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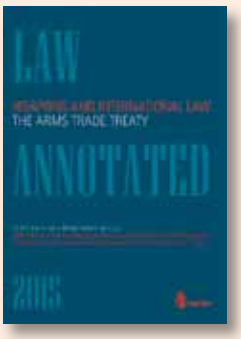

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Editors : **Clare da Silva** and **Brian Wood**

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Sommaire
Table of contents
Indice

Thème principal des illustrations : Main picture theme: Tema principal de las ilustraciones: Cape Town - South Africa

Editorial

Editorial du Président

Miguel A. LOINAZ RAMOS

Accompagner les progrès de la justice vers l'Organisation mondiale des avocats

Platon définissait la justice comme une « harmonie sociale ». Deux mots pour définir un concept dont l'interprétation est étroitement liée aux différentes variables que sont la culture, l'idéologie politique, religieuse ou encore la situation géographique.

Selon Platon, nous pouvons affirmer avec certitude que la justice est la conception du sens que chaque époque, chaque civilisation donne à ses normes juridiques. Une valeur considérée comme un bien commun de la société, imposée par l'harmonie à maintenir entre ses membres.

Comme nous le savons tous, dans la plupart des sociétés modernes, cet ensemble de règles s'appuie, d'une part, sur un fond culturel, un consensus social sur le bien et le mal, et d'autre part, sur une base formelle, qui n'est autre que la relation entre les individus.

Cette base formelle s'applique directement à la structure créée par l'homme, instituant « formellement » des dispositions écrites appliquées par les juges et par les autres acteurs, soumis à impartialité au regard des membres et des institutions de la société et des antagonismes propres à leurs relations.

Cette réflexion initiale est cruciale pour ne pas perdre de vue le lien indissoluble entre le concept de justice et l'évolution des sociétés. Car, suivant le degré d'évolution de la base juridique formelle des sociétés, la structure responsable de l'administration de la justice doit accompagner ce changement.

Or, bien au-delà de l'action même des organismes l'administrant, la justice incarne avant tout une valeur. Une valeur défendue et préservée par l'UIA, et que reflète notre propre structure. Chaque année, nos mandats sont renouvelés tout en assurant une continuité de gestion, conformément à nos objectifs premiers.

Personnellement, je crois que ce processus de renouvellement constitue une garantie face au risque d'une permanence de la direction ou de l'exercice du pouvoir, et nous permet surtout de tenir fermement le cap face aux aléas de notre temps.

L'UIA, sans perdre de vue ses valeurs fondatrices, a le mérite de s'adapter à la dynamique du changement. Nous agissons en nous fixant un agenda annuel sans jamais perdre de vue l'actualité ou la conjoncture qui impose une intervention rapide. Attentifs au changement, nous réagissons sans tarder face à toute situation à même de mettre un avocat en danger.

En s'appuyant sur sa diversité et son multiculturalisme, et dans la perspective d'accompagner l'évolution des sociétés, l'UIA a mis en place des programmes d'actualisation des compétences dans le cadre desquels la question de la formation permanente des avocats n'est qu'un échantillon.

Le nombre et l'importance des défis que nous apportent ces temps de changement sont tels que la continuité même du métier constitue le premier d'entre d'eux.

Quelles exigences imposera la profession à ceux qui débutent aujourd'hui leur carrière ? En quoi l'ère digitale affectera-t-elle la profession ? Quelle sera la place des avocats dans les nouveaux processus de médiation et de résolution des litiges ?

Loin d'être étrangers à l'évolution des systèmes, nous savons comment les gouvernements réforment leurs propres systèmes de justice, et les organisations internationales comme la nôtre doivent s'adapter aux nouvelles réalités.

Je vous livre maintenant notre proposition.

Dans la logique de la transformation et de l'évolution de notre activité professionnelle, nous souhaitons vous inviter à adopter une dénomination qui, nous en sommes convaincus, donnera une définition plus précise de notre organisation et confirmera sa position centrale parmi les associations modernes aux caractéristiques similaires à la nôtre.

Notre proposition est donc de continuer à œuvrer pour le progrès en tant qu' « Organisation mondiale des avocats » (OMA).

L'initiative de cette présidence s'inscrit ainsi dans la droite ligne de nos programmes de perfectionnement et de formation permanente, en incarnant l'avenir de notre organisation.

Forts du même engagement que nous avons démontré depuis notre création, nous avons à cœur de saisir l'opportunité du congrès de Valence et de l'année 2015 pour clairement concrétiser notre volonté de transformation et d'adaptation à notre temps.

Cette OMA que nous proposons continuera d'être la même UIA, une référence consultative sans conteste éthique, solide et incontournable.

Si le changement de dénomination et l'intégration d'un plus grand nombre d'avocats ne règleront bien sûr pas l'intégralité des problèmes propres à l'exercice de la profession, ils adressent en tout cas un signal au monde entier sur l'existence et l'importance de cette organisation dans la perspective d'une véritable professionnalisation juridique.

Je souhaite ici remercier mes consœurs et confrères, convaincu que, au-delà de la décision de devenir l'« Organisation mondiale des avocats », notre engagement grandit de jour en jour.

De la même manière, je suis fier de constater le niveau de réactivité qui est le nôtre chaque fois que nous intervenons en faveur d'un avocat risquant sa vie pour exercer son métier, le plus beau du monde.

Dr Miguel A. LOINAZ RAMOS
Président de l'UIA

President's Editorial

Miguel A. LOINAZ RAMOS

Supporting the Advancement of Justice towards the World Association of Lawyers

Plato defined justice as "social harmony"; a simple definition for a concept whose meaning is intrinsically linked with different variables, such as culture, political and religious views, or geographical location.

What is beyond doubt is that we would agree with Plato that justice is the notion that every era and every civilisation has about what its legal rules stand for. Specific values determined by society for the common good, in response to the need to maintain harmony between its members.

And as we all know, in most modern societies this set of rules has a cultural foundation based on a consensus amongst the individual members of that society about what is right and what is wrong, and another formal foundation relating to how relationships between people are organised.

The formal basis concerns the framework that mankind had to put in place, by "formally" setting out written provisions to be applied by judges and other stakeholders, who must be impartial towards the members and institutions of society and as regards the conflicts that might arise in their relationships.

This preliminary consideration is vital so as not to lose sight of the inextricable link between the concept of justice and the evolution of societies. For as societies develop this formal basis of justice, so must the structures that are involved in the administration of justice support that development.

However, over and above the operation of the bodies responsible for its administration, justice is essentially a value. A value that we defend and preserve through the UIA. This is reflected in our own organisational structure. Here, we renew our terms of office on an annual basis, while maintaining management continuity in accordance with the aims of our constitution.

My personal opinion is that this renewal arrangement acts as a guarantee to avoid the risks associated with permanent management or continuous exercise of power. In other words, it makes it possible for us to navigate more effectively the ever-changing waters of our times.

The UIA has been able to adapt to the dynamics of change, without losing sight of its fundamental objectives. We do this by setting an agenda for each year, while keeping a firm eye on those current issues and circumstances that require a rapid response from us. In the face of change, we act promptly to address any situation that may place a lawyer in danger, for example.

Drawing upon its diversity and multiculturalism, the UIA has developed systems to provide professional updates in the light of social change. And this concern for the continuing professional development of our lawyers is just the tip of the iceberg.

The challenges we face in these changing times are so numerous and so significant that one of them involves the very survival of the profession.

In future, what demands will the profession place upon those who are now just beginning their careers? How will the digital age affect our profession? What role will lawyers play in the new mediation and dispute resolution processes?

Familiar as we are with the way in which systems develop, we see how countries are reforming their Governments and their respective Justice systems, and how international organisations like ours are adapting to these new realities. And so, we would like to put forward the following proposal for your consideration.

As part of our journey of transformation and professional modernisation, we would like to invite you to adopt a name that, we believe, defines our group more accurately and positions us alongside the names of modern associations with characteristics similar to ours.

We propose operating from now on under the name of the "World Association of Lawyers".

An initiative introduced by the current Presidency, it takes the same approach as our update and continuing professional development courses. It is directed towards the future of our Organisation. With the same commitment we have shown since our foundation, we have the opportunity to make the Valencia Congress and the year 2015 clear benchmarks of our intention to transform ourselves, to adapt to the passage of time.

The proposed organisation will continue to be the same UIA that is, without a doubt, the sound, ethical point of reference and source of expertise that it always has been.

A change of name and an increase in the numbers of lawyer members will not, of course, resolve all the issues faced by those practising law, but it is another indication to the world that this organisation exists and that it is important for the true professionalisation of the law.

I would like to thank my colleagues, as I am convinced that, quite apart from any decision we may take regarding the proposal to become the "World Association of Lawyers", our commitment grows stronger day by day.

Similarly, I am proud of how we are always alert and ready to assist any lawyer who risks their life to practise the best profession on earth.

Dr Miguel A. LOINAZ RAMOS
UIA President

Editorial del Presidente

Miguel A. LOINAZ RAMOS

Acompañando el avance de la Justicia hacia la Organización Mundial de Abogados

Platón definía a la justicia como "armonía social". Pocas palabras para definir un concepto cuya interpretación está estrechamente vinculada a diferentes variables como cultura, concepción política, religiosa, o ubicación geográfica.

Lo cierto es que con Platón, decimos que la justicia es la concepción que cada época y civilización tiene acerca del sentido de sus normas jurídicas. Un valor determinado como bien común por la sociedad y que nació de la necesidad de mantener la armonía entre sus integrantes.

Y como todos sabemos, en la mayoría de las sociedades modernas este conjunto de reglas tiene un fundamento cultural que se basa en un consenso entre los individuos de la sociedad sobre lo bueno y lo malo, y otro formal sobre cómo se organiza la relación entre las personas.

El fundamento formal tiene que ver con la arquitectura que debieron crear los hombres estableciendo "formalmente" disposiciones escritas que son aplicadas por jueces y otros actores que deben ser imparciales con respecto a los miembros e instituciones de la sociedad y a los conflictos que aparezcan en sus relaciones.

La reflexión inicial es importante para no perder de vista el indisoluble vínculo entre el concepto de justicia y la evolución de las sociedades. Porque según evolucionan las sociedades el fundamento formal de la justicia, la estructura que participa en la administración de la justicia debe acompañar ese cambio.

Pero – mucho más que la actuación de los organismos encargados de administrarla –, la justicia es esencialmente un valor. Un valor que desde la UIA defendemos y preservamos. Esta preocupación se refleja en nuestra propia estructura de organización. Aquí estamos año a año renovando mandatos pero dando continuidad a la gestión de acuerdo a los objetivos de nuestra fundación.

Personalmente, creo que este mecanismo de renovación actúa como garantía evitando los peligros de la permanencia en la dirección o en el ejercicio del poder. En otras palabras, nos permite navegar con mayor efectividad en los mares cambiantes de nuestro tiempo.

La UIA – sin perder de vista los objetivos fundacionales –, ha tenido la virtud de adaptarse a la dinámica del cambio. Lo hacemos estableciendo una agenda para cada año pero sin perder de vista la actualidad, la coyuntura que nos obliga a la rápida respuesta. Atentos al cambio, actuamos sin demora ante cualquier situación que ponga en peligro a un abogado por ejemplo.

La UIA ha desarrollado – a partir de su diversidad y multiculturalidad – mecanismos de actualización profesional que acompañan el cambio de las sociedades. La preocupación por la formación permanente de los abogados es nada más que una muestra.

Son tantos y tan importantes los desafíos que nos propone este tiempo de cambio, que uno de ellos está relacionado con la continuidad misma de la profesión.

¿Qué exigencias planteará la profesión en el futuro a aquellos que hoy comienzan la carrera? ¿Cómo afectará a la profesión la era digital? ¿Cuál será el lugar de los abogados en los nuevos procesos de mediación y solución de controversias?

Porque no somos ajenos a la evolución de los sistemas, vemos como las naciones introducen reformas a sus Estados y a sus respectivos sistemas de Justicia, y las organizaciones internacionales – como la nuestra – se van adaptando a las nuevas realidades; queremos poner a consideración de ustedes la siguiente propuesta.

Como parte de nuestro camino de transformación y actualización profesional, queremos invitarlos a adoptar una denominación que – estamos convencidos – define con más precisión a nuestro colectivo y lo coloca en el marco de las denominaciones de las asociaciones modernas con características similares a la nuestra.

Nuestra propuesta es seguir adelante como la "Organización Mundial de Abogados" (OMA).

La iniciativa de esta presidencia, se orienta en el mismo sentido que nuestros cursos de actualización y formación permanente. Se orienta hacia el futuro de nuestra Organización.

Con el mismo compromiso que hemos demostrado desde nuestra fundación, tenemos la oportunidad que el Congreso de Valencia y el año 2015 se conviertan en una referencia clara de nuestra intención de transformarnos, de adaptarnos al paso del tiempo.

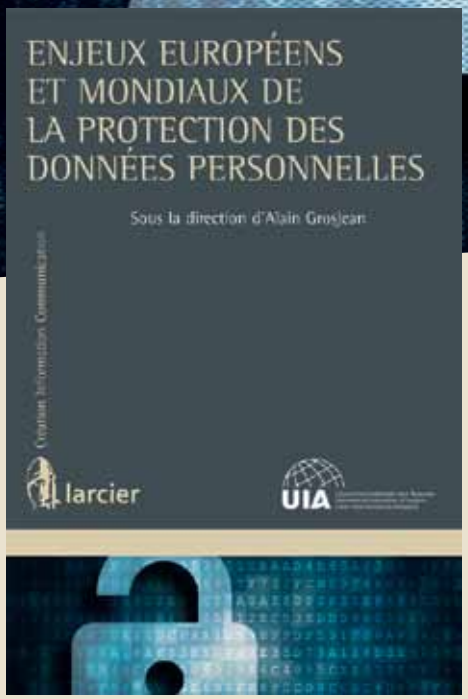
La OMA que proponemos, seguirá siendo la misma UIA que es sin duda una referencia ética, sólida y de ineludible consulta.

El cambio de denominación y la incorporación de más y más abogados, seguramente no resuelva todos los problemas que enfrenta el ejercicio de la abogacía, pero es una señal más que estamos dando al mundo sobre la existencia y la importancia de esta organización para una verdadera profesionalización jurídica.

Quiero agradecer a mis colegas, convencido que – más allá de la decisión que tomemos en cuanto a la propuesta de pasar a ser la "Organización Mundial de Abogados" –, nuestro compromiso se afirma cada día más.

Del mismo modo, siento con orgullo como también se afirma nuestra actitud vigilante para acudir en auxilio de cualquier abogado que ponga su vida en peligro por ejercer la profesión más bella del planeta.

Dr Miguel A. LOINAZ RAMOS
Presidente de la UIA



ENJEUX EUROPÉENS ET MONDIAUX DE LA PROTECTION DES DONNÉES PERSONNELLES

Sous la direction d'Alain Grosjean

Cet ouvrage propose une approche aussi bien juridique que pratique sur les principales évolutions des règles existantes en matière de protection des données personnelles.

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- Champ d'application territorial du règlement et transfert de données
- Comment les droits de la personne concernée sont-ils renforcés?
- Banque, paiement en ligne et protection des données personnelles
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Message du Rédacteur en Chef

Bénédicte QUERENET-HAHN

L'avocat, sa défense et sa profession, occupent la plus large place dans ce numéro, d'abord et avant tout, parce que ces derniers mois ont été malheureusement marqués par de trop nombreuses arrestations et condamnations d'avocats défenseurs des droits de l'Homme.

Lors du congrès de Florence, l'an passé, le prix Ludovic Trarieux a été remis à Madame Mahienour El-Massry, avocate égyptienne plusieurs fois arbitrairement arrêtée et emprisonnée, pour avoir notamment tenté d'assister d'autres défenseurs des droits de l'homme. De retour en Egypte, les poursuites se sont multipliées contre elle et elle a notamment été condamnée le 31 mai 2015, avec deux autres avocats et sept autres personnes, à un an et trois mois de prison. Malgré les protestations et demandes de libération de l'UIA et d'autres associations de défense des droits de l'homme, elle demeure aujourd'hui encore détenue.

Cette année, le prix Ludovic Trarieux a été décerné à notre confrère saoudien Waleed Abu Al-Khair, que l'UIA soutient également très activement. Abu Al-Khair est un défenseur des droits de l'homme et fondateur de l'association Monitor of Human rights in Saudi Arabia. Il a été condamné à 15 ans de prison, 15 années d'interdiction de voyager et une amende de 200 000 rials saoudiens, pour avoir représenté plusieurs victimes de violations des droits de l'homme. Là encore, malgré la mobilisation de l'UIA et d'autres associations des droits de l'homme, Monsieur Abu Al-Khair est encore emprisonné et empêché d'exercer sa profession.

En Chine, ce sont près de 300 avocats, intervenus en soutien de leur confrère Madame Wang Yu, défenseur des droits de l'homme dans plusieurs procès politiques sensibles, qui ont été arrêtés arbitrairement courant juillet 2015. Plusieurs d'entre eux demeurent encore détenus arbitrairement.

Ces quelques exemples, tirés du dernier rapport de la Direction des Droits de l'Homme que nous publions dans cette édition, montrent l'augmentation préoccupante des cas d'atteinte aux droits de l'homme et à sa défense, et la nécessité de la mobilisation de l'UIA – et donc de tous ses membres – au soutien de ces confrères courageux.

L'exercice de notre profession retient également particulièrement notre attention dans ce numéro. Nous nous penchons plus particulièrement sur l'émergence, dans les cabinets d'avocats, d'une fonction de conseiller à l'éthique. Nos confrères Rita Haeusler et Francis Gervais témoignent dans nos colonnes de l'apparition récente de cette fonction dans les cabinets américains, britanniques et canadiens.

Les deux auteurs s'interrogent sur les contours de cette nouvelle fonction, sur sa place par rapport aux Barreaux et sur la confidentialité des échanges entre le conseiller à l'éthique et les avocats qu'il conseille.

Autre thème professionnel de cette édition, celui du financement des *class actions*, au sujet duquel Steven J. Shore commente la décision rendue par la cour de New York le 17 août dernier, dans l'affaire *Hamilton Capital VII, LLC./.Khorrami LLP*. Dans cette affaire, Hamilton Capital VII, LLC avait convenu avec un cabinet d'avocats un prêt à l'effet de financer ses opérations, dont notamment la conduite de *class actions*. Le prêt était remboursable moyennant intérêts augmentés de 10 % du chiffre d'affaires brut du cabinet d'avocat. Ce dernier s'est ensuite opposé à honorer ses engagements, au motif que la rémunération du prêt à hauteur de 10 % de son chiffre d'affaires brut aurait été contraire à l'interdiction faite aux avocats de partager leurs honoraires avec des personnes qui ne sont pas avocats.

L'article de Steven J. Shore vient en prélude à la séance du Sénat International des Barreaux du congrès de Valence, qui portera sur l'indépendance de la profession et les possibles menaces pesant sur ce principe fondamental de la profession, dont celles pouvant résulter du financement extérieur des cabinets d'avocats.

Au congrès de Valence, mon mandat de Rédacteur en chef du *Juriste International* viendra à expiration et Nicole van Crombrugghe me succèdera dans cette tâche. Je suis entrée dans le comité de rédaction du Juriste International en 2007, où je me suis occupée, dans un premier temps, de la rubrique « Pratique du droit », pour ensuite prendre, fin 2011, la succession de Bernard Grelon en tant que Rédacteur en chef.

Juriste International est le reflet des travaux, réflexions et activités de l'UIA. Mes fonctions de Rédacteur en chef m'ont permis de les découvrir et de les connaître, d'aller à la rencontre des commissions et des membres de l'UIA et de m'enrichir ainsi des travaux et réflexions de l'UIA, en matière de droits de l'homme, défense de la défense, profession et pratique du droit. C'est ce qui m'a passionnée dans mes fonctions au sein du comité de rédaction de *Juriste International*. C'est aussi ce qui m'a donné la chance de belles rencontres et amitiés.

Pour tout ceci, je vous adresse à tous et plus particulièrement aux membres du comité de rédaction du *Juriste International* un très grand merci !

Je souhaite à Nicole de connaître autant de joie et d'intérêt que j'en ai eus dans la tâche de rédacteur en chef, qui consiste à rendre compte, au travers du *Juriste International*, des remarquables actions et travaux de l'UIA.

Bénédicte QUERENET-HAHN
Rédacteur en Chef - Juriste International

Message from the Chief Editor

Bénédicte QUERENET-HAHN

Lawyers, their protection and their profession occupy most of this issue, first and foremost because recent months have unfortunately been marked by too many arrests and convictions of lawyers defending human rights.

At the Florence Congress last year, the Ludovic Trarieux prize was presented to Ms Mahienour El-Massry, an Egyptian lawyer who has been arbitrarily arrested and imprisoned on several occasions, in particular for having tried to assist other human rights defenders. Back in Egypt, the charges against her proliferated and on May 31, 2015 she was sentenced, along with two other lawyers and seven other people, to fifteen months in prison. Despite the protests and the requests for release made by the UIA and other human rights defence associations, she is still being held.

This year, the Ludovic Trarieux prize was awarded to our Saudi colleague Waleed Abu al-Khair, who is also being very actively supported by the UIA. Abu Al-Khair is a human rights defender, and founder of the association "Monitor of Human Rights in Saudi Arabia." He was sentenced to 15 years' imprisonment, a 15-year travel ban, and a fine of 200,000 Saudi riyals, for having represented several victims of human rights violations. Again, despite the mobilization of the UIA and other human rights associations, Mr Abu Al-Khair is still imprisoned and prevented from exercising his profession.

In China nearly 300 lawyers acting in support of their colleague Ms. Wang Yu, a human rights defender in several sensitive political trials, were arbitrarily arrested in July 2015. Many of them are still being held.

We are publishing these examples from the Human Rights Directorate's latest report in this issue. They demonstrate the worrying increase both in the number of cases of human rights violations and in the number of cases against those defending the victims, and consequently the need for the UIA - and therefore all its members - to mobilize and support our courageous colleagues.

This issue also focuses special attention on the practice of our profession. In particular, we take a look at the emergence of ethics advisors in law firms. Our colleagues Rita Haeusler and Francis Gervais consider the recent appearance of this function in American, British, and Canadian firms.

Both authors question the boundaries of this new function, its place in relation to the bar associations, and the confidentiality of exchanges between the ethics advisor and lawyers being advised.

Another professional topic in this issue is that of funding for class actions. Steven J. Shore comments on the decision handed down by the New York Courts on 17 August, in the case of *Hamilton Capital VII, LLC ./. Khorrami LLP*. In this case, Hamilton Capital VII, LLC had granted a loan to a law firm to finance its operations, in particular class actions. The loan was repayable with interest plus 10% of the law firm's gross revenue. The firm then refused to honour its commitments on the grounds that the remuneration of the loan at the rate of 10% of its gross revenue would constitute an illegal fee-sharing agreement.

The article by Steven J. Shore is a prelude to the meeting of the International Bar Leaders Senate at the Valencia Congress, which will focus on the independence of the profession and the potential threats to this fundamental principle, including those that may result from external sources of finance for law firms.

My term of office as editor of *Juriste International* will expire at the Congress of Valencia, and Nicole van Combrugghe will succeed me. I joined the editorial board of the *Juriste International* in 2007, where I was initially responsible for the "legal practice" section, before taking over from Bernard Grelon as editor at the end of 2011.

Juriste International mirrors the work, reflections, and activities of the UIA. My role as editor allowed me to discover and understand, meet the UIA's commissions and members and broaden my horizons through the UIA's work and reflections in relation to human rights, defending the defenders, and the profession and practice of law. This is what fascinated me about my job on *Juriste International*'s editorial board. It has also been an opportunity to meet some very interesting people and make friends.

For all these things, I would like to say a very big thank you to you all, and in particular to the members of *Juriste International*'s editorial board!

I hope Nicole has as much joy and finds as much interest as I have had in the role of editor, which consists of reporting on the outstanding actions and work of the UIA through *Juriste International*.

Bénédicte QUERENET-HAHN
Chief Editor - Juriste International

Mensaje del Redactor Jefe

Bénédicte QUERENET-HAHN

El abogado, su defensa y su profesión, ocupan la mayor parte de este número, antes que nada porque, lamentablemente, en estos últimos meses ha habido innumerables detenciones y condenas de abogados defensores de los derechos humanos.

En el congreso de Florencia, el año pasado, el premio Ludovic Trarieux fue otorgado a Mahienour El-Massry, abogada egipcia que en varias ocasiones había sido arbitrariamente detenida y encarcelada por haber intentado asistir a otros defensores de los derechos humanos. De regreso a Egipto, se multiplicaron los procedimientos judiciales en su contra y el 31 de mayo de 2015 fue condenada, junto a otros dos abogados y a siete personas más, a un año y tres meses de cárcel. Pese a las protestas y demandas de liberación de la UIA y de otras asociaciones de defensa de los derechos humanos, Mahienour El-Massry aún se encuentra detenida.

Este año, el premio Ludovic Trarieux fue otorgado a nuestro colega saudí Waleed Abu Al-Khair, que la UIA también sostiene de forma activa. Abu Al-Khair es un defensor de los derechos humanos y fundador de la asociación « Monitor of Human rights in Saudi Arabia ». Fue condenado a 15 años de cárcel, a 15 años de prohibición de viajar y a una multa de 200.000 riales saudíes por haber representado a varias víctimas de violaciones de los derechos humanos. Pese a la movilización de la UIA y de otras asociaciones de derechos humanos, Abu Al-Khair también se encuentra encarcelado e impedido de ejercer su profesión.

