sydney est retenue pour un prochain Forum qui, de toute évidence, devra être reporté à une date qui sera fixée d'un commun accord avec le comité organisateur local. Nous nous réjouissons d'organiser un prochain forum en Australie à une date qui conviendra.

Les circonstances obligent à s'adapter et à faire preuve d'imagination.

Exactement comme un médiateur qui, au cours du process utilise à l'avantage des parties médiées divers outils et techniques de négociation, le Forum Mondial UIA des centres de médiation utilise les outils modernes pour adapter son rendez-vous de début septembre 2020.

Quatre webinars, d'une durée d'une heure chacun, seront organisés et s'étaleront sur deux jours : le jeudi 3 septembre et le vendredi 4 septembre 2020.

Le premier webinar intitulé "*The Impact on International Disputes of the Singapore Convention*" sera l'occasion pour les participants au Forum d'écouter les observations du Professeur Khory McCormick (Griffith University), Dr Christopher Ward SC (Australian National University) et George Lim SC (Singapore International Mediation Centre).

La convention de Singapour reste un sujet de discussion partagé entre ceux qui en sont satisfaits et d'autres qui n'en perçoivent pas les aspects bénéfiques. Ce sujet a d'ores et déjà été traité en divers points au cours du 27^e Forum organisé à Milan, Italie, en janvier 2020.

C'est l'occasion, aujourd'hui, d'entendre des intervenants d'autres continents et de comprendre la position de l'Australie sur le sujet.

Le 2^e webinar est tout autant d'actualité.

La pandémie a conduit les divers professionnels intéressés par la médiation à adapter leur pratique et à proposer aux parties médiées d'utiliser les outils informatiques nouveaux, et notamment les visio-conférences, pour avancer, voire initier des médiations conventionnelles ou judiciaires pendant le confinement.

La crise du Covid-19 a déclenché la prise de conscience de réels besoins et la nécessité d'aller de l'avant et d'utiliser à l'avantage des personnes en conflit les outils modernes, sans réunions présentiels.

En octobre 2017, durant le 24^e Forum organisé à Singapour, la technologie de l'outil *Modron* autorisant la gestion des médiations à distance avait été fort appréciée. Depuis, l'outil a été amélioré.

En juin 2013, lors du Forum organisé en République Tchèque, l'importance de la gestion des médiations *online* avait été soulignée et les participants au Forum avaient apprécié les professionnels qui appuyaient la nécessité de développer cette pratique.

Aujourd'hui, ce ne sont plus uniquement des idées qui sont partagées, mais il y a nécessité de connaître et de parfaire les outils adéquats.

Cette session est l'occasion pour les professionnels médiateurs ou tous ceux qui sont intéressés par le développement de la médiation au sein de leur pratique professionnelle, de vivre une première expérience avec l'outil *Modron*, et de connaître ses caractéristiques.

Le formateur de *Modron*, Nathan Polito, sera l'interlocuteur direct et pourra répondre, le cas échéant, aux questions qui lui seraient posées durant la session qui se veut très interactive, autant que possible.

La troisième session intitulée « *Mediation and space law* » est particulièrement innovante. Elle permettra à trois spécialistes du

sujet d'intervenir à propos des conflits qui ont un lien avec l'espace. C'est l'opportunité de comprendre combien l'outil de la médiation peut s'intégrer dans la gestion de ce type de conflit très particulier.

Steven Freeland, Professeur à l'International Law at Western Sydney University, interviendra pour cette session aux côtés de Donna Lawler, avocate spécialiste en droit commercial de l'espace et Lucy Stewardson, avocate belgo-australienne admise au Barreau de Bruxelles.

Au cours de la dernière session intitulée « *Mediation as a profession – Setting the standards* », modérée par l'incontournable Rosemary Howell, nous aurons l'occasion d'écouter Danielle Hutchison et Emma-May Litchfield qui nous éclaireront utilement sur les méthodes efficaces assurant le développement des activités de la médiation. Une session qui se veut pragmatique, utile, avec la dynamique que l'on connaît de Danielle et Emma-May, speakers habitués du Forum.

Le Forum Mondial UIA des Centres de Médiation se réunit tous les neuf mois avec un taux de participation croissant à chaque session. Il permet à ses participants, de partager de façon libre et efficace leurs pratiques, leurs idées, leurs observations pour peaufiner leurs pratiques de la médiation et les améliorer.

A vos agendas pour les rendez-vous du 3 et 4 septembre 2020, sous forme de webinars !

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Human Rights and Protection of Lawyers

Droits de l'Homme et de la Défense

Derechos Humanos y de la Defensa





Les avocats du Barreau de Bordeaux créent un pôle destiné aux mineurs étrangers

I Christine MAZE

In recent years, the number of foreign minors has increased considerably in Gironde (south-west of France). Not satisfied with the support they received and to meet their legal needs, the Bordeaux lawyers have created a dedicated center for them within the Bordeaux Bar. Supported by the Department (a French local administrative entity), the establishment of this efficient partnership makes it possible to facilitate the administrative regularization of these young people.

Venus principalement d'Afrique subsaharienne, les mineurs non accompagnés (MNA) – ces jeunes étrangers privés temporairement ou définitivement de la protection de leur famille – sont de plus en plus nombreux en Gironde. Fin 2019, 1 100 jeunes étaient ainsi pris en charge par les services de l'aide sociale à l'enfance (ASE) du département, contre à peine 200, trois ans auparavant. Une « question humaine très préoccupante », selon M^e Christine Maze, membre du Conseil de l'Ordre de Bordeaux. Elle s'est saisie de cette problématique en créant, il y a un an, un pôle d'entraide et de soutien juridique unique en France. Une quarantaine d'avocats volontaires s'y relaient, épaulés par un salarié de l'ordre, pour défendre et accompagner dans leur parcours les jeunes concernés.

Pour l'instant, l'accompagnement se fait surtout par rapport à la question de la reconnaissance de la minorité. Depuis la loi du 14 mars 2016, c'est en effet au Président du Conseil Départemental qu'il revient de statuer sur l'âge des jeunes réfugiés. À la clé pour les mineurs, le bénéfice des dispositions de la protection de l'enfance ; pour les demandeurs considérés comme majeurs, un refus de prise en charge mettant fin à l'accueil provisoire d'urgence, et replaçant l'intéressé sous le coup du Céseda (Code de l'entrée et du séjour des étrangers et du droit d'asile). « Apporter la preuve de son âge, cela peut être très compliqué, surtout auprès un

parcours migratoire chaotique. Il est donc nécessaire que les avocats interviennent au plus tôt pour se donner les meilleures chances », relève M^e Christine Maze.

Contestée, notamment sur la validité des tests osseux, objet d'une **question prioritaire de constitutionnalité**, la **procédure** donne régulièrement lieu à des recours, environ 80 par an en Gironde. « À chaque fois, les notifications de décisions précisent bien les voies de recours, et renvoient notamment vers le pôle MNA du Barreau ».

« Pas d'insertion sans juridisme »

Au sein du pôle, les avocats spécialisés en droit des mineurs et en droit des étrangers, ont été rejoints peu à peu par des confrères spécialisés en droit du travail ou de la santé. « Nous avons décidé de décliner cet accompagnement sur tous les autres aspects de l'insertion, professionnelle, économique ou sociale », raconte Christine Maze. Avec toujours, en ligne de mire, la nécessité de régulariser la situation administrative avant le passage à la majorité : « À 18 ans et un jour, on peut devenir expulsable », rappelle l'avocate.

Compte tenu de la moyenne d'âge à l'arrivée – autour de 15 ans –, l'enjeu préoccupe grandement les travailleurs sociaux de l'ASE. Des professionnels éducatifs « insuffisamment armés » sur le plan juridique et manquant de moyens pour « se battre afin d'obtenir les papiers ».

Issue d'un partenariat avec l'Ordre des Avocats, une application financée par le département devrait ainsi voir le jour lors du 1^{er} semestre 2020. Elle offrira aux accompagnants des MNA – professionnels, associations... – un accès direct, immédiat et sécurisé aux compétences du pôle, qu'il s'agisse de s'opposer à un refus de soin, d'intervenir dans un conflit du travail ou d'assurer le lien avec un consulat pour récupérer des documents d'identité. « Il n'existe pas d'insertion sans juridisme et, ici, les



avocats sont pleinement dans leur rôle », renchérit M^e Christine Maze.

Pour conclure, M^e Maze ne compte pas s'arrêter là... avec l'appui du Conseil Départemental, elle a sensibilisé les Bâtonniers d'Afrique de l'Ouest sur un projet de retour au pays, des jeunes MNA, qui une fois formés, seront opérationnels pour une future vie professionnelle sur leur continent d'origine. Une démarche volontaire et incitative pour permettre à l'Afrique de garder ses enfants.

Le Barreau de Bordeaux espère vivement voir le modèle bordelais rapidement décliné dans tous les barreaux de France voire d'Europe !

Christine MAZE

Avocate

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Visages de la liberté : ils prennent le risque de défendre

#avocatsdanger

I Henri CARPENTIER



Un avocat, c'est celui qui conseille et qui défend. Lorsqu'une personne est poursuivie par les autorités judiciaires de son pays, l'avocat est là, pour défendre. Cette défense est l'essence même de notre profession.

Mais cette défense est aussi vaine qu'impossible lorsque le droit et la loi sont bafoués. Face à l'arbitraire, un avocat ne peut rien. Ainsi, lorsqu'un avocat défend une personne, il défend aussi le droit, les textes nationaux et internationaux qui protègent et qui permettent à la justice de s'exercer librement.

depuis Nantes, et elles ont apporté leur expertise, leur professionnalisme et leur infinie disponibilité pour réussir ce projet.

Œuvrant dans ce seul but, ces institutions ont effectué un travail formidable. Durant 5 mois, il a fallu choisir les différents profils que nous souhaitions exposer, puis contacter chaque confrère à travers le monde, depuis la Tanzanie jusqu'à la Russie, pour obtenir son accord, exposer notre démarche et lui témoigner notre soutien... tout en s'assurant que ce projet n'interférerait pas avec les nécessités locales de sa défense.

Les personnes que nous avons exposées, comme tant d'autres, n'ont pas accepté ce silence.

Ces principes, en tant qu'avocats, nous sont chers. Car nous le savons, ces textes de loi ne peuvent vivre que s'ils sont défendus, portés par des individus. Ce ne sont plus des mots vides de sens, jargon juridique désincarné, ce sont des valeurs, des engagements qui tracent la frontière entre une société de droit et une société de violence et qui sont incarnés par nos confrères à travers le monde.

C'est en partant de ce constat que la Commission Internationale du Barreau de Nantes, l'Union Internationale des Avocats (UIA) et le Conseil National des Barreaux ont décidé d'honorer ces avocats qui sont poursuivis, jugés, condamnés ou assassinés pour la seule raison qu'ils exercent leur métier.

Ainsi, ces institutions ont travaillé ensemble autour d'une idée simple – afficher le temps d'une exposition à l'attention du grand public le visage des hommes et femmes de loi qui sont persécutés en raison de leur profession. Car à travers leur métier, ils défendent nos libertés.

L'UIA et le CNB ont répondu immédiatement présents à l'appel que nous leur avons lancé

Les portraits qui ont été choisis pour figurer dans cette exposition, accompagnés par des textes juridiques internationaux qui portent nos libertés fondamentales, ne sont pas exhaustifs. Ils illustrent cependant la détermination de certains à faire de l'État de droit une réalité humaine.

L'exposition, soit 13 visages représentés sur des affiches de 1,70m de haut, a été inaugurée le 24 janvier 2020, au sein du Palais de Justice de Nantes.

Car, le 24 janvier 2020, journée internationale de l'avocat en danger, nos confrères à travers le monde demeurent poursuivis, jugés ou assassinés pour la seule raison qu'ils sont avocats.

Tous ces mois de préparation, ces entretiens téléphoniques avec les comités de soutien, avec les familles, les visites en détention effectuée auprès de nos confrères, nous ont rappelé cette sordide réalité : Les visages de nos confrères sont des visages que certains voudraient battre, que certains voudraient voir fouettés, défigurés ou tuméfiés.

Quelle que soit la violence exercée, une violence physique ou judiciaire, quel que soit

Mohammed AL-ROKEN (Emirats Arabes Unis)

58 ans, marié
Détenu

« Aucune circonstance exceptionnelle, quelle qu'elle soit, qu'il s'agisse de l'état de guerre ou de menace de guerre, d'instabilité politique intérieure ou de tout autre état d'exception, ne peut être invoquée pour justifier la torture. »

Article 2.2 - Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants (1984)



Mohammed al-Roken est un avocat ayant défendu des victimes de violations des droits de l'homme, commises aux Émirats Arabes Unis.

Parmi ses clients se trouvait le groupe des "UAE 5", un groupe de défenseurs des droits de l'homme condamné en novembre 2011 pour son travail en faveur des droits de l'homme, puis libérés à la suite d'une amnistie présidentielle.

Mohammed Al-Roken a été arrêté le 17 juillet 2012 dans le cadre d'arrestations de masse à l'égard d'avocats, de juges, d'intellectuels et de leaders de la communauté étudiante, après la signature d'une pétition réclamant des réformes pour une plus grande démocratisation de l'État.

Il a été détenu dans un lieu secret pendant plusieurs mois, a subi et continue à subir diverses formes de torture et mauvais traitements. Il n'a pu avoir accès à un avocat et son procès est largement entaché de violations des droits de la défense.

Le 2 juillet 2013, Mohammed Al-Roken a été condamné à 10 ans de prison. Il est détenu à la prison de Al-Razeen.



l'auteur de cette violence – États autoritaires ou groupes mafieux, le but est le même : le silence. Voilà le but poursuivi par ceux-là. Faire taire la voix du droit, la voix de la liberté. Ces groupes savent que cette voix porte davantage que leur bruit et leur fureur. Alors, ils emprisonnent, bâillonnent ou mutilent cette voix qui les dérange.

Les personnes que nous avons exposées, comme tant d'autres, n'ont pas accepté ce silence. Elles ont au contraire prêté leurs voix pour faire résonner nos libertés fondamentales. Ces visages sont autant de preuve de courage et de détermination que nous souhaitons porter haut. Ce sont ces visages qui crient la liberté. Et c'est la raison pour laquelle nous les soutenons à travers cette exposition « Visages de la liberté : Ils prennent le risque de défendre ».

Car cette défense de l'État de droit doit être la mission première de nous autres, gens de robe, avocats, magistrats ou personnel de justice. Car si les gens de robe, les professionnels du droit ne le font pas, qui le fera ? A l'échelle d'une population, finalement très peu de gens se préoccupent de la loi et de son application. En France, dans le secret du délibéré d'un conseil constitutionnel, il ne reste en définitive que 9 personnes pour décider si une loi est conforme à nos libertés essentielles ou si, au contraire, elle tord le cou à nos droits élémentaires.

Comme le dit François Sureau, dans son ouvrage « Sans la liberté » : « Il dépend de très peu de monde que notre société se corrompe ». Cette défense de l'État de droit ne doit jamais être perdue de vue. Car l'obscurité n'est jamais loin. L'obscurité où l'on juge à l'abri des regards, l'obscurité où se pratique la torture, l'obscurité qui nous fait nous détourner de nos libertés vers l'impossible chimère d'une sécurité absolue. L'État de droit, le « rule of law » n'est pas un idéal naïf, une eau de rose qu'on sert dans les colloques pour se gargariser et digérer des discours lénifiants. L'État de droit doit être un référentiel pour l'action et pour la construction de nos sociétés à travers le refus de l'arbitraire, qu'il soit individuel ou étatique.

Par conséquent, face à cette obscurité toujours rampante, nous avons voulu mettre également en lumière nos textes

fondamentaux, ces phrases aussi essentielles que magnifiques qui donnent à ces visages toute l'ampleur qu'ils méritent.

Cette volonté de faire de l'État de droit une réalité humaine est la raison même de cette exposition. Car si les hommes et les femmes qui se battent pour l'État de droit sont peu nombreux, leur action est universelle.

Cette exposition a été faite pour être reprise, diffusée, affichée par tous les barreaux et institutions qui le souhaitent. Une version internationale de l'exposition est à disposition, en plus de la version française. Je vous invite à prendre attache avec l'UIA, le Barreau de Nantes ou moi-même : l'exposition vous sera envoyée pour que vous puissiez la reprendre dans vos instances locales et faire de ce projet un témoignage clair de notre attachement collectif à la promotion de l'État de droit et à la solidarité envers nos confrères. Ces visages de la liberté doivent être mis en lumière et l'exposition est ainsi un moyen concret pour le faire.

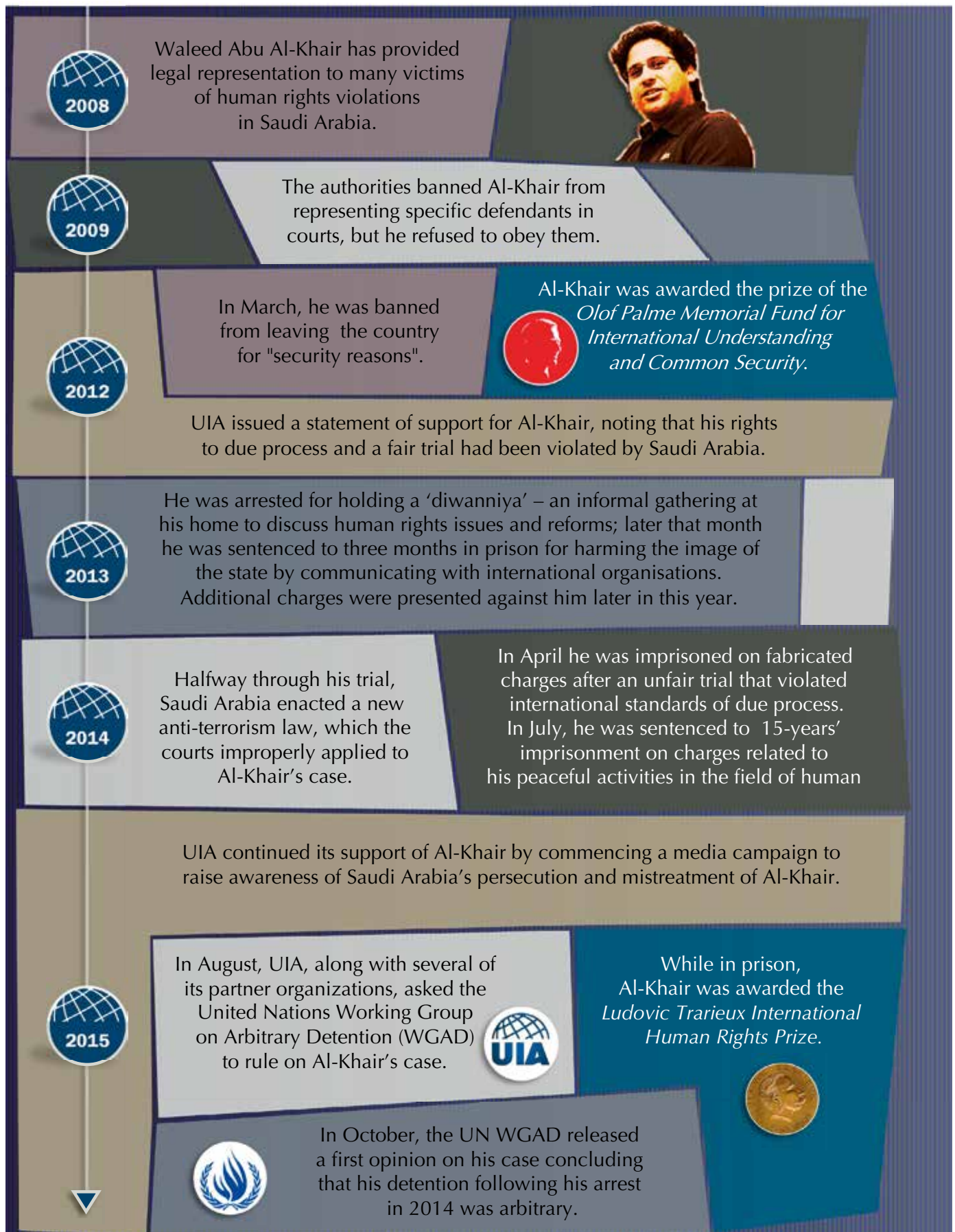
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SAUDI ARABIA HUMAN RIGHTS DEFENDER, WALEED ABU AL-KHAIR, IMPRISONED AND TREATED LIKE A TERRORIST FOR DEFENDING HUMAN RIGHTS



Al Khair was awarded the 2016 *Human Rights Award of the Law Society of Upper Canada (LSUC)*



Al-Khair was beaten by another prisoner in April. When he complained to prison authorities about it, his cell was raided.

In June, Al-Khair began a hunger strike, in protest against the prison authorities' refusal to provide him with needed medical care.

Al-Khair suffered from complications of diabetes and intestinal complications.



The UN WGAD declared his detention, following his conviction and sentencing, as being violative of the relevant provisions of the Universal Declaration of Human Rights.



Al-Khair undertook another hunger strike which he first ended on December 10, the anniversary of the UN Declaration of Human Rights. He continued his strike the next day after the prison authorities did not respond to his demands and kept him in an isolation cell.



Waleed Abu Al-Khair was awarded the 2019 *ABA International Human Rights Award*.

This year, Saudi Arabia's term as a member of the UNITED NATIONS HUMAN RIGHTS COUNCIL expired.



After 30 days on a hunger strike, Al-Khair was transferred to a hospital under high security measures. While in the hospital, he was denied appropriate medical attention.

He was returned to solitary confinement and restarted his hunger strike until authorities finally transferred him from solitary confinement to his former cell.



For further information: <https://www.uanet.org/en/uia-irol>

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The Legal Profession
La profession d'avocat
La Abogacía





How Notary Publics are Gatekeepers to Prevent Property Identity Theft

I Jill MARIANI

There is no greater threat to one's security than being displaced from one's home. Shockingly that can happen with the stroke of a pen or the click of a mouse. A class of criminals specializing in the fraudulent conveyance of residential real estate is flourishing throughout major metropolitan areas in the United States. This *property title theft*, a form of identity theft, is pernicious and emotionally harrowing, especially to the more vulnerable segments of the population.

The international community is not immune from victimization of the American criminals. Foreign investors in American cities on the cusp of renaissance, like Detroit, are undergoing gentrification. Neighborhoods in Philadelphia and New York City are particularly vulnerable to property title theft since they are often physically absent from the property for long periods of time. Additionally, an apostille¹ based upon a fraudulent notarization corrupts the integrity of the record-keeping authorities in other countries.

The modus operandi of these title thieves is being replicated in communities around the globe. For example, individuals forged deeds by unassuming British or Irish homeowners, including an attempt to acquire property owned by Penny Hastings, the wife of journalist and historian Sir Max Hastings. Fortunately, many transactions have been thwarted, or reversed in a timely fashion.² Nevertheless, being able to recognize the red flags of this criminal activity would benefit residential owners worldwide.

A. Targeting

The method of attack is systematic and diabolical. American fraudsters prowl for single- and two-family houses and residential brownstones, especially in redeveloping neighborhoods. They also discover prized parcels by scouring obituaries for recently deceased owners, by physically canvassing neighborhoods for unoccupied or dilapidated residences, or by locating

publicly filed deeds of property owned by older individuals with no mortgages and substantial equity. Such real estate usually represents the accumulated family wealth of several generations, often the only family asset. Modestly priced at the time of purchase decades ago, these properties now command great value.

Unfortunately, the transparency that is afforded through public filings provides these charlatans with a plethora of information to commit their crimes. The public records expose liens from unpaid real property taxes and/or water and sewage charges, and disclose information about both the owners and the notaries public, including their actual signatures.

B. Consequences

Property title theft devastates the property owner. The real estate is transferred through a new deed, usually a "quitclaim" deed, conveying property "as is" without any warranties on the part of the seller. The deed contains either the forged signature of the true owner, who may be deceased, sometimes for decades, or the owner's actual signature, who had been tricked into believing that he or she would still retain ownership. In other instances, particularly when the homeowner has died intestate, meaning without a will, the deed contains the signature of a distant heir or an imposter masquerading as a legal distributee. Even a fractional interest in the property, transferred for a sum of money well below the property's market value, may enable a fraudster to gain control over the entire property eventually, or at the very least to obtain a share in a portion of future sale proceeds.

For example, one convicted defendant stole a three-family residential property in Brooklyn, New York by creating a trust naming himself as trustee. The defendant then filed a forged deed transferring ownership purportedly by the owner to

the trust. This forged deed and related forged documents were recorded with the New York City Register's Office of the New York City Department of Finance, thereby depriving the unknowing victim, the defendant's 84-year-old neighbor, of an asset worth approximately \$445,000.

In Philadelphia, a half dozen properties in a gentrifying neighborhood with soaring values were fraudulently conveyed to the defendants. The purported sellers were deceased before their signatures were purportedly sworn to before a notary public. Some of the transactions were concluded by a man still on parole from a lengthy prison sentence for a string of violent crimes.

Some thieves transfer the property to a limited liability corporation, or through a series of shell entities, or to a totally fictitious person. The fraudsters are then free to use the property as collateral to obtain a mortgage or a loan. The funds are used to make renovations or extracted in cash for personal benefit. They can also sell the property to a *bona fide* purchaser.

The victims of these crimes face a difficult, and sometimes, impossible legal challenge in their efforts to undo the transactions and regain title. It is time-consuming and costly to evict a fraudster in a housing court action or to commence a "quiet title" action in a civil court to establish which party has legal ownership to real property.

C. Notaries Public – the Gatekeeper

A notary public is an intrinsic party to the conveyance of residential real estate. In the United States, the notary public is a public officer, and is sometimes also a licensed attorney. In several countries, like Greece, Italy, and Slovenia, the notary public is a specialized full-time profession; it can be a well-paid profession. The training of notaries varies among countries, but it appears to be



more rigorous in some nations than most American jurisdictions. Nevertheless, the notary public is the gatekeeper poised to avert this most dastardly fraud.

In the United States, every document associated with a real estate transaction requires a notarization. The deed requires an *acknowledgement*. The supporting affidavits to a deed require a *jurat*. In both instances, the notary public must positively identify the signer of the document by obtaining proper identification from that person. In the case of a *jurat*, the notary public also administers an oral oath or affirmation.

Virtually every fraudulent transfer involves a faulty notarization, either by a willing, or an unwitting notary public. In many instances of fraud, the notary public affixes his or her signature and notary seal to documents even though the signer does not appear before the notary. In some cases, the notary public is persuaded to dispense with lawful protocol because the notarial services are being provided to someone regarded as a respectable member of the community, including an attorney or a police officer. Unfortunately, such “respectable” persons may turn out to be criminals. In more disturbing cases, the notary public signs and notarizes a blank grantee or grantor signature line.

For example, a notary public in Ohio, indicted in 2019 on state felony charges, met the fraudsters in a parking lot and notarized four deeds that were either unsigned or pre-signed by the purported seller. One of the stolen homes had been in the same family for 30 years. The fraudulent transaction was discovered by the owner’s daughter, who

worked in real estate, when she assisted her father in selling the property. In some instances, fraudsters arrange for an individual with fake identification to forge the signature of the purported homeowner or the purported legal heir on pertinent documents in the presence of a notary public.

More brazen perpetrators affix a fake notary public signature themselves. Some fraudsters purloin a valid notary public stamp, and without the permission or authority of the notary public, use it to notarize the necessary signatures. Others lift valid notary commission information from public documents accessible through public records, and photo-shop the notarization onto the new documents.

