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Young Lawyers

Newsletter of the International Bar Association Section on Public and Professional Interest

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INTERNATIONAL CONVENTION CENTRE (ICC SYDNEY)

IBA 2017 Sydney

8–13 OCTOBER

ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

The 2017 IBA Annual Conference will be held in Sydney, Australia's leading global city. Recognised internationally as a future-focused and innovative business centre, Sydney provides headquarters for almost 40 per cent of the top 500 Australian corporations.

The city combines natural beauty with buzzing urban villages and a city centre that's home to some of the world's most recognisable and iconic structures such as the Opera House and Sydney Harbour Bridge.

As one of the world's most multicultural and connected cities, Sydney will be an ideal location for the largest and most prestigious event for international lawyers, providing an abundance of business and networking opportunities, as well as the chance to explore one of the most beautiful cities on Earth.

What will Sydney 2017 offer you?

- Gain up-to-date knowledge of the key developments in your area of law which you can put into practice straight away
- Access to the world's best networking and business development event for lawyers – attracting over 6,000 individuals in 2016 representing over 2,700 law firms, corporations, governments and regulators from over 130 jurisdictions
- Build invaluable international connections with leading practitioners worldwide, enabling you to win more work and referrals
- Increase your profile in the international legal world
- Hear from leading international figures, including officials from the government and multilateral institutions, general counsel and experts from across all practice areas and continents
- Acquire a greater knowledge of the role of law in society
- Be part of the debate on the future of the law

To register:

Visit: **www.ibanet.org/Conferences/Sydney2017.aspx**

To receive details of all advertising, exhibiting and sponsorship opportunities for the IBA Annual Conference in Sydney email **andrew.webster-dunn@int-bar.org**

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IN THIS ISSUE

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This newsletter is intended to provide general information regarding recent developments affecting young lawyers. The views expressed are not necessarily those of the International Bar Association.

From the Co-Chairs

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Welcome to Sydney!

The IBA Annual Conference in Sydney is just around the corner, and the Young Lawyers Committee's officers are all working hard, planning very interesting and dynamic sessions and enjoyable social events for all the Committee's members. We trust that as many of you as possible will join us for our activities and events during the week.

As is traditional, the conference week will start on Saturday 7 October with the Young Lawyers' Training Course, as part of an ongoing programme devised by the IBA's Section on Public and Professional Interest (SPPI) and organised by the Young Lawyers' Committee, to assist young lawyers and junior members of the profession with their understanding of the fundamentals of international legal practice. The course takes place at the University of Technology, Sydney and it is a great opportunity for young lawyers to network and to discuss highly relevant topics with more experienced lawyers and professors.

The first event of the Annual Conference week will be the SPPI Awards breakfast on the morning of Monday 9 October, during which the winner of the IBA Young Lawyers' Committee Outstanding Young Lawyer of the Year Award will be presented. We are proud to inform you that this year we celebrate the tenth anniversary of this award which, sponsored by LexisNexis and in honour of William Reece Smith Jr, recognises young lawyers who demonstrate professional excellence, the advancement of legal ethics and service to their community.

The breakfast is followed by our Committee's traditional Young Lawyers' Introductory session, which is intended to assist newcomers and young lawyers in planning a very busy week in Sydney and to take the best from the Annual Conference. During the second part of the session we will also have a very interesting speech around technology and how the legal profession is embracing it. It will also be an excellent opportunity to personally meet our Committee officers, get actively involved in our activities and initiatives and find an interesting role within the Committee.

We are organising and supporting eight working sessions throughout the week, many of which are held jointly with other Committees. This enables us to learn from experienced professionals in many different areas of law, whilst introducing the young lawyers' perspective. This year, sessions will cover a wide range of topics, including substantive areas of law such as real estate transactions, international sales, antitrust and alternative dispute resolution, and others of more general interest such as partnership as career goal, start-ups, and business lawyers and the future of the law firms.

On the social side, this year we are having a joint dinner with the Corporate Social Responsibility Committee and the Leisure Industries Section on Wednesday 11 October, which will allow you to meet informally and network in a relaxed atmosphere. Please remember to purchase your ticket in advance at the Registration Desk!

The 'icing on the cake' of the week will take place on Thursday night with our legendary Young Lawyers' Night Out from 2200 until late at a fantastic venue, Marquee Sydney - The Star, with expansive views of the iconic Sydney Harbour and the city skyline. This not-to-be-missed event is one of the highlights of the IBA Annual Conference social calendar for all young lawyers and the young at heart. We very much hope to see you all there! We would also like to take this opportunity to thank our generous sponsors for supporting the event again this year.

Finally, we would like to wish you a wonderful and very productive Annual Conference, and also thank all our members for your continued support and enthusiasm. Any ideas or queries about future initiatives and events from our Committee are very gratefully received, so please do get in touch or speak to any of our Officers in Sydney.

Enjoy reading this newsletter!

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From the Editor

Dear Members,

It is with great pleasure that I present to you the September 2017 issue of the Young Lawyers' Committee Newsletter. This edition features plenty of interesting articles, coming from diverse geographical and cultural backgrounds.

These articles explore: changes in Austrian antitrust law; the Canadian perspective on expert discovery in arbitration; the logic behind domestic foreign investment reviews; the impact of new technologies in the fight against money laundering and terrorist financing; oral hearings in German civil proceedings; the different standards of review that Delaware courts in the United States apply to challenged board of directors decisions; and the rise of FinTech in Thailand.