En China, cerca de 300 abogados que intervinieron en apoyo a su colega Wang Yu, defensora de los derechos humanos en varios delicados procesos judiciales por motivos políticos, fueron arrestados de forma injustificada durante el mes de julio de 2015. Muchos de ellos aún se encuentran detenidos arbitrariamente.

Estos ejemplos, extraídos del último informe de la Dirección de derechos humanos que publicamos en esta edición, muestran el inquietante aumento de los atropellos a los derechos humanos y a la defensa de los mismos, y la necesidad de que la UIA – y por consiguiente todos sus miembros – se movilice para sostener a sus valerosos colegas.

El ejercicio de la abogacía también ocupa un lugar importante en este número. Entre otros temas, tratamos de la nueva función de consejero de ética en los bufetes de abogados. Nuestros colegas Rita Haeusler y Francis Gervais analizan la reciente aparición de este cargo en los despachos de Estados Unidos, Gran Bretaña y Canadá.

Ambos autores se interrogan sobre los límites de esta nueva función, sobre su lugar respecto a los colegios de abogados y sobre la confidencialidad de los intercambios entre el consejero de ética y los abogados a quienes aconseja.

Otro tema profesional de esta edición es el de la financiación de las *class actions*, a propósito del cual Steven J. Shore comenta la decisión pronunciada por el tribunal de Nueva York el 17 de agosto pasado en el caso *Hamilton Capital VII, LLC./.Khorrami LLP*. En este caso, Hamilton Capital VII, LLC había concertado con un bufete de abogados un préstamo destinado a financiar las operaciones de dicho bufete, entre ellas la gestión de las *class actions*. El préstamo era reembolsable mediante intereses recargados del 10% de la facturación bruta del bufete de abogados. Luego, este último se negó a pagar sus compromisos arguyendo que la remuneración del préstamo fijada en un 10% de su facturación bruta se oponía a la regla que prohíbe a los abogados compartir sus honorarios con personas que no ejercen la abogacía.

El artículo de Steven J. Shore sirve de preludio a la sesión del Senado Internacional de los Colegios de Abogados del congreso de Valencia, que tratará de la independencia de la abogacía y de las posibles amenazas que pesan sobre este principio fundamental de la profesión, entre ellas, las que son generadas por la financiación exterior de los despachos de abogados.

En el congreso de Valencia vencerá mi mandato de redactora jefa de *Juriste International* y Nicole van Combrugghe será mi sucesora en esta tarea. Personalmente, ingresé en el comité de redacción de *Juriste International* en 2007, donde al principio estuve a cargo de la rúbrica « Ejercicio de la abogacía », y más tarde, a fines de 2011, sucedí a Bernard Grelon en calidad de redactora jefa.

Juriste International es el reflejo de los trabajos, reflexiones y actividades de la UIA. Mis funciones de redactora jefe me permitieron descubrirlos y profundizarlos, entrar en contacto con las comisiones y los miembros de la UIA y enriquecerme con los trabajos y análisis de la UIA en materia de derechos humanos, de defensa de la defensa y de ejercicio de la abogacía. Mis funciones en el seno del comité de redacción de *Juriste International* me apasionaron y a la vez me brindaron la oportunidad de establecer hermosas relaciones y amistades.

Por todo ello, os manifiesto a todos, y en particular a los miembros del comité de redacción, mis más sinceros agradecimientos.

Espero que Nicole experimente la misma alegría y el mismo interés que yo misma experimenté en mi tarea de redactora jefe, que consiste en dar a conocer, a través de *Juriste International*, los notables trabajos y acciones de la UIA

Bénédicte QUERENET-HAHN
Redactora Jefa - Juriste International

Actualités de l'UIA
UIA News
Novedades de la UIA

VALENCIA 2015
59th UIA CONGRESS
Main Theme

The Impact of Globalization and Mobility on Immigration Law

Conversation with Jacqueline Bart, President of the UIA Immigration Law & Nationality Commission

This year, at the 59th UIA Congress in Valencia, Spain, participants will have the opportunity to learn, share and discuss about international immigration and nationality law. Jacqueline Bart is the woman behind the organization and planning for the special sessions corresponding with the main theme: *The Impact of Globalization and Mobility on Immigration Law: the Delicate Balance of Economic Growth, Protectionism and Human Rights.*

To discover how and why the immigration theme was designed, I had the opportunity of interviewing Ms. Bart from her office in Toronto, Canada, where she works at BartLAW Canadian Immigration Barristers and Solicitors, the firm she founded in 1994.

The conversation began with a question familiar to many lawyers: why did you go into the field you are in? In Ms. Bart's case, that field is corporate immigration and citizenship law. But that is not how her career began. As a young attorney, she was driven by her passion for refugee children and worked for the United Nations High Commissioner for Refugees in Geneva. She later went on to take up advocacy work for refugees in Canada and eventually shifted focus to corporate immigration.

After learning about Ms. Bart's background, we began talking about the status of immigration law in Canada and the changes immigration lawyers have experienced over the past 25 years.

Immigration lawyers are currently in high demand in Canada to aid prospective immigrants in understanding the best ways to go about the immigration process. Ms. Bart compared the deceivingly straightforward online Canadian immigrant request forms to dating Websites, where people create profiles and wait expectantly, unaware of the complex laws and regulations involved.

Indeed, the reality of the process is much more complicated: "Immigration law is the most difficult area of federal law in Canada", Ms. Bart affirmed, "but it has not always been this way". In fact, Canadian immigration law was once among the easier legal fields. However due to globalization, increased mobility and complex legislation, that is no longer the case.

Given the often-convoluted immigration process and the government's struggle to balance economic growth, protectionism and human rights, I asked Ms. Bart what she believes that it takes to make a meaningful difference in immigration law.

"Well, no country is alike," she began. "Each nation deals with immigration differently and has a different outlook on the process". She identified a country's economy, geopolitical space and culture as the fundamental defining factors that determine the legal immigration process.

Despite the significant differences in immigration law depending on the jurisdiction, several key variables are universally influential. The theme title *The Impact of Globalization and Mobility on Immigration Law* captures two of the strongest effects that have made immigration law the critical issue that it is today.

"Globalization changes how we practice law, and immigration is seeing the greatest change" Ms. Bart explained. Today, companies are more international than ever and as such inter-company international transfers have become commonplace. Additionally, the Internet is connecting people overseas and making information about the possibility of immigration easily available.

The second part of the theme, *the Delicate Balance of Economic Growth, Protectionism and Human Rights* highlights other important considerations regarding immigration law, namely – what does this "delicate balance" look like?

Ms. Bart prefaced her response to this question by reiterating the uniqueness of the situation for each country. A push and pull between economic growth and the need to

protect a country's citizens while also protecting immigrants makes the ideal "balance" challenging to achieve.

According to Ms. Bart, immigration depends a lot on economic growth. She believes that a country must bring in skillsets based on growth and that ultimately fair immigration law is a balancing act by the government largely concerning human rights vs. protectionism.

Gathering the world's lawyers at the UIA Congress to discuss these competing considerations is a powerful way to express, compare and change immigration law. As Ms. Bart pointed out, "the UIA brings together more than just attorneys. It is gathering judges, politicians and specialists as well". The special opportunity that comes with events of such an international magnitude is the influence participants can have on policy and the furthering of legal education.

For Ms. Bart, education is the central goal of the immigration sessions. "It's about speaking with others, learning from their thinking, learning ways your country can improve and sharing practices that work well. There is nothing better than conversing and sharing with others to spread the wealth of information. The UIA Congress is bringing minds together and bringing hearts together and that is very important".

Before concluding the interview, I posed one final question: what do you hope that Congress participants will take away from the immigration sessions at the Congress? "Immigration law is becoming huge!" she responded emphatically. "Immigration and nationality law cross almost every sector of the legal practice and many do not realize how immigration law has changed and its importance to all countries".

Walking away from the Congress with greater understanding about the various competing interests that shape immigration law and the ability to think carefully about how immigration laws have changed are central goals. Then, hopefully Congress participants will share what they learned with their colleagues or at other international or national conferences so that positive, productive changes can be made.

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VALENCIA 2015
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Main Theme

The Commoditisation of Sport Through Trade Marks

Gavin LLEWELLYN & Xavier FAVRE-BULLE

The amount of money being spent on sponsorship, image rights and player wages is also continuing to rise dramatically.

Recent data suggests that global revenues from ticket sales and broadcasting and sponsorship deals in 2014 were worth close to $80 billion. If you add to this the sale of merchandise, sporting goods, clothing and equipment, the global sports industry generates around $700 billion annually, which is about one per cent of global GDP.

Given the increasing amount of money being spent on television rights alone, the contribution of sport to the global economy is inevitably ascending to unprecedented levels. BT Sport has paid £897 million for the exclusive rights to broadcast Champions League football in the UK for three years. The amount of money being spent on sponsorship, image rights and player wages is also continuing to rise dramatically. Adidas has paid £750 million to be the shirt manufacturer for Manchester United football club for 10 years.

One of the reasons for this is the increasing commoditisation of sport as organisations within the sports industry, such as governing bodies and clubs, and individual sports personalities have looked to maximise revenues through trade marks, image rights, sponsorship and endorsements. Trade mark rights are key to securing a strong position.

At the same time, third parties, such as businesses within the betting and gaming sector and media organisations, have, wherever possible, tried to push back against the commoditisation of sport and this concentration of sports-related rights in the hands of the organisations and to take advantage of the growing interest in this sector of the economy to promote their own businesses. Then there are the goods manufacturers and service providers who look for sponsorship deals in return for the right to associate themselves with the clubs and sports events in advertising.

As in any competitive industry, this necessarily involves capitalising on other people's rights, which creates a possible tension between the rights-holders and third parties.

The past decade has seen a substantial increase in the number of intellectual property cases in the European Courts involving the protection and exploitation of sports-related rights, particularly trade mark and image rights. Many of these cases have involved the football and betting industries. In America, the "Washington Redskins" trade mark dispute over the team's entitlement to the trade mark has generated publicity on an international scale. Many cases have been ground-breaking. The relatively few commercial sports cases which went before the Courts prior to the new millennium is perhaps a testament of a prior age when organisations and sports personalities were less concerned about the value of

their intellectual property portfolios and sport was not such big business as it is today.

The combination of the increased worldwide interest sports events, advancementsin technology, the rise of the `celebrity´ culture, where an endorsement of a brand by an organisation or a sports personality has great commercial value, and a greater awareness of the law has given rise to a wave of sports-related litigation. Judges have sometimes struggled to apply existing legal principles to the sporting setting, leading to a great deal of uncertainty (which is illustrated by the number of cases in which questions have been referred to the ECJ). The coming years are likely to see further disputes between the various stakeholders.

Trade marks have been used by the various stakeholders within the sports industry to secure their position, which has led to the increasing commoditisation of sport.

Sports organisations have increasingly sought to protect their registered trade marks to ensure that their revenue-raising opportunities can be maximised, for example, by granting licences to use their trade marks. Trade marks do give sports organisations a powerful tool to protect their positions. Third parties such as betting and gaming companies therefore need to be careful when making use of registered trade marks on websites, leaflets, flyers, posters and other forms of advertising. They must ensure that such use is descriptive in order not to confuse their goods or services as goods and services of the club or sports personality.

Famous sports personalities are also keen to obtain trade mark protection for their names, sometimes registering their names across a variety of categories of goods. Some have even managed to register their likenesses as trade marks. However, the real value of these marks is questionable, given that it is hard to conceive how such a photograph could designate the trade origin of a particular item, rather than simply being a souvenir. Further, in any potential action, it would be difficult to prove that a particular image had been infringed.

Perhaps the more interesting aspect of trade marks as far as sports personalities are concerned is the developing law of image rights. Image rights have become an increasingly important area of trade mark law, particularly as sports personalities have sought to capitalise on their goodwill through endorsement and sponsorship activities.

Their image rights are essentially their proprietary rights to the use of their names or images derived from the reputation and goodwill which they have generated from their celebrity status. They usually depend upon being able to demonstrate sufficient goodwill and reputation in their names and that the unauthorised use of their names by third parties is a misrepresentation that the third party's products originate from or are in some way connected with the sports personality (e.g. via a sponsorship agreement) in a way which is likely to cause confusion and damage, for example, lost licence fees, damage to existing or potential contractual relations or simply damage to their reputation. Third parties therefore need to be aware of the inherent risks which they face if they use the images of well-known sports personalities in their materials in a way which suggests some connection with them.

On the other hand, these so-called "image rights" are unlikely to assist personalities who are not currently in the media spotlight. The substantial hurdles which need to be overcome inevitably mean that this route will only be open to prominent figures.

At the same time, a tension seems to be developing between organisations and sports players over image rights. All Rugby Super League's players are on standard term employment contracts with their clubs, which are prescribed by the Rugby Football League, the governing body. The contract effectively assigns to each individual club the players' intellectual property rights such as image rights and the right for the club to use the players' names for commercial purposes. Not only does this arrangement create a tension between clubs and players, but it also risks infringing European Competition and Human Rights law, which is playing an increasingly important role in relation to the commercial exploitation of a person's image and fame through the development of a quasi-publicity right or a right to trade in one's fame.

One of the Main Themes of this year's Annual Congress of the *Union Internationale des Avocats* (UIA) will be Trade Marks and Sport. Eminent speakers from both private practice and industry will talk about the interests of and challenges faced by the various stakeholders in the sports industry, namely sports organisations, clubs, players, agents and goods manufacturers in relation to the protection and exploitation of sports brands. From the protection of branded sports events to the protection of sports brands, we shall see how sports brands have become a product in their own

right through sponsor-ship and endorsement deals.

The full-day session will break down into a series of international panels of speakers from industry and private practice. We shall begin the day by discussing the needs of the sports industry, with the industry view presented by Frédérique Reynertz of the International Sports Federation (FIA). Mr Laurent Vidal, Professor and Sorbonne-ICSS Chair for Sport Ethics and Integrity will address the problem of fighting against the manipulation of sporting competitions. Mr. Vidal is co-ordinating a Council of Europe handbook on this subject, working closely with UNESCO.

We shall then move on to look at:

- The benefits and advantages of trade mark registrations,
- Problems in obtaining trade marks from the perspectives of the various stakeholders, such as distinctiveness problems faced by celebrity players in relation to merchandise, the 'Washington Redskins' trade mark cancellation dispute and the recent failure by FC Barcelona to obtain the domain name "fcb.email",
- Alternatives to trade mark registration for protecting brands,
- The protection of the 'Olympics' brand and advertising codes and regulations available for the protection of sports brands.

In considering the contractual framework, we shall ask:

- What are the key interests for stakeholders?
- What sort of deals are stakeholders doing?
- What are the terms and conditions in a typical licensing deal?
- What restrictions are placed on players by clubs as to ownership and exploitation of trade marks and their freedom to contract with third parties?
- Do we see the emergence of any new business models?

The issues peculiar to the football industry, from the perspective of both clubs and players, will then come under the spotlight. Next, we shall look at the push-back against the dominance of the industry stakeholders by third parties and how the industry stakeholders have reacted by discussing the challenges posed by ambush marketing and the infringement of sports personalities' image rights. The betting and gaming industry will be one very important aspect of this topic, but there are also other organisations who take advantage of the reputation and goodwill of sports bodies, clubs and personalities in order to generate revenue, including rival manufacturers of goods, goods manufacturers seeking endorsement deals and on-line retailers.

The recent Real Madrid "realmadrid.tienda" domain name dispute is just one example of the problems faced by the sports industry. We shall ask how these threats have been dealt with and whether the law is adequate to deal with them - or have stakeholders had to adapt their business models to reduce the impact of third party competition? Our speakers will give us an insight into the limitations on the scope and effectiveness of trade marks in protecting sports brands and into whether the law is weighted too much in favour of certain interests over others.

Finally, we shall conclude with some alternative viewpoints offered by the Spanish Civil and Mercantile Court of Arbitration and the Court of Arbitration for Sport.

By looking at the key issues and stakes for interested parties and at how the law is used by each of the interested parties to achieve their respective aims from the perspective of different legal jurisdictions, we aim to understand how sports brands, through the protection and opportunities offered by trade marks, have become an international commodity in their own right.

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L'UIA à Dakar

L'exécution des sentences arbitrales en Afrique

Diamana DIAWARA

La ville de Dakar a accueilli, le 25 avril 2015, une conférence sur le thème de l'exécution des sentences arbitrales en Afrique. Quatre panels se sont succédé afin d'aborder cette problématique qui doit être envisagée aussi bien en amont de la procédure arbitrale qu'une fois la sentence rendue avec les spécificités liées à l'espace OHADA.

Le premier panel a montré l'importance d'anticiper au stade précontentieux ou au début de la procédure la question de l'exécution de la sentence arbitrale. En effet, il convient de s'assurer, avant d'engager un arbitrage, de l'existence d'avoirs de la partie contre laquelle on agit afin de garantir l'exécution ultérieure de la sentence. Si la recherche d'avoirs s'avère infructueuse, elle peut remettre en cause l'intérêt d'introduire une procédure. Il apparaît essentiel de tout connaître de son débiteur dès que l'on envisage une procédure à son encontre, de son régime matrimonial à son lieu de villégiature lorsqu'il s'agit d'un particulier, en passant par sa carte d'identité sociétale pour une entreprise (fournisseurs, clients), et même sa politique culturelle lorsque le débiteur est un État.

Le recours à l'arbitrage d'urgence peut également offrir une possibilité d'obtenir des mesures conservatoires avant la constitution d'un tribunal arbitral même si le pouvoir de l'arbitre d'urgence étant fondé sur la seule volonté des parties, il ne dispose pas des mêmes moyens de contrainte sur les biens du débiteur que le juge judiciaire. Le fait que l'arbitre n'ait pas la possibilité de rendre des mesures urgentes *ex parte* a tout particulièrement été souligné comme un élément de risque dès lors que le caractère contradictoire des débats devant l'arbitre d'urgence anéantit l'esprit de surprise permettant d'éviter la disparition des avoirs.

Le deuxième panel a fait un rappel des questions d'*exequatur* et de voies de recours contre les sentences arbitrales dans l'espace OHADA. L'espace OHADA confère à ces questions une spécificité dès lors que leur régime relève de sources de différentes natures qui comprennent les législations nationales, le Traité OHADA, l'Acte Uniforme portant sur le droit de l'arbitrage (l'Acte Uniforme), le Règlement d'arbitrage de la Cour Communautaire de Justice et d'Arbitrage (CCJA), et enfin le Règlement de procédure de la CCJA.

En vertu de l'article 23 de l'Acte Uniforme, la sentence a, dès qu'elle a été rendue, l'autorité de la chose jugée relativement à la contestation qu'elle tranche. Les sentences arbitrales rendues sous l'égide du règlement de la CCJA relèvent du régime de l'article 27 de ce règlement selon lequel elles ont « l'autorité définitive de la chose jugée sur le territoire de chaque État partie, au même titre que les décisions rendues par les juridictions de cet État ».

Les règles applicables varient selon que les sentences sont rendues sur le fondement de l'Acte Uniforme ou sous l'égide de la CCJA.

L'*exequatur* des sentences rendues sur le fondement de l'Acte Uniforme est régi par les législations de procédure civile auxquelles ce dernier renvoie à son article 30. La décision de refus d'*exequatur* n'est susceptible que de pourvoi en cassation devant la CCJA en sa qualité de cour suprême de l'ensemble des États membres de l'OHADA. L'article 30 du règlement CCJA prévoit le régime de l'*exequatur* des sentences rendues sous son égide. L'*exequatur* CCJA a un caractère communautaire qui rend la sentence CCJA exécutoire dans l'ensemble des États.

S'agissant du recours en annulation d'une sentence et des voies de recours possibles, la difficulté vient de ce que c'est la même entité, la CCJA, qui exerce, d'une part, le rôle de cour suprême pour les décisions rendues dans les États membres et, d'autre part, le rôle d'institution d'arbitrage.

Les sentences rendues par un tribunal arbitral dont le siège est situé dans un État de l'espace OHADA peut faire l'objet d'un recours en annulation prévu à l'article 25 de l'Acte Uniforme. Le recours n'est ouvert que pour des moyens limitativement énumérés à l'article 26. L'article 28 de l'Acte Uniforme suspend l'exécution de la sentence arbitrale jusqu'à ce que le Juge compétent dans l'État partie ait statué, sauf si l'exécution provisoire de la sentence a été ordonnée par le tribunal arbitral.

Dans les procédures d'arbitrage CCJA, le règlement d'arbitrage CCJA prévoit trois types de recours : le recours en contestation de validité, le recours en révision et la tierce opposition. Il a été relevé que la CCJA dispose, en vertu de l'article 30, d'un pouvoir d'évocation de l'affaire au fond si les parties en sont d'accord. Il a été souligné qu'il était difficile pour le juge judiciaire dans l'espace OHADA, en dépit de l'accord des parties d'évoquer une affaire en cas de succès d'un recours en annulation compte tenu de la position de la CCJA agissant également en qualité de cour suprême de l'espace OHADA.

La question de l'exécution en Afrique des sentences arbitrales a été examinée par le troisième panel. Une distinction a été opérée selon que l'exécution est fondée sur la Convention de New York de 1958 sur la reconnaissance et l'exécution des sentences arbitrales étrangères ou sur le Traité OHADA.

Seuls 11 des 17 pays de l'espace OHADA ont ratifié la Convention de New York. Dans ces États, cette dernière prime sur l'Acte Uniforme. Toutefois, elle effectue un renvoi vers celui-ci si il prévoit un régime plus favorable ou pour certaines questions relevant du droit national du for saisi, tels que l'arbitrabilité ou l'ordre public international. Même si l'Acte Uniforme est silencieux sur les motifs de refus de l'*exequatur* qui sont en principe les mêmes que les moyens de recours en annulation, il reprend pour l'essentiel les conditions de l'*exequatur* ou les cas d'ouverture du recours en annulation de la sentence arbitrale prévus par la Convention de New York. L'exécution des sentences arbitrales dans les États de l'espace OHADA correspond donc au régime de la Convention de New York.

La notion de « sentence étrangère » telle que visée par la Convention de New York dans son champ d'application est cependant plus complexe dans l'espace OHADA dès lors qu'il existe deux types de sentences étrangères : d'une part, celles qui sont étrangères à l'espace communautaire et d'autre part celles qui sont étrangères à raison de leur exécution dans un État membre de l'espace OHADA autre que celui dans lequel elle a été rendue. Le recours aux règles de conflits de lois et aux traités de coopération judiciaire devient alors nécessaire pour déterminer selon quel régime (celui de la Convention de New York ou de l'Acte Uniforme), la sentence étrangère sera exécutée.

La question a aussi été posée de savoir si la jurisprudence française Hilmarton de 1991, étendue par la jurisprudence Putrabali de 2007 aux termes de laquelle une sentence annulée au siège pourrait être exécutée ailleurs, pourrait être transposée en Afrique. En effet, l'article VII(1) de la Convention de New York permet l'application d'un régime plus favorable que le sien s'agissant de l'exécution des sentences. Si l'article V(1)(e) fait figurer l'annulation d'une sentence arbitrale parmi les motifs de refus de reconnaissance ou d'exécution d'une sentence, tel n'est pas le cas ni du droit français, ni de l'Acte Uniforme OHADA qui ont donc un régime plus favorable. Aux termes de plusieurs jurisprudences, des sentences rendues et annulées en Afrique, qu'il s'agisse de sentences CCJA ou pas, ont été exécutées en France. Cependant, il est apparu difficile, en particulier s'agissant de deux États de l'espace OHADA, d'imaginer qu'une sentence annulée dans l'un puisse être exécutée dans l'autre. Le caractère intégré et communautaire de l'OHADA et le rôle de la CCJA, organe judiciaire suprême au sein de l'OHADA, visant à préserver la cohérence communautaire ont été évoqués à cet égard.

Le dernier panel s'est intéressé à l'arbitrage d'investissement et à l'exécution des sentences contre les États africains.

Plusieurs facteurs ont été identifiés comme favorisant l'exécution volontaire des sentences CIRDI. Il peut s'agir de politiques économiques attractives pour les investisseurs étrangers, de l'intervention de la Banque Mondiale de 1996, ou encore de mesures de rétorsion mises en place par plusieurs États. Le régime de reconnaissance et d'exécution des sentences CIRDI a été présenté. Ce Centre d'arbitrage prévoit un système autonome. Aucun tribunal étatique ne peut revoir une décision ou une sentence CIRDI. Les recours CIRDI, limités et exceptionnels, sont au nombre de quatre : recours en rectification, révision, annulation et interprétation. Certains États comme le Kenya, la Zambie ou le Sénégal ont défini les critères selon lesquels les sentences CIRDI avaient un caractère exécutoire sur leur territoire.

Enfin, il a été examiné dans quelle mesure les États pouvaient se fonder sur des immunités d'exécution pour faire échec à l'exécution de sentences arbitrales. Les débats ont mis en exergue que malgré les tentatives visant à restreindre l'étendue de ces immunités d'exécution, le juge reste frileux lorsqu'il s'agit de faire exécuter une sentence arbitrale en opérant une saisie des biens étatiques.

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La UIA en Madrid

El futuro Reglamento Europeo de Protección de Datos

Marc GALLARDO MESEGUER

Tras la experiencia del seminario organizado el año pasado en el Tribunal de Justicia de la Unión Europea en Luxemburgo, la Comisión Privacidad y Derechos de la Persona Digital de la UIA, en colaboración con la Comisión Derecho de la Unión Europea de la UIA, organizó un seminario en Madrid los días 17 y 18 de abril de 2015 sobre el futuro Reglamento Europeo de Protección de Datos.