Still others use information about a notary public that is contained in public filings, such as the license number, expiration date, and county of issue, to purchase a phony notary public seal from a retail vendor of notary paraphernalia. To test the laxity in the industry, one law enforcement official, acting in an undercover capacity, purchased a fake New York notary seal from an out-of-state online vendor. The officer simply provided the vendor with a fake notary public registration number, county of issuance, and commission expiration date. Upon the payment of a modest fee, a notary seal was created. The vendor did not verify the notary public’s commission as she was not legally obligated to do so.

D. Grand Jury Report

A New York County Grand Jury, empaneled upon the application of New York County District Attorney Cyrus R. Vance, Jr.,

responded to this wave of deed frauds by issuing a Grand Jury Report (“Report”).³ Released in December 2018, the Grand Jury made specific recommendations requiring greater scrutiny concerning the qualifications of the notary public in the first instance.

The recommendations are quite simple. The Grand Jury urged the New York State Legislature to require all notary public applicants to be fingerprinted as part of the background check prior to his or her appointment as a notary public, and to file an official bond. In addition to establishing the applicant’s true identity, these procedures would disclose if the notary public applicant has been convicted of a disqualifying crime, and would provide victims with some measure of recovery for damages suffered as a result of the notary public’s misconduct.

The Grand Jury also recommended that the New York State Legislature increase applicants’ required education, while mandating applicants to take a designed course on notary public law prior to the written examination, and also requires notaries to take a refresher continuing education course prior to reappointment. This practice would ensure that notaries public are aware of current law, including illegal schemes. This is particularly important because attorneys in most American states automatically qualify for notary licenses without even taking a test. Yet, notary public law is rarely, if at all, addressed in any law school courses.

Among other recommendations, the Grand Jury encouraged the New York State Legislature to institute new procedures that a notary public should follow in the exercise of his or her official acts. One critically important recommendation to combat fraud was to require a notary public to keep a chronological and contemporaneous *journal* of all notarial acts. The journal would note the date, time, and the type of the notarial act, that is, the instrument. In addition, the notary public would record the name, address, signature, and the type of photo identification provided by each person whose signature is being notarized. A survey of the 50 states and all United States territories, except Puerto Rico, revealed that 18 jurisdictions require a journal for all notarized documents; 34 of

the remaining 37 jurisdictions recommend keeping such a journal.

The Grand Jury further recommended that if the document to be notarized is a deed or any other document affecting residential real property that is required to be publicly filed, the notary public would also record the block, lot numbers, and the street address of the property in the journal. More importantly, the notary public would have the person signing the document place an inked thumbprint in the journal. Although the thumbprint requirement has generated some controversy in some jurisdictions, this practice has proven successful in the decline of fraud in California, pursuant to Cal. Gov't Code § 8206(2)(G), and is contained in the Model Notary Act of 2010, § 7.2 (7), *Journal Entries*, proposed by the National Notary Association.

A journal provides additional benefits. It demonstrates the notary public's due diligence and exercise of reasonable care, and can be used to refresh a notary's memory, months or years after the fact. It establishes the signer's identity and corroborates the integrity of notarization. A journal is also a valuable investigative tool. There have been instances in which a journal, voluntarily kept by a New York City notary public, enabled New York City law enforcement to prosecute a person engaged in deed fraud.

The Grand Jury also encouraged the New York Legislature to join the majority of other states requiring commissioned notaries public to obtain a stamp or seal, and safeguard it in a locked and secured area under the exclusive control of the notary public. This device would contain the name of the notary public, the county of the commission, the identifying registration number assigned to the notary public, and the exact commission expiration date, setting forth the month, day, and year. Moreover, a new seal would need to be acquired upon each renewal, thereby no longer permitting the notary public to change the expiration date manually. Furthermore, the Grand Jury recommended that the New York State Secretary of State provide each notary public with a certificate that verifies the notary public's commission, a copy of which would be submitted to a retail vendor to purchase a notary seal.

Conclusion

The notary public stands in a pivotal position to thwart real estate conveyance fraud and to assist in bringing scammers to justice. With Notary Public Day being celebrated each November 7th in the United States, there is tremendous pride to be taken in a profession that can be traced back to ancient Egypt, when notaries public were known as scribes. The notaries public of the past witnessed historic events, such as the notary public assigned by King Ferdinand and Queen Isabella to accompany Christopher Columbus in 1492 to ensure that all discoveries were properly accounted and identified. That prestige, however, comes with a responsibility to be alert to those who would perpetrate fraudulent schemes and these professionals would be diligent not to contribute to its fraudulent activities. The notary public must be the gatekeeper.

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1. An Apostille, a specialized certificate necessary for the document's acceptance in a foreign country, can be issued by the Secretary of State of one of the 50 states, the District of Columbia, one of the U.S. territories, or the U.S. Department of State. It is attached to the original document to verify it is legitimate and authentic.

2. Help! My House Has Been Hijacked, Financial Times, Lucy Warwick-Ching, May 17, 2017; <https://www.ofx.ie/protect-your-land-and-property-from-fraud>, April 30, 2019, last visited September 1, 2019; and <https://www.irishtimes.com/news/ireland/ireish-news/witness-tells-byrne-trial-of-horror-at-alleged-deed-fraud>, October 11, 2013.

3. Press release and Report of the Grand Jury of the Supreme Court State of New York issued pursuant to Criminal Procedure Law § 190.85 (1) (c), released by New York Supreme Court Justice Robert Stolz <https://www.manhattanda.org/wp-content/uploads/2018/12/Deed-Fraud-Grand-Jury-Report.pdf>.

4. The views and opinions in this article are her own and do not necessarily reflect her employer's. Jill is a member of the ABA Government and Public Sector Lawyers Division Council, as well as a member of the ABA Section of International Law that has a Memorandum of Understanding with the UIA.

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Cross-Cultural Lawyering and International Succession Law

Peter KUN

Dans notre vie privée comme dans notre vie professionnelle, il nous arrive de plus en plus souvent de nous trouver à la croisée de diverses cultures. Cet article met en lumière les aspects, au-delà des normes professionnelles, qu'il est souhaitable qu'un avocat intervenant au niveau international prenne en considération lorsqu'il traite avec des clients ou des décideurs d'identité culturelle différente. Comme ces aspects apparaissent souvent de façon très contrastée dans les affaires successorales, cet article se propose de les aborder sous l'angle du droit des successions.

"Culture is like the air we breathe – It is largely invisible and yet we are dependent on it for our very being. [It] is the logic by which we give order to the world."

To handle a case successfully, is it always enough for lawyers to have a thorough knowledge of the relevant statutes, case law and professional conventions in his or her country? In cross-border cases, could it be sufficient for a lawyer to only request advice on the national laws from collaborating foreign colleagues? Or, could it take more to successfully represent clients in cases dealing with, for example, international succession cases? These are the questions that we set out to answer in this article.

Cross-Culturalism in our Everyday Lives

It is hardly disputable that we are increasingly exposed to a diversity of cultures as we go about our day-to-day lives. Our personal futures are heavily influenced by the society in which we live, and by the forms of coexistence the given society can establish with members from various cultural backgrounds and identities. Naturally, this cross-cultural *modus vivendi* may vary from country to country, and even from one community to the next. By the 21st century, in some countries, especially in countries with great commercial traditions,

models for easing cooperation between citizens of differing backgrounds had emerged. However, in countries that up until this point have not faced a pressing need to resolve the coexistence of diverse cultures in their history, the related challenges are obviously being addressed a little more slowly and with more pitfalls.

Before we explore everyday cross-culturalism in more depth, we would like to briefly discuss the nature of cross-culturalism itself. Cross-culturalism, multiculturalism and interculturalism are often used as synonyms, but they all refer to different concepts. In a multicultural society, groups with diverse

of abstract, theoretical reason, such as a belief in the utopia of an ideal intercultural society, but rather by some specific, individual aspect, such as how they can successfully run their joint venture.

The number of cross-cultural situations rose steeply with the breaking down of physical barriers and trade restrictions between "west" and "east" at the end of the Cold War. Companies that had previously only operated at a national, or at most a regional level, stepped out into the global market, becoming multinational. As a result, in addition to the linguistic barriers, they were faced with challenges they had never experienced before.

Cross-culturalism, multiculturalism and interculturalism are often used as synonyms, but they all refer to different concepts.

ethnic and cultural backgrounds may live together, but there is not by necessity any deeper relationship between them. They do not necessarily know about each other's gods or frequent each other's restaurants. By contrast, in an ideal inter-cultural community, it is a given that the individuals making up the community, from various cultural backgrounds, know, understand, accept and mutually respect each other. In an intercultural society, there is no dominant norm; the various customs interact with each other, changing and evolving together.

Cross-culturalism, unlike the previous concepts, is related to cultural differences at the level of the individual rather than of the society. Research into cross-culturalism examines the interactions between individuals of differing identity in what are referred to as cross-cultural situations. A typical example of such a situation is where people from different cultural backgrounds meet each other, and for some reason it is in their best interests to understand and accept the differences arising from their differing identities. Therefore, this effort is not primarily motivated by some kind

One of these was how to overcome the conflicts originating from cultural differences, whether they be "in-house" disputes between employees or conflicts with the managers of business partners or companies targeted for acquisition.

Typical cross-cultural conflicts have arisen when two companies entered into a relationship where one operated in accordance with the norms of an individualistic society, while the other functioned according to those of a collectivistic society. In individualistic societies, such as the USA or countries of Western Europe, the individual is largely independent from the other actors in society, whereas in collectivistic, for example, Asian societies, a person is typically defined by his or her social connections.

Presumably, during negotiations between a North American and Western European company, it is unlikely that replacing the previous negotiating partner with a person having the same decision-making authority from one meeting to the next would create any major problem. It is by no means certain,

however, that an Asian company would accept this substitution so easily given that, as far as the representatives of the Asian company are concerned, the trust built up in the course of the previous personal meetings probably carries just as much weight as the professional qualifications of the negotiating partner.

In addition to the spread of global trade, numerous other factors, such as the decolonization that followed the Second World War, the recognition of freedom of movement as a basic right within the European Union, and several waves of economically and politically motivated migration, have also contributed to culture clashes. These clashes emerge not only between companies from different business cultures, but also among employees with different identities at the same company. These conflicts, and their resolution, are perhaps the most clearly visible at multinational corporations. A company that successfully defuses its internal tensions can expect to have more efficient and well-balanced employees and lower staff turnover costs. However, cross-cultural situations are not limited to large companies. They are also present at a growing number in small and medium-sized enterprises, and even in family relationships.

With the dawning of a globalized world, every country has, and will have, more and more families consisting of members with differing identities. A rising number of local small and medium-sized enterprises will have members arriving from different business cultures. As in the case of multinational corporations, where more effective internal conflict management means a more productive company, it is also essential for the profitability of small businesses, and for the happiness and stability of families, that their members be capable of managing their conflicts effectively so they can devote their time to value creation instead of constant infighting.

It is more than likely that cross-cultural conflict management will be a key factor in whether a society can successfully overcome the challenges of the 21st century; whether it can learn to cooperate or have its energy drained by constant struggles between its members. The principles of "Recognition, Respect, and Reconciliation of Differences"² describe the recipe for successful cooperation but cannot be applied with equal effectiveness in all areas. The more deeply rooted a tradition or a basic

value is, the more challenging it is to reconcile it with a completely different one. In the legal area, perhaps the most striking differences of this kind can be found in succession.

For a lawyer dealing with international succession, the question is self-evident. How should I act if I find myself in the crossfire of differing cultures?

Cross-Cultural Lawyering

The lawyer's role is to counsel, conciliate and represent.³ It is in the public's interest for a lawyer to be capable of effectively representing the individual and defending the individual's private interests. The effectiveness of this protection of private interests, however, takes a different form in each branch of law. In a litigious proceeding, it is generally easy to decide whether the lawyer's advocacy was successful. If the court accepted the lawyer's legal arguments and ruled in favour of the lawyer's client, we can say that the legal representation was a success. A lawyer's effectiveness is also beyond question if a corporate acquisition deal is concluded satisfactorily for all parties involved. This occurs when the transaction documents are drawn up accurately and as agreed, then they are signed, then the seller receives the purchase price and the buyer acquires the intended shares in the target company.

Lawyers cannot disregard these relational aspects in the course of their work. They must strive to ensure that the arrangement reached is one the lawyer's client can live with in the long term as well. This is because the success of any agreement is largely dependent on whether the parties are able, or willing, to comply with its provisions. Lawyers advocating in such cases must exercise caution, and they need to be even more careful if the parties have contrasting identities and come from different cultural environments.

In her 2001 landmark paper, Professor Susan Bryant summarized the results of her several-year research project conducted with Jean Koh Peters entitled "*The Five Habits: Building Cross-Cultural Competence in Lawyers*."⁴ The Five Habits refers to a practical technique intended to make it easier to overcome the barriers resulting from cultural differences. Applying these techniques requires a great deal of skill, attention, and self-knowledge on the part of lawyers. While an exhaustive summary of Bryant's work is beyond the scope of this article, it is important to explain what is meant by the "Five Habits."

Habit One requires the lawyer to identify and to differentiate between the cultural similarities and differences of the lawyer and the client, as well as recognize the stereotypes and preconceptions that could

With the dawning of a globalized world, every country has, and will have, more and more families consisting of members with differing identities.

It is more difficult to judge the "success" of a lawyer who has to settle a conflict between people bound by familial and often close emotional ties. That can be the case, for example, in disputed probate procedures. In cases of this type, seemingly irrational considerations are often in play alongside the rational ones. A special feature of these cases is that, after their "completion," for example, following the conclusion of the probate procedure, the participants remain in contact with each other since they are connected by other factors besides the legal relationship. The former disputants may be just as likely to meet again at weddings and funerals as at shareholder meetings of the family company.

subvert lawyer-client communication. Habit Two helps the lawyer identify what impact the explored similarities and differences might have on the relationship between the lawyer and the client, the client and the decision-maker (for example, judge), and the lawyer and the decision-maker. This helps the lawyer correctly "translate" the client's position into the decision-maker's "language."

Nevertheless, it is still common for the lawyer to misconstrue what the client wants to communicate due to their own preconceptions. This is why Habit Three encourages the lawyer to explore what we will call the client's "parallel universe" and to utilize effort to interpret what the client

really intends to communicate in that context. Habit Four is concerned with communication between cultures, especially what are referred to as communication pitfalls and red flags. A typical pitfall is when the lawyer starts to think and communicate in old patterns.

This is a real and usual pitfall, because there is no guarantee that the previously successful pattern into which the lawyer places the solution to a client's problem will apply when there are clients with differing identities. Habit Five gives the lawyer the task of confronting the prejudices and stereotypes stemming from his or her own cultural background, which are especially capable of influencing how the case is handled in stressful situations. This step is far from easy, as prejudices are often very deeply rooted. According to Bryant and Peters, it can help if lawyers constantly and proactively "monitor" themselves in order to recognize when they are being controlled by their own preconceptions.

Each of the habits described above can be a great help for lawyers, enabling them to overcome the obstacles resulting from cultural differences. But why does applying them present an especially big challenge in the field of inheritance law?

The Inter-Cultural Nature of International Inheritance Law⁵

The very existence of inheritance law betrays a very human idea: although individual human lives are finite, they are not isolated. Rather, they are part of an intergenerational "web of relationships" in which the transition of property between certain members must be ensured.

The central issue under inheritance law is determining the mode of transfer. Two factors play a key role in this: on one hand, the "permanent" core values of the given society and on the other, the individuals who wish to determine what happens to their assets after their lives are over. These two factors, however, are not independent of each other as the norms of a society largely reflect the cultural and moral criteria that also shape the identity of the individual.

These cultural and moral criteria are also in play when the inheritance laws set out the idealized order of succession that is perceived to be "right." Looking at the three main

inheritance systems, namely the civil law system, the common law system and Islamic law, it is clear that while all three essentially treat the family members of the deceased as the natural guardians of continuity, subject to specifying how the testator's wealth be divided up among them, they show substantial differences in terms of how much freedom of disposal the testator has.

In essence, the inheritance laws encapsulate a society's "genetic code," and this code is different for every culture. In cross-cultural situations, the most important first step is to decode and recognize what different laws apply in order to manage a given situation. This decision-making process would benefit

The central issue under inheritance law is determining the mode of transfer.

from identifying the origins of these differing laws and understanding which social, political and economic processes led to their creation.

For the sake of argument, take the example of a business founded by three friends, one French, one Egyptian and one American. Upon reaching a certain age, they want to give instructions on who should inherit their share of the company in the event of their death, so as to ensure business continuity. However, they soon realize that different laws on inheritance apply to each of them; what is more, they all regard their own rules as "natural."

While the French and Egyptian members are accustomed to the idea of strict reserved shares and find it self-evident that they cannot freely dispose their assets in their will, it is far from certain whether the American shareholder, who may have never even heard of the reserved or forced share, will find this method so easy to accept. For the American, the freedom to decide what should happen to their assets in the event of death is broader than in most European and Muslim countries. For these entrepreneurs to be capable of finding a solution that both serves the interests of the company and respects the individual considerations of its shareholders, they need to understand and take into consideration the laws and rules to which the others are subject. These laws can only be understood if they also get to know, understand and accept their

cultural roots. Lawyers can help with this, provided of course that they themselves see the importance of such understanding.

Closing Thoughts

There is no such thing as culturally neutral lawyering. Lawyers, just like any other human beings in the course of their work rely – either consciously or unconsciously – on the customs, traditions and norms that they grew up with, and based on which, or perhaps contrary to which, they define themselves as individuals. A lawyer dealing with international inheritance law regularly encounters situations where the client, the party opposing the client, or perhaps the authority presiding over the

client's case, have a fundamentally different cultural background and different ideas about what is right or wrong. In these situations, a lawyer's work goes beyond simply having knowledge of the laws. Lawyers must make an effort to know and understand the points of view of all the differing conventions and rules, and their cultural roots, because this is the only way they can satisfactorily uphold and advance their clients' genuine, long-term interests.

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1 Bryant, Susan, "The Five Habits: Building Cross-Cultural Competence in Lawyers" (2001). CUNY Academic Works; http://academicworks.cuny.edu/cl_pubs/258

2 Samsung: Cross Cultural Management, <https://www.youtube.com/watch?v=rJ4lbhXrqnc>

3 Union Internationale des Avocats: "Core Principles of the Legal Profession".

4 Bryant, Susan, "The Five Habits: Building Cross-Cultural Competence in Lawyers" (2001). CUNY Academic Works. http://academicworks.cuny.edu/cl_pubs/258. Note that although Bryant addresses her work to students of law, they can also be applied, *mutatis mutandis*, by practicing lawyers.

5 This section is based on Olivér Spiriev and Péter Kun "Inheritance systems in the light of testamentary freedom" (International Succession Review, vol. 1 issue 2); <http://www.kunadvocate.hu/wp-content/uploads/2019/11/International-Succession-Review-Vol.-1-No.-2.pdf>



Innovation in Legal Education: The Entrepreneurial Law Course

David POSTOLSKI

Entrepreneurship means the art of transforming an innovative idea into a sustainable enterprise that generates value. An entrepreneur (1) provides a new product or service or (2) develops and uses new methods to produce or deliver existing goods and services at a lower cost. Entrepreneurs take risks to develop a novel, sustainable enterprise – a new or improved organization that benefits the economy and society. Entrepreneurship can involve invention, creativity, and management, starting a small business, or becoming self-employed.

Entrepreneurship entails the commercialization of an innovation. New ideas, products, or organizational schemes matter little until they achieve market acceptance and traction. The market validates utility and need along with excellence. This ultimately means that the market also invalidates new ideas with the judgement that the idea is not good. The entrepreneur's risk, therefore, is as much a gamble as it is an informed calculation about the viability of the new enterprise in the market and about its capacity to meet a demand or need of others.

In America, our founders valued the innovation process by embedding notions and precursors to patent, trademark, and copyright law in our constitution such as the Commerce Clause. It was these protective notions that propelled innovators and entrepreneurs to share their ideas and partake in the industrial revolution in America. In exchange for sharing one's ideas, America bestowed its entrepreneurial citizens with federal protection for original and improved intellectual property that benefited technology, culture, and commerce. Impressing or pushing forward innovative improvements and their implementation addresses a society's needs and wants and propels that society forward. Entrepreneurship is the unique process that, by fusing together innovation and implementation, allows individuals to bring new ideas into being for the benefit of

themselves, others, and society at large. It is the essence of freedom of expression and of a society.

Why Entrepreneurship Belongs in a Learning Curriculum

Learning about entrepreneurship is ideal for and integral to general education because it is a practice that applies to many fields and because it provides a revealing lens for studying how cultural values, social institutions, ethics, economic policies, and legal practices correlate to shape human behavior. Entrepreneurship is not an isolated activity; it is the epitome of teamwork and cooperation. It is rooted in a society's regulatory and ethical constructs. Businesses do not exist in vacuums. In fact, they are

In doing so, a course in entrepreneurship law can not only fulfill business practice theory, but also touch on the proprietary rights of individuals of their self's and their ideas. Conversations at this intersection spark ethical, moral, and regulatory debates in light of emerging technologies.

Basics of Entrepreneurship

Similar to students investing in their own educational journey, entrepreneurs must invest in their ideas and interests and in their resulting company. Their investment includes hours worked, which is sometimes referred to as sweat equity. Their investment may be something less tangible, such as the time spent or the skills or reputation brought, but it also tends to involve a significant investment

Entrepreneurship is not an isolated activity; it is the epitome of teamwork and cooperation. It is rooted in a society's regulatory and ethical constructs.

integrated and interlock with law, economics, politics, finance, and cultural and societal values and behaviors. Entrepreneurialism focuses on the practical and pragmatic and can hone the ambition and talent of people into concrete and tangible projects.

Much of entrepreneurship depends on the legal concept of intellectual property. Under patent law, for example, an idea, once physically embodied, subject to some restraints, can be "owned," such that the owner can control the use and practice of that idea. This concept of ownership of property is directly related to privacy rights and the autonomy of an individual. Our ideas come from within us and therefore belong to us as our property, intellectual property. The entrepreneurial lens effectively illustrates how theory, philosophy, and sometimes theology constructs become not only real and practical, but affect everyday life by revealing, in short, how values matter.

of assets with a clear value, whether they be cash, real estate, or intellectual property. Entrepreneurs who will not or cannot invest in their company cannot expect others to do so and cannot expect it to succeed.

Entrepreneurship requires both extensive organization and delegation of tasks, as well as traits similar to a typical student in an educational environment: juggling classes, workloads, friends, personal life, and responsibilities. This is the organized nature of an entrepreneur and student. Entrepreneurship also requires risk, i.e. operating under uncertainty and exemplifying the courage to stand up to any risks. Students who can appreciate and practice innovation, delegation, organization, team building, risk assessment, and appreciation will not only benefit from simulating the entrepreneurial journey in a classroom setting, but this skillset carries them through life.

Emerging Technologies

Many of the emerging technologies in the world today are entrepreneurial-derived, generated and focused. They include: 3D Printing, Cannabis, Driverless Cars, Smart Homes, and Artificial Intelligence. Many of these emerging technologies fall into the unregulated void and thus, it is incumbent on students, teachers, and entrepreneurs to be responsible researchers and innovators. Societal actors and innovators can become mutually responsive to each other with a view to the (ethical) acceptability, sustainability, and societal desirability of the innovation process and its marketable products.

The ability of a student entrepreneur to engage in innovation through an entrepreneurial product or service to address poverty is a mission most student entrepreneurs could get behind. The involvement of corporations in providing financial incentives to promote entrepreneurial solutions and products to address these goals also provides an additional incentive to the student entrepreneur. The United Nation's 17 Sustainable Development Goals are an excellent basis for creating the reason, purpose, and goals for a new entrepreneurial course. The goals and targets could be in areas of critical importance for humanity and the planet, and who better than entrepreneurs to solve these problems?

Implementing the First Entrepreneurial Law Course

A first entrepreneurial law course must teach about both the entrepreneurial culture and mindset, where the academic institution fosters an entrepreneurial community and ecosystem. The academic institution should seek to work with community partners who can aid and assist in making prototypes and develop programs that implement student's ideas, perhaps utilizing a 3D printer. The curriculum should touch on present shocks to the commercial world that have the effect of sparking ethical and moral debates due to the lack of regulation. Lack of regulation may apply, for example, to those involved with 3D printing, the gig economy, the sharing economy, cryptocurrency, and nanotechnology. Market research and financial considerations that emerge during the entrepreneurial journey should be discussed, as should the need for investment

in student entrepreneurial projects, whether they are based in a real-life venture or a fantasy setting, perhaps in virtual reality. The entrepreneurial course must address other legal pitfalls that haunt a new venture, such as: (1) understanding the regulatory tax implications facing small businesses, (2) understanding the business structure that is best suited for one's business, (3) understanding the need for legally binding contracts, and (4) understanding the difference between full time, part time, and casual employees, freelancers, and consultants, as well as how said status impacts intellectual property rights. Emphasis on the teachings of ethical philosophers and their impact on society, business, law, and freedoms should be explored. The development of ethics in business and their impact on regulatory frameworks around the world, including intellectual property laws, are integral to the entrepreneurial journey.

Finally, an academic institution should prepare itself for the desire of student entrepreneurs to have their solutions incubated and accelerated to a full-fledged self-sustaining business or the academic institution's technology transfer office. Creating a community is important, particularly a community that can follow up on activities such as a business pitch and organized public speaking competitions for interested community and service partners at the state, local, and federal level. Creating a first entrepreneurial course is a labor of love, a term often used by entrepreneurs to describe their own business ventures. From an educational standpoint, the establishment of this course can enhance an existing curriculum and influence student's current courses of study in many interdisciplinary ways. Student entrepreneurs who strive to solve world

problems is an expected additional benefit to this educational commitment.

The course should enable students to explore lean startup concepts for the creation of a new venture, conduct a customer discovery campaign, understand and analyze the options for new venture financing, use financial statements to analyze the financial performance of a new or existing venture, develop a marketing campaign for a new venture, and pitch a venture idea to potential funding sources.

Conclusion

An entrepreneurial law course emerges as a synergy of topics, including the regulatory and ethical issues facing entrepreneurs. It is beyond the black and white black letter law taught in business law courses. Present shocks and emerging technologies present ethical issues to entrepreneurs and society even before they are regulated. Furthermore, just because something is regulated under classic schemes, such as intellectual property laws, this does not always coincide with what may be ethical in a given society. Understanding the right questions to ask by a responsible innovator is just as important as understanding the regulatory schemes for an emerging technology. A class in entrepreneurial law can address these issues as students embark on their legal entrepreneurial journey spanning from conception to possibly an exit or growth of their business.

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AROUND THE LEGAL WORLD IN THREE DAYS



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Bancarrota de los consumidores: salida legal

El uso de un mecanismo concursal mínimo

Esteban CARBONELL O'BRIEN

1. Sumario

En este artículo formulamos una propuesta respecto de plantear una reforma del presupuesto subjetivo de la insolvencia, orientada a los consumidores, dado que debería existir a nuestro juicio, un procedimiento especial, no de talla única, lo que ayudaría a aliviar la crisis de dicho actor.

2. Antecedentes

Me solicitaron para que escribiera una ponencia a la sazón de la insolvencia de la persona natural no comerciante. El tema del mismo tendría que estar ligado a un asunto de actualidad y particularmente vinculado a mi especialidad. En ese entendido, bosqueje varios títulos y temas, quedando como base de estudio, la “crisis patrimonial” que se vive a diario, en este mundo cada vez más globalizado.

Dada la crisis económica que agobia a los agentes del mercado, considero que se deben replantearse objetivos a corto plazo. Ello porque el consumidor debe evitar el endeudamiento, pues cuanto más se financie, más dependerá de terceros y por ende, agudizará los efectos de la crisis, ya que el banco o proveedor que ayuda a dicho financiamiento, aumentará su poder frente a los accionistas de la empresa.

El consumidor debe buscar estructuras de financiamiento menos dependientes de terceros y aún menos onerosas, como la incorporación de nuevos accionistas o socios capitalistas. En suma, las empresas no deben ser tan dependientes de las tasas de interés o efectos exógenos, sino de sus negocios.

En coyunturas complicadas como la actual, un primer paso es realizar un diagnóstico para saber la real situación y, de acuerdo a ello, atacar los síntomas que podrían presentar por efecto de la crisis. Lo importante, de esta primera etapa es que, de ser enfrentados de manera frontal

dichos síntomas, se evitará que las empresas ahonden sus problemas y se sumerjan en la mar de la crisis.

La falta de liquidez es el primer síntoma de ingreso a una etapa de crisis patrimonial. El aspecto que debemos rescatar y que muchas veces, hace que dicho síntoma pase inadvertido, es el “contexto económico”. Al encontrarse el consumidor en un plano económico estable y con indicadores financieros positivos, coadyuvan a pensar que todo anda sobre ruedas. El consumidor se resiste muchas veces, a siquiera pensar que anda mal y que su negocio es uno de los peores. El consumidor debe encarar la crisis, revaluando su planificación estratégica. Ello ayudará a generar mayores ingresos, lo cual reestructurará costos, transformándolos de fijos a variables, y por ende, lograr una mayor eficiencia en el día a día.

competencia, esfuerzo de marketing, costos externos etc. Y ello repercute de manera directa en los consumidores finales.

A manera de colofón, ante una crisis, las empresas y en especial los consumidores tienen algunas opciones, como administrar la coyuntura turbulenta, replanteando su estrategia. La otra orilla es “sobrevivir” o sea identificar los puntos débiles y tratar de dar soluciones para limitar los daños que pueda ocasionar la crisis. Si estas alternativas no fueran posibles, porque el capital o la empresa se sostiene sobre una base endeble, le quedará la opción de fusionarse o vender parte del capital accionario, para ganar con ello, fortaleza. Lo ideal para las empresas locales o extranjeras será aplicar una gestión sobre su propio dinero, y no trabajar sobre la base de más endeudamiento.

Lo ideal para las empresas locales o extranjeras será aplicar una gestión sobre su propio dinero, y no trabajar sobre la base de más endeudamiento.

En tanto, pasar de costos fijos a variables, implica que la empresa opte por la tercerización o comparta sus gastos con otras compañías. Falta ser imaginativo y usar el “sentido común” para resolver problemas.

El uso de la información privilegiada es vital para estos crueles tiempos, por ello cuanto más ágilmente contemos con ella, ayudará a tomar decisiones de manera oportuna e invertir de la manera más conveniente, cubriendo, en todo momento, la mayor cantidad de riesgos posibles.

Los indicadores actuales fijan como las principales causas de “crisis patrimonial” de los empresarios (de mayor a menor grado) las siguientes: Inadecuado *management*, políticas contables inadecuadas, compra de empresas inservibles, cambios en la demanda del mercado, deficiencias en el control financiero, estructura de costos,

En suma, el empresario – y en especial el consumidor – requiere no sólo de herramientas y soluciones financieras para salir a flote, como las antes mencionadas – fruto del ejercicio profesional – sino el uso de mecanismos legales que le permitan viabilizar las decisiones adoptadas de manera eficiente y oportuna.

La legislación de concursos peruana o Ley 27.809 y sus enmiendas, a razón del reciente TLC con EE.UU, ayuda al empresario a contar con un ambiente más cálido, transparente y seguro para negociar con sus acreedores. ¿Cabría acaso incorporar al consumidor?

Cabe resaltarse, que el objetivo del sistema concursal, no es en estricto la “protección del crédito” pues dicha orientación debe entenderse como fin último. Consideramos que el mismo está orientado a enmendar

rumbos y sean los empresarios, los que utilicen este mecanismo de reflatamiento, para reordenar ideas, metas, dependiendo de la viabilidad del negocio, o en defecto de ello, aislarse sin causar mayor daño patrimonial.

Por ende, la prosperidad y el bienestar general de una nación dependen substancialmente de la solidez de su economía, jugando en el afianzamiento de la misma, un papel fundamental: el crédito, como instrumento perfeccionado de cambio económico. De ahí que el crédito requiera el máximo de tutela en nuestro ordenamiento jurídico positivo, como medio de protección legal de la riqueza del Estado.

¿Acaso está preparado el empresario a usar de manera correcta, los mecanismos que prevé la ley de concursos?

Estamos seguros que SI, bastará para ello, decisión política y contar con el soporte de un gestor financiero y legal, los cuales ayudarán a arribar a aguas más tranquilas, en cuyas orillas podrá descansar el empresario cauto y previsor frente a una “crisis patrimonial”. Enhorabuena.

3. Presupuestos

La Ley 27.809 (Perú) y otros ordenamientos concursales en especial la Ley 24.522 (Argentina) introdujo la total unificación del régimen concursal, de modo que cualquier persona física, sea comerciante o no, está sujeta al mismo régimen concursal propio del empresario y de las sociedades mercantiles.

Sin embargo, la solución a problemas de índole patrimonial de los consumidores no ha sido de las mejores, no es eficaz.

Las causas que llevan al consumidor a la bancarrota las podemos clasificar en:

- Insolvencia Activa, la cual conlleva un sobreendeudamiento que arriba la persona física como consecuencia de la civilización y de una época que lo lleva por un lado exceso o abuso del crédito y por otro lado a la bancarización del sistema de pagos de sueldos o haberes profesionales.
- Insolvencia Pasiva, la cual se da por la disminución real de los sueldos, alteraciones en la vida cotidiana como pérdida del empleo, problemas de salud del deudor etc.

La mayoría de veces, el sobreendeudamiento deriva en problemas sociales y económicos. Desde el punto de vista objetivo se debe definir al sobreendeudamiento como la incidencia de las deudas en los ingresos del grupo familiar, estableciendo que existe el sobreendeudamiento cuando el endeudamiento supera un porcentaje de los ingresos del citado grupo. Un punto de vista subjetivo, destaca que la imposibilidad de pago determina el real estado, sin importar la incidencia en los ingresos.

4. Conclusiones

Consideramos en primer término, que la solución que adoptemos – sea cual fuese – debe privilegiar la paz y la convivencia

social. Partiendo de dicha premisa surge la obligación del Estado en participar activamente en una reforma concursal o en su defecto la necesidad de crear un instituto que regule de manera exclusiva la insolvencia del consumidor, sea en sede administrativa o judicial.

El Estado más allá de establecer una norma legal para superar la crisis eventual del consumidor provocada por el sobreendeudamiento excesivo deberá incrementar las acciones preventivas en relación con la responsabilidad de los acreedores, la regulación de publicidad y de la educación para concientizar a la población sobre los hábitos de consumo desmedido o el acceso irrestricto al crédito.

Esteban CARBONELL O'BRIEN¹

Abogado

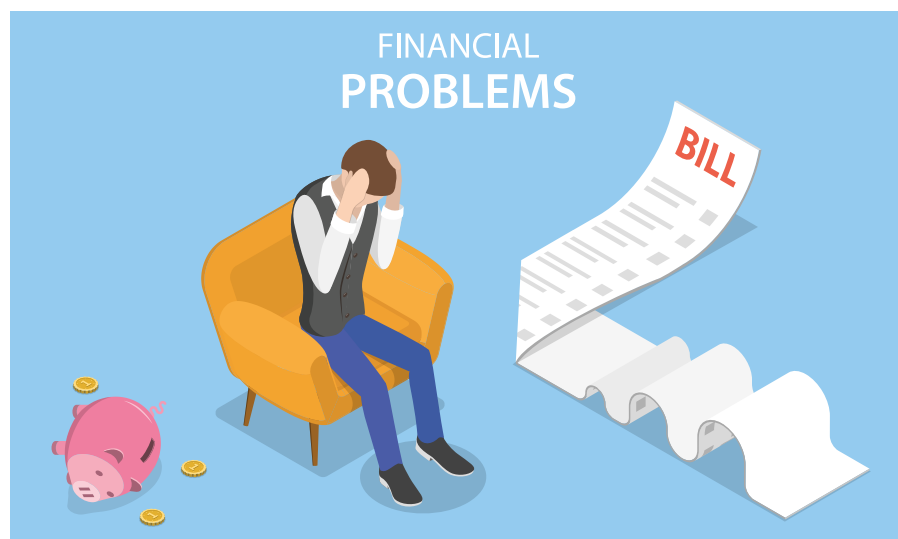
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Nota: Cabe precisarse, que el presente tema de ponencia ha sido materia de discusión en otros foros académicos, tales como en el I Congreso Iberoamericano de Derecho Concursal en Barranquilla (2005), luego en el IV Congreso Iberoamericano sobre la insolvencia en Rosario (2006) posteriormente en el IV Congreso Iberoamericano de Derecho Concursal en Punta del Este (2008) y finalmente en el V Congreso Iberoamericano sobre Insolvencia celebrado en Mendoza (2009).

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How the European Union and the United States Differ Regarding Agricultural GMOs and NBTs

I **Diego SALUZZO**

Différent de l'approche américaine autorisant les organismes génétiquement modifiés (OGM) dans l'agro-industrie, un processus d'autorisation très strict a rendu l'introduction d'OGM rare dans l'Union européenne (UE), malgré les avantages socio-économiques de l'adoption des OGM. L'UE a adopté une approche basée sur des processus selon lesquels les denrées alimentaires transformées à partir de la biotechnologie par le biais de nouvelles techniques de sélection (NTS) doivent être approuvées et étiquetées comme OGM, sauf si elles sont obtenues par certaines techniques de mutations génétiques spécifiques qui sont connues pour être conventionnellement utilisées dans un certain nombre d'applications et qui sont connues de longue date pour leur sûreté. Cette approche entraînera probablement des restrictions dans l'application des NTS dans le développement de nouvelles variétés végétales et ne générera pas nécessairement des avantages positifs pour les consommateurs. Le vrai risque est de perdre une opportunité de fournir aux agriculteurs des outils sûrs et à jour, de respecter la durabilité environnementale et d'affecter la compétitivité des entreprises de l'UE et des investissements connexes.

Legal and Scientific Debate about GMOs in Europe and Precautionary Principles

In recent decades, the exponential use of genetic engineering in agriculture raised debates both in civil society and among legal practitioners at national, European, and international levels. Although technological progress and innovation in agriculture play a key role in ensuring food safety and in addressing challenges associated with population growth, climate change, and scarcity of natural resources, the genetic improvement of plants, carried out through unconventional techniques, continues to

be viewed with suspicion. These concerns remain despite evidence from extensive GMO cultivation worldwide and a growing body of scientific contributions¹ evaluating their agro-environmental impact, related risks, and possible benefits, which remain subject to legal and scientific debate.

For instance, EU Commission Decision n. 2016/321 reintroduced in many UE Countries the prohibition in cultivating maize MON 810. This is a GMO variety previously authorized by EU Commission Decision n. 98/294, with the comfort of European Food Safety Authority (EFSA) scientific opinion n. 3371/2013, which had confirmed that there are no negative impacts on the environment if this variety is properly utilized. On September 13, 2017, the European Court of Justice, in C-111/16, reconfirmed the rulings in C-58/10 and C-68/10. They state, in a case involving Monsanto, that scientific uncertainty is not enough to invoke the precautionary principle and to require the adoption of precautionary measures in the food sector. Instead, a more serious and manifest risk for human health is required for both to apply.²

preliminary objective scientific evaluation." Actions should be consistent with measures adopted in the past, proportionate to the risk, non-discriminatory, and based on cost/benefits analysis, all of which are open to new scientific data and evidence.

NBTs and Novel Foods: European Regulations and Case Law

For global agribusiness corporations dealing worldwide and for all related business partners (investors included), it is becoming crucial to understand if and to which extent this "strict" and conservative approach should be applied to new methods and technologies of plant breeding, the type called NBTs. The legal approach in the EU is substantially different from U.S. regulations. As a consequence, any agro-industry dealing on a global scale has to face double regulatory costs, get multiple approvals, and face the risk of obtaining asynchronous approval for the same products. Legal uncertainty could result in investor reluctance and developer fatigue.

Small farmers may lose the freedom to cultivate the products they want and how they want, particularly if the existing genomes are affected.

Developed as a pillar of European environmental law, the precautionary principle became also part of other areas of law, including food law. It constitutes a mechanism for how to determine risk management measures in a correct manner. This manner includes balancing economic values on one hand and protecting the health and environment on the other. EU law suggests an active and restrictive interpretation, beginning with Commission Communication on precautionary principle COM/2000/0001.

The concept is to identify a specific, well-identified risk or at least utilize "a

The downside is that European-based agribusiness corporations encounter serious problems in complying with U.S. competitors in North America, which remains the first food market in terms of revenues. This is because final products, even when GMO derived, are substantially equivalent to their "traditional" non-GMO counterpart. As no specific labelling was required until now,³ consumers remained unaware of their food's origin.

Plant Breeding

Intended as progressive introduction of certain desired characteristics, breeders

began some 10,000 years ago in Mesopotamia and through their breeding efforts, increased the number of edible plants, reduced possible toxicity, increased plant yield, and improved crop productivity. Starting from Mendel studies, breeders relied on spontaneous mutations and made continuous efforts to preserve favourable alleles. Hybrids were created that were able to adapt to different environments. Nowadays, new commercial varieties, the so-called “elite crosses,” are diminishing due to risk of genetic vulnerability.

Further improvement, with integration of novel technologies into classical breeding, is now a must due to higher quality requirements and new challenges and concerns in food security and safety. Genome editing technologies are applied in a context where: (1) there are technical barriers, making it impossible to combine all the best alleles into a single genotype, (2) wind and transport systems disperse seeds worldwide, (3) aggressive pathogens adapt faster to climate change than crops, and (4) new pathogen genes evolve to overcome new host resistance genes.

Science and Off-Target Effects

With NBTs, from in-vitro culture to genomic engineering and tools, there is more potential for resistance to pathogens, herbicides, and drought. The essential feature of an NBT resides in its ability to obtain the desired genome modifications in a targeted and specific way, with minor waste of time and energy. In agricultural treatment there are three main methods involving mutagenesis. They are: (1) Zinc Finger Nuclease (ZFN), (2) Transcription Activator-Like Effector Nuclease (TALEN), and (3) Clustered Regularly Interspaced Short Palindromic Repeats (CRISPR). CRISPR technology dominates the laboratories.

All the above-mentioned genome editing nucleases platforms cause a specific break in chromosomal DNA. Although all of them can be very effective, none of them has perfect specificity and outcomes can be uncertain, even unanticipated. Concerns about involuntary and unexpected effects of said NBTs were raised in North Europe, where biodiversity could be impacted.

Market Access and Patentability

NBTs could play an important role in terms of access to the seed market and democratize research, subject to ad hoc regulation. Small seed companies or public research centres could in fact utilize these opportunities even with limited budgets, instead of investing millions in the dossiers required for the authorization of current GMOs. This could be done by developing new fruit and vegetable varieties capable of resisting the most common diseases without any use of plant protection products, as part of a sustainable agricultural model facing the ecological transition.

Another recurring theme concerns the patentability of seeds obtained with NBTs. Plant technologies and trait technologies, most patented by large agribusiness players, are having the effect that in a world where more than 70% of the food is produced by small scale farms, economic power will be concentrated in big agribusiness and patent holders. Small farmers may lose the freedom to cultivate the products they want and how they want, particularly if the existing genomes are affected. With private investors protecting their own investments and social parties proposing free access to the results of research, a solution could be the recourse to the so-called “farmer’s privilege,” which involves the right for small operators to reuse the seeds of the previous crop.

Novel Food and Compliance with Required Approval Procedures

Novel foods are governed by EU Regulation n. 2283/2015, a regulation aimed at removing barriers to free trade, thereby opening the market either to the traditional foods of non-EU countries or food deriving, inter alia, from “a novel production process” or “with a new or intentionally modified molecular structure.” As for GMOs, under EU applicable regulations, preliminary authorization is required for NBT products. These products are reasonably expected to be authorized as novel food, unless: (1) there are no significant changes in the composition or structure of the food, which would affect nutritional value, metabolism, or increase

the level of undesirable substances, or, on the contrary, if (2) they are considered to be a GMO within EU Regulation n. 1829/2003.

When replacing novel food with another food, consumers should be informed about the advantages and disadvantages of this substitution, including from a nutritional perspective. The dossier must be prepared and submitted by the applicant, who has the burden of proof in demonstrating safety of the innovation through compliance with risk assessment procedures managed by the EFSA. Precautionary principles still apply, as per art. 7 of EU Regulation. 2283/2015, which states that the Commission shall only authorise and include a novel food on the Union list if the food does not, on the basis of the scientific evidence available, pose a safety risk to human health. This is because the EU must ensure high levels of health protection, namely in areas where the scientific uncertainty principle would require the adoption of risk management measures, as provided under article 7 of EU Regulation n. 178/2002 concerning food safety.

The EFSA, in assessing the safety of novel foods, needs to consider whether the novel food concerned is as safe as food from a comparable food category already existing on the market within the Union and whether the composition of the novel food and the conditions of its use do not pose a safety risk to human health in the Union based on the dossier submitted by the applicant and with no reference to unexpected effects of the production process to be applied. It is a burden, but one less politicized than those that apply to GMOs.

C-528/2016: EU Court of Justice Interpretation

One concern is that NBTs could give rise to GMOs. On 17 October 2016, case 528/2016, this problem was raised before the European Court of Justice by means of a preliminary question lodged by French Conseil d’Etat in a claim by plaintiff, inter alia, Confédération Paysanne. It is a French Agricultural Union which defends the interests of small-scale farming and is led by activist and member of the European Parliament, José Bové.

The subject of this controversy was the Clearfield® soybean variety, a new variety

making conventionally-bred herbicide tolerant seeds more weed resistant, which means significantly greater productivity, better crop quality, and more farmer profitability. Plaintiff argued that use of herbicide-resistant seed varieties could pose a risk of significant harm to the environment, as well as to human and animal health, in the same way as GMOs obtained by trans-genesis do. Trans-genesis is a process whereby a gene from one organism is transferred to the genome of another.

The European Court of Justice decided that there is no difference between GMO and mutagenesis because mutagenesis methods alter the genetic material of an organism in a way that does not occur naturally. The EU decision was supported by formal arguments relating to cross provisions of an annex to Directive n. 2001/18 that includes mutagenesis as a method of “genetic modification.” It was so stated that organisms obtained by means of NBTs would compromise the objective pursued by the GMO Directive because this method works to produce genetically modified varieties at a rate out of proportion to those resulting from application of conventional mutagenesis. The latter has similar risks to those resulting from the production of GMOs through transgenesis.

Towards an EU Regulation for NBTs

NBTs are currently in limbo now that cisgenesis and genome editing, the two most promising techniques, were subjected to the GMOs Directive by the European Court of Justice with a decision that came unexpectedly and has thrown the ball back into the field of politics.

The EU Council asked the Commission to present a study on NBTs and possibly also a legislative proposal to be examined by the EU Parliament by 30 April 2021. This “hot potato” is now on the table of the Commissioners for Agriculture and Health-Food Safety.

The development of novel foods regulation may represent an alleyway to open discussion, again, about whether NBTs’ legal status and regulation best meets national objectives, taking into account the latest

innovations and technologies differentiating them from traditional GMOs. The rules will now have to be adjusted.

GMOs are designed and developed for an intensive, single-crop production model and dependent on chemical herbicides and fertilizers. They have little chance in the EU for obtaining an authorization and a poor chance of achieving public acceptance.

On the contrary NBTs represent a huge opportunity for agriculture, with products able to keep up with the times in terms of consumer tastes, climate change, and production sustainability. And, differently from GMOs, forms of non-transgenic biotechnology like NBTs cannot be genetically traced and no labelling obligations are required. The resulting biotech foods model is closer to the U.S. approach negotiated under the proposed Transatlantic Trade and Investment Partnership (TTIP),

On the other hand, when there is a serious and manifest risk, appropriate precautionary measures proportionate to the risk must taken.

A more positive consideration of innovative mutagenesis techniques would be appropriate in the context of the application of EU Directive n. 2018/350.⁴ This Directive updated the environmental risk assessment requirements for GMOs intended for cultivation. This update was conducted in the light of new scientific and technological developments and based on EFSA guidelines⁵ suggesting a case-by-case evaluation and taking into account: (1) persistence of GMOs, (2) gene transfers, (3) interactions between GMOs and target and non-target organisms, (4) effects on human and animal health, and (5) the impact of specific cultivation, management, and harvesting techniques. They must obtain marketing authorization.

The European Court of Justice decided that there is no difference between GMO and mutagenesis, because mutagenesis methods alter the genetic material of an organism in a way that does not occur naturally.

the comprehensive trade deal negotiated in the recent past between the EU and the U.S.. And it is similar to the model adopted in the Comprehensive Economic and Trade Agreement (CETA), the free-trade agreement between Canada and the European Union. In a nutshell, in Europe, the food legal and cultural context and relevant cultivation are well-defined, with no prejudicial preclusion toward agri-food biotechnologies, but rather, strong caution and attention paid to future developments and associated risks. NBTs require specific regulations tailored to their real features and needs.

Conclusion

The legal and practical landscape of GMO regulation in the EU, exemplified with the latest jurisprudence on the legal concept of GMOs, suggests that the same strict GMO regulations will also apply to NBTs and other methods of mutagenesis. As clarified by the Court, this principle does not make it possible to block transgenic cultivation on the basis of a mere suspicion of harmfulness.

Without further regulatory actions involving separate approval procedures for some NBTs, or even adopting a shift from a process-based to products-based approach, the products of precise mutagenesis may be difficult to market in the EU. Changes in the law would require widespread political consensus, which is difficult to achieve given the controversial nature of this issue. In such a context, innovative technologies are neither available for EU breeders, nor is access to new varieties for farmers. Current situations may influence the choices of breeding methods for plant breeders not only because of the requirements of risk assessment and high costs, but also because of long needed granting authorization in the EU, but even more because there is no real market for GMO food in the EU. Moreover, compulsory labelling means that new varieties will probably be used in the EU primarily as feed, and EU dependency on foreign protein sources, mostly imported soybeans, will be maintained.

Climate change is there for all to see and also portends the need for more sustainable

production. NBTs represent an opportunity to provide farmers with safe and up-to-date tools, respecting the precautionary principle, environmental sustainability, free market access, reversibility, and the need to respond to consumer expectations.

Genome editing operates in a way similar to what happens in nature, but with greater precision and speed. The technique also has the advantage of being inexpensive. On the other hand, genome editing carries a potential to trigger genome modification other than the modifications originally desired, so that an evaluation of potential specific associated risks must be considered. In case of conventional mutagenesis, unintended modifications could be massive, whereas, for site-directed genome edition, they are restricted to the so-called “off-target.” Unintended effects are not necessarily synonymous with hazards, but due to NBTs novelty, the need for specific risk assessment and management is absolutely envisaged.⁶

In a scenario where the market and consumers are looking for tasty, nutrient, diversified, and cheap products, as well as the reduction of waste, fighting diseases, and drought, there is a risk for Europe to stop research and move back to the 20th century. Instead of promoting sustainable growth, the European agro-industry is losing competitiveness in a global market.

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1. Relevant study published by Pellegrino et al., *Impact of genetically engineered maize on agronomic, environmental and toxicological traits: a meta-analysis of 21 years of field data*, Nature, 2017.

2. EFSA Journal 2013;11(9):3371.

3. On the labelling debate on biotech food from a US perspective see Lara B.Wing, *Special labelling requirements for genetically engineered food: how sound are the analytical frameworks used by FDA and*

food producers?, in 54 Food & Drug Law Journal, 667, 1999.

US Congress passed the National Bioengineered Food Disclosure Standard in 2016, originally set to take effect by July 2018. But the United States Department of Agriculture (USDA) extended the implementation two years after a public comment period. On December 20, 2019 the USDA released the official law, effective from 1.1.2020, and require food companies to comply by January 1, 2022.

In EU labelling provisions are based on detection and quantification of authorized GMO. On the contrary, it is not easy to quantify the presence of plant material developed through NBTs. For an EU perspective see Austrian Agency for Health and Food Safety, *Use of Novel Techniques in Plant Breeding and Practical Consequences Concerning Detection, Traceability, Labelling, and Risk Assessment*, AgBioForum, 17(2): 183-190, 2014.

4. Amending EU Directive n. 2001/18, entered into force on 29.3.2018 and effective in Italy starting from 22.10.2019.

5. EFSA Journal 2010,8(11):1879.

6. See in this respect Gao C (2018) The future of CRISPR technologies in agriculture. Nat Rev Mol Cell Biol 19:275–276.

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5 Things you Need to Know When Posting Employees to the Heart of Europe

I Kato AERTS

La Belgique est le pays d'accueil de nombreux travailleurs détachés. Il s'agit de travailleurs qui sont recrutés ou travaillent habituellement dans leur pays d'origine et qui sont détachés temporairement pour accomplir un projet pour une filiale / un client en Belgique, tout en restant employés par leur employeur étranger.

Le détachement de travailleurs nécessite une bonne préparation. Certaines obligations doivent être remplies avant le départ. Ces obligations peuvent être résumées en cinq points que vous devez connaître lorsque vous détachez des travailleurs en Belgique.

Global mobility is increasing in popularity. Belgium, also known as the heart of Europe, is the host country of an ever-growing number of posted employees. Posted employees are employees who have been hired in their home country or habitually work there, and who are temporarily seconded, or assigned, to complete a project at an affiliate's or client's site in Belgium while remaining under employment with their employer in the home country.

A few examples are:

- A United States citizen, employed by a company in New York that is part of an international group, who is posted to manage the company's Belgian branch in Brussels for two years.
- A group of IT specialists, employed throughout Europe, posted to complete an assignment of six months at a client's site in Flanders.

Being exempt from obtaining a visa for short travels to Belgium in the first example, or making use of the right to free movement in the second, might lead to the illusion that these secondments can happen from one day to the next. A few obligations and formalities must, however, be kept in mind and dealt with prior to departure. These may vary from obtaining necessary work permits to addressing tax

liabilities and can be summarized in "5 Things You Need to Know When Posting Employees to the Heart of Europe."

I. Is the Employee Allowed to Reside and Work on Belgian Territory?

Third-country nationals who wish to reside and work in Belgium generally need a permit to do so. This protects the Belgian labor market. Several categories, such as EU nationals¹, are exempt from this obligation. Moreover, there are different ways to obtain the required permits, depending on the situation. A distinction must be made between the work permit, the single permit, the European blue card, and the ICT permit.

- Secondly, the employer can only apply for a work permit if the employee is still abroad. This is to prevent foreigners from coming to Belgium to look for work while already here. Again, exceptions exist for highly educated personnel, executives, long-term residents who come to exercise a profession during a second residence in Belgium, etc.
- Lastly, the employee's monthly salary must enable that individual to provide for oneself and if applicable, their family. For the year 2020, the employee must therefore earn at least an average guaranteed minimum income of €1.593,81 gross per month.

Along with the application, the current employment contract and other pertinent

Do note that in case an employee is temporarily posted to another country, the country where the work is habitually carried out will not be deemed to have changed.

◆ Work Permit

Third-country nationals who will live and work in Belgium for a maximum of 90 days need a work permit ("type B"), while their employer is required to have an authorization to employ a foreign national. Usually, it is the employer who applies for both documents prior to the employee travelling to Belgium.