Este Reglamento es una pieza central de la reforma de la protección de datos en la UE y tendrá un impacto significativo y de gran alcance para las empresas en el contexto de una economía cada vez más basada en los datos.

El seminario se celebró en la sede del Ilustre Colegio de Abogados de Madrid (ICAM) y contó con 90 participantes.

El jueves 17 de abril, por la tarde, tuvo lugar un cóctel de bienvenida en la biblioteca del ICAM, en la que los participantes tuvieron ocasión de encontrarse antes del inicio del seminario y visitar las magníficas instalaciones del Colegio.

El seminario comenzó el viernes 18 de abril con los discursos de bienvenida de la Decana del ICAM, el Vicepresidente del CGAE, el Director de la Agencia Española de Protección de Datos (AEPD) y el Presidente de la UIA. Todos ellos destacaron la importancia que tiene la aprobación del Reglamento para el refuerzo del derecho fundamental a la protección de datos en la UE.

A continuación, el Sr. Bruno Gencarelli, Jefe de Unidad de protección de datos de la Comisión europea, esbozó cuáles son las orientaciones principales del Reglamento, así como los retos más importantes a los que se enfrenta esta norma en su fase de aprobación definitiva, la cual podría tener lugar a finales de 2015, si bien el Reglamento, en su versión actual, prevé un período transitorio de dos años para su efectiva entrada en vigor.

Después de la pausa café, dio comienzo el primer panel sobre el ámbito material y territorial de la propuesta de Reglamento, en el que se destacaron las novedades en su ámbito de aplicación y, en particular, el espinoso tema de su aplicación a empresas establecidas fuera de la UE, cuando estas dirijan sus servicios a ciudadanos de la Unión o bien evalúen su comportamiento en este territorio, realizando para ello un tratamiento de datos personales.

El siguiente panel tuvo por objeto debatir, a través de un caso práctico, cómo se refuerzan o debilitan los derechos de los titulares de datos en la propuesta del Reglamento, haciendo especial hincapié en las formas más creativas de proporcionar la información a los interesados y obtener su consentimiento para el tratamiento de datos en Internet, sin olvidar el ejercicio del "derecho al olvido" de los interesados, teniendo especialmente en cuenta la famosa sentencia del Tribunal de Justicia de la Unión Europea (TJUE) en el caso Google Spain.

Tras el almuerzo, el siguiente panel estuvo consagrado a los nuevos retos que la propuesta del Reglamento plantea para los responsables y encargados del tratamiento de datos, y que sirvió para delimitar el alcance de las nuevas obligaciones incorporadas en el Reglamento, tales como la "rendición de cuentas", la privacidad desde el diseño y por defecto, así como los límites aplicables al uso de perfiles para fines publicitarios o para otro tipo de actuaciones empresariales.

El último panel del día abordó otra cuestión de gran trascendencia para las empresas que exportan datos fuera de la UE, como es el régimen de transferencias internacionales de datos y los mecanismos que las legitiman en la propuesta de Reglamento (por ejemplo, países con un nivel equivalente de protección, cláusulas contractuales y reglas corporativas vinculantes), prestando una especial atención a las transferencias de datos hacia Estados Unidos y el vigente acuerdo "Safe Harbor", donde existe una perspectiva distinta de la privacidad y la protección de datos.

Al final de esta primera jornada tuvo lugar

la cena en el Club Financiero Génova, en la que los asistentes degustaron la comida tradicional española al mismo tiempo que pudieron contemplar las excelentes vistas de la ciudad.

El sábado 19 tuvo lugar la segunda jornada del seminario dedicada a los aspectos más prácticos del Reglamento.

El primer panel ofreció diversas interpretaciones sobre cuál ha de ser el role y las tareas de la figura del delegado de protección de datos que se regula en la propuesta del Reglamento. Hubo cierto consenso en que los abogados, sean o no abogados de empresa, deben implicarse de forma activa en el desarrollo de esta figura.

El siguiente panel presentó las claves para construir un programa de privacidad en las empresas que incorpore los nuevos principios de la propuesta del Reglamento, en aras a anticiparse a los cambios que se avecinan e integrarlos de una forma más natural, en aras a una efectiva protección del derecho fundamental a la protección de datos. También hubo consenso en el hecho de que un enfoque proactivo y garantista de la protección de datos en las empresas es un valor añadido para éstas y en particular para aquellas que tratan un volumen considerable de datos personales o un tipo de datos especialmente sensible (por ejemplo, datos de salud).

Tras la pausa café, intervino el panel sobre el control y sanciones del nuevo Reglamento, poniéndose de manifiesto que la propuesta de Reglamento prevé medios de control más efectivos y sanciones más rigurosas y disuasorias frente a incumplimientos, en comparación con la normativa vigente.

Finalmente, el Sr. García Gozalo, Director del departamento internacional de la AEPD, cerró el Seminario ofreciendo una perspectiva muy interesante sobre la evolución de la propuesta de Reglamento, así como sus puntos más críticos, antes del inicio de las negociaciones entre la Comisión, el Parlamento Europeo y el Consejo en vistas a su aprobación definitiva.

El seminario contó con un servicio de traducción simultánea inglés-español y viceversa que realizaron alumnos en prácticas del Máster de Traducción e Interpretación de la Universidad Pontificia Comillas de Madrid.

El nivel de satisfacción de los participantes al seminario fue muy alto, lo cual nos anima a organizar un nuevo seminario UIA con posterioridad a la aprobación definitiva del Reglamento, para el que esperamos contar de nuevo con vuestras aportaciones y asistencia.

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The UIA In London

The Written Heritage of Mankind in Peril

Giuseppe CALABI & Howard SPIEGLER

On June 26, 2015, the Art Law Commission of the UIA teamed up with the British Library and the Institute of Art and Law in London to hold a full-day seminar to comprehensively review the many aspects of the widespread theft of and illicit trafficking in rare books, maps and manuscripts looted from sovereign and other libraries and similar repositories around the world. 20 expert speakers and over 100 others attended, including representatives of dealers, collectors, auction houses, national collections, law enforcement officials, security experts, attorneys and others.

Everyone was welcomed by Kristian Jensen, the Head of Collections and Curation of the British Library, which hosted the conference. A keynote address was then delivered by Professor Norman Palmer QC, Barrister, Professor Emeritus of the Law of Art and Cultural Property at University College London and Academic Principal of the Institute of Art and Law, one of the conference's organizers. Professor Palmer explained how archives, books and manuscripts relate to cultural property generally.

The first panel then addressed notorious recent examples of rare book theft around the world including in Denmark (discussed by Ivan Boserup, Former Head of Manuscripts and Rare Books, The Royal Library, Copenhagen) and Korea (Professor Keun-Gwan Lee, Professor of Law, Seoul National University). Margaret Lane Ford, International Head of Books and Manuscripts at Christie's, also discussed the thefts at the Girolamini Library in Naples and the National Library of Sweden. This panel was moderated by Giuseppe Calabi, one of the co-autors of this article.

The next panel presented a case study of thefts from the Swedish National Library, which Howard Spiegler, one of the co-authors of this article, moderated. Howard Spiegler and the attorneys who coordinated the investigation and recovery of several of the stolen rare books each explained our respective roles: Sharon Cohen Levin, former Chief of the Money Laundering and Asset Forfeiture Unit of the United States Attorney's Office for the Southern District of New York (and currently a partner at WilmerHale), Jerker Ryden, Senior Legal Advisor of the National Library of Sweden and Jutta Freifrau von Falkenhausen, a Berlin attorney.

The conference was then treated to a special keynote address by Professor Sibel Özel, Head of the Department of Private International Law at Marmara Üniversitesi, Istanbul, who discussed the Turkish experience regarding the protection of ancient books and manuscripts.

The perspective of the rare book trade was then presented in a panel moderated by Monica Dugot, International Director of Restitution at Christie's. The panelists were Richard Aronowitz-Mercer, Head of Restitution Europe at Sotheby's, London, Norbert Donhofer, President of the International League of Antiquarian Booksellers (ILAB) and Stephen Loewentheil, Founder and President of 19th Century Rare Book and Photograph Shop, Baltimore. (Upon discovering that he had been in possession of books stolen from the National Swedish Library, Mr. Loewentheil purchased the books back from his buyer and then returned them to the Library, from which he received a medal.)

The next panel considered the issues surrounding security and the methods of preventing the theft and trafficking of rare books in the first place. The panel was moderated by Mr. Jensen of the British Library and presented as speakers Greger Bergvall, Manuscripts, Maps and Pictures Division of the National Library of Sweden, Denis Bruckmann, Director of Collections, Bibliothèque Nationale de France and Christian Recht, Senior Legal Advisor, Österreichische Nationalbibliothek, Wien.

The concluding panel of the day summarized the lessons learned during the previous panels and began the process of recommending future steps to take. Gert-Jan van den Bergh, Bergh Stoop & Sanders, Amsterdam, led the discussion as moderator and the panelists included prior speakers Mr. Donhofer of the ILAB, Mr. Jensen of the British Library and Ms. Levin of the U.S. Attorney's Office, as well as Hetty Gleave, partner at Hunters Solicitors, London. This panel concluded that the problem of rare book theft presents issues that implicate morality, legality and practicality. The panelists generally agreed that it was critical that there be more transparency and less secrecy when dealing with thefts, especially that all such thefts should be publicized. Another important area discussed was whether the various databases maintained to track stolen books should be merged into one easy-to-access information base. Finally, the significance of ADR and voluntarily returning stolen books to the victims (usually sovereign libraries) regardless of liability was discussed, especially when the statute of limitations for bringing legal actions has expired.

The organizers now plan to publish papers prepared by the speakers and hold a subsequent conference in New York next year.

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For more information:

Part 1
(introductory keynote, panel I):

Part 2
(panel II, keynote II):

Part 3
(panels III and IV):

Part 4
(concluding panel):

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In Memoriam Colin J. Wall

It is with great sadness that we have to announce that our Co-President and dear friend Colin J. Wall passed away on the morning of July 16.

As many of you know, Colin had been diagnosed with pancreatic cancer about a year ago. He was taken care of by the best doctors in the UK and the US and his treatment proved very successful. We were all hoping to see him in good health soon.

Right before he was to travel to the US for surgery, he had a stroke and was hospitalized for a few days in the UK before being allowed to go back home. But during that time his cancer had irreversibly progressed and he left this world on July 16.

Colin was one of the most respected arbitrators and mediators in the world and particularly in the field of construction.

His involvement in the Forum dates back to our first meeting in 2001 where he represented the Hong Kong Mediation Council. His interest and commitment to the Forum and its management led to his years as Deputy President, then Co-President with Thierry Garby and finally as Co-President with Fabienne van der Vleugel.

Colin had hoped to have our next forum in Hong Kong but decided to put this project on hold until he was sure to be rid of his cancer. Unfortunately, this proved him wise again.

His input in the Forum was just phenomenal. He was certainly the most experienced mediator and trainer among us. His knowledge and experience enabled him to guide us in the selection of the best speakers and topics and in taking the best initiatives. Though he had experience in the largest cases, he never built his self-image on it. On the contrary, he was always thinking of new ways to help new mediators and mediation centres to gain knowledge from his experience.

Beyond his considerable professional input, we shall always remember him as a cheerful friend who was always keen to share drinks, dinner and songs with all of us.

For us at the forum, the loss of Colin is like the loss of part of our soul. A few years ago, he wrote the history of the Forum with a focus on its beginning because it was so dear to him. This text was published in Juriste International 2011-3. It perfectly captures his involvement in and his influence on the Forum.

We should not forget the important part he played in the ICC Mediation Competition. He and Alan Limbury have written and edited the competition problems since the beginning of the competition and made significant contributions to its incredible success. Last year he presented the book he had prepared with Greg Bond, a selection of ICC Competition problems, to ensure that future students can benefit from lessons learned, all the copyrights being paid to a charity to help research on pancreatic cancer.

Colin was always thinking of our future. But now our future will have to be lived without him by our side. But he and his influence will remain in our minds and hearts.

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

Racial Bias in United States Policing from a Human Rights Perspective

George M. KRAW

Recent publicized deaths of African-American men at the hands of United States police have renewed questions about systemic racial bias in the American criminal justice system and whether this causes continuing human and civil rights violations against African-Americans and other ethnic minorities. In its reports to agencies such as the United Nation's Committee on the Elimination of Racial Discrimination, the United States government routinely rejects assertions of institutional bias, while acknowledging problems with individual police officers and particular jurisdictions. But many observers, both domestic and foreign are convinced that racial bias infects American policing. This has led to a continuing debate about United States compliance with international human rights treaty obligations and domestic civil rights laws, and what measures it should take to correct shortcomings.

As the Guardian newspaper and others have reported, many more people are killed by police in the United States than in other developed countries. A disproportionate number of those deaths are of African-American men. The Wall Street Journal reports that the federal Center for Disease Control counted 129 African-American men killed by police in 2011, but these figures are incomplete because there are no national reporting requirements. This lack of verified reporting is one of the difficulties in defining the scope of the problem. The widespread publicity given to the latest killings has attached human faces to complaints about police bias in ways that cold statistics written on paper or typed into computers never could. These killings led to the creation of the "Black Lives Matter" movement — the term reportedly comes from a post on a Facebook page dedicated to dead Florida teenager Trayvon Martin — and to demonstrations throughout the United States. They also raised questions about the overall quality and effectiveness of the local police where the killings occurred, and whether unnecessary lethal force is used because of racial profiling and stereotyping. Recent notorious incidents where unarmed African-Americans were killed by police include the following.

In South Carolina, Walter Scott was shot in the back by a white North Charleston police officer, Michael Slager, after Scott ran away from a routine traffic stop. The shooting was captured on a cell phone camera by a witness. Slager had been the subject of previous brutality complaints. In one earlier incident, Slager had been accused of tasing a man without cause, but was reportedly cleared without the victim being interviewed. Prior to Scott's death, North Charleston residents had complained about racial profiling of African-Americans and the unnecessary use of tasers by local police. After the killing, the North Charleston police force requires all of its officers to wear body cameras that record their actions. Slager was charged with murder and is awaiting trial.

In Cincinnati, Ohio, Samuel DuBose was killed during a police stop for a missing license plate on his car. University of Cincinnati police officer Ray Tensing killed DuBose when DuBose refused to get out of the car and began to drive away from the stop. The police department's local use of force procedures which governed Tensing's actions required that he "should not discharge a firearm at or from a moving vehicle except as the ultimate measure of self-defense or defense of another when the suspect is using deadly force." Tensing claimed that he was being dragged by DuBose's car and was forced to shoot him in self-defense. Tensing was subsequently indicted for murder and terminated from the police force. An independent report of the incident released by the University found that DuBose's death was "entirely preventable." Tensing's prosecutor says that DuBose was not acting violently or aggressively and called the killing "asinine" and "senseless."

In Ferguson, Missouri, a small town near St. Louis, Michael Brown was shot and killed by police officer Darren Wilson after Brown was stopped for allegedly stealing a pack of cigarillos from a convenience store and shoving a clerk. Wilson claimed that he acted in self-defense after Brown hit him and tried to grab his gun. Investigations by both federal and state prosecutors resulted in no charges being brought against Wilson, who has since left the Ferguson police force. Questions remain as to whether the

killing was justified, and the Brown family has filed a civil suit against the city of Ferguson, its former police chief and Wilson. A subsequent federal government investigation of the Ferguson police department found that Ferguson police were encouraged to cite African-Americans for minor crimes resulting in fines, in order to supplement Ferguson's tax revenues.

In New York City, Eric Garner was killed by a police officer putting him in a choke hold while arresting him on a city street for selling "loosies" — untaxed single cigarettes. Although a New York state grand jury was convened to hear evidence in the homicide, no criminal charges were brought against the officer. This led to calls for a further federal investigation. The city of New York paid $5.9 million in compensation to the Garner family.

In Baltimore, Maryland, Freddie Gray died in police custody after his arrest. Six officers were charged with complicity in Gray's death. Three of the officers were black and three were white. Gray's death was caused by a spinal injury that apparently occurred while he was being taken to jail in a police van. Prosecutors charged that there was no probable cause to arrest Gray and that he was not properly secured inside the van in violation of police procedures. The police officer driving the van was charged with murder and the other officers with lesser offenses. Gray's death resulted in major demonstrations and civil unrest in Baltimore; the city agreed to pay a $6.4 million settlement to the Gray family.

In an older but much publicized incident in 2009, Oakland, California transit policeman Johannes Mehserle killed Oscar Grant after mistaking his pistol for a taser while arresting Grant for a New Year's Eve brawl on a BART train. The killing was captured on video that still can be seen on YouTube. Mehserle was charged with murder, but a jury convicted him of the lesser charge of involuntary manslaughter, which resulted in riots in Oakland and the arrest of 80 people after the verdict was announced. Grant's daughter received a $5.1 million settlement from BART; Grant's mother received a $1.3 million settlement from BART. Grant's father, who has been in jail since before Grant was born brought an unsuccessful suit against Mehserle. The killing served as the basis for the movie "Fruitvale Station."

The death of 17-year old Trayvon Martin in Florida is the best known recent killing in the United Sates of an unarmed black man suspected of criminal activity. Martin's killing by George Zimmerman did not involve police officers. Zimmerman, a neighborhood watch volunteer who patrolled with a loaded gun and confronted Martin, was subsequently acquitted by a jury. The acquittal represented to some observers a further failure to provide legal protections to United States racial minorities. As a result of Martin's death, the National Association for the Advancement of Colored People called for the adoption of laws that among other things would increase regulation of neighborhood patrols, increase police oversight and mandate law enforcement data collection on homicide cases involving minorities.

These and other incidents have added to the long-standing debate about criminal justice disparities because of race. Critics' charge that the United States violates its treaty obligations by failing to address fully these issues as required by the International Convention on the Elimination of All Forms of Racial Discrimination, CERD, and other treaties. Last year, the United Nations Committee on the Elimination of Racial Discrimination responded to the United States 2013 report on compliance with CERD with the following recommendations to the United States:

a ■ Ensure that each allegation of excessive use of force by law enforcement officials is promptly and effectively investigated; that the alleged perpetrators are prosecuted and, if convicted, punished with appropriate sanctions; that investigations be re-opened when new evidence becomes available; and that victims or their families are provided with adequate compensation;

b ■ Intensify efforts to prevent the excessive use of force by law enforcement officials by ensuring compliance with the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, and ensure that the new Customs and Border Protection directive on the use of force is applied and enforced in practice;

c ■ Improve the reporting of cases involving the excessive use of force and strengthen oversight of, and accountability for, inappropriate use of force;

d ■ Provide, in its next compliance report, detailed information concerning investigations undertaken into allegations of excessive use of force by law enforcement officials, as well as their outcomes, including disciplinary or prosecutorial action taken against the perpetrator and remedies provided to victims or their families.

Both international and domestic rights groups have faulted the United States for not having adopted enabling legislation that would allow private causes of actions by individuals to enforce CERD's terms and for continuing to restrict the treaty's effect through "reservations, understandings and declarations" which were made at the time of signing by the United States. A comment in the Wisconsin International Law Journal argues that "(s)ince the United States imposes international human rights upon other nations, it should not avoid the enforcement of such international norms within its own borders." Enabling legislation for CERD could allow victims of discrimination to seek recourse for police actions in United States courts using CERD standards. However, the likelihood of such legislation passing the United States Congress in the current political climate is remote. Although some American jurists, notably Supreme Court Justice William Breyer have urged America courts to adopt global views that would incorporate international law and foreign practices in ways that would not necessarily require additional legislation, there remains immense opposition to such approaches from others in the judiciary, who view such approaches as violating the United States constitution.

The issues of racial bias in United States policing are closely tied to the complex role of race in American society. Civil rights movements like Black Lives Matters have raised American public awareness of these issues in the United States, but have not accomplished significant policy changes. International criticism has had no significant effect at all to date. Going forward, greater use of technology such as body cameras on police officers will improve police procedures, oversight and accountability. Changing demographics may blur racial identities in ways that will reduce the use of racial profiling and stereotyping. Whether the effects of these and other technological and social changes — or changes in United Sates laws — will satisfy critics of the policing of racial and ethnic minorities remains to be seen.

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Jorge Molano: cuando abogacía rima con coraje

Jorge MOLANO

Jorge Molano, abogado colombiano especializado en los derechos humanos y asesor jurídico de varias ONGs, fue galardonado con el Premio 2015 que atribuye la organización holandesa Lawyers for Lawyers (L4L).

El Sr. Molano representa a las víctimas de varios de los casos más emblemáticos de violaciones de derechos humanos en Colombia, tales como la desaparición de 11 personas tras la toma de rehenes en el Palacio de Justicia de Bogotá en 1985, la masacre de la Comunidad de San José de Apartado en 2005 y las ejecuciones extrajudiciales de Manizales en 2008. Asimismo, el abogado brinda apoyo jurídico a organizaciones y defensores de derechos humanos que son y/o han sido víctimas de espionaje por parte de las agencias nacionales de inteligencia y en casos de ejecuciones extrajudiciales.

A lo largo de su carrera, el ejercicio de su profesión y el carácter altamente político de los casos de los que se ocupa le han valido varias amenazas e intimidaciones. Después de haber recibido amenazas de muerte en 2009 y 2010, Jorge Molano se vio obligado a enviar a sus hijas al extranjero por motivos de seguridad. En enero de 2013, la Unidad Nacional de Protección del Gobierno de Colombia definió el nivel de riesgo de Jorge Molano como "extraordinario". En 2014, Jorge Molano y otros miembros de las asociaciones DHColombia y Sembrar fueron víctimas de varias agresiones, ataques a miembros de familia, allanamientos, ataques informáticos, escuchas telefónicas y vigilancias ilegales, entre otras.

Como muchos otros abogados colombianos, el Sr. Molano debe desplazarse de manera cotidiana en vehículos blindados y cuenta con el apoyo de algunas organizaciones como Brigadas Internacionales de Paz, que lo acompañan desde su vivienda hasta el lugar en el cual desarrolla sus actividades. Reconociendo las tensiones en las que debe ejercer su profesión, cree que la labor de los abogados puede contribuir a aportar cambios en la sociedad y mejoras en el respeto a los derechos humanos.

[…] El ejército colombiano y el Ministerio de la Defensa continúan considerando que quienes representan a las víctimas en ese tipo de caso, son partícipes de una guerra jurídica al servicio de la subversión.

De paso en París, en una gira que emprendió acompañado por la sección francesa de las Brigadas de Paz, el Sr. Molano se reunió con el Presidente de la UIA, Miguel Loinaz, y respondió a las preguntas del Juriste International destacando la gran solidaridad que recibe de muchas organizaciones y sectores de la sociedad.

Juriste International (JI): ¿Cuál es, como abogados, su visión del sistema de justicia en Colombia hoy?

Jorge MOLANO (JM): Yo creería que es un sistema de justicia que se ha demostrado como altamente perverso en lo que se refiere a la garantía de los derechos de las víctimas en la medida que mantiene unos niveles de impunidad bastante elevados, impunidad que está determinada por falta de voluntad política institucional para perseguir determinado tipo de delitos por la ausencia de respaldo y protección debida a los fiscales y jueces que adelantan las investigaciones o por la existencia de directrices internas y, especialmente, dentro de la fiscalía General de la Nación que han afectado la autonomía de los fiscales para desarrollar sus actuaciones. En este contexto, hay que decir que efectivamente también se adiciona la ausencia de recursos suficientes para que la justicia pueda actuar.

JI: En ese marco, ¿cuáles son, en su opinión, los principales problemas y desafíos a los que se enfrenta la abogacía en Colombia?

JM: Creo que uno de los problemas de la abogacía, cuando se ejerce la representación de víctimas de crímenes del poder, es contar con las garantías necesarias para desarrollar de manera libre y tranquila la profesión. Y esto parte primeramente del hecho que el ejército colombiano y el Ministerio de la Defensa continúan considerando que quienes representan a las víctimas en ese tipo de caso, son partícipes de una guerra jurídica al servicio de la subversión. Esta estigmatización afecta la posibilidad de actuar con libertad y con tranquilidad.

En segundo lugar, la identificación que se hace del abogado con las causas de los clientes

resulta ser sumamente grave. En el caso de abogados que trabajan en la representación de este tipo de delitos, sus comunicaciones son objeto de monitoreo permanente por parte de las autoridades, sin ninguna orden judicial. Sus despachos son también objeto de ataques y asaltos con el propósito de hurtarles información y, adicionalmente, sus labores son objeto de seguimiento y tareas de inteligencia ofensiva por parte de órganos del Estado. Estos abogados tienen que actuar además bajo amenazas dirigidas no sólo contra su persona sino que también se extienden a sus familiares. Estas situaciones crean un ambiente, un entorno en el que se hace muy difícil el ejercicio de la profesión y entonces podría plantearse que ejercer la defensa de los derechos humanos en Colombia y la representación de las víctimas es hoy una labor de alto riesgo.

JI: Respecto a la situación que describe, los abogados ¿cuentan con el apoyo de la profesión organizada en colegios de abogados o círculos de abogados? ¿Se siente Ud. concretamente respaldado por este tipo de asociaciones?

JM: En Colombia no existe la colegiatura obligatoria. Existen en cambio organizaciones que buscan aglutinar abogados en diferentes regiones, pero que resultan ser asociaciones de tamaño muy reducido que no son en sí representativas de los abogados. Y en el campo de los derechos humanos se ha ido generando un entorno que es el trabajo conjunto de abogados defensores que se han beneficiado de misiones de acompañamiento y observación de la parte de organizaciones de abogados a nivel internacional, de abogados que viajan de manera recurrente a Colombia y realizan de manera individual misiones de observación, monitoreo y acompañamiento, así como de la atención de la Oficina del Alto Comisionado de Naciones Unidas para los Derechos Humanos, entre otras instancias, que han puesto de relieve las difíciles condiciones en las que debe ejercerse la profesión.