In order to qualify for a work permit, several conditions must be met:

- Firstly, a labor market survey should be carried out. In principle, a foreign worker is only allowed to work in Belgium if a labor market test indicates that no suitable candidate can be found on the Belgian or European Economic Area (EEA) labor market within a reasonable term. Specific categories of foreign nationals are exempt from this obligation, such as those who are highly educated personnel, executives, etc.

documents need to be filed. Depending on the category in which the work permit is sought, specific documentary proof, such as a copy of a college degree, may be required as well.

The entire process takes about two to six weeks, with a maximum of four months.

The work permit is only valid, specifically, for one employer only. As a result, the employee does not have the right to work for any other employer in Belgium. In addition to the above, a residence permit may be required, too.

◆ Single Permit

As from January 1, 2019, the single permit is required for third-country nationals who will live and work in Belgium for a period beyond 90 days. Although the conditions for obtaining a single permit are more or less similar to those for obtaining a work permit, the benefit of obtaining a single permit

includes the grant of permission to both reside and to work in Belgium. The single permit is valid for three years and is also renewable. Just like the work permit, the single permit is only valid for one specific employer.

◆ **European Blue Card**

Highly skilled employees, or better yet, their employers, could also choose to obtain the European blue card, a simplified system introduced by the EU to attract highly qualified third-country nationals. As is the case for the single permit, the blue card allows an employee to both reside and work on Belgian territory.

Contrary to the single permit and work permit, however, the application will not be subject to any labor market survey. At the same time, a few other conditions need to be met. In 2020, the employee must earn a minimum salary of €55,431 gross per year and must have completed a higher education, resulting in at least a bachelor degree.

The process consists of two steps. Firstly, the employer needs to apply for a provisional work permit prior to the employee travelling to Belgium, unless the highly skilled employee is already legally residing in Belgium. The Department of Economic Migration will grant the permit within 30 working days. Secondly, the employee must submit an application for the blue card, which will then be granted within 90 days.

Again, a number of documents, such as a valid passport or equivalent travel document, the employment contract, and a copy of a degree of higher education, need to accompany the application.

Once granted, the blue card is valid for a period of 13 months and is renewable for another 13 months. Upon a second renewal, the administration can grant the blue card for a period of three years, which will automatically qualify as an independent right of the employee to work for every employer in Belgium (contrary to the work permit and the single permit).

◆ **ICT-Directive**

The European Intra Corporate Transfers Directive allows third-country nationals

who work as managers, specialists, or trainees to be posted by their employer to an entity within the same financial-economic group. The Directive enables third-country nationals who have obtained said permit in one member-state to reside and work in another member-state without any additional visa requirements. The Directive has not yet been implemented into Belgian legislation. Until this law is passed, the requirements stated above still apply.

2. Can the Employment Relationship Remain Governed by the Law of the Employee's Home Country?

Following the European "Rome I" Regulation for cross border employment within the European Union and the Belgian International Private Law Code for cross border employment between Belgium and a country outside the European Union, the parties are, in principle, free to decide which law governs their employment relationship.

This choice, however, may not deprive the employee from the protection offered by the "objectively applicable employment law."

The objectively applicable employment law is:

- the law of the country in / from which the employee habitually carries out their work; or,
- if this cannot be determined, for instance for employees habitually carrying out their work in several countries at the same time, the law of the country where the place of business through which the employee was engaged is situated; or,
- where it appears from circumstances as a whole, the law of the country to which the employment is more closely connected.

Do note that in case an employee is temporarily posted to another country, the country where the work is habitually carried out will not be deemed to have changed. Therefore, it is indeed possible for the employment relationship to remain governed by the law of the employee's home country during the temporary assignment in Belgium.

Some safeguards were adopted when Belgium implemented the European Directive 96/71/EG for posted workers. This Directive

deviates from the Rome I Regulation by stipulating and requiring that the so-called "mandatory provisions" of the host member states must be applied to posted workers, irrespective of the legislation governing the employment relationship. The rationale behind this Directive was to allow member-states to protect their internal market and to prevent the side effects of the free market, such as social dumping and unfair competition. Social dumping typically manifests when employers choose to establish in EU member-states where social security charges are low and/or where employment terms and conditions are less stringent, only to assign the workers hired by that establishment to other member-states with higher social security charges and more stringent employment conditions to gain an unfair competitive advantage vis-à-vis employers established in that member-state.

To some extent, European member-states are free to determine which provisions are to be considered mandatory within their jurisdiction. In Belgium, all criminally sanctioned employment law provisions are deemed mandatory since the adoption of the Act of March 5, 2002. As a consequence, nearly all provisions of Belgian employment law, including provisions on minimum wages, working time restrictions, and vacation days, apply to posted employees, with the exception of, for instance, the Belgian Employment Contracts Act of July 3, 1978. Amongst others, this Act includes the rules regarding dismissal.

On June 28, 2018, the EU adopted a new Posted Workers Directive (no. 2018/957) which is to be implemented by the Belgian legislation by July 30, 2020 at the latest. Since Belgium had already implemented the previous Directive very broadly, the impact of this new Directive for Belgium in particular is expected to be rather limited, except for the introduction of a maximum posting period of 12 months that may be extended to an additional six month period.

Generally, it is recommended that the employee signs an assignment letter clearly stipulating and selecting the choice of law, while at the same time covering and addressing the mandatory provisions of Belgian law so that compliance is ensured.

Said assignment letter might also include other relevant clauses, such as: (1) clauses to prevent double use of benefits under the home and host country legislation, (2) tax equalization or tax protection clauses, (3) clauses on termination of the assignment, (4) mandatory return clauses, (5) clauses on reimbursement of costs, or (6) specific expatriate benefits. Do note that language regulations in Belgium are quite strict, requiring documents between the employer and employee to be drafted in Dutch or French, depending on the location in Belgium where the employee will be posted, and this mostly under penalty of nullity.

3. Where Should the Employer Pay the Employee's Social Security Contributions?

The applicable Social Security law varies depending on whether or not the home country of the employee is an EU member-state.

Within the EU, the Social Security Regulation (No. 883/2004) and the Implementation Regulation (No. 87/2009) coordinate but does not harmonize the member-states' Social Security laws to avoid conflicts of law. Said conflicts could be positive, resulting in two Social Security laws being applicable at the same time, or negative, resulting in the absence of Social Security coverage altogether. As a consequence, each member-state is free to decide on the content of their own Social Security laws, which will not be impacted by European law as such. At the same time, it ensures that every EU citizen is – by operation of law – socially insured in only one member-state. For each scenario involving intra-EU cross border employment, the Regulation contains a set of rules designating the applicable Social Security law. In the event of posting, the Regulation states that the applicable Social Security law remains the law of the home country, provided that:

- the expected duration of the posting does not exceed 24 months;
- the posted employee is not replacing another posted employee;
- the employer has substantial activities in the home state; and
- the posted employee was subject to the Social Security law of the sending state prior to the start of the posting.

By way of confirmation that the above conditions are met, the employer must obtain a so-called A1 form from the competent Social Security Administration, which is the European equivalent of a certificate of coverage. The completed A1 form principally confirms the concerned employee is indeed subject to the Social Security law of a specific member-state and said form has binding power vis-à-vis other member-states. Therefore, if doubts arise on the application of the rules or the validity of an A1 form, the host member-state cannot ignore the existence of the A1 and claim Social Security contributions from the employer directly. Instead, it must initiate a specific dialogue and reconciliation procedure with the Social Security Administration of the other member-state.

Outside of the EU, the applicable Social Security laws in cross border employment situations is determined on the basis of bilateral Social Security treaties between the home and host countries directly. Belgium is a party to 25 bilateral treaties designating the applicable laws in case of temporary assignments abroad. In the absence of a bilateral treaty, the posted employee will either not be insured at all, will be insured in one but not both states, or will be insured in both the home and host country. As a protective measure, Belgium's national Social Security laws

Switzerland. Nationals of other countries must be employed by the Belgian State or a company having its registered office in Belgium.

4. Where is the Employee Liable to Pay Taxes?

To avoid unfair double taxation, Belgium entered into a number of double taxation treaties to determine which country is competent to levy taxes in any given cross border employment situation. Most of these double taxation treaties follow the Organisation for Economic Co-operation and Development (OECD) model, stipulating and stating in Article 15 that the employee is liable to pay taxes where the employee works. On the contrary, the state of residence remains competent to levy taxes if:

- a) The recipient is present in the other state for a period or periods not exceeding in the aggregate of 183 days in any 12-month period commencing or ending in the fiscal year concerned, and
- b) The remuneration is paid by, or on behalf of, an employer who is not a resident of the other state, and
- c) The remuneration is not borne by a permanent establishment of the employer in the other state.

Outside of the EU, the applicable Social Security laws in cross border employment situations is determined on the basis of bilateral Social Security treaties between the home and host countries directly.

provide specific rules allowing employees to remain socially insured in Belgium when posted to a country with which Belgium did not conclude a bilateral Social Security treaty for a maximum of six months, which could potentially be extended another six months. The employee could also choose to affiliate with the so-called Overseas Social Security Administration, guaranteeing some sort of minimal Social Security coverage. The Overseas Social Security offers the possibility of building up social security rights in Belgium while remaining professionally active outside the European Economic Area or Switzerland. The overseas Social Security is open to nationals of a Member State of the European Economic Area or of

Specifically, with regard to foreign executives, Belgian tax authorities may grant the so-called special tax status for expats. This regime applies to non-residents with a foreign nationality with a particular knowledge and responsibility, who temporarily perform a job on Belgian territory within a foreign company or a company under foreign control.

The benefits of this status are twofold:

- Firstly, the foreign executives retain the status of non-resident. As a result, the executives do not have to declare their worldwide income in Belgium and are only subject to taxes on income for work performed in Belgium, as well as other income of Belgian origin.

- Secondly, the executives may benefit from a lump sum tax-free cost allowance of €11,250 per year for specific jobs, which can even be increased to €29,750 per year. This is a lump-sum tax free amount that is also exempt from a Social Security contributions.

This special tax status for expats has no legal basis, but it is based on a circular from the Belgian tax authorities. As a consequence, this is no enforceable right and it is granted on a discretionary basis by the tax authorities. The status should be applied for within six months of arrival in Belgium and, once granted, can be enjoyed from the first day of the month following the start of employment in Belgium.

5. Which Formal Steps Should I Take to Adequately Prepare for the Secondment?

Planning the secondment well in advance is key. Most steps are fairly easy to comply with and most obstacles, if any, are not insurmountable. But... the process might take some time.

When posting employees to Belgium, it is recommended that the employer proceed as follows from a strictly legal point of view:

Prior to departure of the employee to Belgium, the employer should make sure:

- The required permits to work and/or stay in Belgium are obtained.
- An AI form or equivalent certificate of coverage is obtained. In any event, it should be closely assessed which Social Security law will apply during the secondment.
- The employee signs a well-drafted assignment letter and assess early which mandatory provisions under Belgian law might cause the employment terms and conditions to be modified during the period of posting.
- A notification commonly known as the Limosa is complete prior to the start of an employee's work in Belgium. Any employee who comes to work on Belgian territory without complying with Belgian Social Security requirements and who comes to work in Belgium on a temporary and/or part-time basis must complete an online notification mentioning at least the

dates and location of the work in Belgium. There are, however, multiple categories of employees who are exempt from this obligation.

Upon arrival in Belgium, the employer should make sure:

- The employee files a request to be registered in the Belgian foreigners' register at the municipality where the employee resides in Belgium.
- To apply for the special tax status for expats in due time.
- To apply for any renewals of work and/or residency permits well in advance of the expiration date.
- To draft certain mandatory social documents such as work regulations, which is similar to an employee handbook, if the period of posting exceeds a period of 12 months.

Conclusion

Employers and employees alike must be careful to satisfy legal requirements, including those pertaining to permits, taxes, and Social Security, when cross border employment is contemplated. Planning ahead will enable everyone to have a positive outcome.

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1. Since February 1, 2020, the UK is no longer part of the EU. The withdrawal agreement concluded between the UK and the EU establishes a transition period until at least December 31, 2020, renewable for one or two years. During this period, European Legislation will continue to apply to the UK. As a result, British nationals continue to have the same rights as citizens of the EU in terms of residence, employment and social security rights for the time being.

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Las empresas B

■ José PAJARES ECHEVERRÍA

En un momento en que cada día es más actual el compromiso social y medioambiental no cabe ya ninguna duda de que los procesos productivos de las empresas han de supeditar el rendimiento económico al perjuicio medioambiental que seguramente acabará siendo, en su propia dicción, fundamental. Esto, y no otra cosa, es lo que propicia el nacimiento, y la reputación, de las empresas B (por cierto, muy desconocidas en España).

De esta manera, si es el lucro el objetivo central de las empresas mercantiles toman protagonismo otro tipo de empresas que no lo tienen como referente exclusivo y de las que aún se habla poco pero que serán vitales en breve –si no lo son ya-, cuales son las sociedades que se conocen como “empresas B”. En efecto, como su propio nombre describe – según explicaré – son empresas que no se centran en el beneficio económico al uso, sino en el beneficio medioambiental y social.

El criterio economicista de toda empresa va pues dejando paso a un criterio social que junto, claro está, con el ánimo de lucro persigue el éxito del proyecto con un objetivo mixto: el ánimo de lucro junto con la protección medioambiental y social.

Téngase en cuenta que muchos estudios comparativos ponen de manifiesto que existe una correlación entre la riqueza de un país, medida por su renta per cápita, y sus inversiones en Investigación, Desarrollo e Innovación (I+D+i), hasta el punto de que se ha llegado a afirmar que los países más desarrollados no invierten en I+D+i porque son ricos sino que son ricos porque invierten o han invertido en ese campo, de modo que el modelo de empresa termina basado en la generación de conocimiento y a través del mismo – máxime ahora con la revolución tecnológica – buscan el recurso económico pero también el humano.

En efecto, cualquier modelo económico que no se base en el conocimiento fracasará a medio o largo plazo. Y aún más, un sistema

público sostenido por los impuestos que no prime ese conocimiento y facilite su acceso a la empresa privada no estará desarrollando adecuadamente su función.

Parece evidente entonces que al presente debieran desarrollarse numerosas empresas mixtas con ese doble objetivo. Y ello por cuanto que además hay que tener en cuenta un dato objetivo esencial: la desconfianza general en la empresa ha alcanzado niveles altísimos ya que casi un 75% de la población no confía en la empresa, por lo que cada vez más se buscan empresas con diferentes valores, que adopten un fin social por encima de sus propios beneficios.

financiación ética y la creación de valores. Es significativo que la RSC hoy se reconozca y premie en el mundo empresarial y se ignore – cuanto menos por algún legislador – las empresas B cuando su objetivo es mucho más intenso y el resultado mucho mayor que aquellos.

Hasta ahora lo que es manifiesto en la realidad sin embargo no lo es en el Derecho porque, como ya he anticipado, no aparecen regulaciones de las mismas en muchos países, entre ellos en España. Es decir, concurriendo en el mercado esa idea y habiendo ya mercantiles con ese perfil social, no pueden actuar bajo un cobijo

[...] Cualquier modelo económico que no se base en el conocimiento fracasará a medio o largo plazo.

Pues bien, y salvo excepciones, no hay muchas estructuras de este tipo porque no hay un reconocimiento normativo de las mismas, de las empresas B. En efecto, no hay posibilidad jurídica de crear una estructura societaria que combine el ánimo de lucro y el beneficio social y medioambiental: o se trata de su sociedad mercantil con ánimo de lucro o de una sociedad civil sin esa finalidad económica; nada más.

Es pues indiscutible que en la sociedad actual debe procurarse esa nueva estructura ante la actual sensibilidad del cambio climático, y que ello haya de hacerse a través de las empresas B que como dice Raúl Aníbal Etcheverry¹, facilita “un nuevo ADN empresarial” que a través del propio mercado persigue dar soluciones estructurales a los desequilibrios sociales y ambientales, y no sólo su beneficio económico.

Se trata de ir un poco más lejos de la responsabilidad social corporativa (RSC) actuando ante problemas sociales y medioambientales, valorando también una

normativo sino bajo un sistema privado de reconocimiento, lo que no parece operativo ni actual.

Por consiguiente, el primer paso necesario para implantar y facilitar esta necesidad será desarrollar un modelo normativo de empresa B que ya comenzó en 2007, cómo no, en EE.UU.

Jay Coen Gilbert, Bart Houlahan y Andrew Kasoy son tres emprendedores estadounidenses que, tras ver como la empresa que habían fundado prefirió dejar a un lado el compromiso social para satisfacer las demandas económicas de sus accionistas, decidieron fundar ‘B Lab’ en 2006, donde se “cocinaron” los fundamentos que hoy caracterizan a las empresas B.

No contando con regulación general habrá que considerar cómo puede, mientras tanto, crearse y desarrollarse su actividad, pero fundamentalmente cómo podría realmente hacerse cuando los objetos sociales y medioambientales no siempre son accesibles sin ayuda y colaboración pública.

Pues bien, y por ahora, las empresas B son certificadas por su transparencia, dinamismo, independencia y credibilidad por un organismo privado que una vez las reconoce como tales permite:

- a. Demostrar estándares rigurosos de impacto social y ambiental positivos.
- b. Distribuir legalmente, entre sus accionistas, la responsabilidad empresarial al considerar los intereses de la comunidad, los trabajadores y el medio ambiente en la toma de decisiones.
- c. Co-construir una voz colectiva al pertenecer a la comunidad de Empresas B reconocidas bajo una única marca.

¿Pero qué caracteriza a las empresas B?, entre otras:

1.- El lucro debe consistir en generar un beneficio para la sociedad, y la obtención de rentabilidad económica será una consecuencia más resultante de que ese modelo de negocio sea viable y compatible.

2.- El deber de auditar y facilitar toda la información relativa a su contabilidad a ojos de consumidores, proveedores e inversores las hacen transparente.

3.- El margen entre el salario más alto y el más bajo de la empresa debe ser equilibrado y coherente con los valores que transmite, sin que ningún salario puede ser más de 10 veces superior a cualquier otro dentro de la organización.

4.- Los empleados deben poder optar a una oferta formativa en temas profesionales y valores como sostenibilidad, impacto social, etc. promovido desde dentro de la misma empresa.

5.- La empresa debe establecer una política ambiental en sus estatutos que cumpla requisitos básicos como el reciclaje, el diseño y el uso de productos no contaminantes y desarrollar su actividad en un entorno lo más limpio posible para sus trabajadores.

Los beneficios de las empresas B, podrían, por ahora, identificarse como las siguientes:

1. Diferenciación y liderazgo a través del compromiso social y ambiental.
2. Excelencia para la mejora continua del desempeño en la gestión empresarial.

3. Formar parte de una comunidad de líderes empresariales en sostenibilidad.

4. Atracción de talento.

5. Atracción de inversores y capital.

6. Benchmarking con empresas afines basado en información fiable.

7. Visibilidad y difusión en medios de comunicación.

8. Descuentos en servicios y productos de empresas B Corp.

Será por todo esto por lo que la comunidad de empresas B Corps forma un movimiento global de más de 2.500 compañías en 50 países y 130 sectores con un único fin: que un día todas las compañías compitan por ser las mejores para el mundo, y, como resultado, la sociedad camine hacia estadios de bienestar compartido y superior.

Habrà que aludir, aunque no sea el objeto fundamental de esta reflexión, el proceso de obtención de esa certificación, ya que tendrán que superar un exhaustivo proceso de autoevaluación en el que deberán obtener una puntuación mínima de 80 sobre 200 y llevar al menos un año funcionando. Superada la prueba, y otros trámites en los que firmará un documento con sus derechos y obligaciones, se certifica el ingreso en la comunidad de empresas B.

Es posible que la compañía tenga que realizar cambios en sus estatutos para acoplarse al modelo de negocio ético y sostenible de manera que en ellos tenga en consideración a los trabajadores, la comunidad y el medio ambiente para que sus derechos sean valorados de manera vinculante en la toma de decisiones.

Siendo una necesidad y contando con el seguro interés de la sociedad, será fundamental contar con un marco regulatorio adecuado, que vaya en directo beneficio a la sociedad a través de una comunidad de Empresas B, con el objetivo de diferenciarlas, promoverlas y resguardarlas estructuralmente².

Hasta la fecha se conocen únicamente cuatro regulaciones: el Benefit Corporation o Low-Profit Liability Company en EE.UU, Community Interest Company en Reino Unido y Impresa Sociale en Italia.

En España, por el contrario, no consta regulación sobre las empresas B.

Únicamente consta la propuesta de Ley de apoyo a las actividades de los emprendedores sociales presentada en 2013 por el Grupo Parlamentario Catalán, publicada en el Boletín Oficial de las Cortes Generales, Congreso de los Diputados, el 18 de octubre de 2013, donde ya refiere en su exposición de motivos – que por su importancia y claridad tomaré textualmente – que en varios países han surgido nuevas formas jurídicas para llevar a cabo los proyectos de los emprendedores sociales.

La actual normativa española no contempla las nuevas peculiaridades de las empresas sociales, y eso dificulta el acceso a la financiación privada, y dificulta su visibilidad, credibilidad y reconocimiento en el mercado por la inexistencia de un marco jurídico más amplio que incorpore nuevas modalidades como la sociedad de responsabilidad limitada de interés general para facilitar el desarrollo de sus actividades sociales así como su financiación.

Serán empresas que tendrán como objeto social desarrollar una actividad económica con el objetivo de reducir o transformar una necesidad social concreta; proporcionar productos y servicios al alcance de individuos o colectivos vulnerables; promover oportunidades económicas para individuos colectivos en riesgo de exclusión social, preservar y mejorar el medio ambiente y colaborar económicamente o de otro tipo con las entidades contempladas en el artículo 5 de la Ley 5/2011, de 29 de marzo, de Economía Social, que tengan domicilio fiscal en el Estado español. Todo ello, mediante el compromiso estatutario de crear un impacto de interés general en la sociedad. Este tipo de emprendimiento se diferenciará respecto a otros tipos de emprendimiento en que existirá limitación en el reparto de dividendos, de manera en que cada ejercicio social tan solo podrá repartirse un 30% del beneficio obtenido, obligándose a reinvertir el 70%.

Con el fin de proteger a los inversores minoritarios y evitar que la figura de la Sociedad Limitada de Interés General se utilice incorrectamente, cualquier modificación estatutaria que suponga la pérdida de los rasgos característicos de las S.L.I.G deberá acordarse a través, de una mayoría reforzada del 80% de los votos del capital social.

En aras de impulsar la transparencia de dichas sociedades, formará parte del consejo de administración, por lo menos, un consejero totalmente independiente, tanto del equipo de gestión como de los socios. Y además, el Consejo de Administración deberá elaborar un informe anual que se pondrá a disposición de todos los socios y de cualquier tercero que lo solicite.

En el título II, que se divide en dos capítulos, tiene como objeto establecer incentivos fiscales para las sociedades limitadas de interés general e incentivos fiscales destinados a los llamados inversores de proximidad, con el fin de que inviertan en empresas sociales.

Tributan por las actividades económicas que realicen a un tipo reducido, del 18% o del 22%, dependiendo de la base imponible que obtengan.

En el capítulo II se regulan los incentivos fiscales para el inversor de proximidad o Business Angel en las diferentes modalidades de empresa social. En primer lugar se incorpora una deducción para el inversor de proximidad del 30% por el capital aportado o por el préstamo participativo suscrito, sea en el Impuesto sobre la Renta de las Personas Físicas, sea en el Impuesto sobre Sociedades. Esta deducción tendrá un límite máximo en la base sobre la que aplicar la deducción de 200.000 euros anuales, siempre que dicho capital se mantenga en la empresa un mínimo de cuatro años. En segundo lugar, también se establece que los inversores de proximidad tendrán derecho a aplicarse una reducción de 1.500 euros anuales por los dividendos e intereses percibidos. Y, en tercer lugar, se establece que, en el caso de que exista transmisión y existieran pérdidas, estas podrán deducirse en su totalidad.

“La certificación B Corp viene a ser como el sello de comercio justo, pero para la empresa en su conjunto y no para un producto concreto. B Corp valora la totalidad de la empresa: que esté bien gestionada, que tenga un impacto en la sociedad y que sea una buena empresa”, se explica por un empresario.

La primera Memoria Anual de B Corp. en España también destaca que el movimiento cuenta en nuestro país con casi 50 compañías

de 12 sectores diferentes que han obtenido el certificado. Danone, Universidad Europea, Holaluz, Triodos Bank, Veritas, Change.org o Corresponsables son algunas de estas compañías que lideran el cambio. “Creemos en el poder de las personas y de cómo cada vez que escogemos lo que comemos y bebemos influimos en el mundo que queremos. Por ello somos conscientes de que, hoy más que nunca, las empresas debemos actuar como agentes de cambio y asumir la responsabilidad de que podemos dibujar un futuro mejor con nuestro compromiso y buenas prácticas”, señala con acierto Danone Iberia.

Ejemplo de alguna empresa española reconocida como empresa B son las siguientes:

Superada la prueba, y otros trámites en los que firmará un documento con sus derechos y obligaciones, se certifica el ingreso en la comunidad de empresas B.

Wopi, que es un proyecto web y aplicación móvil que permite a los deportistas (profesionales, habituales o esporádicos) convertir en donaciones a proyectos sociales sus kilómetros recorridos, ya sean haciendo running, natación, senderismo, caminata... todos los metros cuentan. Nació en mayo de 2014 y suma ya más de 40.000 usuarios registrados que han recorrido más de ocho millones de kilómetros para ayudar a 65 proyectos sociales, hasta la fecha.

1000^{friends} es una B Corp que se dedica, precisamente, a diseñar e implementar estrategias de sostenibilidad y responsabilidad social en otras empresas. Se trata de una agencia de marketing y comunicación que además de crear oportunidades de negocio para terceros a través de la integración de las RSC en toda la compañía, realiza campañas publicitarias con su socio, La casa de Carlota.

La casa de Carlota es un estudio de diseño que juega con las distintas capacidades de sus empleados (personas con síndrome de Down, autismo y otras discapacidades intelectuales y estudiantes de diseño) para crear campañas publicitarias de lo más creativas. Un trabajo que ya está siendo reconocido por clientes y certámenes publicitarios.

Cuento de Luz es una editorial de narrativa infantil que puede presumir de ser la primera en Europa y tercera en todo el mundo de obtener la certificación B Corp.

Hasta qué extremo es importante esta regulación que incluso la Mutuality General de la Abogacía Española ha invertido en una empresa B, en concreto el PENSUM, lo que puede dar una idea que si los abogados así lo hacen qué no harán por regularlos.

Me resta recoger una reflexión final relativa al premio Nobel de Economía 2019 obtenido por tres científicos de diferentes países pues lo ha sido por “un enfoque experimental para aliviar la pobreza global”, concretándose en aspectos como por ejemplo métodos oficiales para mejorar la

salud infantil o la educación, liderando ese cambio social incluido en la integración y el reconocimiento mundial de esta sin que ello conlleve – siendo el de Economía – un beneficio económico.

Entonces, si la economía mundial discurre por estos derroteros ¿qué espera España para procurarse las medidas que lo regule y los empresarios para poner todos sus esfuerzos en ello?

José PAJARES ECHEVERRÍA

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1. La empresa comercial frente a la comunidad: Empresas B, de Raúl Aníbal Etcheverry, Profesor de la Universidad de Buenos Aires (Argentina).

2. La empresa comercial frente a la comunidad: Empresas B, de Raúl Aníbal Etcheverry, Profesor de la Universidad de Buenos Aires (Argentina).