JI: Ud. se ocupa de varios casos que podrían considerarse como emblemáticos. Si tuviera que elegir uno de ellos para darle mayor visibilidad, ¿cuál elegiría y por qué?

JM: Creo que elegiría el caso de la masacre en contra de la Comunidad de Paz de San José de Apartado[1], porque es una comunidad que ha sido objeto de un proceso de exterminio y en donde la mayoría de los crímenes en su contra son fruto de la acción directa del ejército colombiano o de paramilitares que han actuado con el apoyo del ejército colombiano. También han sido objeto del ataque de las guerrillas en menor proporción.

En segundo lugar, porque es un caso donde la impunidad es excesiva y, debería decir, descarada. Donde las víctimas que concurren ante la justicia para declarar sobre los hechos son objeto de victimizaciones adicionales a través de amenazas, ataques, o atentados contra su vida, pero en donde existe además una política institucional que claramente indica que esta comunidad es un objeto de persecución por parte de agentes del Estado.

Para culminar, los hechos de la masacre del 21 de febrero de 2005[2], donde se actuó no en nombre de la comunidad, sino en nombre de la sociedad colombiana, revisten mayor crueldad y sevicia. Se trata de un caso en que niños indefensos de 18 meses, 5 años y 13 años fueron descuartizados y degollados, fruto de la acción conjunta de militares y paramilitares.

JI: La UIA, participa activamente en la Caravana de Juristas[3] que se desplaza a Colombia cada dos años para documentar la situación de los abogados en el país. Según su experiencia, ¿qué cree Ud. que le aporta este tipo de iniciativas?

JM: Creo que esta iniciativa nos aporta mucho por diferentes vías. En primer lugar, mediante la presencia en terreno, la Caravana envía un mensaje claro de que hay una preocupación de la comunidad internacional y que se responde por una labor de observación, monitoreo y seguimiento de la situación.

En segundo lugar, creo que el trabajo realizado por parte de quienes conforman la Caravana ha sido una labor importante para preparar y publicar informes de la situación bajo la cual debe ejercerse la profesión, y la situación de los derechos humanos en Colombia. En ese sentido, se ha podido contribuir a que se conozca y se difunda la verdad sobre lo que está sucediendo.

Y en tercer lugar, las diferentes autoridades gubernamentales de cada país han sido informadas sobre las conclusiones de la Caravana siendo un punto importante de incidencia a efectos de que se revisen las políticas implementadas para intervenir en Colombia.

JI: ¿Qué tipo de apoyo espera Ud. concretamente de organizaciones como la UIA y de los Colegios de Abogados de todo el mundo?

JM: Creemos que es muy importante que se puedan mantener y ampliar las misiones de observación en el país, así como la preparación de informes sobre la situación que se está viviendo.

Creemos además que es importante que puedan hacer el acompañamiento de juicios especialmente en caso de carácter emblemático donde se encuentren en riesgo la vida y la seguridad de las víctimas, de los testigos y de quienes las representan.

En tercer lugar creemos que se puede contribuir a través de la preparación de *amicus curiae* dirigidos a los tribunales colombianos a efectos de que se armonice la jurisprudencia y la legislación nacional con el derecho internacional, ya que se trata de aspectos relevantes para el ejercicio de la profesión y para la garantía de la continuidad de la labor del abogado en Colombia.

Entrevista realizada para *Juriste International*
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[1] Desde 1997, la Comunidad de Paz de San José de Apartado declaró neutral frente al conflicto armado colombiano, rechazando la presencia de cualquier de los grupos armados en su territorio fueron éstos guerrillas, paramilitares e incluso el Ejército. Como resultado de esta resistencia 210 miembros de la Comunidad han sido asesinados por los distintos actores del conflicto. La Corte Interamericana de Derechos Humanos ha exigido al Gobierno colombiano que implemente medidas eficaces para ampararla. Para más información, puede consultar http://www.cdpsanjose.org/

[2] El 21 de febrero de 2005, un grupo de hombres armados, militares y paramilitares, ingresaron a la zona donde confluyen los departamentos de Antioquía y Córdoba, más exactamente en las veredas La Resbalosa (Córdoba) y San José de Apartadó (Antioquía), en Colombia, y asesinaron y descuartizaron a un grupo de campesinos entre los que se encontraban 3 niños y 5 adultos. Aunque durante mucho tiempo el Ejército insistió en que los autores de los hechos habían sido las FARC, 84 miembros del Ejército y varios miembros del grupo paramilitar conocido como Autodefensas Unidas de Colombia (AUC) han sido involucrados en las investigaciones. Para más información, puede consultar http://www.pbi-colombia.org/field-projects/pbi-colombia/about-pbi-colombia/accompanied-organizations/peace-community-of-san-jose-de-apartado/

[3] Para saber más sobre la Caravana, visite la página Web de este iniciativa http://www.colombiancaravana.org.uk/

Últimas acciones de la Dirección de Derechos Humanos y Defensa de la Defensa de la UIA

Romina BOSSA ABIVEN

Arabia Saudí
Waleed Abu Al-Khair recompensado con el Premio Ludovic Trarieux 2015

El pasado 12 de junio, el jurado del Premio Ludovic Trarieux, del que la UIA forma parte, atribuyó el premio 2015 a Waleed Abu Al-Khair, defensor de derechos humanos saudí y fundador de la asociación "Monitor of Human Rights in Saudi Arabia".

El Sr. Abu Al-Khair cumple una sentencia de 15 años de prisión en el centro de readaptación Al Hair, en Riad. Los cargos que se le imputaron son: "tentativa de derrocamiento del Estado y de la autoridad del Rey", "críticas e insultos al sistema judicial" e "incitación de organizaciones internacionales en contra del Reino".

Como asesor jurídico, Waleed Abu Al-Khair ha defendido a muchas víctimas de violaciones de derechos humanos y, entre ellas, a Samar Badawi, encarcelada en 2010 durante 6 meses por haber desobedecido a su padre, que se convertiría más tarde en la esposa de Abu Al-Khair y una de las más conocidas activistas por los derechos de la mujer en Arabia Saudí; a Abd Al-Rahman Al-Shumairi, un profesor jubilado que formaba parte del grupo conocido como « Jeddah reformers » , y a Raif Badawi, el famoso bloguero saudí condenado en mayo de 2014 a diez años de prisión, mil latigazos y una multa de un millón de riyales saudíes por haber insultado a las autoridades religiosas creando y administrando una página Web.

En agosto de 2015, la UIA se unió a la petición presentada por varias organizaciones al Grupo de Trabajo sobre la Detención Arbitraria de Naciones Unidas solicitándole que se pronuncie sobre el caso de Waleed Abu Al-Khair.

Bulgaria
Ventislav Petrov Tochkov

El 28 de agosto de 2015, la Corte Suprema de Casación de Bulgaria absolvió al abogado búlgaro Ventislav Petrov Tochkov, al que se le había impuesto una pena de multa y el pago de daños y perjuicios por difamación el 18 de septiembre de 2014. Las acusaciones en su contra residían en declaraciones que el abogado había realizado en alegatos, en pleno ejercicio de su mandato de representación de uno de sus clientes.

A solicitud de los abogados búlgaros, la UIA había intervenido en este caso para recordar a las autoridades de Bulgaria los principios aplicables en materia de inmunidad por declaraciones hechas por escrito o en alegatos orales, así como respecto a la libertad de expresión de los abogados en sala de audiencia cuando representan a sus clientes.

China
Arrestos masivos de abogados de derechos humanos

A principios del mes de julio, al menos 288 abogados, juristas y miembros del personal de bufetes de abogados pro derechos humanos, fueron interpelados y/o arrestados en varias provincias de China. Además, se realizaron registros y confiscaciones en el bufete Fengrui Law Firm y en los despachos de los abogados Li Jinxing (NGO Xiyuan Action Office) y Li Heping en Pekín.

Las interpelaciones comenzaron el 9 de julio con el arresto de la Sra. Wang Yu, abogada en el bufete Fengrui Law Firm de Pekín. La abogada Wang Yu es conocida por su participación en la defensa de casos políticamente sensibles, como lo son los casos de miembros del movimiento religioso Falun Gong, prohibido en China, y de las cinco famosas feministas que fueron arrestadas en marzo pasado cuando preparaban una campaña contra el acoso sexual.

La Sra. Wang Yu y el abogado Bao Lungjun, su esposo, quien fuera también arrestado el 9 de julio pasado, permanecen en "supervisión domiciliaria" en un lugar desconocido, acusados de "incitar a la subversión del poder del Estado", un delito pasible de hasta 15 años de prisión. El Sr. Bao Longjun también se enfrenta al cargo de "provocar disturbios y problemas".

Poco después del arresto de la Sra. Wang Yu, más de 100 abogados chinos firmaron una declaración conjunta condenando su desaparición. Muchos de estos letrados fueron entonces arrestados y, entre ellos, Zhou Shifeng, Director del Bufete Fengrui.

En algunos casos, una campaña de difamación orquestada por los medios oficiales acompañó a los arrestos, acusando a los abogados y los activistas de Fengrui

Law Firm de formar parte de una "banda criminal" que habrían organizado protestas con peticionarios por dinero alterando así el orden social.

Aunque la mayoría de las personas interpeladas han sido liberadas, al 25 de septiembre de 2015, 16 personas permanecían en "supervisión domiciliaria" sin que se tuviera información exacta sobre el lugar donde se encontraban y 8 personas estaban aún detenidas, en muchos casos incomunicadas y/o sin tener acceso a un abogado. Se desconoce el paradero de al menos tres personas, y entre ellas la abogada Li Shuyun.

La UIA, en una carta firmada con la Asociación Internacional de Jóvenes Abogados (AIJA), exigió a las autoridades chinas la liberación inmediata de los abogados, juristas y activistas detenidos arbitrariamente y sigue con atención la evolución de la situación.

Croacia
Apoyo a las acciones del Colegio de Abogados

El 23 de marzo de 2015, el abogado Vlatko Vidakovic fue asesinado en su despacho en Osijek, Croacia, por uno de sus antiguos clientes. El presunto autor del hecho ya había sido condenado a 3 años de prisión por el secuestro de otro abogado y ex-juez.

Lamentablemente, el homicidio del Sr. Vidakovic no es un caso aislado ya que, según las informaciones que el Colegio de Abogados de Croacia transmitió a la UIA, desde 1972, nueve abogados y un abogado en prácticas fueron asesinados en similares condiciones. En el mismo lapso de tiempo, al menos 15 abogados fueron víctimas de ataques y/o agresiones físicas incluyendo colocación de artefactos explosivos en sus despachos y tentativas de incendio.

En respuesta a esta situación, el Colegio de Abogados de Croacia instó al Ministro de Justicia a realizar reformas para mejorar la protección de los abogados en ejercicio de sus funciones.

La UIA escribió a las autoridades de Croacia para manifestar su preocupación por la situación de los abogados croatas y apoyar las acciones del Colegio.

Egipto
Mahienour El-Massry, ganadora del Premio Ludovic Trarieux 2014, nuevamente arrestada

El 20 de septiembre de 2015, un tribunal de apelaciones en Alejandría, confirmó la sentencia a 15 meses de prisión dictada el 31 de mayo de 2015 contra Mahienour El-Massry, abogada de derechos humanos distinguida con el Premio Internacional de Derechos Humanos Ludovic Trarieux en 2014.

La Sra. El-Massry está en prisión desde el 11 de mayo de 2015 cuando el juez que entendía en su recurso de apelación ordenó su detención durante una audiencia. La abogada apelaba entonces la sentencia pronunciada en su contra el 9 de febrero de 2015 que la condenaba a dos años de cárcel. La ejecución de la sentencia se había suspendido en ese momento, tras el pago de una multa de 5.000 libras egipcias (aproximadamente €580).

Los cargos que se le imputan son, entre otros, "manifestar sin autorización", "producir daños en la estación de policía", "atacar a las fuerzas de seguridad" y "amenazas a la seguridad pública". Los hechos que se le reprochan datan del 29 marzo de 2013, cuando la Sra. El-Massry y otros cuatro abogados se presentaron en la comisaría de Mahatet El-Raml, en Alejandría, para defender a varios manifestantes detenidos tras los enfrentamientos entre opositores y simpatizantes del entonces Presidente Morsi. Junto con los demás miembros del Jurado del Premio Internacional Ludovic Trarieux, la UIA difundió un comunicado expresando su preocupación y sigue de cerca el desarrollo del caso.

República Democrática de Congo
Arresto del abogado David Bugamba

El 5 de septiembre de 2015, el Sr. David Bugamba Amani, abogado del Colegio de Abogados de Bukavu y asesor jurídico de la Initiative Congolaise pour la Justice et la Paix – ICJP (Iniciativa Congolesa por la Justicia y la Paz), fue arrestado por "ultraje a magistrado", "denuncias calumniosas" y "acusaciones perjudiciales".

Su detención estaba directamente relacionada con una petición que el Sr. Bugamba presentó al Fiscal General de la República el 19 de agosto de 2015, donde denunciaba el disfuncionamiento del sistema judicial en Bukavu y la intervención arbitraria del Fiscal en una serie de casos, mencionando especialmente la intervención de este último en las decisiones de los jueces y el incumplimiento de reglas de procedimiento.

Como muestra de solidaridad con su colega David Bugamba, el Colegio de Abogados de Bukavu inició una huelga y organizó una serie de manifestaciones, pidiendo su liberación inmediata.

El 8 de septiembre, los abogados del Sr. Bugamba interpusieron un recurso de apelación contra la prisión preventiva dictada por el Tribunal de Paz de Bukavu. El 12 de septiembre, el Tribunal de Gran Instancia se pronunció rechazando el pedido de liberación del Sr. David Bugamba en razón de que no había tomado conocimiento de todos los documentos relacionados con la prisión preventiva, documentos que la Fiscalía y el Tribunal de Paz debían transmitirle.

Tras esta decisión, y frente a las protestas de la Abogacía, una delegación de dos funcionarios de la Fiscalía General de la República, enviados desde Kinshasa, se reunió con el Colegio de Abogados de Bukavu el 14 de septiembre. El 15 de septiembre de 2015, el Sr. Bugamba fue liberado sin condiciones gracias a la intervención de los representantes de la Fiscalía.

Desde el arresto del Sr. Bugamba, la UIA ofreció su apoyo al Colegio de Abogados de Bukavu y envió una carta a las autoridades judiciales congolesas, para expresar su preocupación. La asociación se mantendrá alerta hasta que se retire totalmente la acusación.

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Assembly of Worldwide Lawyers in Defence of the Defence

Valencia, Spain - October 30, 2015
Auditorio 3 A - Palacio de Congresos

PRELIMINARY PROGRAM

3.00 p.m. – 3.20 p.m.	**Welcome and Opening Remarks**
	• Miguel LOINAZ, *President, Union Internationale des Avocats (UIA - International Association of Lawyers)*
	• Carlos FATÁS MOSQUERA, *UIA Co-Director of Human Rights and Protection of Lawyers*
	• Martin PRADEL, *UIA Co-Director of Human Rights and Protection of Lawyers*
	• Jacqueline SCOTT, *UIA Co-Director of Human Rights and Protection of Lawyers*
	• Pierre-Olivier SUR, *President, Paris Bar Association*
	• Omar ABOUZZOHOUR, *President, Marrakech Bar Association*
3.20 p.m. – 4.00 p.m.	**Mechanisms for the Protection of Lawyers**
	• *Presentation of the Mandate of the Special Rapporteur on the Independence of Judges and Lawyers* Amanda FLORES, *Human Rights Officer, Special Procedures Branch, Office of the United Nations High Commissioner for Human Rights*
	• *The Mechanisms for the Protection of Lawyers in the Organisation Internationale de la Francophonie (OIF)* Michel CARRIÉ, *OIF Legal and Judicial Co-operation Officer*
	• *Regional Protection Mechanisms* Julie GOFFIN, *UIA Human Rights and Protection of Lawyers Coordinator*
4.00 p.m. - 4.15 p.m.	**Questions**
4.15 p.m. - 4.30 p.m.	**Coffee Break**
4.30 p.m. - 5.30 p.m.	**Invited Lawyers**
	• Michel TOGUÉ, *Lawyer, Cameroon Bar Association and Legal Adviser, Human Rights Defenders Network in Central Africa*
	• Daniel ARSHACK, *Lawyer for Saudi Defender Waleed Abu Al-Khair's*
	• Yiu-Leung CHEUNG, *Founding Member and Vice-Chair, China Human Rights Lawyers Concern Group*
	• José Luis VALLADARES, *President, Bar Association of Honduras*
5.30 p.m. - 6.10 p.m.	**Coordination Mechanisms in Organizations of Lawyers**
	• American Bar Association (ABA) - Paulette BROWN, *President*
	• Conférence Internationale des Barreaux de tradition commune (CIB) - Bernard VATIER, *Secretary General*
	• Council of Bars and Law Societies of Europe (CCBE) - Maria SLAZAK, *President*
	• European Democratic Lawyers (EDL) / European Lawyers for Democracy and World Human Rights (ELDH) Hans GAASBEEK, *President of the Dutch League for Human Rights*
	• Lawyers for Lawyers (L4L) - Adrie van de STREEK - *Executive Director*
6.10 p.m. - 6.40 p.m.	**Past Experiences and Suggestions for Improvement**
	• *Moderator:* Pascal MAURER, *Director General, UIA - Institute for the Rule of Law (UIA-IROL)*
6.40 p.m. - 6.50 p.m.	**Conclusion**
6.50 p.m. - 7.00 p.m.	**Adoption of a Resolution by Representatives of the Participating Organizations**
7.00 p.m.	**Closing**

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La profession d'avocat
The Legal Profession
La Abogacía

The Law Firm General Counsel and the Attorney-Client Privilege

Rita HAEUSLER

As law firms have become larger there has been a trend to organize law firm management more along the lines of a corporation, with a managing partner serving the function of a CEO and an executive committee serving the function of a board of directors. One aspect of this trend has been the increasing use by law firms of an in-house general counsel for the firm. This practice has become common in the United States in large firms, but the practice is also taking hold in midsized law firms. In the past decade, the practice has also become the norm among the top 20 law firms in the United Kingdom, though it has not yet permeated much below that elite circle.

The adoption of this practice over the last two decades has been driven by a number of factors, including conflicts issues due to law firm mergers, the increasingly complex regulatory schemes outside counsel are now subject to, such as Sarbanes-Oxley in the U.S., the U.K. requirement that law firms appoint a compliance officer for legal practice, and pressure from professional liability insurers to proactively minimize malpractice liability. Law firms that have adopted the general counsel model almost uniformly praise the benefits of having a person within the firm readily available to its lawyers as a sounding board and advisor for thorny conflict issues, potential ethics issues and actual or possible malpractice concerns.

1 Benefits and Best Practices

Many firms that have adopted the general counsel model cite specific benefits including: fostering uniformity of firm-wide practice with respect to conflict and regulatory issues, allowing attorneys to raise ethics and potential malpractice issues with an experienced neutral party, and freeing attorneys and managing partners from individual responsibility for these types of issues, thus allowing them to focus more on billable work and business development. In addition, there is anecdotal evidence that use of a law firm general counsel lessens the number and severity of malpractice claims. See e.g., Anthony E. Davis, The Emergence of Law Firm General Counsel and the Challenges Ahead, The Professional Lawyer, v.20, no.2, 2010 Summer.

While the specific responsibilities and duties of a law firm general counsel vary from firm to firm, best practices are developing. Among these best practices are to formally designate a lawyer:

I ■ dedicated full-time to the role and who does not perform billable work for firm clients (or at least has not performed billable work with respect to the particular client at issue);

II ■ available to all lawyers within the firm on an unrestricted basis, not just equity partners, and as appropriate, even available to staff;

III ■ experienced in conflicts and ethics issues;

IV ■ knowledgeable about regulatory schemes that impose obligations on law firms and their lawyers;

V ■ familiar and up to date with respect to precedents that relate to malpractice liability and professional liability insurance coverage; and

VI ■ able to effectively liaise with insurers, auditors, outside counsel and regulators. Given the multinational nature of many large law firms, these are substantial responsibilities and the trend toward the full-time law firm general counsel makes sense. Additionally, the lawyer tasked with these responsibilities must have the respect of the equity partners of the firm so that difficult situations involving high fee earners or significant clients can be handled promptly in accordance with the highest applicable standards.

2 Application of the Attorney-Client Privilege

While there appears to be a consensus developing among large firms that a general counsel is a useful, indeed necessary adjunct, complexities arise as to whether the communications between the law firm's attorneys and the law firm's general counsel are subject to the attorney-client privilege. Since the law varies by jurisdiction,

whether the privilege protects these communications also varies. In jurisdictions where an in-house counsel privilege is either not recognized or only recognized under limited circumstances, such as Russia and India, the law firm should assume that these communications will not be privileged. Instead, while still encouraging consultations between the firm's lawyers and the law firm's general counsel, the law firm should institute appropriate policies that take into account that these communications may not be confidential.

Even in jurisdictions where there are established rules and precedent recognizing the attorney-client privilege for in-house counsel, such as the U.S., the application of the privilege to communications between firm lawyers and the law firm general counsel cannot be assumed. This is especially the case where the communications involve a current client of the law firm. Law firms most often seek to assert the privilege in situations where a lawyer consults with the law firm general counsel because he suspects an error has been made in the representation of a current client or a current client has intimated or even outright claimed that an error in legal representation has occurred. Law firms that have asserted the privilege in malpractice law suits in order to shield from discovery internal documents and communications concerning a current client of the firm have received mixed results from the U.S. courts.

U.S. Federal Case Law

Federal courts in the U.S. that have ruled on this issue generally have found against application of the privilege to communications concerning a current client of the law firm. For example, in *Bank Brussels Lambert v. Credit Lyonnais (Suisse)*, 220 F.Supp.2d 283 (S.D.N.Y. 2002), the client advised the law firm that it believed it had a potential malpractice claim against the firm. In reaction, the law firm conducted an internal investigation and conflict checks regarding the potential claim. Ultimately, the client terminated the law firm and sued for malpractice. In ruling on the law firm's assertion that the attorney-client privilege protected from disclosure the internal investigation and related conflict checks, the District Court held that the law firm's actions were at least in part for the benefit of the client and therefore the law firm could not invoke the privilege against a current client because the work was done "in furtherance of representing the client." (*Id* at 288)

This type of analysis creates a quandary for a law firm. If the work is done for the benefit of the client, by definition it belongs to the client. If the work is done for the benefit of the law firm to protect it from malpractice liability to the client, there is arguably a conflict between the interests of the client and of the law firm. Under applicable U.S. ethics rules, the law firm must either withdraw from the representation or obtain informed consent from the client to continue the representation. Other federal cases also have refused to uphold the privilege. See e.g., *Koen Book Distrib. V. Powell, Trachtman, Logan, Carrie, Bowman & Lombardo*, 212 F.R.D. 283, 283-285 (E.D. Pa. 2002). (Recognizing "fiduciary exception to a law firm's attorney-client-privilege; firm owed fiduciary duty to plaintiffs while they remained clients and could not use privilege or work product protection to shield internal communications concerning potential malpractice claim from discovery in later malpractice suit.) See also, *Asset Funding Group, LLC v. Adams & Reese, LLP*, 2008 WL 4948835, 2008 U.S. Dist. LEXIS 96505 (E.D. La. 2008 Nov. 14, 2008) (firm cannot shield communications that occur after it has knowledge of a conflict); Thelen Reid & Priest LLP v. Marland, No. C 06-2071 VRW, 2007 WL 578989, at *7, 2007 U.S. Dist. LEXIS 17482, at 16-21 (N.D. Cal. Feb. 21, 2007) (firm must disclose communications discussing conflicts, known errors, or claims the client may have against the firm; firm not required to disclose communications discussing its legal and ethical obligations to the client); *SonicBlue Claims LLC v. Portside Growth & Opportunity Fund (In re SonicBlue Inc.)*, Adv. No. 07-5082, 2008 WL 170562, at *9-10,2008 Bankr. LEXIS 181, at *31, 34 (Bankr. N.D. Cal. Jan. 18, 2008) (firm cannot shield communications arising after a conflict with the client becomes apparent).

Bar Association Guidance

Concerned over the potentially "chilling" effects that these types of decisions could have on lawyers seeking legal advice from within their firms concerning current clients, state bar associations and the American Bar Association began in depth studies of the ethical implications. First among the bar associations to address this issue was the New York State Bar Association Committee on Professional Ethics. Analyzing the issue as presented in the *Bank Brussels* case, the Committee determined in 2005 that under then extant New York ethics rules, there was no conflict between the law firm and the client by reason of the law firm's internal investigation; thus privilege should have applied to the communications. Indeed, the Committee opined that seeking legal advice on ethical obligations is "part of what clients and the legal system expect lawyers to do, serves to reinforce ethical behavior, and informs future conduct." N.Y. Eth. Op. 789 (N.Y.S. Bar Assn. Comm. Prof. Eth.), 2005 WL 3046319, at *5. The Committee went on to opine that while the communications were privileged and the lawyer had no obligation to disclose to the client that he or she had sought advice, the lawyer was still obligated to fulfill ethical obligations to the client. By way of example, the Committee noted that a lawyer would have to advise the client of a conflict of interest and obtain informed consent or disclose an error or omission to a client, particularly where the mistake gives rise to "a colorable malpractice claim, is capable of correction or is injurious to the client." (*Id*. At 6.)