Les nouveaux régimes fiscaux incitatifs pour les expatriés HNWIs et retraités résidents en Italie

■ Anne-Manuelle GAILLET & Luca VALDAMERI

This article describes the new Italian attractive tax regimes available for Expats, HNWIs and pensioners moving to Italy such as:

1. The “Impatriati” regime (Expats tax breaks), for “impatriates” which offers a beneficial tax treatment to Italian source employment or self-employment income limiting, under certain conditions, to 30% (10% in certain regions) the taxable income in Italy for individuals transferring their residence in Italy.

2. The “New Resident” regime (Flat tax) is addressed to High Net Worth Individuals (HNWIs) who transfer to Italy after having been tax residents out of Italy for tax purposes for 9 out of 10 years. They can opt for the regime and, for 15 years, pay an annual flat tax of € 100,000, that substitutes any tax (income and wealth tax) on non-Italian sourced income and assets (both financial and income from a working activity), even if remitted to Italy; conversely, Italian-sourced income is taxable under ordinary rules.

3. The “Retirees” regime (Pensioners tax breaks), is addressed to pensioners and retired individuals who have not been tax residents in Italy for the last 5 years and relocate to a southern Region of Italy; they may elect to pay a flat 7% tax rate on their non-Italian sourced income for a maximum of 9 tax periods.

Au cours des dernières années, la loi italienne a introduit des régimes spéciaux et avantages fiscaux, pour attirer en Italie des personnes physiques résidant à l'étranger,

ces régimes se révélant très compétitifs par rapport aux régimes comparables institués par d'autres États européens (par ex. Royaume-Uni, Espagne, Benelux).

A ce jour, les avantages pour les particuliers qui transfèrent leur résidence en Italie sont :

1. le régime “Impatriés” (*Expat tax breaks*), qui a été introduit en 2016 et qui, depuis, a été rendu de plus en plus attractif ;
2. le régime “Nouveau Résident” (*Flat tax*), qui est un régime fiscal spécifique destiné plutôt aux grandes fortunes, soit les HNWIs (*High Net Worth Individuals*) ;
3. le régime “Retraités” (*Pensioners tax breaks*), qui est un régime fiscal spécial pour les contribuables retraités.

Ces régimes sont liés à l'acquisition de la résidence fiscale italienne, qui est acquise dès lors que l'une des conditions ci-après se trouve remplie sur le territoire italien pendant une durée supérieure à 183 jours au cours d'une année fiscale :

- Inscription au registre de la population résidente d'une commune (*Anagrafe*), ou
- Présence physique sur le territoire, ou
- Établissement en Italie du centre de ses intérêts vitaux.

Le droit de l'immigration italien a été également modifié pour faciliter les procédures d'immigration pour les ressortissants de nationalité non européenne qui sont intéressés à bénéficier des régimes fiscaux spéciaux visés ci-dessus.

4. Le régime “Impatriés” 2020: avantages pour les travailleurs expatriés

Le régime fiscal spécial pour les « impatriés » (soit les travailleurs expatriés transférant leur résidence en Italie pour y travailler) offre une imposition fiscale avantageuse en ce qui concerne les revenus italiens dérivant de l'activité de salarié ou de travailleur indépendant.

Le régime est une combinaison du célèbre 30% *ruling* néerlandais, du régime « impatrié » français et du régime espagnol, mais, contrairement à ces autres régimes, le régime italien présente des caractéristiques supplémentaires intéressantes (par ex. : il est applicable également aux travailleurs indépendants).

A noter que pour ces derniers, comme pour les entrepreneurs, l'avantage fiscal découlant de l'application du régime est plafonné à 200.000 Euros sur une période de trois années d'imposition.

Comment le régime “Impatriés” fonctionne-t-il ?

Le régime prévoit que, sous réserve que soient remplies certaines conditions, l'assiette imposable des revenus italiens dérivant de l'activité de salarié ou de travailleur indépendant exercée par un particulier transférant sa résidence fiscale en Italie, peut être limitée selon le cas à 30% ou même 10%.

Ainsi, le taux d'imposition maximum pour l'impôt sur les revenus du travail de source



italienne se trouve réduit à environ 13%, mais il peut être abattu jusqu'à 4,5% en fonction du lieu de résidence en Italie.

Le régime est applicable pendant cinq années fiscales mais, dans certaines conditions, il peut être appliqué jusqu'à 10 années fiscales. Si le bénéficiaire de ce régime ne maintient pas sa résidence en Italie au cours des deux premières années au moins, ou bien n'exerce pas une activité substantielle en Italie, il perd la possibilité de se prévaloir de ce régime.

Comment un particulier peut-il demander l'application du régime "Impatrié" ?

L'exonération est effectuée directement par l'employeur qui, aux fins du calcul du prélèvement à la source de l'impôt sur le revenu, appliquera la base imposable réduite. La demande doit être formulée auprès de l'employeur en justifiant du bénéfice du régime.

En alternative, le régime pourra être choisi dans le cadre de la déclaration de revenus individuelle, notamment pour les travailleurs non-salariés.

Qui peut se prévaloir de ce régime ?

Ce régime s'applique aux particuliers qui n'ont pas été résidents en Italie pendant au moins deux périodes d'imposition avant le transfert de leur résidence en Italie.

Comment bénéficier de la période et du taux maximal d'exonération ?

Le régime est applicable pendant cinq périodes d'imposition pour tous les particuliers, avec une base imposable réduite à 30% du revenu imposable (portant à un taux d'imposition d'environ 13%).

Si le particulier transfère sa résidence dans une région du sud de l'Italie (soit Abruzzes, Molise, Campanie, Pouilles, Calabre, Sicile, Basilicate) ou en Sardaigne, la base imposable est réduite à 10% du revenu (portant à un taux d'imposition d'environ 4,5%).

De plus, les avantages supplémentaires suivants pourront s'appliquer :

- si le contribuable a au moins un enfant, le bénéfice du régime est étendu pour une période supplémentaire de 5 ans, avec une base imposable réduite à 50% ;

Ou bien

- si le contribuable (ou son conjoint, partenaire ou enfant) acquiert la propriété d'un bien immobilier résidentiel, le bénéfice du régime est étendu pendant cinq années supplémentaires, avec une base imposable réduite à 50% ;

Ou encore :

- si le contribuable a au moins trois enfants, le bénéfice du régime est étendu pour une période supplémentaire de 5 ans, avec une base imposable réduite à 10%.

Par exemple, un particulier qui a trois enfants et qui transfère sa résidence dans une Région du Sud de l'Italie pourra ne payer l'impôt que sur une base de 10% de ses revenus professionnels de source italienne pendant dix ans.

Règles pour les sportifs professionnels

Le régime « Impatriés » s'applique aux sportifs professionnels dans les limites suivantes :

- la durée est limitée à cinq périodes d'imposition ;
- la base imposable est de 50% et ne peut pas être réduite ;
- un impôt supplémentaire de 0,5% est dû sur les revenus bruts.

5. Le régime forfaitaire italien Flat tax pour les HNWIs

Le régime forfaitaire italien s'inspire du régime suisse « globaliste » et de celui des *non-dom* anglais, même si, contrairement au régime suisse, il n'empêche pas d'exercer une activité professionnelle ou salariée en Italie et si à la différence du régime britannique, tout paiement perçu en Italie n'est pas soumis à imposition.

En outre, l'Italie bénéficie d'un grand nombre de conventions fiscales (en comparaison à la Principauté de Monaco, autre localité privilégiée par les HNWIs) et son patrimoine culturel et artistique, sa qualité de vie, sa position stratégique et la libre circulation dans l'espace européen Schengen, font de l'Italie une destination idéale pour les HNWIs.

Comment le régime forfaitaire fonctionne-t-il ?

Le mécanisme est très simple :

- les nouveaux particuliers résidents fiscaux qui choisissent le régime payeront un impôt annuel forfaitaire de 100 000 Euros, qui substitue tous les impôts sur les revenus et le patrimoine **qui ne sont pas de source italienne** (tant financiers que découlant de revenus d'une activité salariée ou professionnelle), même s'ils sont perçus en Italie ;
- en revanche, les revenus de source italienne sont imposés selon les règles ordinaires italiennes.

Le bénéfice du régime a une durée limitée à 15 ans.

Néanmoins, une règle anti-évasion fiscale exclut de l'assiette de la Flat Tax les plus



values découlant de la vente de participations qualifiées détenues dans des sociétés étrangères, intervenant dans les cinq premières années de résidence en Italie, qui restent donc assujetties à l'imposition ordinaire.

Les HNWI qui maintiennent une activité d'entreprise (par ex. par le biais d'une *holding*) ne sont pas soumis aux règles CFC (règles de transparence du *Company Foreign Control*) ni aux règles du lieu de management.

Les HNWI peuvent également choisir d'exclure du régime forfaitaire les revenus ayant leur origine dans certains États déterminés (*cherry picking*), qui deviennent totalement assujettis à imposition en Italie, tout en bénéficiant des règles étrangères en matière de crédit d'impôt.

Qui peut se prévaloir de ce régime ?

Toute personne physique peut choisir d'appliquer ce régime si elle n'a pas été fiscalement résidente en Italie pendant 9 des 10 dernières années (bien évidemment, ce régime s'applique aussi aux particuliers qui n'ont jamais été résidents en Italie). Contrairement au Royaume-Uni ou à la Suisse, le régime s'applique aussi aux particuliers de nationalité italienne.

Qu'en est-il des membres de la famille ?

Les particuliers qui choisissent d'appliquer ce régime peuvent l'étendre, sur base volontaire, à certains ou à tous les membres

de la famille (la notion de membre de la famille est assez large): dans ce cas, un impôt forfaitaire supplémentaire s'élevant à 25.000 Euros sera dû par chaque membre supplémentaire de la famille.

Comment un particulier peut-il choisir le régime forfaitaire ?

Pour choisir ce régime, le particulier peut déposer une requête spécifique (*rescrit*) auprès de l'administration fiscale italienne, qui peut inclure également les membres de la famille. En alternative au *rescrit*, l'option en faveur du régime peut être indiquée dans la déclaration des revenus après le transfert de la résidence en Italie. Dès lorsque le *rescrit* peut être demandé avant le transfert de la résidence fiscale en Italie, cette modalité même si elle n'est pas obligatoire, est fortement recommandée afin de sécuriser le régime applicable et les biens qui y seront soumis. L'Administration fiscale adressera une réponse dans le délai de 120 jours.

Qu'en est-il des droits de succession et donations ?

Les droits de succession et de donation prévus par les règles fiscales italiennes ne sont pas applicables aux biens situés en dehors de l'Italie, d'où la possibilité de considérer une réorganisation patrimoniale tenant compte de l'ensemble des règles susceptibles de s'appliquer, y compris sur la base des conventions internationales le cas échéant applicables.

6. Régime "Retraités": avantages fiscaux pour les retraités - Comment ça marche ?

Les particuliers retraités qui transfèrent leur résidence dans certaines régions de l'Italie (soit Abruzzes, Molise, Campanie, Pouilles, Calabre, Sicile, Sardaigne, Basilicate) peuvent choisir de payer un impôt forfaitaire à un taux de 7% sur leurs revenus d'origine non italienne (par ex., pension étrangère, revenu financier, revenu dérivant d'une location, etc.), pendant au maximum 9 périodes d'imposition.

Comment un particulier peut-il choisir ce régime ?

L'option en faveur de ce régime doit être exercée dans le cadre de la déclaration de revenus.

Qui peut s'en prévaloir ?

Les personnes physiques qui peuvent s'en prévaloir sont les retraités qui :

- perçoivent une pension ou une annualité de la part d'une entité étrangère ;
- n'ont pas été fiscalement résidents en Italie pendant les 5 années précédant le transfert de leur résidence en Italie ;
- transfèrent leur résidence dans une commune d'une des Régions susvisées dont la population est inférieure à 20 000 habitants.

Avantages supplémentaires

Les particuliers bénéficiaires de ce régime sont exonérés de l'obligation de droit italien de déclarer les éléments du patrimoine situés à l'étranger et ne sont pas soumis au paiement des impôts italiens sur le patrimoine situé à l'étranger.

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“Life Moves Pretty Fast”: a decade on from bitcoin, English law confronts cryptoassets¹

■ Marc JONES

Bitcoin was born in January 2009. To say it arrived largely unnoticed by most of the world would be an understatement. Just over a decade on, and even those who still do not have the faintest idea what a cryptocurrency actually is or how “blockchain” operates, will at least have heard of them. For those who did stop and look around, the reality is that over the last decade cryptocurrencies and the blockchain technologies that underpin them have moved at an ever-accelerating speed from their origins on the periphery of the periphery and into the financial mainstream. Early prophecies that cryptocurrencies and blockchain technology generally were everything from a criminal enterprise to simply pointless have fallen away. Financial markets now offer a variety of products linked to cryptocurrencies, from plain vanilla futures to exchange traded notes. In July 2019 the Securities and Exchange Commission approved a digital public token offering to the general public for the first time. At the retail end there is an ever-growing array of applications enabling consumers to transact and invest in a variety of cryptocurrencies, commonly grouped under the tag “DeFin”: decentralised finance.

As the technology has raced ahead, a wide range of novel and difficult questions have arisen about the legal fundamentals of this new asset class and its underlying technology. Until very recently most legal activity has been focussed on controlling this new asset class through criminal or financial regulatory measures. Perhaps that is a product of the history of cryptocurrencies which early on were portrayed as an off-grid method of selling and purchasing illegal goods and laundering money. That regulatory focus has tended to obscure the legal fundamentals, in particular “what are cryptocurrencies”: mere information, intangible property, or something else entirely? The implications are enormous, and answers are required urgently to provide the legal certainty needed by developers, financial service providers and investors in this rapidly growing new technology.

The most significant English response to date came on 18 November 2019 when Sir Geoffrey Vos, Chancellor of the High Court, launched the Legal Statement on Cryptoassets and Smart Contracts (the “Legal Statement”) and in doing so made the point that “*There is no point in introducing regulations until you properly understand the legal status of the asset class that you are regulating*”. By coincidence the launch was book-ended by the first two interim judicial decisions (*Robertson v Persons Unknown* in July 2019 and *AA v Persons Unknown* in December 2019) in which bitcoin was treated as legal property. It is fair to say that the Legal Statement is a first in English law and a genuine legal landmark; and that the two cases are important indicators of the challenges ahead.

was supportive of Mr Robertson’s claim but was limited in what it could do, given its contractual and regulatory obligations, unless complying with a court order.

A key issue at the hearing was: is bitcoin “personal property”? If not, then a proprietary injunction could not be made. The prevailing view was that in English law: “*All personal things are either in possession or in action*” (Lord Justice Fry in *Colonial Bank v Whinney* (1885)). The first is a “thing” that you can take physical possession of, and the second is a property right that can only be obtained or enforced through legal action. At first blush, bitcoin is neither. It is not a physical thing and English law is clear that intangibles are not choses in possession (*OBG v Allen*).

Beyond the context of fraud litigation, whether cryptocurrencies are property will be a matter of importance in a variety of commercial contexts [...]

Robertson v Persons Unknown²

Mr Robertson was the victim of a “spear phishing” attack which resulted in one of Mr Robertson’s intended investment, of 100 bitcoin (at the time worth approximately £1.2M) being misdirected to the fraudster(s). These were the “persons unknown” who were sued as the first defendant. Having established that 80 bitcoin had been sent to a wallet held at Coinbase UK Ltd, the UK arm of San Francisco-based Coinbase, one of the world’s leading cryptocurrency exchanges. Mr Robertson applied to court for a proprietary interim injunction called an asset preservation order to “freeze” the 80 bitcoin, as well as a Bankers Trust order to permit Coinbase to reveal the identity of the individual who controlled the wallet containing the 80 bitcoin. (A Bankers Trust order is an order that typically requires a bank to provide details ordinarily protected by the bank’s duties of confidentiality.) Coinbase

And unlike, for example, money in a bank account which creates a relationship of debtor and creditor, a bitcoin is an intangible “thing” that does not depend upon a legal right enforceable against some other person in order to have value. In that sense, bitcoin it is more like a bank note than the money in your bank account: the former has value simply by virtue of being a bank note to which people attach value; the latter depends upon the account-holder’s ability to enforce a right against the bank and the bank’s ability to pay.

When the Robertson application was heard there was no English authority on the issue³, so the claimant relied on *B2C2 Ltd v Quoine Pte Ltd* [2019] SGHC(I) 03 in which the Singapore International Commercial Court held that bitcoin are personal property. The closest English law analogue was *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10(Ch), which concerned the fraudulent transfer of carbon emissions

allowances (EUAs). In that case the court held that the claimant had a proprietary restitutionary claim for the value of the EUAs which constituted “a chose in action or some form of other intangible property”.

Despite the fact that cryptocurrencies have no physical existence, the idea that cryptocurrencies may be things in possession was not regarded as unthinkable. For example, the Financial Markets Law Committee (FMLC) (July 2016) took the view that “it may be convenient to understand [cryptocurrencies]... as a kind of hybrid: ‘virtual chose in possession’. That is, intangible property with the essential characteristics of chose in possession.” In the event the judge in *Robertson* was prepared to proceed on the basis that whether bitcoin is a thing in possession, in action or some form of other intangible property, – here was a serious issue to be tried and that it was appropriate to make an interim proprietary injunction to protect Mr Robertson’s interest.

Why does it matter whether cryptocurrencies are property? In the narrow context of fraud claims, obtaining proprietary relief gives the claimant a much stronger position. The specific assets are better secured and (generally) cannot be used to pay the defendants costs. Then claimants’ ability to trace and the range of remedies available is increased. Also the cryptocurrency might appreciate significantly in value during the time the claimant is out of possession and the claimant may want the specific cryptocurrency returned rather than having to seek damages and engage in arguments over the quantum of loss.

Whether cryptocurrencies are chose in action, in possession or something else does matter. Defences under English law that are open to a defendant who has received stolen cryptocurrency are probably wider if the cryptocurrency is treated as a chose in possession than a chose in action. The starting point for both is the ‘nemo dat’ rule (i.e. a seller of property cannot give better title to the property than he himself has). The main exception to that rule is the ‘bona fide purchaser for value without notice’ rule (i.e. a person who buys property in good faith and is not on notice of defects in the transferor’s title takes good title). While that applies to both types of personal property, it is more difficult to

see how it could affect a chose in action (and authorities on this are hard to find). Also, there are far more statutory defences available in respect of chose in possession (for example sale of goods legislation). In short, the ability to satisfy the court that there is a serious issue could well be harder to satisfy if cryptocurrencies are classified as chose in possession because there will be a much greater likelihood of the defendant(s) having a potentially good defence. And quite what the position is if they are some third type of property is unknown.

Beyond the context of fraud litigation, whether cryptocurrencies are property will be a matter of importance in a variety of commercial contexts (for example taxation, sale of goods legislation, transfer of title, the taking of security, etc.) and perhaps especially in insolvency scenarios. For example, an office-holder would need to know against whom action could be taken in order to realise the value of the virtual currency.

2019 by Sir Geoffrey Vos, Chancellor of the High Court:

I believe that this morning is a watershed for English law and the UK’s jurisdictions. Our statement on the legal status of cryptoassets and smart contracts is something that no other jurisdiction has attempted. It is genuinely groundbreaking... The first thing to understand about cryptoassets is that they are not all about Bitcoin and Bitcoin mining as some people tend to think when the subject is raised. There is an endless spectrum of types of cryptoasset and cryptocurrencies, many of which already are or certainly will be designed for use as wholesale and retail payment mechanisms. They will be what one might call investment grade. It is for that reason that the thinking behind this legal statement was that what was lacking was a clear view of the legal status of cryptoassets under English law. If the legal foundation could once be established, uncertainty would dissipate, and it would be possible for the regulators to consider what regulatory measures were needed, and for the courts to consider, where

One of the great virtues of the Legal Statement is the brevity and accuracy with which it cuts through difficult issues to produce clear answers.

The Legal Statement on Crypto-assets and Smart Contracts

The Legal Statement is the result of the Law Tech Delivery Panel’s (“LTDP”) consultation in relation to cryptoassets, distributed ledger technology and smart contracts. The LTDP was established by the UK Government, the Judiciary and the Law Society of England and Wales and has as its overarching objective the promotion of the use of technology in the UK’s legal sector. The UK Jurisdiction Taskforce (UKJT) is one of six taskforces established by the LTDP for the purposes of achieving this objective, and it is the UKJT that produced the Legal Statement. The stated objective of the UKJT is “to demonstrate that English law and the jurisdiction of England and Wales together provide a state-of-the-art foundation for the development and use of DLT, smart contracts and associated technologies”.

The Legal Statement was launched at a packed Guildhall in London on 18 November

appropriate, what remedies might be available in respect of transactions involving the transfer and securitisation of cryptoassets... I hope that the document will be hugely influential on legal thinking across the common law world”.

In the foreword to the Legal Statement Sir Geoffrey notes: “I hope that the Legal Statement will go a long way towards providing much needed market confidence, legal certainty and predictability in areas that are of great importance to the technological and legal communities and to the global financial services industry.”

The Legal Statement has an explicitly commercial purpose. It anticipates the day when “investment grade” cryptoassets will be commonplace. In a wide-range of international commercial activities English law is the most widely chosen governing law in the world, and it is nothing if not rooted in, and accommodating of, the changing realities of commercial enterprise. So it is not surprising that English law should want to get ahead of the game. But it is the

manner in which this has been attempted that is genuinely novel. The Legal Statement is not a piece of legislation nor a binding judicial decision. As Sir Geoffrey explained: *“The process that the taskforce adopted was to draft a short list of legal questions, and then to consult widely about the appropriateness of those questions amongst the tech community, the financial services sector, the regulators and the lawyers. The Taskforce held public meetings and received a wide range of the very best expert opinion. The resulting questions were put to the team of expert QCs and barristers asking them to deliver a definitive statement of what English law now provides in this area. The outcome is not about what they would like English law to be; it is about what they believe English law actually to be”*. As such it has no legally binding effect – or any legal effect at all.

Having said that, the range and quality of individuals involved in the consultation should inevitably mean that significant weight will be attached to the Legal Statements conclusions. What are they?

The key conclusion of the Legal Statement as regards cryptocurrencies⁴ is that:

- (a) cryptoassets have all of the indicia of property;
- (b) the novel or distinctive features possessed by some cryptoassets – intangibility, cryptographic authentication, use of a distributed transaction ledger, decentralisation, rule by consensus – do not disqualify them from being property;
- (c) nor are cryptoassets disqualified from being property as pure information, or because they might not be classifiable either as things in possession or as things in action;
- (d) cryptoassets are therefore to be treated in principle as property.

Significantly the Legal Statement also concludes that the famous statement of Lord Justice Fry in *Colonial Bank v Whinney* (referred to above), properly understood, did not restrict the types of personal property known to English law in the way it had been assumed for the best part of 150 years, but that *“the class of things in action could be extended to all intangible property (i.e. it was a residual class of all things not in possession) rather than on the basis that the class of intangible property should be restricted to rights that could be claimed or enforced by action”*.

There is an important qualification to all this. Whether or not any particular cryptoasset is treated as property will depend on its specific traits. The number and variety of cryptoassets is ever-expanding, and the underlying structure of each can differ radically. What traits must a particular cryptoasset possess in order to qualify as property? The authoritative description of the necessary characteristics of property is set out in *National Provincial Bank v Ainsworth* (1965): before a right or an interest can be admitted into the category of property it must be: (a) definable; (b) identifiable by third parties; (c) capable in its nature of assumption by third parties, and (d) have some degree of permanence or stability. In other words: certainty, exclusivity, control and assignability.

One of the great virtues of the Legal Statement is the brevity and accuracy with which it cuts through difficult issues to produce clear answers. It deals with many other issues which flow from the conclusions on cryptocurrencies as property, such as transfer, security and insolvency. But the Legal Statement is very far from comprehensive, and never set out to be. Two areas are with noting. First, how rules of private international law are to be applied to the proprietary aspects of dealings in cryptoassets. This is a particularly complex area and this is reflected in the Legal Statement: *“...we think that there is a good argument that the normal rules should not apply... [but] it is very difficult to say which rules would be used instead”*. Second, the Legal Statement specifically did not address the issue of remedies. Again, another fundamental and difficult area. Quite how problematic these issues will prove to be is touched on in the case of *AA v Person Unknown*.

AA v Persons Unknown

The decision in *AA v Person Unknown* is believed to be the first occasion on which any common law court has not only referred to the Legal Statement but has positively approved its conclusions as regards cryptocurrencies. Beyond that *AA* is a fascinating early example of the many difficult questions that disputes involving cryptocurrencies, indeed any blockchain based digital asset, are going to raise.

The claimant was the English cybercrime insurer of a Canadian company targeted by

the BitPaymer ransomware virus. The virus encrypted the company's files and demanded a US\$950,000 payable in bitcoin as ransom to decrypt them. The claimant paid the ransom for its insured by buying 109.25 bitcoins and transferring them to a bitcoin address provided by the anonymous attackers (the “persons unknown”). Once the files had been recovered, the claimant traced and attempted to recover the bitcoin. 96 bitcoin were located at an address linked to the cryptocurrency exchange known as Bitfinex, which is operated by two BVI companies.

The judge granted an interim proprietary injunction over the bitcoin against the BVI companies and the attackers. The judge stated: *“I consider it is fallacious to proceed on the basis that the English law of property recognises no forms of property other than choses in possession and chose in action. The reasons for this are set out at paragraphs 71 to 84 of the Legal Statement”*.

Cases combining “persons unknown” and cryptocurrencies present novel legal problems for unwary claimants, and it's clear that difficulties arose in *AA*. As the Bitfinex companies were based in the BVI, and the whereabouts of the “persons unknown” was not known, the claimant needed the court's permission to serve process out of the jurisdiction. Although the claimant insurer was based in England and was subrogated to the rights of the assured, the malware attack had been carried out against a Canadian company, and presumably the tortious acts and/or damage encompassed by the hack occurred in Canada, providing no basis for English jurisdiction.

What claims could the claimant pursue in England? The judge explored in some depth the potential causes of action and jurisdictional bases, which were clearly very problematic for the claimant. Ultimately, the claimant narrowed its application to *“the claims of the insurer in restitution and/or constructive trust against all four defendants”*, seeking a proprietary injunction against all defendants. Essentially the claim was that: (a) the \$950,000 used to purchase bitcoin was the claimant's property; (b) the payment was wrongfully extorted by the “persons unknown” who have no right to the money, and (c) the bitcoin represent the traceable proceeds of the claimant's money against which it has a claim in unjust enrichment.

The judge concluded that the claims for restitution and constructive trust gave the English court jurisdiction on two bases: the claimant was seeking an interim remedy under s.25.1 of the Civil Jurisdiction and Judgments Act 1982; and the claim was in tort where loss was (likely to be) sustained within the jurisdiction or result from acts (likely to be) committed in the jurisdiction. Both are problematic⁵ but only the second is of interest for present purposes.

The judge proceeded on the basis that because the claimant is based in England and had paid the \$950,000 from an English bank account, damage was suffered in the jurisdiction. It's not clear whether it was the location of the claimant or the bank account or both that mattered. But that is not the full picture. The claimant paid the money to its agent, JJ, who then purchased the bitcoin which were then transferred to the "persons unknown".

On that basis, the claimant didn't suffer loss until JJ transferred the bitcoin. As such, the focus should be on the bitcoin. But where was the bitcoin transferred from? Arguably nowhere. As a bitcoin is simply a record on a distributed ledger that has no locus, it does not exist anywhere. On another view, it is wherever the payor is when the transfer is made. But should that be the claimant's location (England) or its agent's (which may have been elsewhere?) These are difficult questions with which the English courts are going to have to grapple.