In 2008, the American Bar Association followed suit when its Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 08-453. In Formal Opinion 08-453, the ABA opined that a lawyer who seeks advice from a law firm general counsel to prevent an ethics violation and conform to applicable law or rules does not have a conflict of interest. The ABA went on to note that a conflict may exist where a lawyer has already engaged in misconduct since "it may be

difficult or impossible for that lawyer" or the law firm to give the client "sufficiently detached advice". Moreover, while the fact of an internal consultation need not be revealed to a client, misconduct discovered during an in-house consultation must be disclosed to the client if it is related to the representation.

Although Formal Opinion 08-453 does not expressly address the discoverability of in-house communications concerning a current client, its opinion that such consultations do not in and of themselves constitute a conflict of interest provides a persuasive argument in favor of upholding the privilege in applicable circumstances. Closing the loop, in 2013, the ABA issued a resolution calling for all adjudicative bodies in the U.S. to recognize the applicability of the attorney-client privilege to "confidential communications between law firm personnel and their firms' designated in-house counsel made for the purpose of facilitating the rendition of professional legal services to the law firm (including any legal advice provided by such counsel) to the same extent as such confidential communications between personnel of a corporation or other entity and that entity's in-house counsel would be protected." American Bar Association House of Delegates Res. 103 (2013).

Recent Case Law in Favor of the Privilege

Several recent state court cases and one federal court case have upheld the privilege in the context of communications concerning a current client. Principal among these cases are the ones discussed below.

In *RFF Family Pship. LP v. Burns & Levinson, LLP*, 991 N.E.2d 1066 (Mass. 2013), the Massachusetts Supreme Court upheld the lower court's grant of a protective order preventing disclosure of a lawyer's communications with the law firm's in-house counsel. The court dismissed the client's conflict of interest argument, stating: "a law firm is not disloyal to a client by seeking legal advice to determine how best to address the potential conflict, regardless of whether the legal advice is given by in-house counsel or outside counsel." *Id* at 720, 991 N.E.2d at 1078. The court went even further to note applying conflict of interest rules to these types of communications "yields a dysfunctional result." (Id at 1080.)

In *St. Simons Waterfront LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 746 S.E.2d 98 (Ga. 2013), the Georgia Supreme Court concluded that if all requisites of the privilege are met, the privilege applies to communications between a firm's lawyers and the law firm's general counsel concerning a current client even if a conflict exists, finding that the ethics rules "are not intended to govern or affect judicial application of either the attorney-client or work-product privilege." (*Id* at 106 (citing Ga. Rules of Prof. Conduct, Preamble, Para. 19).)

In *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 326 P.3d 1181(Or. 2014), the Oregon Supreme Court held that since the attorney-client privilege in Oregon is defined solely by Oregon Evidence Code §503 and Section 503 contains no law firm fiduciary exception, the attorney-client privilege was not abrogated as to the law firm. (Id. at 1189, 1191.) The Oregon court narrowly circumscribed its role to interpreting statutory language and refused to engage in a conflict of interest analysis or to impose a fiduciary exception. (Id. at 1189, 1191.) The same year, a California state appellate court came to the same result using the same reasoning. *See Edwards Wildman Palmer v. Superior Court* (*Mireskandari*), 180 Cal. Rptr. 3d 620(2014) (California Evidence Code does not contain fiduciary exception, therefore law firm's legal discussions regarding problems with a current client's representation were privileged.)

In *TattleTale Alarm Systems v. Calfee, Halter & Griswold, LLP*, 2011 WL 382267, 2011 U.S. Dist. LEXIS 10412 (S.D. Ohio 2011), the federal district court held that Ohio state law did not recognize a fiduciary exception to the attorney-client privilege and the client had failed to demonstrate good cause for vitiating the privilege under federal common law. The District Court expressly noted the benefits of the privilege in encouraging lawyers to seek legal advice.

The Stock Case

Given this spate of recent cases, the trend appears to be in favor of recognition of the attorney-client privilege even where the communications concern a current client. Nonetheless, the law remains unsettled in a number of U.S. jurisdictions, including New York. *Bank Brussels* remains the prevailing authority in the Second Circuit and a recent New York state court interim opinion refusing to recognize the privilege where a current client was the subject of the communications has garnered significant attention. That decision, Stock v. *Schnader Harrison Segal & Lewis LLP* (Index No. 651250/13, 2014 NY Slip Op. 33171U (Sup. Ct. N.Y. Co. 12/5/2014)), is currently on appeal to the New York Appellate Division, First Department.

Seventy four law firms, either New York based or with substantial presences in New York, including this author's firm, have joined in an *amicus curiae* brief filed in *Stock*. The amici firms were particularly concerned that the lower court in *Stock* "appeared to have ruled that privilege here was vitiated not only as a factual matter, but also as a matter of law by some combination of the fiduciary duty owed by a law firm to its client and the alleged conflict of interest arising out of the firm's simultaneous representation of itself and the client." Interested Law Firms Amicus Brief ("ILFAB"), pages 4-5. While not opining on the specific facts of the *Stock case*, the amici firms have urged the appellate court to apply the privilege as it would to any entity "without any special exceptions that purportedly arise out of lawyers' special duties". ILFAB, page 5.

While many law firms feel strongly that the ability of their lawyers to consult confidentially with the law firms' general counsel serves a greater public policy interest by allowing lawyers to fully and openly explore their ethics and disclosure obligations to clients without fear that these

communications will be disclosed, clients do not necessarily agree. The Association of Corporate Counsel ("ACC") has taken a different view in its own amicus curiae brief ("ACCAB") filed in the Stock case on behalf of its over 35,000 in-house counsel members representing over 10,000 organizations worldwide. In its request for permission to file the ACC amicus brief, the ACC asserts that "[g]ranting lawyers a license to withhold communications from their clients would harm ACC's members and their organizations by weakening the trust between organizational clients and their lawyers."

The ACC argues that as long as the client is a current client of the firm there cannot be a separate attorney-client relationship between the client's lawyer and the firm and that therefore *all* communications concerning the client's representation, even the lawyer's communications with the law firm's general counsel concerning the lawyer's ethical obligations, belong to the client. (ACCAB at 2-28.) The ACC further argues that since the outside client is the only client in the relationship, the privilege never attaches to the communications between the lawyer and the law firm general counsel and therefore no conflict analysis or fiduciary exception is necessary.

(ACCAB at 24.) The ACC's argument goes even further, however, expressing bluntly what many law firms have secretly been concerned about – even if the lawyer consults with independent *outside* counsel to discuss the lawyer's ethical obligations, the communications are not privileged and also belong to the client. (ACCAB at 33.)

The *Stock* case has been fully briefed and argued. Decision is expected later this year. Given the large concentration of lawyers in New York and the large number of major international firms with offices in Manhattan, the decision of the New York appellate court could have wide ranging influence on how communications concerning current firm clients, whether with the law firm general counsel or outside counsel, are handled.

3 Conclusion

Given the jurisdictional and fact-specific nature of the privilege analysis, there is no "one size fits all" solution that a law firm can follow to insulate intra-firm communications concerning a current client from disclosure. However, adopting the best practices outlined above could prove helpful in those jurisdictions that already have recognized the privilege and those that may still be undecided. In addition, guidance from the case law indicates that maintaining the separateness of the consultation from the law firm's work for the client can improve a law firm's odds of preventing disclosure. Having a dedicated law firm general counsel who has not worked on the matter for the client at issue, not having any attorney bill or charge the client for the consultation, and maintaining the confidentiality of the communications are all steps a law firm can take that might be persuasive with a court. Equally important is that the law firm meet all applicable ethical standards. The law firm therefore must

- I ■ disclose conflicts and either obtain informed consent from the client or withdraw;
- II ■ must disclose all facts relevant to the client's representation, even if learned during the confidential consultation and even if the facts demonstrate malpractice by the firm, and
- III ■ must continue to give the client the appropriate legal advice in furtherance of the client's interests.

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Les confidences faites au Conseiller à l'éthique d'un cabinet sont-elles protégées au Canada par le secret professionnel ?

Francis GERVAIS

Préface

Ce texte est un résumé d'une présentation faite, lors d'une séance de formation du Barreau du Québec à Montréal le 1er mai 2015, intitulée Récents développements en déontologie, droit professionnel et disciplinaire (2015)[1];

Dans le cadre de la présentation originale, l'auteur avait abordé les points suivants :

- l'approche de la doctrine américaine face au phénomène du conseiller à l'éthique d'un cabinet ;
- les prises de position des ordres professionnels ou associations d'avocats américains ;
- les décisions récentes rendues par les tribunaux américains ;
- ce que pourrait être la position canadienne quant à la confidentialité des informations transmises au conseiller à l'éthique.

Dans le présent texte, l'auteur reprend uniquement son questionnement et ses conclusions après un long et attentif examen de la situation aux États-Unis.

1 Introduction : L'éthique, un thème prédominant au XXIe siècle ?

En consultant la presse, les médias de même que la législation récente, il semble évident que l'éthique et la déontologie sont des sujets d'actualité omniprésents et même un des "sujets brûlants" !

Rappelons qu'au Québec et au Canada, plusieurs textes de lois récents se sont adressés à la question et ont prévu la création d'une "charge" soit celle de responsable de l'éthique et à la déontologie, alors que les titulaires de cette charge peuvent, à l'occasion, porter des titres différents[2].

Selon la loi qui le gouverne, le Commissaire à l'éthique, (titre que nous retenons pour ce texte), peut, soit donner dans certains cas des opinions sur leur conduite aux membres tenus de respecter un Code de déontologie, soit effectuer des vérifications ou des enquêtes pour déterminer si des manquements au Code de déontologie qu'il est appelé à faire suivre ont été commis par une personne qui y est soumis, soit exercer les deux fonctions; le Conseiller à l'éthique et à la déontologie exerce donc des fonctions qui peuvent être hybrides.

Rappelons que l'objectif visé par la création d'un poste de Conseiller à l'éthique dans le domaine public se voulait avant tout un soutien aux membres dans leur réflexion sur le comportement à adopter devant une situation potentielle de contravention aux règles éthiques ou déontologiques qui s'imposent à eux[3].

Comme le rappellent Mes Hétu et Roy, l'introduction de cette charge dans la sphère des activités publiques fait suite à des recommandations que l'on retrouve dans le rapport Gagné[4] (recommandations R-12 et R-13)[5]:

« Cette disposition renforcerait la responsabilité individuelle et aiderait à une prise de décision éclairée en situation d'incertitude ou d'inconfort. (...) Cette ressource, ou ce répondant à l'éthique, ne devrait pas répondre à la place de l'élu sur la pertinence d'agir dans tel ou tel cas. Elle chercherait plutôt à seconder l'élu dans la résolution d'un dilemme, à l'éclairer sur les valeurs et les principes en cause, à mieux définir les enjeux éthiques, à faciliter sa réflexion éthique sur la situation rencontrée et à fournir un avis judicieux, neutre et confidentiel. »

Seuls les cabinets comportant un grand nombre d'avocats semblaient intéressés à l'institutionnalisation de la fonction de conseiller à l'éthique.

On peut facilement transposer cet objectif au rôle joué par le conseiller à l'éthique dans un cabinet d'avocats :

« Le conseiller à l'éthique du cabinet ne devrait pas répondre à la place de l'avocat sur la pertinence d'agir dans tel ou tel cas. Le conseiller à l'éthique du cabinet chercherait plutôt à seconder l'avocat ou le cabinet dans la résolution d'un dilemme, à l'éclairer sur les valeurs et les principes en cause, à mieux définir les enjeux éthiques, à faciliter sa réflexion éthique sur la situation rencontrée et à fournir un avis judicieux, neutre et confidentiel. »

2 L'émergence de la fonction de conseiller à l'éthique dans les cabinets d'avocats

Au cours de ces dernières années, on a constaté le développement d'une nouvelle fonction à l'intérieur de cabinets d'avocats. De plus en plus, les cabinets vont désigner un de leurs membres comme « conseiller à l'éthique » ou bien encore, sous le titre de « directeur juridique » ; cette tendance s'est surtout développée aux États-Unis.

En effet, il n'était pas rare de rencontrer des situations dans lesquelles un avocat voyait ses gestes et sa conduite remis en question suite à des allégations de manquements aux règles de déontologie ou d'éthique gouvernant la profession et avait comme première réaction de croire qu'il était en mesure de gérer personnellement la situation en se convainquant:

« Qu'on est jamais si bien servi
que par soi-même »[6]

L'émergence de la fonction de « conseiller à l'éthique » fait suite à une conscientisation qu'il est peut être inapproprié que les avocats se représentent seuls ou tentent de s'occuper de dossiers dans lesquels ils sont personnellement impliqués et dans lesquels les clients ou encore de tierces parties ont soulevé la possibilité que leur comportement soit inapproprié ou à l'encontre des règles de déontologie, ce qui entraînerait leur responsabilité professionnelle.

Est-il opportun de se représenter seul dans de telles circonstances ?

Vous me permettrez, cette brève citation du juge Binnie tirée de la décision *Canada (Commissaire à la protection de la vie privée) c. Blood Tribe Department of Health*[7]:
[9] *« Le secret professionnel de l'avocat est essentiel au bon fonctionnement du système de justice. Étant donné la complexité des règles de droit et de procédure, il est impossible, de manière réaliste, de s'y retrouver sans les conseils d'un avocat. On dit que celui qui se défend lui-même a un imbécile pour client, mais la valeur des conseils d'un avocat est fonction de la qualité des renseignements factuels que lui fournit son client. Nous savons par expérience que les personnes aux prises avec un problème juridique se refuseront souvent à dévoiler la totalité des faits à un avocat s'ils n'ont pas une garantie de confidentialité « aussi absolu[e] que possible ».*

Sans avoir été l'objectif original de cette citation, je vous soumets que cet énoncé du juge Binnie se veut également un plaidoyer pour que les cabinets d'avocats se dotent, à l'intérieur de leur structure, d'avocats exerçant la fonction de conseiller juridique interne ou également appelé soit « conseiller à l'éthique » ou bien « directeur juridique ».

Ce point de vue est partagé par le professeur Adam M. Dodek, qui publiait en 2011 *« Regulating law firms in Canada »*[8], dans lequel il se référait à des textes réglementaires adoptés par l'Association du Barreau Américain (ABA), et exprimait le souhait que les ordres professionnels de juristes au Canada adoptent des procédures plus strictes concernant la mise en application des politiques ou des procédures en matière d'éthique ou de déontologie ainsi que la mise en place de systèmes de contrôle et de supervision plus performants de la conduite des avocats pour s'assurer davantage que tous les avocats respectent les règles qui gouvernent la profession :

"In furtherance of these compliance obligations, law societies should require that every law firm designate one of its lawyers as "ethics counsel." This lawyer would serve as a law firm equivalent to the Chief Compliance Officer (CCO) in securities and other firms."

Le professeur Dodek rappelle que chez nos voisins du sud, cette façon de faire était devenue monnaie courante sinon la règle :
"Such positions have become commonplace in American law firms."

Le professeur Dodek déplore que cette pratique ne se soit pas développée aussi rapidement au Canada, où l'on ne retrouvait qu'exceptionnellement une structure de cette nature dans les cabinets canadiens :
"Some Canadian law firms already effectively have ethics counsel in place."

Le professeur Dodek définit en quelques mots la tâche et le rôle d'un conseiller à l'éthique :
"Often denoted as "general counsel", these lawyers advise the firm on conflicts of interest and other ethics issues that arise within the firm. Like the CCO under securities legislation, a designated ethics counsel would be responsible for ensuring, maintaining, supervising and applying the firm's policies and procedures to ensure compliance with law society regulatory and ethical responsibilities.

It is hoped that the ethics counsel would also become an ethics counsellor to individual members of the firm: someone who other lawyers could come to when ethical issues arise."

Une tentative de traduction et d'adaptation de ce passage pourrait se lire :
« Souvent appelés "Directeur Juridique" ces avocats ont pour mission de conseiller leurs cabinets d'une part sur les sujets soulevant des questions de conflits d'intérêts et d'autre part sur les questions générales d'éthique ou de déontologie.

Un conseiller à l'éthique aurait comme fonction de veiller à la mise en application, au maintien et à la supervision des politiques et procédures adoptées par le cabinet pour assurer le respect des règles de déontologie et d'éthique adoptée par leur ordre professionnel.

Il serait également souhaitable que leur fonction comprenne aussi la dispense de conseils aux autres membres du cabinet et que le conseiller à l'éthique soit celui à qui s'adresse sans restriction et en toute confidentialité les membres du cabinet aux prises avec des situations problématiques en matière d'éthique et de déontologie. »

Le professeur Dodek rappelle[9] que le titre porté par la personne exerçant cette fonction peut être différent d'un cabinet à l'autre et de ce fait, peut également comporter plusieurs fonctions dont évidemment, celle de veiller à l'application des règles de déontologie et d'éthique mais également, tout en exerçant un plus grand rôle au niveau du conseil juridique pour la conduite des membres d'une étude :

215. "I prefer the term "ethics counsel" to both "general counsel" and "chief compliance officer." To me, "general counsel" connotes the legal adviser to the firm which may involve responsibilities beyond advising on ethics matters. In practice, many general counsel may be designated "ethics counsel" as well, if my proposal is adopted.

Similarly, I prefer "ethics counsel" to "chief compliance officer" because the latter seems too narrow to me and connotes rule-following rather than a broader duty to foster an ethical environment and to serve as an advisor and counselor to lawyers within the firm who seek ethical advice."

Le professeur Stephen G. A. Pitel de l'Université Western Ontario en collaboration avec Me Jordan McKie, ont également publié un texte traitant du conseiller à l'éthique des cabinets d'avocats dans le journal de l'Association du Barreau Canadien : *Solicitor-Client Privilege for Ethics Counsel: Lessons for Canada from the United States*[10];

Pour ces auteurs, la question la plus intéressante est la détermination de la nature des communications entre les membres d'un cabinet et le conseiller à l'éthique et surtout si on doit considérer que les échanges entre le conseiller à l'éthique et les membres d'un cabinet sont protégés par le secret professionnel ou si au contraire le client ne pourrait avoir accès au contenu de ces échanges, soit dans le cadre d'un interrogatoire subséquent ou en vertu du devoir de loyauté des avocats à l'égard de leur client.

On peut facilement imaginer que le professionnel qui rencontre le conseiller à l'éthique pour lui faire part d'une difficulté et qui se douterait que la confidence ne sera pas confidentielle, pourrait ne pas tout dévoiler au conseiller et de ce fait, ne pourrait bénéficier d'une opinion éclairée de ce dernier qui serait fondée sur une connaissance complète des faits.

Les recherches faites en littérature juridique canadienne nous indiquent qu'il y a très peu d'études menées sur le sujet. Il ressort, entre autres, de ces textes que seuls les cabinets comportant un grand nombre d'avocats semblaient intéressés à l'institutionnalisation de la fonction de conseiller à l'éthique.

3 En se fondant sur l'expérience américaine, que pourrait être la situation au Canada ?

Les textes consultés nous amènent à conclure qu'au Canada, même si aucun tribunal ne semble avoir été, encore, saisi de la question, les confidences faites par un avocat d'un cabinet au conseiller à l'éthique du même cabinet ou à l'avocat directeur juridique du cabinet seraient également protégées par le secret professionnel.

Rappelons qu'au Canada, tout comme aux États-Unis, les règles relatives à l'existence du secret professionnel se fondent sur 3 éléments qui ont été établis dans l'arrêt *Solosky c. La Reine*[12], soit :

- une communication entre un avocat et un client ;
- qui a pour objet d'obtenir des services juridiques ;
- des communications qui se voulaient confidentielles.

De plus, il n'est pas besoin d'épiloguer plus longtemps car le 13 février 2015, dans la décision *Procureur général du Canada c. Fédération des ordres professionnels des juristes du Canada*[13], la Cour suprême rappelait la nature constitutionnelle de la protection accordée au secret professionnel au Canada.

Nous appuyons fortement l'initiative de la mise en place de la fonction de conseiller à l'éthique dans tous les cabinets d'avocats et ce malgré la taille des cabinets et nous croyons qu'il faudrait sérieusement considérer la suggestion que la règlementation professionnelle des ordres professionnels de juristes imposent la désignation d'un conseiller à l'éthique pour chaque cabinet.

Nous sommes d'avis que les tribunaux devraient accorder la protection du secret professionnel aux échanges entre les membres d'un cabinet et le conseiller à l'éthique interne du cabinet, toutefois sujet à certaines conditions ou restrictions.

Nous y allons des suggestions suivantes quant aux règles d'application ;

The law firm must designate, formally of informally, an attorney or attorneys within the firm to represent the firm as in-house or ethics counsel, so as to create a clear attorney-client relationship between the inquiring lawyer and the law firm.	Le cabinet doit désigner, de façon formelle ou informelle, un avocat ou des avocats exerçant leur profession à l'intérieur du cabinet pour agir comme avocat interne ou conseiller à l'éthique afin de créer clairement et spécifiquement une relation avocat-client entre l'avocat du cabinet, qui agit à ce titre, et le cabinet ou ses membres.
The in-house counsel providing the advice "must not have performed any work on the particular client matter at issue or a substantially related matter".	L'avocat interne qui prodigue les conseils aux membres du cabinet ne doit pas avoir effectué du travail juridique dans le dossier du client qui fait l'objet de la consultation ou dans un dossier substantiellement relié à ce dossier.
The time spent by the attorneys in these communications with in-house counsel may not be billed or charged to any outside client.	Le temps consacré par l'avocat, comme avocat interne ou comme conseiller à l'éthique, dans le cadre des consultations avec le membre du cabinet, ne doit pas faire l'objet d'une facturation au client.
The law firm's internal attorney-client communications must be made in confidence and kept confidential.	Les communications faites de la part du cabinet ou d'un membre du cabinet au conseiller à l'éthique ou à l'avocat général, doivent avoir été faites dans une perspective de confidentialité et d'être conservées comme confidentielles.
The role can be further demarcated by ensuring that its function is known and understood throughout the firm.	La fonction de l'avocat interne ou du conseiller à l'éthique doit faire l'objet d'une présentation aux membres du cabinet, professionnels et non professionnels, pour clairement établir la ligne de démarcation et d'indépendance de ce dernier dans le rôle de conseiller qu'il joue.
Its compensation is not significantly determined by firm profit and other similar measures.	La rémunération du conseiller à l'éthique ou de l'avocat interne ne doit pas être déterminée de façon significative par les profits du cabinet ou par des mesures similaires.

Nous sommes d'avis que l'implantation de ces conditions ferait en sorte que les tribunaux canadiens seraient, encore plus, enclins à reconnaître :

- l'existence de la fonction de conseiller à l'éthique interne d'un cabinet et
- le caractère confidentiel et la protection du secret professionnel qui devrait être accordée aux confidences faites par un membre du cabinet au conseiller à l'éthique ou à l'avocat interne qui enquête sur une situation de dérogation potentielle aux règles d'éthique et de déontologie.

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[1] Francis Gervais, Les confidences faites au conseiller à l'éthique d'un cabinet sont-elles protégées par le secret professionnel ? Développements récents en déontologie, droit professionnel et disciplinaire (2015), volume 399, Éditions Yvon Blais, page 109 et suivantes.
[2] Quelques exemples non exhaustifs : Le *Code d'éthique et de déontologie des membres de l'Assemblée nationale, RLRQ c. C-23.1* (Commissaire à l'éthique et à la déontologie). *Loi sur l'éthique et la déontologie en matière municipale, RLRQ .c. E-15.1.0.1 (Conseiller à l'éthique). Loi sur l'instruction publique, RLRQ c. I-13.3 (Conseiller à l'éthique). Loi sur les conflits d'intérêt, LC 2006, c 9* (Commissaire aux conflits d'intérêts et à l'éthique).
[3] Mes Jean Hétu et Alain Roy, Éthique et gouvernance municipale. Guide de prévention des conflits d'intérêts, 2e édition, Wolters Kluwer-CCH, 2013, page 453.
[4] *Éthique et démocratie municipale. Rapport du Groupe de travail sur l'éthique dans le milieu municipal, juin 2009.*
[5] op. cit # 10.
[6] Proverbe tiré d'une pièce de théâtre écrite en 1807, *Bruis et Palaprat,* de Claude Guillaume Étienne.
[7] [2008] 2 RCS 574, 2008 CSC 44 (CanLII).
[8] 2011, 90 R. du B.C. 381 (voir page 435) (Revue de l'Association du barreau canadien).
[9] op. cit # 8, page 435, note de bas de page.
[10] 2013, 91 R. du B.C. 313 (Stephen GA. Pitel et Jordan McKie)
[11] Op Cit. # 14.
[12] Solosky c. La Reine, [1980] 1 RCS 821.
[13] 2015 CSC 7, commentée dans le volume 2015-2 du *Juriste International,* Francis Gervais, *Le secret professionnel de l'avocat et le devoir de se dévouer à la cause de son client, consacrés principes de justice fondamentale,* page 55.