Finally, it is worth highlighting a few difficult points which are not addressed in *AA v Person Unknown* but are bound to arise in cryptocurrency fraud claims in the future. The applicable law of a tort under article 4 of Rome II is "the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur". If it is correct that AA's loss was suffered in England because the ransom money was paid out of an English bank account, then English law applies. But what if it is the place of the transferor or the transfer of the bitcoin (if there is such a thing) that is determinative? Even in cases where the High Court has jurisdiction on some basis unrelated to the place where damage was suffered, the applicable law must



be considered because it affects what claims and (interim) remedies can be pursued. Suppose AA's agent had been outside England when he transferred the bitcoin, say Utopia; and (to keep it simple) that he transferred the bitcoin from the wallet of a cryptoexchange also located in Utopia. The law of Utopia would prima facie apply to any tort claims. If Utopian law permits claims for restitution and/or constructive trust, would the Utopian law also apply to any tracing exercise, or would English law still apply? And what if the law of Utopia does not treat bitcoin as property at all? What type of interim and final relief could the claimant seek from an English court?

What have we learned so far?

It now looks increasingly clear that English law will treat bitcoin and similar cryptoassets as legal property. The first outing of the Legal Statement in court has been a positive one, its approach and conclusions endorsed. That is a good start and good news for all commercial parties involved in this area. But an authoritative and binding decision on this specific point is still needed and we may have to wait a while for the right case to reach appeal level for that to happen.

However, that positive news is tempered by the fact that AA highlights how many more legal conundrums lie in wait in this area which have yet to receive the detailed judicial consideration that will be needed in order to provide clarity.

As cryptocurrencies, digital assets more broadly, and the underlying technologies on which they rest become ever more widely adopted and continue to multiply in number, the days when any lawyer could dismiss this area as one that has no relevance to his/her practice are rapidly diminishing. Banking and financial markets, corporate finance, international trade, insolvency, estate management, trusts, tax, divorce, intellectual property, the list goes on. And if you thought that the pace of development over the last decade has been surprising, then you need to "stop and look around once in a while" over the next decade - or you're probably in for a shock.

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¹ For those who missed the 1980s the quote is from "Ferris Bueller's Day Off".

² The author represented Mr Robertson in the litigation

³ The decision in *Vorotyntseva* had not been made public at the time.

⁴ It must be remembered that the report also looked at the legal status of "smart contracts" which are not considered in this article.

⁵ The court's jurisdiction to grant interim remedies under s.25 is limited to doing so in support of foreign proceedings. Here, no mention is made of any foreign proceedings in respect of which a s.25 order was sought.



Website Accessibility Litigation 101

I Michelle WORRALL TILTON

Website accessibility has sparked litigation, class actions and uncertainty for businesses in the United States. Title III of the Americans with Disabilities Act (“ADA”) protects individuals against discrimination on the basis of disability in “places of public accommodation.” In this article, we address the legal accessibility requirements that pertain to websites and applications. Other countries have similar civil rights legislation.¹

The inherent problem with the ADA is that it addresses accessibility to physical – not virtual – spaces. The internet was still in its infancy and not yet an integral part of daily life when the ADA was passed in 1990. Despite the spate of litigation, Congress has not identified what website compliance should be under the ADA, resulting in conflicting rulings in the federal circuits. The lack of guidance has created a conundrum for business owners and for attorneys who advise clients regarding website accessibility.

The ADA is the most comprehensive of the United States’ disability laws. It is a civil rights law that guarantees the right of individuals with disabilities to receive reasonable accommodations to be able to work and to participate in the many benefits of society. The law is divided into “Titles.” Title III, which is the focus of this article, covers public accommodations and commercial facilities. It focuses, in significant part, on private and public entities providing goods or services to the public. The language of Title III, which has been the primary focus of web accessibility litigation, is as follows:

No individual shall be discriminated against on the basis of a disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, accommodation of any place of public accommodation by any private entity who owns, leases (or leases to), or operates a place of public accommodation.”
42 U.S.C. § 12182(a)(2011)

Types of businesses that are considered to be “public accommodation” are: “hotels, restaurants, bars, theaters, grocery stores,

hardware stores, dry-cleaners, banks, professional offices of health care providers, lawyers, and accountants, hospitals, private bus or train stations, museums, libraries, zoos, amusement parks, places of education, day care centers, senior citizen centers, homeless shelters, gymnasiums, health spas, bowling alleys, and golf courses to name a few.”² Nearly any business that serves the public fits within a public accommodation category. Private clubs and religious organizations are exempt under Title III.

ADA claims against business websites have typically been brought by visually impaired individuals alleging that the website owners failed to provide accommodations for their disabilities. A prevailing plaintiff is entitled to attorney’s fees and costs, as well as injunctive relief, wherein, effectively, a federal judge issues a curative order in favor of the plaintiff. Additionally, a number

legal and factual defenses to the claim to use as points of leverage and engage in early settlement discussions to negotiate a favorable resolution, including reasonable web accessibility accommodations.

Disability Statistics

According to the Centers for Disease Control and Prevention (“CDC”) based in Atlanta, GA, it is estimated that 1 out of 4 individuals have some type of disability at some point in their lives, including sight, hearing, motion and cognition impairment, which can limit website access. This number increases to 2 out of 5 for adults age 65 and older. The CDC identifies mobility as being the most common disability, followed by cognition. Moreover, the World Bank estimates that 15% of the world’s population – or a billion people – have a significant disability.

While experts agree that web accessibility is good for business, it comes at a cost.

of states within the United States have disability rights laws that complement the ADA and may impose additional damages.

According to Victor Zarrilli, a partner at White and Williams LLP in Cherry Hill, N.J. who represents clients regarding disability access laws, the fee shifting component under the ADA makes litigation attractive to some plaintiff attorneys. “It doesn’t take much to trigger liability under the ADA,” Mr. Zarrilli cautioned, “which exposes the defendant to the plaintiff’s attorney’s fees and costs.” The defendant may be ordered by the court to modify its website to accommodate the disabled plaintiff within a limited time frame. Because of the exposure to myriad expenses under the ADA, including the defendant’s own legal expense, Mr. Zarrilli generally recommends to his corporate defendants that they quickly identify all

The U.S. Office of Disability Employment Policy (“ODEP”) estimates that people with disabilities are “the third largest market segment in the United States.” This number more than doubles when considering the family members of disabled people and their caregivers, who appreciate and support businesses that are inclusive. Most business owners agree that websites should be accessible to everyone. If a website is not accessible by a consumer with a disability, he or she may make a purchase from a competitor’s site.

While experts agree that web accessibility is good for business, it comes at a cost. Remediation expenses can be significant for a small business, whose sites and applications were launched prior to the emergence of web accessibility legal issues and awareness. A recent article in *Entrepreneur* magazine

estimates it could cost “tens of thousands of dollars” for businesses to meet accessibility recommendations. A U.S. defendant in the 2017 web accessibility case, *Juan Carlos Gil v. Winn-Dixie Stores, Inc.*, argued that accessibility conformance would cost \$250,000 for the grocery store chain. Because every website is different, costs will vary depending on the complexity and functionality of any given site.

Joshua Mooney, a data privacy and cyber law expert and Chair of White and Williams’ Cyber Law Group, frequently collaborates with Mr. Zarrilli on web accessibility cases because of his expertise in technology. Both he and Mr. Zarrilli emphasized that it is preferable to make changes to websites prior to litigation. Mr. Mooney, who is based in Philadelphia, emphasizes that a small business should do what it can within its budget constraints to identify and address accessibility issues. *“For a small business, doing a little something is better than doing nothing at all”* Mooney said. He described the current litigation environment as a “ticking time bomb” and warned that websites that are not compliant are at risk. Mr. Zarrilli confirmed that businesses of all sizes must consider website accessibility issues.

What Standards Apply for Website Accessibility?

Absent formal guidelines from Congress, most experts point to the Web Content Accessibility Guidelines (“WCAG or guidelines”) 2.0 and 2.1 as the website and mobile application accessibility standards.³ The guidelines are technical and written for website developers and, for this reason, are referenced in the broadest terms in this article.

The guidelines were developed by technology and accessibility experts with the World Wide Web Consortium (“W3C”), who were tasked with providing private international industry standards. The accessibility guidelines they developed are recommendations only as the W3C lacks enforcement power. The guidelines have been adopted globally, including by the EU, to help people with a variety of disabilities better navigate the Internet. The guidelines carry significant weight and are widely considered to be the gold standard. In some instances, the U.S. Department of Justice

has required entities that fall within Title III to comply with WCAG 2.0 in consent decrees involving the United States. Most web accessibility vendors recommend that websites meet the most current WCAG standards.

In the United States, government sites must meet accessibility standards set forth under Section 508, an amendment to the U.S. Workforce Rehabilitation Act of 1973 (29 U.S.C. § 794(d)) that applies to electronic and information technology *“developed, procured, maintained, or used by the federal government.”*⁴ If you have ever wondered why government websites are relatively plain and simple, it is because they comply with accessibility standards. Section 508 incorporates WCAG guidelines by reference.

In the first U.S. trial over web accessibility, *Juan Carlos Gil v. Winn-Dixie Stores, Inc.*, a federal District Court judge in Florida determined that the website of supermarket

wcag-2-1-explained-c26e62b196’2. There are also a number of YouTube videos that demonstrate how text readers help the visually impaired access a website.

Courts Divided

UseableNet, a website access company that promotes an inclusive website and application experience for its clients, tracks statistical information about the ADA website and mobile application accessibility lawsuits filed in federal court. This site estimates that one accessibility lawsuit is filed every hour and that more than 2,000 lawsuits will be filed in 2019. Litigation is predicted to continue into 2020. Retailers are identified as a “top target,” particularly those providing food services. Legal experts note that most cases are quickly settled because of the cost of defense and the risk of having to pay for the plaintiff’s attorney’s fees and costs. Only a handful of cases have proceeded to trial.

The guidelines have been adopted globally, including by the EU, to help people with a variety of disabilities better navigate the Internet.

chain, Winn-Dixie, is a place of “public accommodation” under Title III. This was because it is highly integrated with its stores and serves as a “gateway” to the store’s physical locations. The plaintiff, Juan Carlos Gil, has cerebral palsy and is visually impaired. He unsuccessfully tried to access the defendant’s website to fill a prescription. In ruling for the plaintiff, the court granted injunctive relief and ordered the defendant to implement a website accessibility policy in conformance with WCAG guidelines. Winn-Dixie appealed this decision to the 11th U.S. Circuit Court of Appeals in Atlanta, which heard the appeal in October 2019 and has not yet issued an opinion.

For attorneys who are not particularly tech-savvy, do not practice disability law, and are able to access websites without a text reader or other software accommodation, accessibility guidelines may be entirely new. It is helpful to read a WCAG blog written in layperson’s terms. Take a look at: <https://blog.prototypr.io/the-new-guidelines-in->

The federal courts are divided about whether the definition of “public accommodations” under Title III applies to a digital space or whether it is limited to websites with a nexus or relationship to physical locations. Courts in the federal First, Second, and Seventh Circuit Courts of Appeals have determined that a place of public accommodation does not need to be a physical location. In these jurisdictions, a stand-alone website that provides goods and services does not require a nexus to a physical business location to be subject to exposure and liability under Title III of the ADA. The federal Third, Sixth, Ninth, and Eleventh Circuit Courts of Appeals, on the other hand, have determined that online goods or services offered *without* a nexus to a public accommodation’s physical location are not subject to Title III.

There has been no direction from the U.S. Supreme Court regarding web accessibility to resolve the split in the circuit courts. Last summer, the U.S. Supreme Court declined to review the U.S. Ninth Circuit

Court of Appeals ruling, which held that the Domino's pizza chain and other retailers must make online services accessible to people with disabilities. The Ninth Circuit Court reasoned that the website and application, which allowed custom pizza orders and access to coupons, supported the pizza chain's carry-out and delivery locations and were an extension of the physical locations. Because the Supreme Court chose not to review the Ninth Circuit ruling, it remains in effect.

Lack of Congressional Guidance in the United States

As Title III website cases continue to proliferate, it is unlikely that Congress will provide guidance regarding website accessibility any time soon. According to the Hunton Andrews Kurth LLP labor blog, which provides an excellent summary of the legislative history surrounding websites and Title III, the U.S. House of Representatives tackled the accessibility issue by amending the ADA Education and Reform Act of 2017 (HR.620) in February 2018 to include a notice provision. The Act did not directly address website accessibility but amended requiring prospective plaintiffs to provide written notice of noncompliance to the operator of a public website prior to filing suit. The entity placed on notice would have 60 days to address the claimant's concerns. The Act was supported by Republicans, who believed that the ADA was being abused by anti-business plaintiff attorneys. Democrats, on the other hand were concerned that the Act would have a detrimental impact on civil rights. The Act faltered in the Senate after Democrats threatened to filibuster. A filibuster essentially means to obstruct by speaking an inordinate length of time.

Guidance has been provided by the U.S. Department of Justice ("DOJ"), which is the administrative agency responsible for enforcing the ADA. With respect to website accessibility issues, the DOJ has sided with disabled plaintiffs. This support was reiterated in a DOJ letter dated September 28, 2018 to The Honorable Ted Budd, a member of the U.S. House of Representatives. Bipartisan members of Congress had written to then Attorney General, Jeff Sessions, to clarify website accessibility under Title III. The Office of the Assistant Attorney General replied that

it first interpreted the ADA as applying to public accommodations' websites more than 20 years ago, and its interpretation is consistent with Title III's requirement that "goods, services, privileges or activities" be equally accessible to people with disabilities.

The EU and Web Accessibility

Even with the deficiencies in the U.S., EU countries have lagged behind the U.S. with respect to web accessibility standards for governmental websites and applications. EU countries did not pass the EU Web Accessibility Directive ("Directive") until 2016.⁵ This 15-page directive requires EU member states, as well as those seeking to become members, to implement and enforce accessibility guidelines requiring all public sector websites to be compliant and to generally incorporate the WCAG 2.0. All public sector websites are to be accessible by September 23, 2020, and all mobile applications by June 23, 2021. While each member state of the EU is responsible for identifying penalties for websites that are not in compliance, the Directive goes a long way to establish uniformity and clarity in the EU as to governmental sites.

potential business opportunity, and should be addressed accordingly.

Tips to Mitigate Risk

Even without clear direction from the courts or the legislature in the United States, there is risk of liability for business websites and applications that serve as a "public accommodation" with respect to the sale of goods or services. Mr. Mooney and Mr. Zarrilli emphasize that it is a best practice for businesses to address website and application accessibility early on and not wait until a client is served with a demand letter or a complaint. Best practices for website accessibility risk management include the following:

- Discuss website accessibility issues with an experienced attorney and web vendor.
- Have a web vendor audit the website at issue to determine if it is accessible for people with disabilities.
- If there are deficiencies, a remediation plan and budget should be developed. It is a good idea to get several bids from reputable vendors.
- New businesses should develop websites from inception that are accessible for people with disabilities.

Courts in the federal First, Second, and Seventh Circuit Courts of Appeals have determined that a place of public accommodation does not need to be a physical location.

Under the Directive, public sector websites include those operated by: (1) state, regional and local governmental entities, (2) entities governed by public law and financed by public contract, and (3) associations formed by such entities for the purpose of "meeting needs of general interest" that are neither industrial nor commercial. There are a number of public entities that are excepted from compliance with the Directive, including, but not limited to, public service broadcasters and most public schools. Private entities that service or support governmental sites are also required to be WCAG compliant. Attorneys who represent private companies in other countries should be familiar with applicable disability legislation and advise their clients that website accessibility for people with a range of disabilities is an emerging legal liability issue, as well as a

- If remediation costs are cost prohibitive, identify the digital pages that are most important with respect to the sale of products or services and address those first. Include a dedicated helpline for disabled individuals to call for assistance.
- A website that is compliant now may not stay in compliance if new content is uploaded to the site or if other changes are made. Make sure that new digital content is accessible.
- Consider adopting and posting a web accessibility statement. The W3C provides excellent information about how to draft a statement at www.w3.org/WAI/planning/statements/.
- Discuss potential insurance coverage with an experienced insurance professional or coverage attorney. In the event of a

threat of litigation or upon receipt of a complaint, timely submit the claim to all relevant insurers, including employment practices liability, commercial general liability, technology errors and omissions, cyber and media liability, to see if there is potential coverage.

- Make sure that contracts with web designers and other vendors include language that websites and applications are designed to meet all state and federal requirements, including ADA accessibility. Better yet, require the vendor's contractual promise to pay to be backed by suitable insurance. Require a "certificate of insurance" as proof of the insurance coverage and adequacy of limits. It may even be possible to be added to the vendor's policy as an additional insured. These are important issues to be discussed with an insurance professional or coverage attorney.

Conclusion

Because of the continued lack of clarity as to website and mobile application accessibility and ADA compliance, there are challenges for attorneys who counsel their clients on the subject matter, or when reviewing their own law firm websites. Businesses should engage in proactive risk management to identify whether there are accessibility issues; and if so, implement a reasonable remediation plan. Risk may be further mitigated through appropriate insurance and contracts with technology vendors. In the long term, it is a good business decision for you and your clients to make websites accessible to as many people as possible.

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¹ See generally, Directive (EU) 2016/2102 of the European Parliament and of the Council of October 26, 2016 on the accessibility of the websites and mobile applications of public sector bodies. Retrieved from <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32016%2D2102>

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The “Cat-and-Mouse Game” with Tax Avoidance

Constantin NEACSU

La fraude fiscale est un phénomène omniprésent, commun à différents pays en termes de développement économique ou social. Bien que certains pays soient plus vulnérables que d'autres et souffrent davantage des effets dévastateurs de la fraude et de la criminalité en col blanc, aucun pays au monde n'est actuellement à l'abri de l'influence destructrice de ces formes de criminalité. En Roumanie, la formulation et l'application des règles fiscales sont difficiles car la politique budgétaire doit concilier les préoccupations concurrentes d'attirer les investissements et les revenus tout en persuadant des multinationales de ne pas délocaliser vers d'autres pays dont la fiscalité est plus favorable aux entreprises.



Financial and banking crime is in correlation and interdependence with a series of destructive mechanisms and political, moral, normative, and cultural deregulation, which are manifested at national level. The facilities provided by the political, social, and economic structures of a country, coupled with the insufficiency and sometimes inefficiency of legitimate control, favor profit-oriented criminality that tends to, and in some places, succeeds in, gaining a global and organized character. This leads to aggravating the economy as a whole, structuring and multiplying continuously, materializing in a great diversity and complexity in terms of the number of participants, the methods used, the damage caused, and the importance of the economic agents and institutions concerned.

Representing a complex social problem whose manifestation, social consequences, and remedies are of interest to both the public and the institutionalized level of social control, financial banking crime is conceived by most social segments as a particularly serious and dangerous phenomenon, capable of undermining the structures of power, the hope of moving towards a solid legal system, and ability to eliminate economic and social injustices.

Most multinationals are involved in a cat-and-mouse game with origine state tax authorities, and use some very creative strategies to minimise income tax payments.

Financial activities create an infrastructure that can be used by legitimate companies as well as criminals to hide illicit funds. Most tax havens follow a policy of encouraging non-residents' banking activity by introducing a distinction between the banking activity of the country's residents and those of foreign citizens. In general, the activity of foreign entities is not subject to requirements regarding the reserve of funds, nor on contracts for foreign exchange, or other controls. Compared to foreign trade, bank deposits abroad in the jurisdictions of tax havens are considerably higher than foreign bank accounts in banks that are not located in tax havens. The largest banks in the world (UBS, HSBC Holdings, Bank of America, Morgan Stanley, China Merchants Bank or Deutsche Bank) often have subsidiaries in tax havens. They set up these headquarters to participate in the increasingly aggressive and refined market of financial instruments, accepting deposits from foreign nationals, and borrowing money to non-resident clients.

Most multinationals are involved in a cat-and-mouse game with origine state tax authorities, and use some very creative strategies to minimise income tax payments. Much discussed is the criminal potential of the offshore world. Although the general impression is that tax havens primarily deal with money laundering of any origin, the reality is that even in some traditional offshore centers (Luxembourg or Switzerland, for example), the regulations are even more stringent than in developed countries. In this respect, it should be noted that the majority of governments in offshore states carefully supervise the activity of licensed banks in the territory and ensure appropriate regulation of new financial institutions.

However, the increase in interest in offshore companies was directly proportional to the acceleration of the economic crime rate. One circumstance of excessive regulation that has political tones is where a nation



imposes financial commitments of capital to the sole benefit of the country's budget. As an example, foreign capital in Romania achieves the highest outcomes with minimal spending from its angle of interest: (1) uses too little capital; (2) make their profits by exploiting small wages in Romania and by accessing resources and assets at low costs; and (3) increases its financial results by masking the real profitability achieved, especially by outsourcing the profits (even 80-90%) before taxing.

The example of Romania is not singular. The European Commission itself, in a press release to the European Parliament (COM / 2012/0351), states that tens of billions of euros, often undeclared and unimpaired, are still in offshore jurisdictions, reducing national tax revenues. In order to increase cooperation, measures have been taken to strengthen existing instruments to avoid the generalized practice of offshore structures, intensify the exchange of information, combat tax evasion and tax fraud patterns, and strengthen fiscal governance.

It is thought that the total sum hidden away in low-tax, low-regulation jurisdictions around the world could be \$21^{trn}—as much as the total annual economic output of the United States and Japan combined.¹ There are four primary uses for 'tax haven' locations:

- First, they are used by those wishing to avoid or evade their obligation to pay tax. Common tax avoidance strategies include assigning intellectual property rights to foreign subsidiaries, and then paying the subsidiaries to use a brand, trademark, patent, or license.
- Second, they are used to hide criminal activities from view. That criminal

activity might be tax evasion itself, but it might also be money-laundering or crimes generating cash that needs to be laundered.

- Third, they are used by those who want their activities to be anonymous, even if legal. Some people wish to hide wealth from their spouses, for example.
- Fourth, they are used by those seeking somewhere cheaper to do business, to avoid the costly obligation to comply with regulations.

Secrecy jurisdictions raise revenue by collecting fees from registering companies, or for regulating local financial services, and income tax on anyone working in that industry.

Secrecy

The need for anonymity is common to all these activities, which take place in what one might call the 'secrecy world.' Governments that choose to create laws allowing it to exist must have status as international jurisdictions (though not necessarily as countries, as the British Crown Dependencies demonstrate). Since no jurisdiction willingly undermines its own laws, the secrecy so created can be used only by people residing outside its own domain.

The regulations created by these 'secrecy jurisdictions' are designed to undermine the legislation or regulations of another jurisdiction. To facilitate matters, a legally backed veil of secrecy ensures that those making use of them cannot be identified as doing so.

Secrecy jurisdictions raise revenue by

collecting fees from registering companies, or for regulating local financial services, and income tax on anyone working in that industry. All this is possible because secrecy jurisdictions create the structures that the financial services industry sells access to. Typical among these are tax haven companies.

The Companies

The tax haven companies are almost invariably owned by trusts, which are also registered 'offshore' and are run by the local financial services industry. The trusts are completely anonymous. There is no record of them on any public register and local tax authorities know nothing about them.

An offshore company owned by an offshore trust presents an almost impenetrable barrier to inquiry: not least to law enforcement agencies and tax authorities. Tax havens may call themselves 'offshore finance centers' or 'international finance centers,' but that is misleading. Secrecy is what they are selling.

The Spurious Argument

Secrecy jurisdictions argue that because the transactions take place 'elsewhere,' they are not taxable within the secrecy jurisdiction. Such places choose not to tax transactions happening outside their domain. They then insist that declaring these transactions is the responsibility of their clients. That way, the secrecy providers are able to argue that they are fully tax compliant. But transactions undertaken 'elsewhere' will also escape regulation in the jurisdiction where the activity is actually taking place. That of course is the intention. The truth is that multinational corporations do not really have what most think to be real offshore operations. They simply record some transactions in the secrecy space provided by tax havens.

The emergence of the so-called "Paradise Papers" has highlighted once again the

conundrum faced by any world's Parliament in legislating in response to the lawful avoidance of tax in offshore tax structures. The Paradise Papers are only slightly smaller in scale to that of the Mossack Fonseca "Panama Papers" in early 2016.²

The outrage precipitated by this latest disclosure, which implicates Apple, Facebook, and Bono, as well as a myriad of other well-known companies and individuals, is largely the result of distrust of offshore tax havens. As many have struggled with austerity since the global financial crisis, the use of lucrative and opaque structures by the ultra-wealthy is not a welcome concept to the ordinary person on the street.

However, it is important to evaluate what exactly is the primary focus of the outcry. At the moment, it is apparent that most of the structures identified in the Paradise Papers are those which enable the legitimate avoidance of tax. This is to be contrasted with the unlawful evasion of tax. The difference between the two concepts continues to be a source of confusion, even for those well-versed in the complexities of tax law. Essentially, the difference is one of legality; tax evasion exists where there is a deliberate manipulation of the tax regime in order to gain an advantage which was never intended by government. The value of those who advise in relation to "tax-efficient investment structures" is their expertise in navigating the grey area in the financial benefit of their clients.

The reaction of the European Commission to the Panama Papers scandal was, in part, to fast-track legislation designed to hold corporate bodies criminally liable for the facilitation of tax evasion by an associated person acting for or on its behalf. Simply put, a corporate body is now criminally liable if it fails to prevent such facilitation without having reasonable prevention procedures in place. The legislation is not retrospective, so cannot be used as the basis for any prosecutions which may be appropriate arising from the latest disclosure. In any event, on the basis of the information disclosed so far in the Paradise Papers, it does not appear as though any Directives and Regulations could have made it easier to prosecute wrongdoers even if it had been applicable. Why is that?

First, if the offshore tax structures exposed by the Paradise Papers were to be classed as "avoidance" rather than "evasion" (which certainly seems to be the case) then the first test of the new offense would not be satisfied. If there was evidence of criminal evasion, then the second question would be whether the evasion was criminally facilitated by a person acting on behalf of the corporate entity. This would require evidence of that person being knowingly concerned in the aiding, abetting, counseling, or procuring of the tax evasion, as well as evidence of that person acting for or on behalf of the company and not on a frolic of their own.

financial penalties despite falling short of a criminal offense.



The value of those who advise in relation to "tax-efficient investment structures" is their expertise in navigating the grey area in the financial benefit of their clients.

However, widening the scope of strict liability offenses relating to individuals would be a bold legislative move given the inherent complexities of tax law. It would risk criminalizing negligent or reckless offending by those who do not have the benefit of sophisticated wealth managers or advisors. It is a natural reaction to perceived unfairness or inequality to look to the criminal law for remedy, but great care should be taken not to assume that further reactionary offenses on the statute books will address the underlying problem. In fact, remedy is more likely to be found in reducing or eliminating the secrecy associated with offshore structures. Transparency in these regimes would, given the uproar caused by the Paradise Papers, act as a direct deterrent to their use by any individual or company with a reputation to uphold.

The combination of these enhanced powers and information sharing may in the long term result in a greater interrogation of high net worth individuals and their financial affairs. In the short-term, those individuals should expect greater reticence or introspection by those professionally engaged to advise them on their tax affairs. Given the apparent susceptibility of offshore firms to data leaks or hacking, tax advisers will need to be more confident than ever before that their advice will not expose their clients to investigation, either for criminal tax evasion or for "aggressive" tax avoidance, which is capable of incurring

Conclusion

Sweeping changes in global tax law and more aggressive government enforcement has made it more difficult than ever for the wealthy to stash their assets and income out of sight. Longtime tax resorts like Switzerland, Liechtenstein, and the Bahamas that used to pride themselves on their secrecy are increasingly having to cooperate with other governments searching for tax fraud.³

The OECD is in the process of coming up with rules designed to tackle "base erosion and profit shifting," which involves companies using mismatches in tax rules to make profits "disappear" legally. However, these efforts may take many years to come to fruition. In the meantime, the cat-and-mouse game between multinationals and tax authorities continues.