New York Court Upholds Law Firm Financing Agreements

Steven J. SHORE

The Canons of Ethics for lawyers in the United States have long prohibited anyone other than a lawyer from holding an ownership interest in a law firm. Although law firms in many other countries may be part of an integrated enterprise, in the United States a law firm's members must consist exclusively of attorneys. The ethical rules also prohibit what is termed "fee-splitting" of attorneys' fees with a non-lawyer. These rules have been interpreted to prohibit dividing legal fees between attorneys and non-attorneys, even including non-attorneys who assist with operating the law firm or with a specific legal matter.[1]

Also unlike in European and many other legal systems, a practice common in the United States is the mass tort action, in which a group of people with similarly caused injuries join together to pursue their claims in a single litigation or a consolidated group of litigations. Another legal institution more common in the United States than elsewhere is the contingent-fee litigation, in which an attorney represents a plaintiff or group of plaintiffs, with the understanding that the attorney's fee will be a percentage of the plaintiffs' recovery.

Most mass tort cases are also contingency-fee cases, and since these cases are often protracted and difficult, the law firms that specialize in handling them often have cash-flow issues. For example, a group of plaintiffs may wish to file a meritorious case asserting that they suffered serious injuries, and alleging tens or hundreds of millions of dollars in collective damages. But almost invariably, the individual plaintiffs will be unable to pay any legal fees except as a share of the ultimate recovery. Indeed, the plaintiffs may not even be able to cover the day-to-day operating expenses of running the litigation, such as experts' fees. If the law firm eventually succeeds in proving or settling its case, it will eventually collect enough money to pay all its expenses and, if it selects its cases well, earn a lucrative legal fee. But the time between when an injured plaintiff walks in the door and when his or her case is resolved will usually be measured in years. A law firm may be able to cover the costs of one or two such cases – but if it specializes in these cases, it will usually need some form of financing arrangement with a lender to cover its cash flow needs between judgments or settlements and paydays.

By now, many lawyers are familiar with third-party litigation funding entities. These are entities that are willing to invest in a pending or proposed litigation, in return for a share of the recovery if the case is successful (and with no expectation of recovery if the case is unsuccessful). However, as litigation becomes more complex and expensive and firm overall cash flow needs increase, new forms of litigation funding are developing to finance the law firms themselves, particularly mass-tort or class-action firms handling virtually only contingency-fee matters. In one type of funding arrangement, similar to factor lending, the lender agrees to make a line of credit available to the law firm. The firm may draw upon the line of credit to fund its operating expenses. The lender is entitled to be repaid its principal, plus interest, plus in some cases a portion of the law firm's revenue.

This new form of law-firm-funding plays a valuable role in making it possible for law firms specializing in mass-tort and class action cases to pursue mass-tort or other cases on behalf of plaintiffs who will often have sound legal claims, but where neither the plaintiffs themselves nor their lawyers have the funds to pursue them. However, the legality of such funding arrangements are being challenged on the ground that they represent a sharing of fees between the lawyers and the non-lawyer funding entity.

In one type of funding arrangement, similar to factor lending, the lender agrees to make a line of credit available to the law firm. The firm may draw upon the line of credit to fund its operating expenses.

Fortunately for the public and for this new form of law firm financing, a recent New York State court decision in August 2015 has upheld the validity of such funding agreements. In *Hamilton Capital VII, LLC v. Khorrami, LLP*,[2] the plaintiff funding entity agreed to provide a line of credit to the defendant mass-tort law firm. The law firm agreed to repay the amount borrowed with interest at a specified percentage. In addition, the law firm

agreed to pay additional "revenue interest" in the amount of 10% of the law firm's gross revenues over a three year period of time. The law firm granted the lender a security interest in its account receivables and agreed to provide the lender with regular reports on the status of its cases. The lender had no role in the legal work associated with the cases.

For several years, the law firm enjoyed the benefits of this arrangement, borrowing millions of dollars from the line of credit to finance its portfolio of mass-tort litigation. However, after the law firm fell into default on its payments, it sought to avoid its contractual obligations – under the credit agreement that it had voluntarily entered into – by arguing that the credit agreement provided for improper fee-splitting between the lender and the law firm. In particular, the law firm challenged the agreement's provisions under which the law firm granted the lender a security interest in the law firm's receivables and received a percentage of the revenues.

On August 17, 2015, Justice Shirley Werner Kornreich of the New York State Supreme Court (a trial court) in Manhattan rejected the law firm's arguments. The court explained that sound public policy favors allowing law firm financing agreements:

> Providing law firms access to investment capital where the investors are effectively betting on the success of the firm promotes the sound public policy of making justice accessible to all, regardless of wealth. Modern litigation is expensive, and deep pocketed wrongdoers can deter lawsuits from being filed if a plaintiff has no means of financing his or her case. Permitting investors to fund firms by lending money secured by the firm's accounts receivable helps provide victims their day in court. This laudable goal would be undermined if the Credit Agreement were held to be unenforceable. The court will not do so.

Justice Kornreich, quoting her colleague Justice Eileen Bransten, also observed that "there is a proliferation of alternative litigation financing in the United States, partly due to the recognition that litigation funding allows lawsuits to be decided on their merits, and not based on which party has deeper pockets or [a] stronger appetite for protracted litigation."

Justice Kornreich then rejected each of the law firm's specific challenges to the credit arrangement. With respect to the challenge to the lender's security interest in the law firm's accounts receivable, Justice Kornreich quoted from two earlier court decisions, one by Justice Eileen Bransten in late 2013 and the other from Delaware,[3] which upheld the practice of a lender's taking a security interest in both a law firm's earned and not-yet-earned fees:

> Defendants suggest that it is "inappropriate" for a lender to have a security interest in an attorney's contract rights. Yet it is routine practice for lenders to take security interests in the contract rights of other business enterprises. A law firm is a business, albeit one infused with some measure of the public trust, and there is no valid reason why a law firm should be treated differently than an accounting firm or a construction firm. The Rules of Professional Conduct ensure that attorneys will zealously represent the interests of their clients, regardless of whether the fees the attorney generates from the contract through representation remain with the firm or must be used to satisfy a security interest. Parenthetically, the court will note that there is no suggest that it is inappropriate for a lender to have a security interest in an attorney's accounts receivable. It is, in fact, a common practice. Yet there is no real "ethical" difference whether the security interest is in contract rights (fees not yet earned) or accounts receivable (fees earned) in so far as Rule of Professional Conduct 5.4, the rule prohibiting the sharing of legal fees with a nonlawyer, is concerned. It does not seem to this Court that we can claim for our profession, under the guise of ethics, an insulation from creditors to which others are not entitled.

Justice Kornreich concluded that the law firm had not supported its "proposition that a credit facility secured by a law firm's accounts receivable constitutes impermissible fee sharing with a non-lawyer."

The court also held that, despite the law firm's contention, the credit agreement did not give the lender a prohibited ownership interest in the law firm. "A lender who loans money under a revolving credit facility is a creditor of the borrower. Unless the credit agreement provides for equity, the loan results in debt, not equity." The court also rejected the law firm's argument that the terms of the credit agreement in this case were objectionable because the law firm agreed to pay the lender a percentage of the firm's revenue on all of the firm's cases, rather than a percentage in certain cases.

The Hamilton Capital decision strongly supports the lawfulness and viability of revolving credit agreements in which the lender receives a percentage of the law firm's receipts as with a factoring agreement, for mass-tort and other law firms. Lawyers whose firms need funding to take on new cases, injured parties who need well-funded lawyers who can vigorously pursue their claims, and investors looking for investment opportunities, can all benefit from this development.[4]

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[1] *See, e.g., Jacoby & Meyers, LLP v. Presiding Justices of First, Second, Third & Fourth Departments*, 2015 WL 4279720 (S.D.N.Y. 2015) (rejecting constitutional challenge to New York law and court rules prohibiting non-lawyers from taking an equity interest in a law firm); *Ungar v. Matarazzo, Blumberg & Assocs.*, P.C. 260 A.D.2d 485, 688 N.Y.S.2d 588 (2d Dep't 1999) (agreement under which non-lawyer administrative employee of law firm received half of the firm's earnings and profits constituted impermissible fee-sharing with a non-lawyer); *Bonilla v. Rotter*, 36 A.D.3d 534, 829 N.Y.S.2d 52 (1st Dep't 2007) (precluding fee-sharing arrangement with investigator who located personal-injury clients at hospitals); *Prins v. Itkowitz & Gottlieb*, P.C., 279 A.D.2d 274, 719 N.Y.S.2d 228 (1st Dep't 2001) (condemning fee sharing-arrangement with purported insurance expeditor charged with extortion); *Gorman v. Grodensky*, 130 Misc. 2d 837 (Sup. Ct. N.Y. Co. 1985) (attorney splitting fees with collections manager).

[2] Index No. 650791/2015, 2015 NY Slip Op 51199(U) (Sup. Ct. N.Y. Co. Aug. 17, 2015).

[3] *Lawsuit Funding, LLC v. Lessoff*, 2013 WL 6409971 (Sup.Ct. N.Y. Co. 2013); *PNC Bank, Delaware v. Berg*, 1997 WL 527978 (Del. Super. Ct. 1997).

[4] The author's firm, Ganfer & Shore, LLP, represented the successful plaintiff in the *Hamilton Capital case.*

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Los incentivos fiscales a *Juegos de Tronos* para rodear en España su sexta temporada

Verónica BENITO ALONSO

¿Qué tienen en común Lawrence de Arabia, Evita y Star Wars? Que todas ellas se han rodado en España. Si tuviéramos en cuenta la anterior afirmación a efectos cualitativos, podríamos pensar en nuestro país como un referente en el mundo de los rodajes de producciones cinematográficas. No obstante, lo cierto es que de 80 potenciales rodajes, 66 se terminan perdiendo por la falta de incentivos fiscales y el resto únicamente utilizan nuestro país para rodar una parte de lo inicialmente previsto. Por todo esto, si los productores de la serie *Juego de Tronos*, emitida en 170 países y con 20 millones de espectadores en todo el mundo, anuncian que rodarán la sexta temporada en España, la primera cuestión que se nos plantea es conocer cuáles han sido las razones que les han llevado a tomar esa decisión. Ellos mismos fueron los encargados de contestar: los incentivos fiscales.

La serie estadounidense rodó una pequeña parte de su quinta temporada en España, concretamente en Sevilla y Osuna, experiencia tras las que anunció que, a pesar de sus magníficas localizaciones, no volvería a nuestro país por motivos fiscales. Una gran pérdida si tenemos en cuenta que los 20 días que duró el rodaje de *Juego de Tronos* en España generaron un negocio que rondó los 100 millones de euros.

Los nuevos incentivos fiscales

Tras la caída del sector de la cultura debido a la subida del IVA cultural del 8% al 21%, el Gobierno ha optado por incentivar el sector mediante deducciones en el Impuesto sobre Sociedades. Así, los incentivos fiscales introducidos por la nueva Ley 27/2014, del Impuesto sobre Sociedades, aumentan el porcentaje de deducción por inversiones en producciones cinematográficas españolas de diversa índole e introducen una nueva deducción para las producciones extranjeras.

Asimismo, en el supuesto de coproducción, el importe de la deducción se calculará para cada productor, en función de su respectivo porcentaje de participación en la producción. En el caso de las producciones internacionales, el porcentaje de deducción será del 15% de los gastos realizados en territorio español, siempre que superen el millón de euros. Para hacernos una idea de los gastos que implica un rodaje diremos – a modo de curiosidad – que el episodio piloto de *Juego de Tronos* contó con un presupuesto de diez millones de euros.

En el caso de las producciones internacionales, el porcentaje de deducción será del 15% de los gastos realizados en territorio español, siempre que superen el millón de euros.

Por un lado, la deducción para las producciones españolas aumenta al 20% de la base de la deducción para el primer millón de inversión y se mantiene en el 18% sobre el exceso. La base de la deducción incluirá el coste total de la producción, así como los gastos para la obtención de copias y los gastos de publicidad y promoción hasta un límite conjunto del 40% del coste de la producción. Además, el importe de la deducción no podrá ser superior a 3 millones de euros ni podrá superar, conjuntamente con el resto de ayudas percibidas por el contribuyente, el 50% del coste de producción.

En cuanto a los límites de la deducción, ésta no podrá ser superior a 2,5 millones de euros ni podrá superar, conjuntamente con el resto de ayudas percibidas por el contribuyente, el 50% del coste de producción.

Por último, hay que destacar los regímenes más beneficiosos aplicables en las Comunidades Autónomas de Navarra y Canarias. En el primer caso, el productor podrá aplicar una deducción del 35% de la base de la deducción, la cual está constituida por el coste de la producción. Por su parte, las Islas Canarias tienen

un límite de 5,4 millones de euros en el caso de la deducción por inversiones en producciones españolas y de 4,5 millones de euros en el caso de la deducción por gastos realizados en territorio español por producciones extranjeras.

Los gastos deducibles

Una de las principales quejas del sector ante esta reforma legislativa es la falta de seguridad jurídica que plantea la redacción del nuevo artículo 36, al no especificar con detalle los gastos que se considerarán deducibles en el caso de la deducción por gastos realizados en territorio español por producciones extranjeras. La ley hace referencia a los "gastos de personal creativo", con un límite de 50.000 euros por persona y con la condición de que tengan residencia fiscal en España o algún otro estado miembro del Espacio Económico Europeo, y a los *"gastos derivados de la utilización de industrias técnicas y otros proveedores"*. Ante la generalidad del precepto, se rumorea que la serie *Juego de Tronos* decidió realizar una consulta vinculante a la Dirección General de Tributos (DGT), con el objetivo de que aclarase y especificase los gastos que finalmente serán deducibles según la nueva deducción. Sea cierto o no, la consulta ha sido respondida y la verdad es que la respuesta de la DGT ha sido notablemente satisfactoria.

La consulta (V1746/2015) detalla como gastos deducibles derivados de producciones cinematográficas los siguientes:

- En cuanto a los gastos relativos al personal creativo, la Agencia Tributaria hace una enumeración *numerus clausus* que incluye al director, el guionista, el director de fotografía, el compositor, los actores y otros artistas, el montador jefe, el director artístico, el jefe de sonido, el figurinista y el jefe de caracterización.

- En cuanto a los gastos derivados de la utilización de industrias técnicas y otros proveedores, el detalle es más amplio, e incluye, entre otros:
  - el productor ejecutivo, productor y ayudante de producción;
  - el equipo de realización, escenografía, vestuario y caracterización;
  - el equipo de efectos especiales, iluminación y sonido, y el equipo técnico;
  - el personal complementario y el equipo artístico secundario;
  - la manutención y alojamiento del equipo, así como el transporte de personas dentro del territorio nacional;
  - el alquiler o compra de mobiliario y maquinaria, así como el alquiler de locales o localizaciones; y
  - los seguros de responsabilidad civil con cobertura relacionada directamente con la producción.

Por otro lado, como gastos no deducibles, la consulta enumera el transporte de material desde otros países, la asesoría laboral y jurídica, y el equipo administrativo.

Por último, la consulta especifica asimismo que los gastos se entenderán realizados en territorio español, con independencia de la nacionalidad del proveedor, cuando los servicios se presten y las entregas de bienes se realicen, efectivamente, en territorio español.

La acogida por parte del sector

Esperemos que esta consulta calme los ánimos del sector audiovisual español, que ha sido bastante crítico con la reforma de los incentivos. En efecto, una de las principales quejas que derivaban del nuevo precepto era la inseguridad jurídica que producía la indefinición de los gastos exactos que serán deducibles. Sobre esta cuestión, como decimos, la consulta resulta bastante explícita y extensa.

No obstante, ésta no era la única queja de los profesionales del sector que se pudo escuchar en la "Conferencia sobre la economía de los rodajes en España", organizada por el Ministerio de Hacienda y Administraciones Públicas junto con la Spain Film Comission el pasado 3 de marzo. Otro comentario recurrente en los foros y jornadas sobre la cuestión consiste en la tardanza en recuperar la inversión realizada, ya que, a tenor del artículo, la deducción se aplicará a partir del periodo impositivo en el que finalice la producción de la obra. Es más, la misma consulta especifica que en caso de una serie de televisión, como sucede con *Juego de Tronos*, la producción se considerará finalizada cuando termine la grabación de la temporada completa. Si a esto le añadimos que el plazo para presentar el Impuesto de Sociedades finaliza 25 días después de que transcurran 6 meses desde el cierre del periodo impositivo en el que finalice la producción y que la Agencia Tributaria dispone de 6 meses desde dicha fecha para la devolución de la cuota resultante, la recuperación de la inversión se retrasa de manera considerable.

Por último, otra recriminación del sector es la fragmentación que existe debido a los regímenes forales que hacen que Navarra y Canarias gocen de una tributación diferente, como ya hemos tenido ocasión de advertir. Si bien es cierto que ambas comunidades autónomas proponen un régimen más beneficioso, lo que los profesionales advierten es que la imagen transmitida no es unitaria, sino que cada territorio busca su propio beneficio. En consecuencia, no se consigue transmitir una imagen de España como un escenario global, de forma que las producciones puedan disfrutar, con el mismo régimen fiscal, de todo tipo de paisajes diferentes.

La comparación con otros países

Si nos fijamos en la situación de los países de nos rodean, podemos entender a las voces que tachan de insuficiente la reforma de los incentivos aprobados por la nueva ley.

Como dato a destacar, diremos que entre 2010 y 2014, 12 nuevos incentivos fiscales fueron introducidos por los países europeos para fomentar su industria cinematográfica, televisiva y de videojuegos. El paradigma de los

países protectores con su industria cinematográfica lo encontraríamos en Francia, con un presupuesto de 770 millones de euros para ayudas públicas al sector, seguido de 340 millones en Alemania o 120 millones en el Reino Unido.

En cuanto al porcentaje de las deducciones, Bélgica destaca con un 150%, mientras que Francia le sigue con hasta un 36% y el Reino Unido con un 25%.

Si tenemos en cuenta que la participación en el PIB de las producciones en países con incentivos fiscales es del 0,06%, mientras que en países carentes de estos incentivos es de 0,01%, entendemos las razones por las que el Reino Unido acoge un 8% de la producción mundial. Asimismo, el presupuesto de los rodajes ha aumentado un 9% en los países con incentivos.

Queda por ver si finalmente la medida resulta eficaz y si la experiencia de *Juego de Tronos* anima a las demás productoras internacionales a utilizar nuestro país como escenario para sus próximas aventuras.

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The First Pillar of the Banking Union: The Single Supervisory Mechanism

Barbara BANDIERA

Le mécanisme de surveillance unique (MSU) constitue un nouveau cadre de contrôle bancaire en Europe. Il est composé de la Banque centrale européenne et des autorités compétentes nationales des pays de la zone euro. Les trois principaux objectifs du MSU sont les suivants:

- garantir la sauvegarde et la solidité du système bancaire européen;
- accroître l'intégration et la stabilité financières;
- assurer une surveillance cohérente.

Le MSU est devenu opérationnel le 4 novembre 2014.

1 The Banking Union

The financial crisis which emerged in 2007/2008:

- made it clear that the regulation and supervision of bank activities needed to be harmonised across the EU and especially in the Euro Zone;
- revealed in particular that the misjudgement of risks by the banking sector can undermine the financial stability of entire Member States.

In June 2012, the European Council therefore agreed to break the vicious circle between banks and sovereigns. One of the EU's responses to correct previous shortcomings was to establish two new institutions, which are the key elements of the so-called Banking Union.

The first key element is the Single Supervisory Mechanism (SSM), which assigns the role of direct banking supervisor to the European Central Bank (ECB) in order to ensure that the largest banks in Europe are independently supervised under common rules.

The second key element is the Single Resolution Mechanism (SRM), which is responsible for planning for the worst-case scenario, namely the failure of a bank, to ensure that the situation can be resolved in an orderly manner with minimal costs for taxpayers. The will to spare taxpayers from the cost of future bank resolutions led to a change in underlying rules, namely the provisions of the Directive 2014/59/EU (the so-called Bank Recovery and Resolution Directive - BRRD), according to which resolutions shall mainly be financed by banks' shareholders and creditors. The BRRD, adopted in Spring 2014 to provide authorities with comprehensive and effective arrangements to deal with failing banks at national level, as well as cooperation arrangements to tackle cross-border banking failures, sets out the rules for the resolution of banks and large investment firms in all EU Member States. Banks will be required to prepare recovery plans to overcome financial distress. Authorities are also granted a set of powers to intervene in the operations of banks to avoid them failing. If they do face failure, authorities are equipped with comprehensive powers and tools to restructure them, allocating losses to shareholders and creditors following a clearly defined hierarchy. They have the powers to implement plans to recover failed banks in a way that preserves their most critical functions and avoids taxpayers having to bail them out. Precise arrangements are set out for how home and host authorities of banking groups should cooperate in all stages of cross-border resolution, from resolution planning to the resolution itself, with there being a strong role for the European Banking Authority to coordinate and mediate in case of disagreements.

> In the coming years, a well-developed and fully functioning Banking Union will ensure the overall stability and transparency of the financial system in the Euro Zone […].

Where necessary, financing can also be provided, on a complementary basis, by the newly established Single Resolution Fund (SRF), which is financed by the banking industry.

The SSM is already fully operational, while the SRM is preparing to become so in January 2016. The SRF should reach its target funding level in 2023.

Both the supervisory and resolution mechanisms are underpinned by a set of common rules for banks in all 28 Member States, known as the "single rulebook".

The "single rulebook" is the foundation of the Banking Union. It consists of a set of legislative texts that all financial institutions (including approximately 8300 banks) in the EU must comply with. These rules, amongst other things, lay down capital requirements for banks, ensure better protection for depositors, and regulate the prevention and management of bank failures (see the aforementioned BRRD).

Members of the Euro Zone are automatically part of the Banking Union, while other Member States may opt in.

With regard to the Banking Union, furthermore, it has to be highlighted that it is an essential complement to the Economic and Monetary Union (EMU) and the internal market, which aligns responsibility for supervision, resolution and funding at EU level and forces banks across the Euro Zone to abide by the same rules. In particular, these rules ensure that banks take measured risks, and that a bank that errs pays for its losses and faces the possibility of closure while minimising the cost to the taxpayer.

The aforesaid EMU represents a major step in the integration of EU economies. It involves the coordination of economic and fiscal policies, a common monetary policy, and a common currency, the Euro. Whilst all 28 EU Member States take part in the economic union, some countries have taken integration further and adopted the Euro. Together, these countries make up the Euro Zone.

The decision to form an EMU was taken by the European Council in the Dutch city of Maastricht in December 1991, and was later enshrined in the Treaty on European Union (the Maastricht Treaty).

In the coming years, a well-developed and fully functioning Banking Union will ensure the overall stability and transparency of the financial system in the Euro Zone, with a positive impact on the entire EU, and it will help rebuild confidence in banks and support the growth of the EU economy.

2 Outlines of the SSM

In March 2013, a political agreement was reached between Parliament and the Council on establishing the first pillar of the Banking Union, the SSM, covering all banks in the Euro Zone. Non-Euro Zone Member States may opt in if they so wish.

The SSM is a new framework for banking supervision in Europe and an important milestone towards a Banking Union within the EU. Its main aims are to:

- ensure the safety and soundness of the European banking system;
- increase financial integration and stability in Europe;
- ensure consistent supervision.

A truly European supervision mechanism weakens the link between banks and national sovereigns. This helps to rebuild trust in Europe's banking sector.

The SSM, operational since 4 November 2014, has been placed within the ECB and is responsible for the direct supervision of the 123 largest banking groups, representing almost 82% of total banking assets in the Euro Zone, while national supervisors continue to supervise all other banks, under the ultimate responsibility of the ECB.

Since 4 November 2014, the ECB has been exclusively responsible for key tasks concerning the prudential supervision of banks. It has the power, among other things, to:

- grant/withdraw the authorisation of all banks in the Euro Zone;
- assess acquisition and disposal of holdings in banks; and
- ensure compliance with all prudential requirements laid down in EU banking rules and set, where necessary, higher prudential requirements for banks to protect financial stability.

The criteria for determining whether banks are considered significant – and therefore fall under the ECB's direct supervision – are set out in the Council Regulation (EU) No 1024/2013 (the so-called SSM Regulation) and the Regulation (EU) No 468/2014 of the European Central Bank (the so-called SSM Framework Regulation), and relate to a bank's size, economic importance, cross-border activities and need for direct public support. In line with the development of these criteria, the actual number of banks directly supervised by the ECB can therefore change over time; the ECB can furthermore decide at any time to classify a bank as significant to ensure that high supervisory standards are consistently applied. In each participating country, at least the three most significant banks are generally subject to direct supervision by the ECB, irrespective of their absolute size.

In order to avoid a potential conflict of interest, clear rules govern the organisational and operational separation of the ECB's roles in the area of supervision and of monetary policy.

National supervisory authorities, also known as national competent authorities, work together closely with the ECB. They prepare and implement the ECB's adopted decisions. They also directly supervise less significant banks in the participating countries, around 3500 in the Euro Zone alone, which are not directly supervised by the ECB.

The national supervisory authorities are also responsible for the following supervisory tasks:

1 ■ the power to receive notifications from credit institutions in relation to the right of establishment and the free provision of services,

2 ■ to supervise bodies which are not covered by the definition of credit institutions under Union law but which are supervised as credit institutions under national law,

3 ■ to supervise credit institutions from third countries establishing a branch or providing cross-border services in the Union,

4 ■ to supervise payments services, to carry out day-to-day verifications of credit institutions,

5 ■ to carry out the function of competent authorities over credit institutions in relation to markets in financial instruments,

6 ■ the prevention of the use of the financial system for the purpose of money laundering and terrorist financing and consumer protection.

3 The legal basis of the SSM

The SSM Regulation and the SSM Framework Regulation provide the legal basis for the operational arrangements related to the prudential tasks of the SSM.

The objectives of the SSM Regulation are setting up an efficient and effective framework for the exercise of specific supervisory tasks over credit institutions by a Union institution, and ensuring the consistent application of the single rulebook to credit institutions.