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Digital Natives and Analogue Adults: The Same Naive Approach to Technological Evolution and Data Protection

I Guido LACHI

Introduction: Technological Progress and Related Issues

Nowadays, the debate on technological development is rapidly becoming one of the focal points of greatest interest, increasingly at the centre of our attention. We often hear about “Big Data,” the Internet of Things, Blockchain, and 5-G coverage, to name a few. But new terms and phenomenon are becoming part of the vocabulary, such as ransomware, hack attacks, and violation of computer systems.

Technology evolves quickly. The potential positive effect for consumers is considerable, thanks to the information daily released by the same users on different networks and platforms. The aggregation of gigantic amounts of data and the use of specialized tools make it possible to deeply analyse online consumer habits, with significant market consequences. For example, the so-called “addressable TV” is a digital advertisement development by which *ad personam* spots are allowed, realized on the basis of the geographical location of the viewer and characteristics such as age, sex, and employment.

Nevertheless, technological progress engenders complexities and grey areas, from the increase in hack attacks and computer systems violations to possible nonconformities by operators while treating and processing the interested parties’ data, up to the actual dispersion of information.

In this regard, the Cambridge Analytica case is of interest. Cambridge Analytica was a company dealing with consumer research and targeted advertising. It was accused of having stolen and used without consent the personal data of many Facebook accounts to create customized political spots. While the case was sensational, it is not an isolated example.¹ Other than that, the risk for online users of being infected with different kinds of malware has been increasing rapidly. Kaspersky, a cybersecurity and anti-virus

provider, issued a press release on July 23, 2019, reporting a 60% rise in consumers hit by “password-stealers” malware, from less than 600,000 people in the first half of 2018 to over 940,000 during the same period in 2019. Also, ransomware attacks have become much more common.

In conclusion, it is important that technological lights are not overcome by their shadows. A filter for new processes is needed in order to adapt digital evolution over “our” mandatory paradigms, be they ethical or professional.

progress, and decide not to implement protection and defence mechanisms. The process of practical adaptation of Italian companies to the GDPR – despite the full legal validity of Legislative Decree 101/2018 – appears to be fractional and cumbersome, especially in the case of small and medium sized enterprises (SMEs).

Deficient behavior generally concerns: (1) the failure to publish the contact data of the company’s data protection officer (DPO), assuming the company even has one, (2) privacy policies that are difficult to read,

Except for some virtuous exceptions, the protection of one’s personal data is not particularly effective, and may even be lacking.

Focus on Italy: Awareness of Rights and Obligations

The analysis of the Italian context focuses on corporate compliance in respect to regulatory changes, with specific reference to small and medium enterprises (“SMEs”), and based on the information made public, as well as on user behaviour with respect to technological means and IT transformations. The attitude of Italian companies towards innovation is often contradictory.

Despite a widespread but nonspecific appreciation towards technological novelty (considered as essential), data shows a large gap between large and small businesses on “digital intensity indicator,” with “high” or “very high” levels being present in 44.0% of companies with at least 250 employees and only in 12.0% of companies with 10 to 49 employees, as per the Istituto Nazionale di Statistica (ISTAT), National Institute of Statistics press release dated January 18, 2019.

Moreover, numerous entrepreneurial companies seem not to understand the significance of the risks connected to IT

due to excessive length or exaggerated technicalities, and (3) broad requests for consent without information on the purposes and methods of the concerned processing. Sometimes, the corporate attitude may even be inclined to risk a possible sanction imposed by the Data Protection Authority rather than orient itself to bear the costs of a technical and legal consultancy.

The approach of single Italian users (being the average age of the Italian population on January 1, 2019 of 45.4 years)² to the technological universe shows certain digital ignorance and less than full awareness of personal rights. Except for some virtuous exceptions, the protection of one’s personal data is not particularly effective, and may even be lacking.³ The impression is that, despite the efforts of the European legislator, the hoped-for “Copernican revolution” of the GDPR is still a distant horizon for Italian users. This is also caused by a systematic lack of attention towards one’s own intimacy and the protection of personal data, often not in line with the defence of other values which are instead considered as primary.

As a final remark, note that to date, professional operators specializing in the personal data market gain enormous advantages, to the detriment of the users' often-sacrificed awareness of the value of their information. To partially "correct" this remarkable imbalance, two different solutions will be analysed: the "business-oriented" turning point and the educational proposal.

Data Breach and Privacy Sanctions: A Comparative Analysis

DLA Piper's report of February 2019 shows that personal data breaches reported to data regulators amounted to more than 59,000 cases, with the Netherlands leading with more than 15,400 notifications (89.8 data violations per 100,000 people). In Italy, only 610 violations were reported (0.9 data violations per 100,000 people). It seems incredible that such a small number of reports depends on the fact that, in reality, a limited amount of violations truly happened. It is more likely to assess that violations might not have been reported, thus perhaps depending on a misleading practice, not fully oriented towards transparency and accountability.

More recent numbers, based on the sanctions issued during 2019 by European data protection authorities, show that the Italian "Garante per la Protezione dei Dati Personali" was the most active authority in the EU, having imposed 30 sanctions. It is curious to note that the authority of the Netherlands has only issued three sanctions. Even within the EU, national cultures on data protection can be quite different from each other, thus reflecting over consumers' behaviours, companies' habits, and data protection authorities' actions.

Lastly, it is to be noted that certain examples would require a deeper study because of their complexity. In the case of Ireland and Luxembourg, authorities have imposed no sanctions over companies or their company branches incorporated on their national soils. The question is whether such enterprises are really applying their best practices in observing the privacy requirements set by the law, or a slightly different evaluation method is being used, thus showing that there could be various levels of tolerance according to

the context in which the standards are being implemented. This is, however, up to debate.

The "Business-Oriented" Turning Point

At one point, some specialist operators have decided to offer commercial proposals to the recipients of the technology in order to strengthen the relationship between professionals and online users. For example, certain Apps (i.e., Wibson, Citizen.Me, People.io.) have allowed users to transfer their personal data in favour of a fee; another example is the compensation offered by Google in exchange for facial photographs. Such an approach, although it may trigger the curiosity of the interested users, does not yet appear to be systematic. These are isolated proposals that are solely aimed at the acquisition of personal data, not inclined towards the development of true digital culture and lacking a necessary informative background.



to our privacy, and in general, the hastiness of our technological actions.

From where does the seemingly carelessness with which we use online services, and from which we expect nothing but immediacy, originate? What are the reasons for this indifference to the culture of our rights (and why not duties) on the internet? It is simply a question of digital education. Gloria González Fuster and Dariusz Kloza, authors of *European Handbook for Teaching Privacy and Data Protection at Schools*,⁵ set a goal of raising the awareness of educational

Lastly, it is to be noted that certain examples would require a deeper study because of their complexity.

The real risk is in proposing a model that is pragmatic, but contrary to the "spirit" of the GDPR.⁴ The economic advantage of an unaware commodification of one's personal data could cause one to forget the digital individual rights, originally conceived in the Charter of Fundamental Rights of the Union European and subsequently merged into Regulation 2016/679. If the economic motive is the only one that is today easily understood and accepted, then would it not be more correct to reward (with incentives, or quality certificates) companies and applications that effectively protect our privacy?

The Educational Proposal

The current asymmetry between supplier and consumer could be reduced due to a systematic approach, and be useful in developing an equal relationship, based on users' awareness of both their rights and technological evolution. To suggest an effective action, neither extemporaneous nor merely opportunistic, it is necessary to analyse the reasons for the scarce attention

institutions on the subject, believing that today's digital natives lack the correct know-how to immerse – and coexist – correctly with the digital world. The "protected categories" cannot, however, be exhausted to the digital natives (who, despite any cognitive/implementation deficits, are users completely at ease in the virtual world).

There are also other subjects who, although legally independent, are particularly unaware of the dynamics and problems connected to technology and personal data. These subjects recognize the need for greater understanding, directly requested from professional operators and public bodies, which should, therefore, offer to the general public more information on the advantages and challenges of new technologies. Consequently, the goals of awareness-raising and digital literacy should not remain an exclusive prerogative for a restricted audience of young users but establish themselves as a bulwark for all those in need of protection.

At the same time, companies should change their current approach, i.e. the need to

invest in consultancy and training in the privacy field not only if there is a concrete risk of a dispute (or has already been), but in favour of ethical and professional practices able to revitalize and enhance the corporate image on the market. A synergistic approach must be set up between businesses and consumers to promote a circle based on legitimate claims of users who are aware of their rights and on the functioning of the digital market. In this sense, only a really competent offer can satisfy an increasingly careful and punctual demand.

To protect consumers from a market perspective, digital education and information can play a decisive role, involving the revision of business models in the light of the privacy discipline, as well as to create ethical models and transparent business practices. In this way, it would be the same companies that could obtain considerable market advantages, in terms of image and relationships with actual and potential customers.

In this sense, the correct market interaction between operators and users should be mediated by the professional contribution of a class of “knowledge bearers,” indirect guarantor of the effective (therefore, efficient) application of the protections provided for by the EU legislation. A qualified workforce capable of conveying a strong educational proposal might be, therefore, able to enhance the digital market, expanding the trust of new educated users towards the awareness of the personal data protection system.

Conclusion

What's next? Currently, individual digital users do not seem to have fully understood the value and meaning of their personal data and the related processing. This does not mean that the commodification of information – in the absence, however, of adequate awareness – is the only conceivable solution. On the contrary, increased education and awareness could help in fueling confidence towards the technological system, developing the adoption of technology and its market. Professional operators could, alongside, opt for specialization in the market, tending towards the protection of users and the quality of the processing of personal data.⁶



To gain an economic and image advantage, Italian companies (specifically SMEs) could be the bearers of an alternative model to those adopted by market giants, currently inclined to vast standard processing in order to monetize users' personal data. SMEs could, therefore, become effective promoters of “privacy by design” – enhancing the attention to details and developing customers' digital rights, with full dedication and care to their specific needs. This, also thanks to the

1. See the sanction imposed by the Federal Trade Commission and the New York State Attorney on Google for violating the *Children's Online Privacy Protection Act* (COPPA), prohibiting tracking and commercial targeting for children under 13; see also Marriot case, British Airways case and recently the Capital One cyber incident, where the U.S. Bank has been under hacker attack over about 100 millions of requests for credit cards in U.S.A. and Canada.

2. See <http://dati.istat.it/>.

3. According to research conducted by YouGov for VMware (survey that involved 1,030 adults

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contribution of specialized professionals, awareness of business processes enables assessment of risks and identification of advantages in relation to customers, employees, and suppliers.

In this sense, the concept of privacy by design could find effective application, escaping from the standard schemes and automatic procedures of the “large-scale distribution.” The prospect of data monetization could even be analysed under a different light, supported by educated and aware users and assumed that companies guarantee consumers an ethical and transparent service. Only such a fullness disclosure, which at present seems to be missing, could constitute the foundation over the choice for the economic transfer of user data.

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interviewed from 3 to 8 May 2019), 62% of Italian consumers admit that they do not know who can actually access their personal data when using new services. In addition, 39% of respondents admit to having little knowledge of new technologies.

4. As pointed out in Reg. EU n.679/2016, Whereas (4): “The processing of personal data should be designed to serve mankind.”

5. Gloria González Fuster & Dariusz Kloza (2016), *European Handbook for Teaching Privacy and Data Protection at Schools*, 3rd edition, EAP.

6. The Ferrero company has for example obtained the “Privacy OK” quality mark, an evaluation benchmark that expresses compliance with a specific code of conduct (in this case: Federprivacy) and with the general principles of the relevant legislation.



Health Science, Virtual and Augmented Reality, and Legal Frameworks: What is the Future? Part II¹

■ Barbara J. GISLASON

In Part I of this article that was published in the 2019.4 issue of the *Juriste International*, the background of virtual reality (VR) and augmented reality (AR) was discussed. In Part II, the focus is on the current state of the law, and what an evolving legal framework will need to address. Lawyers may be surprised to learn that how we think about intellectual property, crimes, torts, and contracts in the real world (RW) may be different in a VR environment. The rule of law may apply differently in real and virtual realities.

The Law – At First

Technology advances often come with unintended consequences. Pokémon Go, a game app created by Nintendo that became popular in 2016, represented many game users' first AR experience. Gamers who were searching for Pokémon could be careless of their own safety or oblivious to trespassing, as well as other problems they caused.

How augmented environments continued to collide with RW reality is exemplified in the U.S. common law decision *Candy Lab Inc. v. Milwaukee County*.² As there is a dearth of statutes or common law pertaining to VR or AR technology anywhere, this case will be discussed in some detail.

Candy Lab created its own software to be used on the owner's own hardware platform where users could interact with digital content in a game called "Texas Rope 'Em Up" by utilizing the device's geolocation. A popular place for this AR game to be played was in Wisconsin's Milwaukee County parks.

With security, garbage collection, and medical services expenses rising at the park, the local government passed an ordinance requiring Candy Lab park users to obtain permits. The developer claimed that this violated the company's First Amendment constitutional right to free speech. The Candy Lab developer prevailed on a motion

for a preliminary injunction where the court not only considered the standard requirements for a preliminary injunction in federal court – irreparable harm, inadequate legal remedies, and likelihood of success on the merits – but also delved into whether the ordinance violated the First Amendment. The court was aware of the dearth of law on point when it stated, "These are multifaceted issues where little definitive guidance exists."

Before rendering its decision, the court turned to a precedent in the U.S. Supreme Court decision *Brown v. Entm't Merchs. Ass'n*,³ wherein the Court determined that video games were a form of expression entitled to First Amendment free speech protection. The Court also said, "whatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." The Court reasoned that as the *Brown* precedent eschewed aesthetic judgments, "Texas Rope 'Em Up" met the "minimum quantum of expression" necessary for First Amendment protection. Even otherwise

speech," the court in *Candy Lab* ultimately determined that the ordinance "dooms itself" by failing to narrowly draw reasonable and definite standards. The court also complained how the application process under the ordinance had the effect of treating AR applications in a separate category from other games.

Next, we will review selected IP issues in more detail.

Copyright

When holding a copyright, the owner has legal right, including, but not limited to, the exclusive right to print, publish, perform, film or record literary, artistic, and visual material derived from the original work. The two primary international copyright agreements are the Berne Convention and the Universal Copyright Convention. The original copyright holder has the right to create a derivative work, unless the derivative work is transformational enough to qualify for an independent copyright. The transformational standard, difficult to apply in the RW, is even more difficult to apply in the context of our new realities (NR).

The original copyright holder has the right to create a derivative work, unless the derivative work is transformational enough to qualify for an independent copyright.

protected express content can be regulated constitutionally if (1) within the constitutional power of the government; (2) furthers important or substantial governmental interest; (3) government interest unrelated to the suppression of free expression; and (4) the incidental restriction is no greater than is essential to the furtherance of that interest.⁴

Foreseeing that censorship would give government officials "unbridled discretion" and the ability to "suppress disfavored

When looking at a copyrighted work, if a device causes the user to experience new images or sounds that overlap with the copyrighted work, is there copyright infringement? Does the new work on the screen device constitute a work subject to copyright protection? These types of issues will busy copyright lawyers.

Users should be careful not to run afoul of copyright laws when creating an avatar with characteristic traits of a copyrighted work. It remains to be seen what the fair use

doctrine limitations will be. Similarly, liability may be an issue under licensure agreements if the court determines an impermissible liability shifting provision in a contract is involved. VR and AR operators should be aware of evolving direct or contributory infringement standards.

DMCA

Typical IP claims arise under the auspices of the World Intellectual Property Organization (WIPO) treaties. In the U.S., there are also protections for software developers under the Digital Millennium Copyright Act (DMCA), which constitutes an amendment to Title 17 of the U.S. Code, where it is a crime to circumvent anti-piracy measures in software. Immunity for operators and intermediaries under the DMCA is expected to have limits, particularly if a notice and takedown request is ignored following a claim of infringement, or if there are repeat infringements.

Even so, the DMCA shields virtual platform creators and owners from liability for publishing information sourced by another content provider that might otherwise result in an invasion of privacy, defamation, or intentional infliction of emotional distress claim.⁵ In contrast, the European Union's General Data Protection Regulation (GDPR) has high standards that require platform holders to design and implement privacy practices.

Trademark

Trademarks are works, names, symbols, or designs, or a combination thereof, that identify the source of the good. Trademark applications and registrations are typically subject to the Madrid Agreement or the Madrid Protocol treaties. While there are international trademark rights under these treaties, each signatory country may only recognize and protect trademark rights according to its own jurisprudence.

Is there trademark infringement, meeting the "in commerce" requirement, when an app enables a user looking at a trademark to gain information about competing trademarks when utilizing an AR platform? If a doctor prescribes a name-brand prescription for a patient, is it legal for competing drugs to be promoted in AR? Is there an infringement

claim, too, when the app replicates, distorts, or replaces the trademark? These are all expected legal claims.

Another typical trademark violation involves dilution. Trademark dilution laws are typically limited to commercial uses involving famous marks. It is not yet known how dilution claims will be addressed in virtual spaces. First Amendment defenses, at least in the U.S., will predictably be asserted.

An important early decision involving IP infringement, that lays out the quagmire of legal issues that pertain to VR litigation in the U.S., is *Zenimax v. Oculus*.⁶ The jury determined that the defendants had engaged in trademark infringement but did not award any damages for this claim.

Software as Medical Device

One important legal question in the U.S., when it comes to VR and AR applications, is whether the underlying software is Software as a Medical Device (SaMD) subject to regulation by the U.S. Food & Drug Administration. SaMD could include software run on a hardware medical device for which it was not designed.

specific analysis, patient-specific diagnosis, or treatment recommendation. The subject of what constitutes an FDA regulated medical device will predictably arise regarding mobile apps pertinent to Covid-19.

Right of Publicity

In the U.S., an individual's right to profit from the personal use of that individual's name, likeness, or persona is protected by the right of publicity under individual state, rather than federal, law, and can vary from state to state. This extends to when someone assumes another's name, likeness, or voice, effectively another's persona, even as an avatar. When a claim is made against a VR company, the business may posit a First Amendment defense.

Communications Decency Act

Under 47 U.S.C. § 230, commonly referred to as the Communications Decency Act of 1996 (CDA), providers and users of interactive computer services are not treated as the publisher or speaker of information provided by another information content provider. This means online platforms are treated like newspaper editors and have unique protection under the U.S. Constitution's

Trademark dilution laws are typically limited to commercial uses involving famous marks.

It is possible for a software application to meet the definition of a medical device if classified as a Mobile Medical App (MMA). This can occur when a mobile app is used to "transform the mobile platform into a regulated medical device by using attachments, display screens, or sensors or by including functionalities similar to those of currently regulated medical devices."⁷

Another example of an MMA is when the mobile apps are effectively a medical device extension because the app connects to medical devices for the purposes of (1) controlling the devices, (2) for use in active patient monitoring, or (3) for use in analyzing medical device data. It can also occur when mobile apps become a regulated medical device, such as an SaMD. This occurs when a SaMD performs a patient-

First Amendment. When countries and businesses outside of the U.S. have online services originate from the U.S., the CDA is expected to apply. It is yet to be seen how this law will impact VR and AR.

Tort Claim

A tort is typically a cause of action that arises from a duty, breach of duty, causation of an injury, and an injury. Tort claims may arise from negligent or intentional acts by an individual or business. Epileptic VR users might be virtually assaulted or harmed by strobe lighting and loud noises. These risks could be mitigated, and potential liability limited, by precautionary action in software design, including the presence of safety conscious default settings.

When one avatar gropes another, and causes a traumatic reaction by the user, is there a civil cause of action? Do VR companies have a duty to keep the bad actor out of the VR world? While the groping of an avatar may be virtual, what about a claim for intentional infliction of emotional distress to the RW person behind the avatar? Is this possible when the platform has worldwide access and bad actors can quickly cloak themselves with new identities? These are all subjects for developers, businesses, and the courts to wrestle with.

Research has shown that a subject slapped in VR responds with skin conductance and heart rate level changes. VR liability may increase with haptic technology, whereby a user wearing a body suit has a greater immersive experience and the avatar's sense of touch is directly felt by the user.

In the U.S., a user could bring a personal injury claim against a VR company if an injury occurs during or following the use of a VR product. There might be a failure to warn claim, for example, if off the shelf software fails to caution the user that vital signs should be monitored when undergoing PTSD treatment.

In a hospital context, a virtual intrusion could occur on a computer system, where a perpetrator could make their avatar invisible by stalking a surgeon and utilizing this information to harm a target. From the standpoint of hospital management, the chair and board have a fiduciary duty of care, including ethics compliance. The business may need to utilize new tools to monitor and protect AR and VR platforms. Businesses may also have a duty to self-report under applicable laws, rules, and regulations.

Will plaintiffs be able to make legal theory claims when a business knowingly causes the compulsive use of technology where injuries, perhaps a loss of job or failure of self-care, result? Already, the widow of a RW slot machine user who committed suicide was unsuccessful against MTR Gaming Group on the tort theories of strict product liability, negligent design, and failure to warn.

There is also the specter of a products liability claim. These claims typically arise when a manufacturer distributes or sells a product available to the public that has

a design defect, a manufacturing defect, or a failure to warn or label. The Council of the European Union's Product Liability Directive of 1985 established a regimen of strict liability for defective products, and this Directive has influenced the passage of strict liability laws in Asia.

Not only is there liability potential for haptic technology, but also, for its cousin, algic technology. There, some seek a negative experience, such as an electric shock or bitter taste, in context specific situations.

From a product liability standpoint, default settings may affect liability. Safe default settings are particularly warranted for loud sounds, strobe lights, nudity, and private spaces. Another approach to this same concern is for the user to give valid consent. But if a user gives permission for a painful algic experience and determines how strong or frequent electric shocks would be, will that consent be valid if the user dies?

Pursuant to the U.S. Restatement (Third) of Torts, a treatise, there may be liability for

made a claim of virtual groping, a grope that felt like sexual battery. It was not technically one based upon the peculiarity of the law of physical assault being tied to a battery, where there is fear of an actual "physical assault." Jordan claimed she was virtually sexually assaulted by one of the participants in a multi-user game called QuiVr. When she realized BigBro442's avatar was rubbing her avatar's virtual crotch and groin, she felt violated.

Regarding crime on the virtual street, the ability to get law enforcement involved requires overcoming what is called the "Bangladesh problem," a location chosen for illustrative purposes given this country's perceived remoteness. If the crime happens outside of the local area, the police may experience jurisdictional headaches. If the perpetrator is far away, perhaps in Bangladesh, the problem is compounded by whether the alleged crime would be a crime in Bangladesh and the U.S., and if so, whether the crime is serious enough to warrant extradition and the associated costs.

Safe default settings are particularly warranted for loud sounds, strobe lights, nudity, and private spaces.

physical and emotional harm when there is a duty to exercise reasonable care. The developer may have a duty to implement low-cost effective measures to enable a user to be protected from harm, such as electrocution, without excluding other users or invading their privacy.

Defamation

Defamation is another tort claim that may arise differently in VR. Is there a claim when a user's avatar has been defamed? A user may not only strongly identify with the user's own avatar, but also spend time and money to develop it. Once that avatar has been defamed, it could affect, in effect, the defamed avatar's access to social groups and thereby change the avatar owner's business opportunities.

Crime

According to multiple national news sources, Jordan Belamire (pseudonym)

On the horizon, VR operators may be expected to have utilized sophisticated biometric identification methods and VR police who, at the very least, could efficiently eject or suspend a perpetrator from the VR environment.

Right of Privacy

In the U.S., tort claims based on privacy are generally a function of state common law or statute, or a combination of those. Of more relevance for this discussion are state and federal statutory rights that implicate personal data. Claims for privacy violations may not survive when users are aware that VR and AR providers readily use their data. Medical providers in the U.S. should develop a protocol on how to expand patient privacy under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), which applies to medical providers, but not others who gain possession of patient data. In Europe, this

type of data is subject to the General Data Protection Regulation (GDPR). In Canada, patient records and sensitive information are subject to the Personal Information Protection and Electronic Documents Act (PIPEDA). In Mexico, patients are protected by the Federal Law on the Protection of Personal Data.

Contract Law

The owners of platforms, including Amazon, Facebook, and Yelp, have crafted end-user license agreements and terms of service. These agreements are designed to give the platform holders the right to regulate user behaviors on their spaces as they see fit. Within the confines of their platforms, they determine what speech is permitted and assert authority to do that by user consent as part of the conditions for using the site. To the extent that creative behavior exists on a platform, such as an innovative design on a platform by a user, the platform owner can claim it owns the content through these types of contractual agreements.

Regulation and Addictive Technology

The U.S. currently has few safeguards in place regarding addictive technology. There are gambling laws and consumer protection laws which prevent unfair and deceptive practices that are regulated by the Federal Trade Commission (FTC). Under the FTC, an unfair practice is defined as (1) causing substantial harm to consumers, (2) the harm must not be reasonably avoidable by the consumer, and (3) the injury sustained must not be outweighed by the countervailing benefit to competition and consumers. The FTC is known to place more emphasis on deceptive, rather than unfair, practices.

As more is learned about habit-forming technology, it is likely that the FTC will engage in rulemaking that expands the meaning of unfair practices, particularly if Congress gives the FTC requisite authority. In the meantime, addictive technology targeting children, perhaps under friendly banners such as "Family" at the Google Play Store, may be more subject to FTC deceptive practice violations.

Asian countries are at the forefront of methods to promote anti-addiction design.

South Korea, Vietnam, and Thailand have made mandated anti-addiction designs and are zealous about protecting minors. China requires its developers to utilize "fatigue mechanics," which means games become less entertaining for identified problem users.

Strategies for regulation include labeling requirements, such as "use of this product may promote the development of a VR disorder that may have harmful medical effects." Regulations may require device feedback for users to let them know how often they are using the technology.

Software developers could be required to design anti-addiction functionality. This could mean utilizing a warning if the user exceeds self-imposed use limits. Currently, this type of function is often purposefully difficult to find, buried in menus, or anti-addiction functionality turned off "by default." Another desirable regulatory feature could be to limit features known to drive compulsive behavior. For gamers, the "loot box" might disappear in VR gaming. Use of the color red, known to drive compulsive behaviors, might be restricted.

obsolete. Is the nutrient quality of your food substandard, your air quality poor, and your life expectancy dwindling? Well, you get the point. In addition to addictive pharmaceutical products and street drugs, VR may cause the user to lose interest in self-care and quality of life, and the health of their body while their brain is, effectively, elsewhere.

Our sense of self is linked to our environment, even as our sense of environment shifts from an external reality to new forms of reality. If our loss of focus causes ecosystems to diminish and collectively, our disorientation and obsessive behaviors increase, who will serve as the gatekeepers of the external world? Lawyers, as natural leaders, must be vigilant and on the front lines.

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Claims for privacy violations may not survive when users are aware that VR and AR providers readily use their data.

Conclusion

The purpose of this article is to help lawyers learn how everyone will be profoundly affected by the addition of new realities in their personal and professional lives. In the health sciences context, AR and VR products may enable medical and mental health diagnoses, treatments, and outcomes never imagined. Entrepreneurs and bad actors will seek to exploit the opportunities these new technologies represent, too.

Remember soma, a happiness producing drug described in Aldous Huxley's dystopian novel, *The Brave New World*? The author's warnings still have relevance. Is the individual agitated by demonstrations in the street? Hormone producing VR products can reduce anxiety. Have all the factories been automated? VR will make you feel better as your skills become

1. In Part I of this article that was published in the 2019.4 issue of the *Juriste International*, the background of virtual reality (VR) and augmented reality (AR) was discussed. In Part II, the focus is on the current state of the law, and what an evolving legal framework will need to address. Lawyers may be surprised to learn that how we think about intellectual property, crimes, torts, and contracts in the real world (RW) may be different in a VR environment. The rule of law may apply differently in real and virtual realities.

2. 266 F.Supp.3d 1139 (2017).

3. 564 U.S. 786 (2011).

4. *United States v. O'Brien*, 391 U.S. 367 (1973).

5. Daniel Koburger, *Legal Implications of Public Spaces in Virtual Reality*, LANDSLIDE, September/October 2019.

6. N.D.Tex. Civil Case No. 3:14-cv-01849-p.

7. *Digital Health Criteria*, U.S. FOOD & DRUG ADMINISTRATION, <https://www.fda.gov/medical-devices/digital-health/digital-health-criteria> (last visited Oct. 14, 2019).

8. Barbara J. Gislason is Past President of both the UIA Biotechnology Law Commission and the U.S. National Committee.

The Case of South Africa

In October 2017, South Africa passed the International Arbitration Act, which is substantially based on the *United Nations Commission on International Trade Law* (UNCITRAL) model law. This new legal instrument aims to: (i) streamline South African arbitration law; and (ii) promote South Africa as an arbitration proceedings seat.

The OHADA Reforms

During its session of November 23-24, 2017, the Council of Ministers of the *Organization for the Harmonization of Business Law in Africa* (OHADA) adopted a number of texts designed to attract investors and foster their confidence in the OHADA area countries as seat for their arbitration proceedings.

These are primarily: (i) the reform of the 1999 Arbitration Law Uniform Act; (ii) the strengthening of the Common Court of Justice and Arbitration (CCJA) Arbitration Rules; and (iii) the introduction of a Uniform Act on Mediation. As such, public institutions, decentralized authorities, and any legal persons may now be parties to an arbitration proceeding, in addition to States.

Similarly, arbitration proceedings may be initiated based on an arbitration clause or an investment-related legal instrument, such as an investment code or a bilateral or multilateral investment treaty. The new reforms have also introduced the possibility for the parties to expressly waive their right to request the annulment of the arbitral award, except in cases where such waiver proves to be contrary to international public policy, as defined in the new Uniform Act.

In addition, the CCJA Rules clearly provide that arbitration fees between the court and the parties must be approved by the CCJA. Furthermore, the deadline for the review of the arbitral award by the CCJA has been shortened in order to ensure swiftness and efficiency.²

The new Uniform Act on Mediation, on the other hand, provides the parties the possibility to use the services of a third party to help them negotiate the best solution to their dispute, in compliance with the principles of confidentiality, independence, and impartiality.



As pointed out by some African practitioners, the development of international arbitration in Africa is attributable to risk factors investors face.

2018: A Year of Reforms in Africa

A large number of reforms on arbitration was recorded on the African continent in 2018.³ This reform movement had the twin objectives of: (i) promoting African countries as seats for arbitration proceedings, and (ii) reaffirming their sovereignty in dispute settlement.⁴

The China-Africa Joint Arbitration Center

The Center has been created pursuant to the ambitious Chinese project “Belt and Road Initiative.” The objective of the Joint Arbitration Center is to roll out a neutral and accessible mechanism for settling commercial disputes that may arise between the African and Chinese parties.⁵ A few prerequisites must be met prior to enforcing this mechanism, notably the harmonization of business practices and arbitration systems, as well as the training of arbitrators on African and Chinese cultural standards.

The Nigerian Arbitration and Conciliation Act

The major innovations brought by this new law include: (i) the possibility for the parties to conclude an arbitration agreement electronically; (ii) the implicit recognition of the funding of arbitration costs by third parties (Third Party Funding); and (iii) the arbitrators’ power to order interim measures to protect the interests of a party.⁶ However, these positive developments of the arbitration in Africa are opposed in some countries, such as Cote d’Ivoire, Ethiopia, and Tanzania.

Arbitration in the New Ivorian Investment Code

In 2018, Cote d’Ivoire revised its Investment Code dispute settlement regime by indicating in its Article 50 that parties shall endeavor to resolve amicably their dispute and may submit it to arbitration. This is a clear departure from Article 20 of the 2012 Investment Code which unambiguously consented to submit all investment disputes to ICSID.

As noted by commentators, “this glaring omission appears deliberate and seeks to address a criticism against the current format of investor-state dispute settlement (ISDS) which is the lack of African participation.”

Recent Ethiopian Arbitration Case Law

In re *National Mineral*, opposing an Italian company Consta J.V. against the joint venture formed by Ethiopia and the Republic of Djibouti, the Supreme Court of Ethiopia ruled that, although the parties had waived their right to appeal, it (the Supreme Court) remains competent to examine whether or not the judgment is vitiated by an error of law.⁷ This judgment contradicts a previous ruling (*National Motors Corp. vs. General Business Development*), in which the same Supreme Court of Ethiopia reaffirmed that the parties’ waiver of their right to appeal the judgment could not be challenged by any court, including the Supreme Court.

Arbitration in Tanzanian Law

The Tanzanian Law on Public-Private Partnerships (PPP), which entered into force in September 2018, provides in its Section 22 that the settlement of mediation or arbitration proceedings related to disputes arising from the performance of a PPP contract or a project in natural resources, will henceforth be the sole competence of

national courts or other bodies established in Tanzania, and the Tanzanian law will apply.⁸ Should this be considered as a resurgence of the Calvo doctrine?⁹

Conclusion

The examples of Ethiopia and Tanzania mentioned above constitute a cause of concern with respect to African States and practitioners’ objective to promote the continent’s attractiveness in terms of arbitration. Notwithstanding these isolated cases however, optimism should prevail, especially when one observes the movement towards arbitration, supported by the creation of the African Arbitration Association, the development of arbitration centers, as well as the new reforms of the legal framework, that have been happening on the continent since 2018, particularly those carried out by the OHADA.

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1. For more information on the African Arbitration Association, visit <https://www.aaaa.ngo>.

2. *When Arbitrators and Institutions Clash or The Strange Case of Société GETMA Internationale v. Republic of Guinea* in Kluwer Arbitration Blog 12 May

2016. “*Watch Out, Africa is Here.*” The East African International Arbitration Conference 2019. By Sadaff Habib-. Kluwer Arbitration Blog 29 October 2019.

3. *2018 in Review: A Tug of War for International Arbitration in Africa* by Sadaff Habib in Kluwer International Arbitration Blog, 17 January 2019.

4. *Impact of Foreign Direct Investment on Arbitration in Africa* by Sadaff Habib, in Kluwer International Arbitration Blog, 27 March 2018.

5. www.shiac.org/CAJAC/index_E.aspx.

6. *Demystifying the Nigerian Arbitration and Conciliation Bill 2017* by Joseph Onele in Kluwer International Arbitration Blog, 11 May 2018.

7. “The new Ivorian Investment Code: Tinkering with an Imperfect System or Pioneering a Path?” by Jonathan Ripley-Evans, Jenalee Harrison and Marie Terrien in Kluwer Arbitration Blog November 2019.

7. Judgment of 24 May 2018 by which the Supreme Court of Ethiopia annulled the arbitral award, which had awarded the sum of 20 million euros to the Italian company CONSTA J.V. in a case against the Ethiopian-Djiboutian mixed economy company CDE. See <https://www.iarbafrica.com/en/news-list/17-news/660-the-ethiopian-supreme-court>.

8. *A Wind of Change! Tanzania’s Attitude towards Foreign Investors and International Arbitration*, by Ibrahim Amir in Kluwer Arbitration Blog 28 December 2018. See www.arbitrationblog.kluwerarbitration.com/2018/12/28/a-wind-of-change-tanzania.

9. The Calvo Doctrine is a foreign policy doctrine, which maintains that in disputes relating to investment, the jurisdiction is determined by the place where the investment is made. Consequently, the foreign investor must submit any claim to the host country’s jurisdictions and not to those of his home country or another foreign country. The Calvo Doctrine is the expression of a legal-judicial nationalism and was applied in a number of Latin American countries.

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Plaidoyer visant à l'adoption rapide d'un acte uniforme OHADA sur la protection des données à caractère personnel

I Jean-François HENROTTE
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I. Introduction

La mondialisation du numérique, l'utilisation de l'Internet, l'utilisation de nouvelles technologies et le besoin de communication et de consommation des services ... sont des occasions donnant lieu à des traitements de données à caractère personnel.

En effet, plus personne n'échappe à la collecte des données personnelles pour des raisons telles qu'évoquées ci-dessus.

On peut lire dans un rapport intitulé : *Surveillance Giants* récemment publié par une grande organisation de défenses des droits l'homme « Google et Facebook dominent nos vies modernes ; ils ont accumulé un pouvoir inégal sur la sphère du numérique en collectant et en monétisant les données personnelles de milliards d'utilisateurs. Leur contrôle insidieux de nos vies numériques sape le fondement même de la vie privée et c'est l'un des défis majeurs de notre époque en termes de droits humains ».

Nous partageons le point de vue de Kumi Naidoo, secrétaire général d'Amnesty International, lorsqu'il écrit « À l'ère numérique, afin de protéger nos valeurs humaines fondamentales – dignité, autonomie et vie privée – il faut une refonte radicale du fonctionnement des géants de la haute technologie et l'essor d'un Internet qui accorde la priorité aux droits humains ».

La protection de la vie privée doit également être une priorité pour les États parce qu'ils sont également responsables de traitement pour des fins diverses.

On pense par exemple à l'introduction de la dimension électronique dans le Registre du Commerce et du Crédit Mobilier (RCCM) et ses fichiers connexes institués par les articles 34 et suivant de l'acte uniforme révisé portant sur le droit commercial général, adopté le 15 décembre 2010 à Lomé.

Une telle base de données à caractère personnel présente évidemment des dangers pour les commerçants dont les données à caractère personnel sont traitées, dangers auxquels nous pensons, à l'instar de D. Allechi dans sa contribution « L'informatisation du RCCM et la protection

Pour faciliter la mise en œuvre de la Convention, la Commission de l'Union africaine a demandé à l'Internet Society d'élaborer conjointement les lignes directrices du 9 mai 2018 sur la protection de la vie privée et des données à caractère personnel pour l'Afrique.

Elle vise, en vertu de son article 8, à ce que chaque État partie mette en place un cadre juridique ayant pour objet de renforcer les droits fondamentaux et les libertés publiques, notamment la protection des données physiques et de réprimer toute infraction relative à toute atteinte à la vie

Malgré l'inspiration commune de la directive 95/46, les législations européennes étaient trop diverses et cela nuisait à l'efficacité des entreprises européennes et à la libre circulation des données.

des données à caractère personnel », qu'il devrait être obvié par une législation relative à la protection des données.

Enfin, une telle législation, si elle est reconstruite par la Commission européenne comme offrant un niveau de protection adéquat, facilite le transfert de données à caractère personnel encadrées par le règlement général sur la protection des données à caractère personnel vers ces pays tiers (voy. infra).

La Convention de l'Union africaine (UA) sur la cybersécurité et la protection des données à caractère personnel – appelée aussi « Convention de Malabo » – a été adoptée à cette fin le 27 juin 2014.

privée sans préjudice du principe de la liberté de circulation des données à caractère personnel.

L'échéance des dernières signatures était fixée au 14 mars 2018. Or, force est constatée que seuls 14 pays sur les 55 de l'Afrique ont signé cette convention : Bénin, Tchad, Comores, Congo, Ghana, Guinée-Bissau, Mozambique, Mauritanie, Rwanda, Sierra Leone, São Tomé-et-Principe, Togo, Tunisie et Zambie.

Et encore, seulement cinq pays – Ghana, Guinée, Ile Maurice, Namibie et Sénégal – l'ont ratifiée pour que celle-ci entre en vigueur sur leur territoire national ...

La Convention n'entrera en vigueur 30 jours après le dépôt du 15^e instrument de ratification.

On peut donc craindre, avec C. de Laubier dans sa contribution « L'Afrique se met en ordre de bataille contre la cybermalveillance et la cybercriminalité », que cette convention soit un échec.

Si l'on examine les législations des États OHADA, tous les États parties ne sont pas dotés d'une telle législation et parmi ceux qui en sont dotés, certaines de leur législation sont obsolètes :

- Le Bénin est doté d'une loi 2009-09 du 27 avril 2009 portant protection des données à caractère personnel ;
- Le Burkina Faso est doté d'une loi 010-2004/AN du 20 avril 2004 portant protection des données à caractère personnel ;
- Le Cameroun est doté d'une loi 2010/012 du 21 décembre 2010 relative à la cyber-sécurité et à la cybercriminalité ;
- Le Congo-Brazzaville a adopté le 30 juillet 2019 une loi portant protection des données à caractère personnel ;
- La Côte d'Ivoire est dotée d'une loi 2013-450 du 19 juin 2013 relative à la protection des données à caractère personnel ;
- Le Gabon est doté d'une loi 01-2011 du 25 septembre 2011 relative à la protection des données à caractère personnel ;
- La Guinée est dotée d'une loi 2016/037 du 28 juillet 2016 relative à la protection des données à caractère personnel ;
- Le Mali est doté d'une loi 2013-015 du 21 mai 2013 portant protection des données à caractère personnel ;
- Le Niger est doté d'une loi 2017-28 du 3 mai 2017 relative à la protection des données à caractère personnel ;
- Le Sénégal est doté d'une loi 2008-12 du 25 janvier 2008 sur la protection des données à caractère personnel ;
- Le Tchad, notre hôte, est doté d'une loi 007/PR/2015 du 10 février 2015 portant protection des données à caractère personnel ;
- Et enfin, le Togo vient de se doter d'une loi 2019-014 du 29 octobre 2019 relative à la protection des données à caractère personnel.

II. Plaidoyer pour l'adoption d'un acte uniforme OHADA sur la protection des données à caractère personnel et à la libre circulation de ces données

L'Union européenne s'est dotée d'un nouveau règlement général sur la protection des données à caractère personnel (RGPD) pour deux raisons : une uniformisation de la législation au sein de l'Union et une prise en compte des nouvelles technologies et des nouveaux risques pour la protection de la vie privée.

En effet, malgré l'inspiration commune de la directive 95/46, les législations européennes étaient trop diverses et cela nuisait à l'efficacité des entreprises européennes et à la libre circulation des données.

Par ailleurs, si en 1995 on se méfiait des États, il devenait urgent d'encadrer également l'activité des GAFA et leurs nouveaux moyens technologiques.

L'utilisateur d'Internet ne sait pas toujours si le site web qu'il va visiter et auquel il va fournir des données est établi ou non sur le territoire de l'Espace économique européen (EEE).

Du fait de l'hétérogénéité de législations, parfois obsolètes, de ses États parties et que certains de ceux-ci ne disposent même pas de législation sur la protection des données, nous estimons, à l'instar d'autres auteurs comme Mouhamadou Lô, auteur d'un livre sur « La protection des données à caractère personnel en Afrique », qu'il est temps pour l'OHADA de se doter d'un acte uniforme relatif à la protection des personnes physiques à l'égard du traitement des données à caractère personnel et à la libre circulation de ces données, à l'instar du RGPD.

Un tel acte pourrait en outre être reconnu comme offrant un niveau de protection adéquat autorisant le transfert de données à caractère personnel de l'Union européenne vers les États parties de l'OHADA (voy. infra).

À défaut, les entreprises africaines seront en outre victimes si pas du protectionnisme de l'Union européenne, de sa stricte protection des données.

III. La stricte protection des données à caractère personnel au sein de l'Union européenne du RGPD

En effet, les règles encadrant la vie privée et les traitements de données à caractère personnel en vigueur au sein de l'Union européenne sont considérées internationalement comme étant particulièrement protectrices des citoyens, ou contraignantes pour les entreprises, spécialement non européennes, selon le point de vue.

Bien qu'appliqué avec plus ou moins de vigueur selon les États membres et les différentes autorités nationales de protection des données, le RGPD forme un cadre cohérent à l'intérieur des frontières de l'Union.

Toutefois, les flux internationaux de données sont inhérents au monde globalisé dans lequel les citoyens de l'Union se meuvent, singulièrement depuis l'avènement

du Cloud, dont les plus grands acteurs ne se situent pas sur le territoire européen.

L'utilisateur d'Internet ne sait pas toujours si le site web qu'il va visiter et auquel il va fournir des données est établi ou non sur le territoire de l'Espace Economique Européen (le RGPD est en vigueur en Islande, Norvège et Liechtenstein).

Des données à caractère personnel peuvent donc être traitées dans d'autres pays du globe n'offrant pas un niveau de protection de la vie privée équivalent, voire aucune protection.

La portée des droits conférés par le règlement serait dérisoire si les internautes européens bénéficiaient d'une protection précaire face aux entreprises étrangères qui exercent des activités dans l'EEE.

La technologie et la globalisation induisent une multitude de transferts de données transfrontières. Le responsable du traitement, soumis au règlement, peut transférer les données à caractère personnel vers

des tiers ou faire appel à des sous-traitants étrangers. Le RGPD autorise ces flux, mais les règles sont différentes lorsque les données sont transférées au sein de ou en dehors de l'Union européenne.

IV. Les transferts de données à des responsables de traitement ou à des sous-traitants établis en-dehors de l'Union européenne

Grâce au RGPD, les États membres appliquent le même niveau de protection lors du traitement de données à caractère personnel.

Un transfert **au sein de** l'Union européenne est par conséquent autorisé et régi de la même manière qu'un transfert au sein d'un même État et doit donc respecter les principes généraux de la réglementation (respect notamment des principes de légitimité, compatibilité de la communication avec le traitement d'origine, information des personnes concernées).

Les choses sont différentes si le responsable de traitement souhaite exporter des données à caractère personnel **hors de** l'Union européenne.

L'article 44 du RGPD dispose qu' : « un transfert, vers un pays tiers ou à une organisation internationale, de données à caractère personnel qui font ou sont destinées à faire l'objet d'un traitement après ce transfert ne peut avoir lieu que si, sous réserve des autres dispositions du présent règlement, les conditions définies dans le présent chapitre sont respectées par le responsable du traitement et le sous-traitant, y compris pour les transferts ultérieurs de données à caractère personnel au départ du pays tiers ou de l'organisation internationale vers un autre pays tiers ou à une autre organisation internationale. Toutes les dispositions du présent chapitre sont appliquées de manière à ce que le niveau de protection des personnes physiques garanti par le présent règlement ne soit pas compromis. »

Ni la directive antérieure 95/46, ni le règlement ne définissent cette notion de « transfert ». Le transfert de données suppose un déplacement effectif de données à l'étranger, quel que soit le support utilisé, dans le but de faire l'objet d'un traitement. Rendre acces-

sible des données sur un serveur informatique à partir de l'étranger ne constituerait par contre pas un transfert selon une frange de la doctrine¹ se basant sur une interprétation de l'arrêt *Lindqvist* de la Cour de Justice. Cette interprétation est toutefois critiquée par une autre partie de la doctrine².

En suivant ces derniers auteurs, il convient effectivement de tenir compte du caractère limité de la question préjudicielle ayant amené la Cour de Justice à se prononcer en partie sur la notion de transfert dans l'arrêt *Lindqvist*.

Une manière de réconcilier les positions tout en tenant compte du libellé du RGPD est de considérer que le transfert de données visé par le RGPD suppose, à la fois, un déplacement effectif de donnée et un objectif de traitement dans un pays tiers.

Il est à noter que le transfert de données constitue en tant que tel un traitement de données et qu'il doit donc respecter, outre les règles encadrant le transfert, l'ensemble des règles afférentes aux traitements de données en général.

L'article 44 du RGPD pose comme principe l'interdiction des transferts de données vers des pays n'offrant pas un niveau de protection adéquat.

Différents régimes permettent d'aboutir à ce niveau de protection adéquat, à différentes conditions. Des États non européens peuvent avoir mis en place un niveau de protection suffisant, leur permettant d'être reconnus.

Les transferts vers un État tiers ou une organisation internationale peuvent se faire si la Commission européenne a constaté, par voie de décision qu'un État tiers, un territoire ou un secteur spécifique de cet État tiers ou l'organisation internationale concernée présente un niveau de protection adéquat.

En effet, l'article 45 du règlement autorise la Commission européenne à décider qu'un État tiers (voire un territoire ou un secteur spécifique – comme le secteur privé ou un secteur économique particulier³ – de cet État tiers) ou qu'une organisation internationale présente un niveau suffisant de protection des données, de telle sorte qu'aucune autorisation spécifique ne sera

nécessaire pour transférer des données vers ces entités.

Le règlement formalise et étend les critères déjà examinés *in concreto* par la Commission ou les Autorités nationales pour déterminer si un état offre un niveau de protection adéquat (ou si des BCR sont valables au regard du droit européen). De manière générale à travers l'ensemble du RGPD, les procédures à suivre sont également détaillées afin de dégager des solutions cohérentes, par référence soit à la procédure de concertation contenue dans le règlement, soit à la procédure d'examen contenue dans le règlement 182/2011 du Parlement Européen et du Conseil du 16 février 2011 établissant les règles et principes généraux relatifs aux modalités de contrôle par les États membres de l'exercice des compétences d'exécution par la Commission. En l'occurrence, en vertu de l'article 93.2, la procédure prévoit un avis préalable du Comité Européen de la Protection des Données (CEPD) et renvoie, pour les modalités pratiques de l'examen à la procédure décrite à l'article 5 du règlement 182/2011.

Dans son processus d'évaluation, la Commission devra particulièrement tenir compte des éléments listés à l'article 45, plus nombreux et plus précis que ceux contenus dans la directive 95/46.

La décision devrait préciser sa portée territoriale et, si possible, identifier l'Autorité indépendante de Protection des données.

Un document de travail wp254^{rev.01} du Groupe de travail de l'article 29, désormais CEPD, établit les critères de référence pour l'adéquation.

Une intéressante nouveauté par rapport à la situation actuelle réside dans l'obligation pour la Commission de surveiller le déroulement effectif des transferts réalisés sur base de cette décision et de vérifier que l'État tiers ou l'organisation internationale concernée présente **toujours** un niveau de protection adéquat. À défaut, la Commission peut entrer en discussion avec l'État tiers ou l'organisation en vue de trouver une solution et amender ou suspendre la décision, sans possibilité de rétroaction toutefois. La Commission peut également décider, suivant le considérant 106, qu'un État tiers ne présente pas de niveau de

protection adéquat et interdire les transferts vers ces États tiers, sous réserve de l'application des articles 46 à 49.

La modification ou la suspension de la décision doit également respecter la procédure décrite à l'article 5 du règlement 182/2011.

Outre les trois membres de l'Espace Économique Européen que sont la Norvège, le Liechtenstein et l'Islande, au jour de la rédaction des présentes, les pays suivants sont considérés par la Commission comme présentant un niveau de protection adéquat : la Suisse, le Canada (pour les traitements soumis à la loi canadienne «Personal Information Protection and Electronic Documentation Act» et pour les données relatives aux passagers aériens), Andorre, l'Argentine, les États-Unis (si le destinataire des données aux États-Unis a adhéré aux « principes du bouclier de sécurité », ou «Privacy Shield» ainsi que pour les données relatives aux passagers aériens), Guernesey, l'île de Man, les îles Féroé, Jersey, l'Australie (pour les données relatives aux passagers aériens), Israël, la Nouvelle-Zélande, l'Uruguay et le Japon.

Dans les limites éventuellement édictées par la Commission et dans les limites du champ d'application du RGPD, des données à caractère personnel peuvent donc être transmises vers ces pays à des fins de traitement, moyennant uniquement le respect de l'ensemble des règles encadrant la protection des données dans l'État membre de départ.

Aucun pays africain n'est reconnu comme offrant un niveau de protection adéquat.

En l'absence de décision d'adéquation, le transfert ne peut donc se faire vers un État africain que moyennant des garanties appropriées offertes par le responsable du traitement ou par le sous-traitant, garanties coulées dans un instrument juridique contraignant, par exemple des clauses contractuelles, des règles d'entreprise contraignantes ou des codes de conduite ou mécanisme de certification. Le règlement prévoit enfin un certain nombre d'exceptions (le consentement de la personne concernée, le transfert est nécessaire à la conclusion ou à l'exécution d'un contrat ou à la constatation, à l'exercice ou à la défense de droits en justice⁴ ...).

V. Conclusions

La collecte des données à caractère personnel est soit subie (à l'utilisation des services) soit obligatoire (imposé par l'État pour des besoins d'identification de la personne ou des de sécurité nationale). Dans les deux cas, personne concernée se voit contraint par une machine puissante contre laquelle elle n'a d'autre choix que de subir.

Il revient donc aux États de garantir la protection des données de types divers, collectées à différents niveaux. Il est sidérant de voir les collecteurs de ces données les vendre à l'insu et/ou contre le gré des personnes concernées (usagers de services).

L'article 44 du RGPD pose comme principe l'interdiction des transferts de données vers des pays n'offrant pas un niveau de protection adéquat.

L'intervention des États devrait garantir un traitement transparent des données à caractère personnel exclusivement pour les finalités pour lesquelles elles sont collectées. Il est impérieux que les États, particulièrement africains, se dotent d'une loi pour encadrer les traitements de données à caractère personnel. Il faut également prévoir la création d'autorités de protection des données chargées d'assurer le contrôle et sanctionner les abus et tout manquement à la loi.

En plein essor de la quatrième révolution, celle du numérique, les États africains devraient prendre leur destin en main afin d'éviter de subir le même sort que lors des trois dernières révolutions notamment agricole et industrielle.

Nous plaçons donc pour l'adoption rapide par l'OHADA d'un acte uniforme relatif à la protection des personnes physiques à l'égard du traitement des données à caractère personnel et à la libre circulation de ces données.

L'acte uniforme relatif à la protection des données à caractère personnel que nous appelons de nos vœux pourra, outre la protection moderne des personnes concernées elles-mêmes, à terme, être reconnu par la Commission européenne comme offrant un niveau de protection adéquat et permettre donc de mêmes transferts aisés.

Dans l'intervalle, mais également pour les responsables du traitement établis dans les autres États tiers, les responsables de traitement peuvent utiliser une des options offertes par le RGPD : par exemple des règles d'entreprise contraignantes, des clauses contractuelles types ou particulières, passer par le mécanisme de la certification ou l'adhésion à un code de conduite. Le règlement prévoit enfin un certain nombre d'exceptions que les entreprises, et leurs conseils, pourront exploiter.

Une chose est sûre : le RGPD est exigeant, mais n'est qu'un cadre. Il autorise encore les traitements de données à caractère personnel dans l'Union européenne et dans le reste du monde.

Il convient néanmoins que les responsables du traitement situés dans les États tiers maîtrisent, avec leurs conseils, le RGPD. Ce sera bientôt la clef obligatoire pour continuer à traiter avec des entreprises européennes.

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1. V. notamment l'avis prudent de B. DOCQUIR, «Le droit de la vie privée», Bruxelles, Larcier, 2008, p. 244.

2. V. notamment C. DE TERWAGNE (ed.), «Vie privée et données à caractère personnel», Bruxelles, Politia, 2014, chapitre 4.2/2.

3. Considérant 104.

4. Que ce soit dans une procédure judiciaire, dans une procédure administrative ou toute procédure à l'amiable, y compris les procédures devant les organismes de réglementation, considérant 111.

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