The SSM Regulation establishing the SSM, stipulates, in Article 1, that its goal is to contribute to the "*safety and soundness of credit institutions and the stability of the financial system within the Union and each Member State*". This requires the ECB to apply consistent high-quality supervisory standards to banks operating in all participating Member States (in 19 countries, the same as those using the Euro). Financial stability, according to the definition adopted by the ECB, is a condition whereby savings are appropriately channelled to finance productive investment; the ultimate goal, therefore, is a well-functioning real economy. A more specific aim of the SSM, mentioned in the SSM Regulation, is to help loosen the tie between national public finances and national banking systems, a nexus that was the cause of repeated episodes of financial instability in Europe in recent years.
The SSM Regulation establishes a "separation principle" ensuring that supervisory decisions do not interfere with the conduct of monetary policy, and vice versa. In particular, the ECB shall carry out the tasks conferred on it by the SSM Regulation without prejudice to and separately from its tasks relating to monetary policy and any other tasks. The tasks conferred on the ECB by the SSM Regulation shall neither interfere with, nor be determined by, its tasks relating to monetary policy. The tasks conferred on the ECB by the SSM Regulation shall moreover not interfere with its tasks in relation to the European Systemic Risk Board (ESRB), that is tasked with overseeing risks in the financial system within the EU as a whole (macro-prudential oversight), or any other tasks. The tasks conferred by the SSM Regulation on the ECB shall not alter the ongoing monitoring of the solvency of its monetary policy counterparties.

The SSM Framework Regulation sets out the legal structure for cooperation with national supervisors within the SSM. It governs relations between the ECB and national supervisors and includes rules that apply directly to banks.

4 Decision-making within the SSM

The Supervisory Board plans and carries out the SSM's supervisory tasks and proposes draft decisions for adoption by the ECB's Governing Council.

The decision-making process is based on a "non-objection" procedure. If the Governing Council does not object to a draft decision proposed by the Supervisory Board within a defined period of time that may not exceed ten working days, the decision is deemed adopted. The Governing Council may adopt or object to draft decisions but cannot change them. The ECB has created a Mediation Panel to resolve differences of views expressed by the national competent authorities concerned regarding an objection by the Governing Council to a draft decision of the Supervisory Board.

The ECB has also established an Administrative Board of Review to carry out internal administrative reviews of decisions taken by the ECB in the exercise of its supervisory powers. Any natural person or supervised entity may request a review of an ECB decision, which is addressed to them, or is of direct and individual concern. The Administrative Board of Review may also propose to the Governing Council that it suspend the application of the contested decision for the duration of the review procedure. A request for a review of an ECB decision by the Administrative Board of Review does not affect the right to bring proceedings before the Court of Justice of the EU.

5 On-site inspections

With regard to the supervision of significant institutions, the SSM carries out on-site inspections, i.e. in-depth investigations of risks, risk controls and governance with a pre-defined scope and time frame at the premises of a credit institution. These inspections are risk-based and proportionate.

The purpose of on-site inspections is to:
- examine and assess the level, nature and features of the inherent risks, taking into account the risk culture;
- examine and assess the appropriateness and quality of the credit institution's corporate governance and internal control framework in view of the nature of its business and risks;
- assess the control systems and risk management processes, focusing on detecting weaknesses or vulnerabilities that may have an impact on the capital and liquidity adequacy of the institution;
- examine the quality of balance sheet items and the financial situation of the credit institution;
- assess compliance with banking regulations; and
- conduct reviews of topics such as key risks, controls, governance.

Under the SSM Regulation, the ECB may at any time make use of its investigatory powers vis-à-vis less significant banks. These powers include the possibility to conduct on-site inspections.

6 Sanctions

With regard to the supervision of significant institutions, if regulatory requirements have been breached, the supervisor may impose sanctions on credit institutions and/or their management. The ECB may impose administrative pecuniary penalties on credit institutions of up to twice the amount of the profits gained or losses avoided because of the breach where those can be determined, or up to 10% of the total

annual turnover in the preceding business year. In addition, in the case of a breach of a supervisory decision or regulation of the ECB, the ECB may impose a periodic penalty payment with a view to compelling the persons concerned to comply with the prior supervisory decision or regulation of the ECB. The periodic penalty payment will be calculated on a daily basis until the persons concerned comply with the supervisory decision or regulation of the ECB, provided that the periodic penalty is imposed for a period of no longer than six months.

7 Stress test results

Prior to assuming its supervisory responsibilities, the SSM conducted a comprehensive assessment consisting of an asset quality review (AQR) and stress tests. These were then brought together to produce a measure of the capital required to satisfy certain prudential criteria. The AQR provided for a risk-based analysis of the main components of the banks' assets. The stress test calculated the sensitivity of the banks' balance sheets to two macroeconomic scenarios, a consensus one and an adverse one.

While the main focus of the AQR was on credit exposures, financial market positions were also covered in a dedicated work stream and credit valuation adjustment (CVA) calculations on derivatives were reviewed specifically. Moreover, the stress test included a detailed review of both credit and market risk exposures, in which banks were required to carry out a full revaluation of their trading books.

The aim was to achieve greater transparency of the banks' balance sheets in order to ensure a reliable starting point for the work of the SSM. The results, published on 27 October 2014, showed that 25 out of 130 participating banks experienced capital shortfalls. Although some shortfalls had already been covered by the time of publication, all banks had to submit capital plans to the ECB showing how they intended to plug the gaps over the course of 2015.
The stress tests and the comprehensive assessment together helped to dispel doubts and restore confidence in EU banks.

8 Conclusion

As specified by Ignazio Angeloni, Member of the Supervisory Board of the ECB, in his speech "*Exchange of views on supervisory issues with the Finance and Treasury Committee of the Senate of the Republic of Italy*" *made on 23 June 2015 and addressed to the Members of Italian Parliament, "much has been achieved in building the banking union, but many challenges still lie ahead. The ECB is rapidly building its capability; it already provides high-quality supervision and fosters supervisory harmonisation. It does so by leveraging two strengths: the quality of its human resources and the cooperation with national authorities.*

An open dialogue is necessary between the ECB, which has recently been entrusted with new powers in the interests of the people of Europe, and national public opinion, and its representative bodies. Transparency is a precondition for effective action".

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Les plateformes de financement participatif : mode d'emploi

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L'Autorité des marchés financiers (AMF), par deux publications des 11 et 15 décembre 2014, a rappelé les caractéristiques essentielles du *crowdfunding* et de sa nouvelle réglementation applicable depuis le 1er octobre 2014.

L'AMF reconnaît au financement participatif le rang d'alternative de financement possible pour les entreprises.

Si ce canal de financement peut contribuer à mobiliser les fonds pour les investissements à long terme, l'AMF rappelle qu'il comporte des risques pour les investisseurs et qu'elle a créé, avec l'Autorité de contrôle prudentiel et de résolution (ACPR), le Ministère de l'Économie et des Finances ainsi que les associations de « *crowdfunders* », un cadre réglementaire qui a pour ambition de favoriser le développement du *crowdfunding* tout en prenant en compte la nécessaire protection des investisseurs.

Elle invite les acteurs du financement participatif qui ne l'auraient pas déjà fait à se mettre rapidement en conformité avec ce cadre réglementaire spécifique, sous peine de se trouver en situation d'exercice illégal d'une activité réglementée.

Dans sa communication, l'AMF rappelle clairement que, depuis le 1er octobre 2014, toute plateforme souhaitant réaliser une activité de financement participatif doit opter pour l'un ou l'autre des statuts réglementés :

- Conseiller en investissement participatif (CIP),
- Intermédiaire en financement participatif (IFP), ou
- Prestataire de services d'investissement (PSI).

Il convient de rappeler brièvement les caractéristiques essentielles de cette nouvelle réglementation et la marche à suivre pour créer une plateforme de financement participatif.

Le *crowdfunding*, ou littéralement « financement par la foule » est une pratique importée des États-Unis qui consiste à utiliser le lien social en ligne pour récolter des fonds en vue de financer un projet artistique ou entrepreneurial, sans recourir à l'intermédiation des acteurs traditionnels que sont les banques. Ce secteur de la finance participative s'est beaucoup développé ces dernières années, outre-Atlantique et en Europe. En France, plusieurs sites sont voués à cette activité, comme *Babyloan, My Major Company, Kiss Kiss Bank Bank, Anaxago ou encore Wiseed,* qui représentent, aujourd'hui, plusieurs millions d'euros d'encours. Aux États-Unis, *the Lending Club* s'est introduit en bourse fin 2014 et vient de signer un partenariat avec Alibaba pour le financement des entreprises. Le développement de cette pratique appelle un cadre réglementaire adapté. Trois grandes catégories de financement participatif existent actuellement : le don, le prêt, rémunéré ou non, et la souscription de titres d'une société ou d'une holding créée exclusivement dans le but de financer la société bénéficiaire.

L'identification des risques par les régulateurs

Les régulateurs, en l'occurrence l'AMF et l'ACPR, ont publié deux guides en mai 2013 : l'un à destination du public, l'autre des plates-formes de financement. Ceux-ci détaillent les risques encourus comme la perte de tout ou partie du capital investi ou des fonds prêtés, le risque de valorisation des titres non cotés, le risque de détournement lié à l'absence de dépôt des fonds auprès d'un établissement contrôlé, l'absence de garantie quant à l'affectation des fonds collectés, ou encore l'absence de garantie d'une information claire, exacte et non trompeuse du public.

Pour encadrer ces risques, une ordonnance (n° 2014-559) a été publiée le 30 mai 2014 puis complétée par divers textes d'application. Les pouvoirs publics y traduisent d'une part leur volonté de favoriser le développement de ce financement participatif et, d'autre part, celle de préserver les intérêts des investisseurs et des prêteurs.

Les régulateurs – AMF et ACPR – ont, néanmoins, souhaité proposer un cadre allégé qui offre la souplesse nécessaire au développement des plateformes de financement participatif.

Grâce à cette réglementation nouvelle, les plateformes de financement participatif échappent à la plupart des contraintes de la réglementation bancaire et financière

relatives à la fourniture de service d'investissement, l'offre au public de titres financiers, la réalisation d'opérations de banque, les services de paiement et le démarchage bancaire et financier.

2 La création de deux statuts d'intermédiaires

La réglementation s'articule autour de la création de deux statuts particuliers, celui de « conseil en investissements participatifs » (CIP) et celui « d'intermédiaire en financement participatif ».

II ■ Le statut de conseil en investissements participatifs

Le statut de conseil en investissements participatifs (Articles L. 547-1 à 547-9 du Code monétaire et financier - CMF) est calqué sur celui de conseil en investissements financiers (CIF). Le CIP exerce cette activité réalisée à titre professionnel par une personne morale de fourniture de conseil en investissements portant sur des offres d'actions et d'obligations par le biais d'un site Internet remplissant les caractéristiques fixées par le règlement général de l'AMF (L. 547-1 du CMF). Il doit être immatriculé à l'Organisme pour le registre unique des intermédiaires en assurance, banque et finance (ORIAS) (L. 547-2 du CMF). Les dirigeants doivent, par ailleurs, respecter des exigences de compétences et d'honorabilité (L. 547-3 du CMF). Ce statut n'est pas cumulable avec d'autres statuts (agent d'assurance, agent immobilier, CIF, intermédiaire en opérations de banque et en services de paiement (IOBSP)) sauf avec celui d'intermédiaire en financement participatif. Les compétences des dirigeants seront appréciées par l'AMF, au moment de l'enregistrement, qui délivrera une attestation avant l'immatriculation à l'ORIAS. Par ailleurs, le CIP est soumis à un certain nombre d'autres obligations.

III ■ Le statut d'intermédiaire en financement participatif

La réglementation crée également un statut d'intermédiaire en financement participatif (IFP) (Articles L. 548-1 à 548-6 du CMF). L'IFP met en relation, par l'intermédiaire d'un site Internet, des prêteurs (ou donateurs) et des porteurs de projets. Il propose à des particuliers de contribuer au financement de projets professionnels ou de besoins de formation par des prêts rémunérés, des prêts sans intérêt ou encore des dons, et uniquement des prêts sans intérêts pour le financement d'autres projets. Comme le CIP, l'intermédiaire en financement participatif doit être immatriculé à l'ORIAS (L. 548-3 du CMF) et répondre aux principes de compétence et d'honorabilité (L. 548-4 du CMF). Par ailleurs, les activités de l'IFP sont limitées à la fois sur les opérations et sur le statut.

Des plafonds des prêts sans intérêts et avec intérêts ont été fixés sur les opérations. Il est de 1 000 € par prêteur et par prêt pour les prêts avec intérêts, 4 000 € par prêteur et par prêt pour les prêts sans intérêts et de 1 000 000 € par porteur de projet. La durée des prêts est elle-même limitée par décret à 7 ans maximum[1]. Concernant le statut, le cumul est limité aux seules activités ouvertes aux IFP en qualité d'établissement de crédit, de société de financement, d'entreprise d'investissement, d'établissement de paiement, d'établissement de monnaie électronique, d'agent de prestataire de services de paiement (agent PSP) et de conseiller en investissements participatifs.

À l'instar du CIP, l'IFP doit respecter un certain nombre de règles de bonne conduite (L. 548-6 du CMF) comme :

- l'information du public sur les conditions de sélection des projets et des porteurs de projets ;
- l'information du prêteur sur les caractéristiques des prêts ;
- la mise en garde sur les risques encourus (pas de conseil) et les outils d'aide à la décision ;
- l'information du prêteur sur le coût total de l'emprunt et sur les risques liés à un endettement excessif ;
- l'obligation de suivi des opérations à travers un rapport annuel d'activités ;
- le respect des règles relatives à la lutte contre le blanchiment (L. 561-12, 7° du CMF).

Sous le contrôle direct de l'ACPR et de la Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes (DGCCRF), l'IFP est également soumis à d'autres obligations professionnelles et légales.

Il doit naturellement justifier de la compétence nécessaire pour pouvoir s'enregistrer. Contrairement au CIP, c'est l'ORIAS qui instruira les dossiers et, ensuite, l'autorité prudentielle effectuera des contrôles.

3 L'interdiction du cumul

L'IFP ne pourra pas cumuler ce statut avec celui de CGPI.

Pour autant, les plateformes – CPI et IFP – sont nécessairement des personnes morales, ce qui peut ouvrir des perspectives à un Conseil en gestion de patrimoine indépendant (CGPI) qui pourra créer une personne morale pour porter une plateforme.

En revanche, le statut d'intermédiaire en financement participatif peut être cumulé avec d'autres activités comme celles d'établissement de crédit, de société de financement, d'entreprise d'investissement, d'établissement de paiement, d'établissement de monnaie électronique ou d'agent de prestataire de service de paiement.

Ce dispositif a été complété par un arrêté du 22 septembre 2014 portant homologation de modifications du règlement général de l'AMF.

Ce dernier a apporté des précisions concernant :

- les offres au public de titres financiers réalisées au moyen d'un site Internet[2];
- le statut des CIP et leurs règles professionnelles[3];
- l'agrément des associations représentatives de CIP[4];

L'AMF a également publié une position concernant le placement non garanti et le financement participatif[5].
La qualification d'un service de placement non garanti aux émetteurs est écartée si la plateforme de financement participatif :

- dispose d'un site Internet qui satisfait aux exigences définies par l'article 325-32 du Règlement Général AMF ;

- ne recherche pas activement de souscripteurs pour une opération spécifique ;
- fournit le service de conseil en investissement en tant que PSI ou CIP.

La même position rappelle les règles de bonnes conduites des prestataires de services d'investissement (PSI) et des Conseiller en Investissement Participatif (CIP) relative aux frais facturés à l'émetteur au titre des services qui lui sont fournis.

Enfin, une instruction de l'AMF relative au processus d'examen de la demande d'immatriculation des CIP et à la transmission des informations annuelles a été publiée par l'AMF[6].

Au-delà de ce dispositif qui concerne la France, les discussions se poursuivent au niveau européen notamment.

En effet, la réglementation française ne s'applique que sur le territoire français et n'a pas vocation à régler les activités transfrontières du *crowdfunding*.

Un équilibre subtil est à mettre en place car il suffit qu'au sein de l'Union européenne un pays développe des règlementations plus souples que celles de ses voisins pour que les plateformes soient tentées d'aller s'installer dans l'État où les contraintes sont les moins fortes.

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[1] Article D.548-1 du code monétaire et financier.

[2] Articles 211-2, 217-1, 314-106 et 315-66-1 du Règlement Général AMF.

[3] Articles 325-32 à 325-50 du Règlement Général AMF.

[4] Articles 325-51 à 325-67 du Règlement Général AMF.

[5] Position AMF - Placement non garanti et Financement participatif - DOC-2014-10.

[6] Instruction AMF – DOC-2014-11.

México y los medios alternativos de solución de controversias en materia penal

Dr. Oscar CRUZ BARNEY

Mexico is going through a profound reform regarding Alternative Dispute Resolution mechanisms (ADR) for criminal cases. In 2008, a Constitutional modification was implemented to contemplate ADR mechanisms by criminal laws such as the National Criminal Procedure Code of 2014.

On December 29, 2014, a *National Law of Alternative Dispute Resolution Mechanisms for Criminal Cases* was issued. A law that contemplates mediation, conciliation and a restorative board as a right for the victims of a crime and a way to obtain the compensation they deserve.

This law is applicable both in a Federal and in local criminal proceedings.

1 Introducción: La reforma al Artículo 17 Constitucional

El 18 de junio de 2008 se modificó el Artículo 17 Constitucional que establece que ninguna persona podrá hacerse justicia por sí misma, ni ejercer violencia para reclamar su derecho. Asimismo, toda persona tiene derecho a que se le administre justicia por tribunales que estarán expeditos para impartirla en los plazos y términos que fijen las leyes, emitiendo sus resoluciones de manera pronta, completa e imparcial.

El servicio de los tribunales será gratuito, prohibiendose así las costas judiciales. Se faculta al Congreso de la Unión para expedir las leyes que regulen las acciones colectivas. Se establece asimismo que las leyes preverán Mecanismos Alternativos de Solución de Controversias (MASC) y hace la especificación en el sentido de que en la materia penal dichas leyes regularán su aplicación, asegurarán la reparación del daño y establecerán los casos en los que se requerirá supervisión judicial.

2 El Código Nacional de Procedimientos Penales

El reciente *Código Nacional de Procedimientos Penales* de 2014 establece dentro de los derechos de la víctima u ofendido el de participar en los mecanismos alternativos de solución de controversias; y constituye una de las obligaciones del defensor el promover a favor del imputado la aplicación de mecanismos alternativos de solución de controversias o formas anticipadas de terminación del proceso penal, de conformidad con las disposiciones aplicables.

Una de las múltiples obligaciones del Ministerio Público es justamente promover la aplicación de mecanismos alternativos de solución de controversias o formas anticipadas de terminación del proceso penal, de conformidad con las disposiciones aplicables.

Al tratar del ejercicio de la acción penal se establece que si bien ésta corresponde al Ministerio Público, podrá ser ejercida por los particulares que tengan la calidad de víctima u ofendido en los casos y conforme a lo dispuesto en el Código Nacional.

Las reglas generales aplicables a dicho ejercicio por el particular señalan que si la víctima u ofendido decide ejercer la acción penal, por ninguna causa podrá acudir al Ministerio Público a solicitar su intervención para que investigue los mismos hechos, y la carga de la prueba para acreditar la existencia del delito y la responsabilidad del imputado corresponderá al particular que ejerza dicha acción penal.

Se aclara en el Código que salvo disposición legal en contrario, en la substanciación de la acción penal promovida por particulares, se habrán de observar en todo lo que resulte aplicable las disposiciones relativas al procedimiento, previstas en el Código y los mecanismos alternativos de solución de controversias.

3 La Ley Nacional de Mecanismos Alternativos de Solución de Controversias en Materia Penal

El *Código Nacional de Procedimientos Penales* al tratar de los MASC hace referencia a la "ley de la materia." Esta fue publicada en el Diario Oficial de la Federación del 29 de diciembre de 2014. Se trata de la *Ley Nacional de Mecanismos Alternativos de Solución de Controversias en Materia Penal* (Téngase presente que existen otros ordenamientos similares en estados de la República como ejemplo Puebla y Sonora. Asimismo se contemplan mecanismos alternativos en la legislación de Aguascalientes y otros más). En dicha publicación se reforman también diversas disposiciones del *Código Nacional de Procedimientos Penales* y se reforman y adicionan diversas disposiciones del *Código Federal de Procedimientos Penales.*

Los mecanismos alternativos de solución de controversias en materia penal tienen como finalidad propiciar, a través del diálogo, la solución de las controversias que surjan entre miembros de la sociedad con motivo de la denuncia o querella referidos a un hecho delictivo, mediante procedimientos basados en la oralidad, la economía procesal y la confidencialidad.

La Ley será aplicable para los hechos delictivos que sean competencia de los órdenes federal y local, conforme a la Constitución y los tratados internacionales de los que México sea parte.

Se deja a la legislación procedimental penal y demás disposiciones jurídicas aplicables la determinación de la competencia de las Instituciones especializadas en MASC en materia penal dependientes de las Procuradurías o Fiscalías y de los Poderes Judiciales de la Federación o de las entidades federativas, según corresponda.

La Ley contempla tres MASC que son: *La mediación, la conciliación* y la *junta restaurativa*, regidos en su aplicación por una serie de principios rectores que son los de voluntariedad, información, confidencialidad, flexibilidad y simplicidad, imparcialidad, equidad y honestidad. Los MASC podrán ser aplicados desde el inicio del procedimiento penal y hasta antes de dictado el auto de apertura a juicio o antes de que se formulen las conclusiones, según corresponda, de conformidad con lo dispuesto en la legislación procedimental penal aplicable, que determinará también los casos en que proceda.

Quienes intervienen en los MASC tienen, conforme a la Ley, derechos y obligaciones durante el desarrollo de dichos mecanismos.

Dentro de sus derechos están los de:

I ■ Recibir la información necesaria en relación con los mecanismos alternativos y sus alcances;

II ■ Solicitar al titular de la Institución especializada en Mecanismos Alternativos de Solución de Controversias en materia penal de la Federación o de las entidades federativas (en adelante el órgano) o al superior jerárquico del facilitador la sustitución de este último, cuando exista conflicto de intereses o alguna otra causa justificada que obstaculice el normal desarrollo del mecanismo alternativo;

III ■ Recibir un servicio acorde con los principios y derechos previstos en la Ley;

IV ■ No ser objeto de presiones, intimidación, ventaja o coacción para someterse a un mecanismo alternativo;

V ■ Expresar libremente sus necesidades y pretensiones en el desarrollo de los mecanismos alternativos sin más límite que el derecho de terceros;

VI ■ Dar por concluida su participación en el mecanismo alternativo en cualquier momento, cuando consideren que así conviene a sus intereses, siempre y cuando no hayan suscrito el acuerdo;

VII ■ Intervenir personalmente en todas las sesiones del mecanismo alternativo;

VIII ■ De ser procedente, solicitar al órgano, a través del facilitador, la intervención de auxiliares y expertos, y

IX ■ Los demás previstos en la Ley.

Téngase presente que conforme al Artículo 40 de la Ley, la Procuraduría General de la República y las procuradurías o fiscalías estatales deberán contar con órganos especializados en mecanismos alternativos de resolución de controversias. El Poder Judicial Federal y los poderes judiciales estatales podrán contar con dichos órganos. Los órganos deberán tramitar los mecanismos alternativos previstos en la Ley y ejercitar sus facultades con independencia técnica y de gestión. Asimismo realizarán acciones tendientes al fomento de la cultura de paz.

El órgano estará obligado a conservar y mantener actualizada una base de datos de los asuntos que tramite de acuerdo con su competencia. Se deberá contar con una base de datos nacional con la información anterior, a la cual podrán acceder los órganos. Los reportes de la base de datos nacional servirán para verificar si alguno de los Intervinientes ha participado en mecanismos alternativos, si ha celebrado Acuerdos y si los ha incumplido.

Entre las obligaciones de los que intervienen en un MASC, están las de:

I ■ Acatar los principios y reglas que disciplinan los mecanismos alternativos;

II ■ Conducirse con respeto y observar buen comportamiento durante las sesiones de los mecanismos alternativos;

III ■ Cumplir con los acuerdos a que se lleguen como resultado de la aplicación de un mecanismo alternativo;

IV ■ Asistir a cada una de las sesiones personalmente o por conducto de su representante o apoderado legal en los casos que establece la Ley y demás normas aplicables, y

V ■ Las demás que contemplen la Ley y otras disposiciones aplicables.

4 El inicio del Mecanismo Alternativo

El inicio de un MASC en materia penal podrá ser resultado de la solicitud de los interesados o bien por derivación hecha por el Ministerio Público al órgano adscrito a las procuradurías o fiscalías. Los interesados en la aplicación de un MASC podrán solicitarlo de manera verbal o escrita ante la autoridad competente. Tratándose de personas físicas la solicitud se deberá hacer personalmente y, en el caso de personas morales, por conducto de su representante o apoderado legal.

La Ley será aplicable para los hechos delictivos que sean competencia de los órdenes federal y local, conforme a la Constitución y los tratados internacionales de los que México sea parte.

En el caso de la derivación hecha por el Ministerio Público, una vez recibida la denuncia o querella deberá orientar al denunciante o querellante sobre los MASC, en qué consisten y sus alcances. El Ministerio Público, podrá derivar el asunto al órgano adscrito a las procuradurías o fiscalías cuando:

a ■ La víctima u ofendido esté de acuerdo con solicitar el inicio del MASC,
b ■ Los intervinientes se encuentren identificados, se cuente con su domicilio y
c ■ Se cumplan con los requisitos de oportunidad y procedencia conforme a la propia Ley.

De cualquier manera, el Ministerio Público deberá realizar las actuaciones urgentes o inaplazables para salvaguardar los indicios necesarios.

Cuando el imputado haya sido vinculado a proceso, el Juez derivará el asunto al órgano respectivo si el imputado y la víctima u ofendido están de acuerdo en solicitar el inicio del MASC y se cumplan los requisitos de oportunidad y procedencia. Los Intervinientes podrán optar por que el mecanismo se desarrolle en el órgano adscrito a la Procuraduría o Fiscalía, o en el órgano adscrito al poder judicial, si lo hubiere. Cuando el Solicitante y el requerido acepten someterse a un MASC deberán manifestar su voluntad en ese sentido y se deberá registrar esa circunstancia por escrito.

Una vez recibida la solicitud por el órgano, deberá examinar la controversia y determinar si es susceptible de resolverse a través del MASC. Una vez admitida, se deberá turnar al facilitador para los efectos conducentes. El facilitador es el profesional certificado del órgano cuya función es facilitar la participación de los Intervinientes en los MASC.

Cuando se estime de manera fundada y motivada que el asunto no es susceptible de ser resuelto por un MASC, el órgano se lo comunicará al Solicitante, y en su caso, al Ministerio Público o al Juez que haya hecho la derivación para los efectos legales a que haya lugar. La negativa de admisión puede ser sujeta a una reconsideración por el órgano.

El órgano deberá efectuar una invitación al Requerido dentro de los cinco días hábiles siguientes contados a partir de la fecha del registro del expediente del caso, preferentemente de manera personal.

El término de la prescripción de la acción penal se suspende durante la sustanciación de los MASC, iniciando la suspensión a partir de la primera sesión del mecanismo y hasta que se actualice alguna de las causales de conclusión, salvo que ésta produzca la extinción de la acción penal.

Las causales de conclusión de los MASC se presenta en los casos siguientes:

I ■ Por voluntad de alguno de los intervinientes;

II ■ Por inasistencia injustificada a las sesiones por más de una ocasión de alguno de los intervinientes;

III ■ Cuando el facilitador constate que los intervinientes mantienen posiciones irreductibles que impiden continuar con el mecanismo y se aprecie que no se arribará a un resultado que solucione la controversia;

IV ■ Si alguno de los intervinientes incurre reiteradamente en un comportamiento irrespetuoso, agresivo o con intención notoriamente dilatoria del mecanismo alternativo;

V ■ Por incumplimiento del acuerdo entre los intervinientes, y

VI ■ En los demás casos en que proceda dar por concluido el mecanismo de conformidad con la Ley.

Los intervinientes pueden recibir orientación jurídica durante su participación en el MASC. Cuando ambos intervinientes cuenten con abogados, éstos podrán presenciar las sesiones, sin embargo, se aclara que no podrán intervenir durante las mismas.

En aquellos casos en los que los intervinientes fueren miembros de comunidades indígenas o personas que no entiendan el idioma español, deberán ser asistidos durante las sesiones por un intérprete de conformidad con la legislación procedimental penal aplicable.

Cuando la víctima u ofendido perteneciere a un pueblo o comunidad, el asesor jurídico deberá tener conocimiento de su lengua y cultura y, en caso de que no fuera posible, deberá actuar asistido de un intérprete que tenga dicho conocimiento.

Corresponde al Ministerio Público o al Juez aprobar el cumplimiento del acuerdo alcanzado por las partes dentro del MASC, en cuyo caso resolverá de inmediato sobre la extinción de la acción penal o el sobreseimiento del asunto, según corresponda. La resolución emitida por el Juez tendrá efectos de sentencia ejecutoriada.

El incumplimiento del acuerdo dará lugar a la continuación del procedimiento penal. En caso de cumplimiento parcial de contenido pecuniario éste será tomado en cuenta por el Ministerio Público para efectos de la reparación del daño.

El órgano deberá contar con un área de seguimiento, la cual tendrá la obligación de monitorear e impulsar el cumplimiento de los acuerdos alcanzados por los intervinientes en el MASC.

5 Del Consejo de certificación en sede judicial

Conforme a la Ley, el poder judicial de la federación y los poderes judiciales de las entidades federativas, que cuenten con un órgano o Institución especializada en Mecanismos Alternativos de Solución de Controversias en materia penal, deberán conformar un consejo de certificación en sede judicial para, entre otras funciones, la certificación de facilitadores de los órganos de la Federación y de las entidades federativas de conformidad con lo dispuesto en la Ley.

El órgano contará con facilitadores certificados de conformidad con los estándares mínimos en materia de capacitación, evaluación y certificación.

Corresponde a la Federación y las entidades federativas, en su ámbito de competencia respectivo, proveer los recursos humanos, materiales, tecnológicos y financieros que requiera la implementación de la Ley, conforme a sus presupuestos autorizados.

6 Conclusión

México tiene una vasta experiencia en materia de mecanismos no estatales de solución de controversias. Los MASC constituyen claramente una salida a la dificultad del Estado para atender con prontitud las demandas de justicia de los gobernados. Si bien estos medios no solían utilizarse en materia penal dada la naturaleza de los procesos en la materia, la mediación y la conciliación han resultado ser una opción útil para el restablecimiento del equilibrio y la paz social.

La justicia restauradora se ve reflejada en los esfuerzos por ofrecer a la sociedad respuestas ante la ineficacia de los medios ordinarios para resolver la problemática penal. La Ley Nacional de Mecanismos Alternativos de Solución de Controversias en materia penal constituye un paso de gran importancia en esta dirección.

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Will English Law Take a Leap of (Good) Faith?

Stephen SIDKIN

A duty of good faith has long been implied into fiduciary relationships by the English Courts. Such relationships include those between an employer and an employee or a principal and an agent. But in English contract law the traditional position of the Courts has been that no general duty of good faith exists.

As was explored in "English Law and the Obligation to Act in Good Faith" (*Juriste*, 2013.3)

English case law showed that this traditional position might be changing. Recently the increasing willingness of English Courts to imply a duty of good faith into a wider range of contractual relationships has been demonstrated in a number of cases. Earlier this year the judgment in *MSC Mediterranean Shipping Company S.A. v Cottonex Anstalt*[1] *("MSC")* confirmed that when exercising their discretion, and deciding whether to terminate or affirm a repudiated contract, the innocent party must act in good faith.

1 The historical position

In the case of *Walford v Miles*[2] a duty to negotiate in good faith was considered by the Court to be "inherently repugnant to the adversarial position of the parties when involved in negotiations." This was explored in further detail in *Yam Seng Pte Limited*[3] *("Yam Seng")* where the judge cited three principal reasons for the English court's reluctance to recognise a general principle of good faith for all commercial contracts:

1 ■ Firstly it was identified that English law has traditionally looked to address particular problems with particular solutions "rather than by enforcing broad overarching principles."

2 ■ Secondly English law allows parties to pursue their own self-interest in both the negotiation and performance of the contracts they enter into. This "ethos of individualism" is only limited by the requirement that the parties do not act in a way which would amount to a breach of contract.

3 ■ The argument against the implication of a duty of good faith stems from the importance English Law places upon contractual certainty. This was confirmed by the third and final reason cited where the reluctance of the courts to adopt a "vague and subjective" obligation at the expense of contractual certainty was noted.

2 English law and other jurisdictions

The position taken by the English Courts is notably different to that of other common and civil law jurisdictions where an implied duty of good faith is commonplace.

In *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*[4] Bingham LJ noted that "in many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith." He went on to contrast this position with that of English law. Under English law there has traditionally never been a commitment to a general overriding duty of good faith. Rather, the English courts have developed alternative, fact specific ways of dealing with issues of unfairness as and when they arise.

A move towards an established duty of good faith would certainly bring English law closer to both its European and worldwide contemporaries.

Despite the reticence of the courts to impose a duty of good faith on contracting parties, such a duty has become more prevalent and increasingly applied in recent case law. Many have seen this shift in attitude as a move towards a general duty of good faith.

A move towards an established duty of good faith would certainly bring English law closer to both its European and worldwide contemporaries. Indeed the increasing influence that EU law has over English law is evident through the incorporation of the duty to act in good faith into various pieces of English legislation. An example of this is the requirement of good faith can be found in the Consumer Rights Act 2015

building on the corresponding requirements in the Unfair Contract Terms Act and the Unfair Terms in Consumer Contracts Regulations. Indeed in Yam Seng the court noted that "there can be little doubt that the penetration of this principle into English law and the pressures towards a more unified European law of contract in which the principle plays a significant role will continue to increase."

3 Express duty of good faith

Parties are permitted to incorporate an express agreement obliging the parties to act in good faith when exercising their contractual duties. The drafting of such an obligation usually means that the duty to act in good faith is applicable to specific clauses of the contract, such as a provision allowing one party to withhold payment of an invoice pending the other parties fulfillment of their contractual obligations, for example the delivery of goods. When clearly incorporated into a specific clause, such a provision will not mean that the parties are bound by a duty of good faith in performing all of their contractual obligations. Nevertheless in rarer cases, a general duty to act in good faith may be drafted so as to apply to the contract as a whole.

In the recent case of *Portsmouth City Council v Ensign Highways Ltd*[5] it was acknowledged that in the absence of a general implied duty, commercial contracts can contain express provisions obliging the parties to act in good faith. The agreement in question contained a provision obliging the parties to act in good faith however this provision was not found to be applicable to the entire agreement. The Court therefore refused to extend the duty to act in good faith to cover a further clause. In doing so the Court noted that "the presence of various clauses which contain a specific and narrow obligation of good faith suggests that the parties considered the situations in which a duty of good faith was necessary and provided accordingly." Despite their refusal to extend the obligation to act in good faith to the contract in its entirety, the Court maintained that Portsmouth City Council had a duty "to act honestly and on proper grounds and not in a manner that is arbitrary, irrational or capricious." This decision echoes the earlier case of *Mid Essex Hospital Services NHS Trust v Compass Group*.

The fact that express agreements obliging parties to act in good faith have become more common in contracts governed by English law is testament to the uncertainty that surrounds the implication of a duty of good faith into a contract where no fiduciary relationship exists. Further the ability of parties to incorporate such an express obligation arguably negates the need for a general implied duty of good faith which can be implied into contracts which lack such an express provision as the parties have the freedom to incorporate a duty of good faith if they wish.

4 Implied duty of good faith

Despite a long standing reluctance the High Court held, in the case of *Yam Seng*, that a duty of good faith may be implied into contractual relationships.

This case concerned a distribution agreement made between the claimant and defendant. The agreement granted the claimant exclusive rights to distribute "Manchester United" branded fragrances in territories within the Middle East, Australasia and Asia, Africa. The relationship between the parties deteriorated and the claimant informed the defendant that the contract was to be terminated by reason of the defendant's breach. Following the termination of the agreement, the claimant claimed damages for various alleged breaches of the agreement. The claimant made a further claim for damages, stating that it had been induced into entering into the distribution agreement by reason of misrepresentation. The defendant, unsurprisingly, denied both claims.

The claimant maintained that the contract contained an implied term that the parties would act in good faith. It was held, by Leggatt J, that good faith could be implied into "an ordinary commercial contract based on the presumed intention of the parties". This had the effect of extending the duty to act in good faith from fiduciary relationships to general commercial ones. The claimant's action was therefore successful as the Court held that both parties should have acted in good faith.

The existence of an implied duty of good faith was recently identified in the case of MSC. Here the Court held that a party must exercise their right to terminate a contract, following a repudiatory breach by the other party, in good faith and it was explicitly noted that there was an "increasing recognition in the common law world of the need for good faith in contractual dealings."

MSC, the claimant in this case, was "the second largest carrier of shipping containers in the world." Cottonex, the defendant, was a cotton merchant. The claimant carried 35 containers of raw cotton from the Middle East to Bangladesh. A third party, Regent Spinning Mills Ltd, was due to collect the goods but never did. No other party collected the goods. The cotton remained at the port inside of the shipping containers. The case concerned whether or not the defendant was liable to pay the claimant a "demurrage", or daily charge, for each day that the containers remained uncollected and packed with cotton meaning that they were therefore unavailable to be used by the claimant.

In coming to his decision, the judge relied upon the implied duty of good faith between contracting parties. The claimant was informed that, in the absence of language which clearly states the opposite, any contractual discretion must be exercised in good faith.

5 The issue of ambiguity

The implied duty of good faith has a minimal impact when the contractual terms are sufficiently clear. Indeed the fact that the judge specifically mentioned a contractual discretion makes clear that parties can make express agreements which may go against a duty of good faith. It is where the parties find themselves bound by an agreement with somewhat ambiguous terms that issues are most likely to arise and the implication of a duty of good faith to be most relevant. With this in mind parties whose contractual

terms are sufficiently clear will remain able to avoid the uncertainty an overriding duty of good faith would cast over the terms. This was evident in another recent case, Myers v Kestrel Acquisitions.[7] Here the Court noted that they were "being asked to conclude that the parties omitted to insert an important term." The Court further noted that the agreement contained several terms which had been included to protect Myers' interests. The Court made clear that the fact that a party has a choice of more than one option of how to proceed does not mean that such a choice will be subject to an automatic duty of good faith. Indeed the Court noted that a duty to act in good faith will arise when a party has a range of options of how to proceed rather than when a party has a choice of either exercising or not exercising a contractual right.

6 Repudiated contracts - Termination or affirmation?

Traditionally in English contract law a repudiatory breach of contract entitled the innocent party to choose whether to terminate or to affirm the contract. If the innocent party elected to affirm the contract following a repudiatory breach, both parties remained bound by their contractual obligations as a repudiatory breach did not automatically bring the contract to an end. However the innocent party's decision of whether or not to affirm the contract could not be exercised in an arbitrary, capricious or unreasonable way.

The test for whether a party can be held to have been acting in good faith when terminating or affirming a repudiated contract has been addressed by the courts. In previous cases the courts have indicated that the question of whether affirming or terminating the contract is in the "legitimate interest" of the innocent party will determine whether or not that party has the right to affirm the contract and insist upon its performance. If the innocent party is found not to have such an interest in affirming the contract, the Court ruled that the party is obliged to accept the repudiatory breach, thereby bringing the contract to an end and relieving both parties of their contractual obligations. This constraint on the freedom of the innocent party is fairly limited as it is generally acknowledged as a low threshold to be met, usually without difficulty.

Leggatt J in MSC looked at the exercise of a contractual discretion and the discretion to terminate or affirm a repudiated contract and concluded that both situations required one party to make a decision which will affect the counterparty to the contract. That counterparty will often, if not always, have conflicting interests. Leggatt J concluded that there was reason "in each case to imply some constraint on the decision maker's freedom to act purely in its own self-interest." It was therefore concluded that the test was to be whether the party who made the decision had acted in good faith.

The claimant in MSC was found not to be acting in good faith when it elected to keep the contract alive following the repudiatory breach. The Court found that the claimant had no interest in keeping the contract alive other than to continue to collect the demurrage payable under the contract.

In practice an innocent party will have no problem in keeping a repudiated contract alive provided that the guilty party wants to do the same. However, the decision in MSC makes clear that the innocent party's freedom to terminate or affirm a repudiated contract is somewhat fettered if the counterparty is unlikely to agree.

The MSC judgment therefore means that parties can no longer have sole regard to their own best commercial interests when deciding whether to affirm or terminate a contract following a repudiatory breach. An innocent party now appears to be obliged to exercise a duty of good faith when deciding how to proceed.

7 The ebb and flow of the tide of good faith

The English courts have, by their refusal to acknowledge a general duty of good faith applicable to all commercial contracts, been accused of "swimming against the tide". However, recent decisions indicate an increased willingness on behalf of the courts to imply a general duty of good faith into a contract.

Parties have the ability to incorporate an express duty of good faith into their contracts. In order to avoid being bound by an implied duty of good faith, will we see a shift from the incorporation of a clause which expressly obliges the parties to act in good faith to one which expressly excludes such a duty? If so, what will the effect of the exclusion of the duty to act in good faith have on the relationship of the parties? The risk is that such action would appear to amount to one party attempting to exclude the duty to act honestly and reasonably. And how conducive would such a risk be to long term relationships?

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[1] [2015] EWHC 283 (Comm)

[2] [1992] 2 AC 128

[3] [2013] EWHC 111

[4] [1989] QB 433

[5] [2015] EWHC 1969 (TCC)

[6] [2013] EWCA Civ 200

[7] [2015] EWHC 916 (Ch)

The Protection of Artistic and Cultural Heritage in International Criminal Law

Alfredo GUARINO

The need was felt in the Western world that war events should cause no damage to cultural heritage but for many centuries there was no specific international legal regulation.

We can recall Frederick of Germany who forbade the plundering of churches; in 1613, Carlo Emanuele of Savoy forbade any looting and in 1874, Czar Alexander II, at the Brussels Conference on the rules and customs of war, stated that "cultural heritage" should be protected during conflict, like any other private property.

In 1907, with the International Peace Conference in the Hague, an attempt was made to standardize the legal concept of "looting", dictating to the contracting countries the prohibition to practicing it again in the future, with rules on the uses of ground war and the bombing of ground targets by naval forces, as well as drafting an international convention.

The convention, in addition to providing in art. 25 the prohibition of attack or bombing of undefended towns and buildings, in art. 27 included the need to safeguard, as far as possible, buildings dedicated to religion, the arts, science and charity, historic monuments, hospitals and places of caring for the sick and wounded, prohibiting also, under art. 28, any actions of pillage of a town or place.

Lastly, art. 56 stipulated that the property of municipalities, institutions dedicated to religion, charity and education, the arts and science, even when State property, should be treated as private property, with the consequence of the prohibition and punishment of each seizure, destruction or willful damage of such institutions, historic monuments, works of art and science.

Subsequently, in 1919, the Dutch Society of Archaeology proposed the creation of recognized "*sanctuaries of art*" and in 1938, there was a draft convention on the protection of monuments and works of art during armed conflicts developed by the Office International des Musées.

In 1935, the so called Roerich Pact was signed in Washington by 21 American countries, which provided for the establishment of the protection of buildings of particular value which should have been marked with a distinctive sign, defined as "*Roerich*", from the name of the eclectic Russian humanist of esoteric trends.

A significant innovation and extension of international protection, relating to the assets of artistic and historic value, was introduced with the 1954 Hague Convention for the protection of cultural property in the event of armed conflict.

First, it should be noted that, in the international legal framework, the notion of "*cultural heritage*" appears which includes all property, even furniture relevant to the cultural heritage of the peoples (thus paintings, statues, sculptures, craft items of particular value); architectural monuments of all kinds, art or history, whether religious or secular; archaeological sites; manuscripts, books and other objects of artistic, historic and archaeological interest as well as scientific collections and important collections of books or archives or reproduction of the assets defined above.

Protection in question are also all buildings whose intended use is to store and exhibit movable cultural property, such as museums, archives and large libraries and shelters designed to store those assets in case of conflicts and, finally, protection in question are also the urban centers that contain a large number of cultural assets defined as "*monumental centers*".

In addition to the commitments that contracting States take for the protection of such property, as well as to prevent theft and looting and vandalism, even with reference to possible retaliatory actions on cultural heritage (see art. 4), the constitution of a special protection is provided in Chapter 2 of the Convention for the setting up of shelters designed to protect mobile cultural objects in the event of armed conflict (see art. 8), coming to predict the establishment of an "*International register of cultural heritage under special protection*". Moreover with the second Additional Protocol of 1999 a system of "*enhanced protection*" was introduced, more extensive than that of the special protection, which in art. 15 provides for the principle of individual criminal responsibility in the case also of the use of cultural property protected and its surroundings in support of military actions and in case of destruction or appropriation of cultural property protected, with reference to theft, looting, embezzlement or acts of vandalism;

an even higher level of protection must be ensured to said cultural property, when and if this property under special protection is provided with specific markings (arts. 9 and 10).

The field of application of the International Convention is that of international armed conflicts and of internal armed conflicts arising in the territory of one of the Contracting Parties.

Even if the list of assets requiring international protection has extended, it must be noted that the registration procedures of cultural heritage with special protection are to be found in the concrete experience rather complex and cumbersome but it also should be noted that all statements found in the recalled conventions suffer from three fundamental limitations:

1 ■ they are legislative provisions which apply in case of international armed conflicts among States or even, as for the Convention of 1954, in the case of armed conflicts that occur on the territory of one of the contracting States, with the exclusion of riots, acts of terrorism and acts that do not fall into the ambit of armed conflicts;

2 ■ the standard received here is not applicable for each deed that occurs outside the territory of the contracting States or outside the military actions of the contracting States, unless they are, following the second Protocol of 1999, deeds of "*extended*" destruction or of attack to cataloged assets as recipients of "*enhanced*" protection;

3 ■ above all they appear to be imperfect standards, for the reason that there are no adequate sanctioning mechanisms: the provision of the Convention of 1907 that the wrong-doings must be sanctioned suggests that identification of an adequate sanctioning treatment is generically left to the national legal systems and the second Protocol of the Convention of 1954 provides for penal sanctions, entrusted to the States, only for "s*erious violations*".

Consider then the huge delay in the international community in accession to the 1954 Convention, considering that only in the last decade the United States, China and Japan have ratified it, and it seems that the UK have not ratified it yet.

Subsequently, in March 2001, UNESCO, too, adopted a specific statement, later merged into the Convention of October 17, 2003 on cultural heritage, which, by the nature of said international organization, tends to be a common law in progress, which the national and international legislation could draw on for an effective system aimed at prosecuting crimes related to at least voluntary and intentional destruction of cultural heritage identity.

The text of the UNESCO Convention, for the safeguarding of Intangible Cultural Heritage, regards language, performing arts, rituals and festive events, the knowledge and practices concerning nature and the universe and traditional craftsmanship.

Art. 12 provides that the contracting States must compile inventories and in art. 13 other measures of protection are established, in order to constitute, under art. 16 a representative list of the intangible cultural heritage of humanity, with any additional provision for cooperation programs and international assistance but nothing is planned in the text of the Convention, for the destruction activities of said heritage and for any consequential sanctions.

Thus, if we find a troubled and rough path in the general international law for the protection of cultural heritage, we must necessarily turn our gaze to criminal international law in order to identify simpler, quicker and more effective tools for the effective protection of said heritage by means of an adequate system of international criminal sanctions.

In this area we must note how in the Statute of International Tribunals of the former Yugoslavia and for Ruanda, as well as in the Statute of the International Criminal Court, the deliberate attack to the cultural heritage of peoples has been introduced as "*war crime*" .

In international criminal law, the initial judgments that regarded the infliction of penalties for the harming of cultural assets have been those of the Court of Nuremberg, where convictions were pronounced for "*looting of public and private property*", "*destruction for no reason of cities*", "*unjustified devastations due to military needs*", with the consequential conviction of Göring for looting and of Keiter for destruction.

Furthermore, the Court of Nuremberg defined crimes against humanity, among which those against cultural property, as crimes of "*persecution*", therefore convicting Rosenberg because, with the "*EISATZ-STAB ROSENBERG*" he had plundered and looted museums, libraries and art collections.

Even Von Schirach was convicted for having ordered the bombing of an English culture city.

There is, however, to add that the verdicts of the Nuremberg Tribunal were given in application of rules created for that purpose, indeed in violation of the principle of non-retroactivity of criminal law.

The most significant experiences, in recent times, have been recorded in the case law of the Hague tribunal for crimes committed during the conflicts that followed the dissolution of the Yugoslav state.

In the case of serious attacks on cultural and artistic heritage, the Hague Tribunal has considered applicable the penalties provided for in the case both of international conflicts and in the case of internal conflicts, with definition in *subjecta materia* of individual criminal responsibility, calling on the one hand war crimes and on the other crimes against humanity, when the cultural heritage is also of identity value, such as for religious symbols.

In the judgment of 04/04/2004, in the trial against Blagojevic and Jokic and in the judgment of 31/01/2005 against Strugar and in the judgment of 26/02/2001 against Kordic and Cerkez, it was expressly stated that the destruction of cultural heritage, especially religious ones, is tantamount to an attack on the religious and historical identity of a people and constitutes a crime against humanity.

Furthermore in the judgment of 08/02/2001, in the trial against Krstic, it was also highlighted as the intentional destruction of cultural and religious heritage can be considered as evidence of the intention to

physically destroy an ethnic group, therefore as proof of perpetrating a genocide.

Even if the statement raises some concern, perhaps it should be considered that the systematic destruction of the cultural heritage of a specific ethnic or religious component is a crime far more serious than the destruction of individual specific property, perpetrating what would perhaps be defined as "*cultural genocide*".

The brief layout of this accomplished exposure should lead us to a careful and serious reflection on the need for a synergic commitment by the States, so that prevention and repression activities are effectively carried out, even within the area of internal criminal law, of the wrongful destruction of identity cultural property that belong to the history of mankind.

In actuality, it appears that implementation of art. 7 para. 2, of the Hague Convention has not been carried out. Said Convention calls for the training of specialized military personnel and their collaboration with the civil authorities charged with the safekeeping of cultural property, and perhaps it should lend listening to the Italian government to set up a special section, within the ambit of the United Nations, of *peace keeping forces,* perhaps to be defined as *culture-keeping forces.*

There is hope that mankind, leaving behind its insane and criminal childhood, may finally become mature, by effectively safeguarding the heritage of its own history, where the specific assets of each group enrich all human beings.

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