Finally, we also check in with last year's Outstanding Young Lawyer of the Year Award Recipient, Remy Choo, and the recent developments in his case against the Singaporean government.

On behalf of the Young Lawyers' Committee, I would like to extend my sincere gratitude to all the contributors – your time and effort are greatly appreciated.

We continue to be willing to provide an opportunity for young lawyers around the world to be published. Should you wish to know more about how to get published and or if you have ideas for a new article, please do not hesitate to submit your ideas to the Young Lawyers' Committee and the Communications Officer.

We hope you enjoy this newsletter, and I hope to meet you in Sydney.

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ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

Young Lawyers' sessions

Monday 0930 – 1230

Young lawyers' introductory session

Presented by the Young Lawyers' Committee

This session will assist young lawyers and newcomers in navigating and making the most of the Annual Conference, from tips on how to network effectively, assisting them in understanding the structure and function of the IBA, as well as becoming involved in its committees.

This session will also look at the skills and knowledge required to become a successful international lawyer, and aims to show which career ladder to climb.

Tuesday 0930 – 1045

The perfect pitch: what to learn from transactional real estate lawyers

Presented by the Real Estate Section, the Corporate Counsel Forum and the Young Lawyers' Committee

Although lawyers are chasing business all of the time, occasionally lawyers get asked to make a formal 'pitch' for business, including transactional real estate lawyers. This kind of opportunity initially results in great enthusiasm, which is followed by the realisation that you will need to put a serious effort into preparing for the pitch while still fulfilling the rest of your daily responsibilities. That effort involves asking and answering a number of questions, including:

- How should you organise your pitch?
- Who should be involved in the pitch from your firm?
- What should you try to find out about the target company you are pitching before making the pitch?
- Should you deliver any materials to the target company before actually making the pitch?
- Who from your firm should attend the pitch?
- What materials should you bring to the pitch?
- How should your firm follow up with the target company after making the pitch, but before the target company's selection decision is made?
- What should you do if you don't win the business?

These and other questions, and the challenges of pitching business, will be explored by our panel of experts, some of whom have been on both sides of such pitches during their careers.

Tuesday 0930 – 1230

Partnership: is it still a primary career goal in the modern legal environment?

Presented by the Young Lawyers' Committee and the Senior Lawyers' Committee

Partnership has long been a primary career goal for young lawyers starting their career at a law firm. This session will discuss from various angles if partnership is still a primary career goal for young lawyers, looking at challenges facing law firms and the impact on the legal profession.

Tuesday 1430 – 1730

Startups and business lawyers: global perspectives and future challenges

Presented by the Young Lawyers' Committee and the Closely Held and Growing Business Enterprises Committee

This session will introduce experiences in establishing new companies and startups around the globe, and discuss winning combinations between entrepreneurs and business lawyers, covering the topic of how lawyers can use an entrepreneur mindset to practise law.

This session will also show the successful experience of lawyers in launching startups, introduce challenges the lawyers have faced and overcome, and foresee future challenges.

Wednesday 0930 – 1045

International sales contracts: boot camp in the outback

Presented by the International Sales Committee and the Young Lawyers' Committee

Drafting of agreements for clarity and communication is key. The 'boilerplate' – that is, entire agreement, assignment, severability and like clauses – is often neglected while it could prevent disputes or, at worst, cause one. Material terms of international sales contracts will be reviewed, making reference to recent case interpretations where applicable. This could include reference to Incoterms and any current commentary there.

Continued overleaf

Wednesday 1115 – 1230

Law firm of the future: the vision of young lawyers

Presented by the Law Firm Management Committee and the Young Lawyers' Committee

What do young lawyers envisage the law firm will look like in ten to 15 years and how can today's law firm management provide the support and necessary tools to develop the legal, technological and people skills as well as required leadership qualities in young lawyers so that they are equipped for the law firm of the future?

Thursday 0930 – 1045

Antitrust after cartels: next generation enforcement

Presented by the Antitrust Committee and the Young Lawyers' Committee

Virtually all jurisdictions today are united in their hostility to cartels. Antitrust enforcers have arrived at a consensus that 'hardcore' price and output restraints must be rooted out and attacked with punitive measures. What next? This panel will address emerging approaches to the application of competition law to competitor coordination falling short of cartel activity. What are the rules and how can businesses comply? Topics to be discussed are the scope of prohibitions on 'concerted practices' under EU (and, soon, Australian) law, scope of 'agreement' under US law, contrasting approaches across jurisdictions to the legality of information exchanges and price signalling, and the nature of other 'non-traditional' theories of collusive or cooperative conduct.

Thursday 0930 – 1230

Changes in national law and their role for promoting alternative dispute resolution (ADR)

Presented by the Young Lawyers' Committee, the Arbitration Committee and the Mediation Committee

This session focuses on recent changes in the framework for ADR in different jurisdictions. By bringing to the table for discussion how venues are becoming more attractive to parties, and what shifts are being made in the public and private sectors, this session aims to provide informed opinions on which jurisdictions could be emerging in the ADR-scene in the next few years. Topics such as legislative reform of national acts, governmental initiatives, support from judicial systems, and the creation of private institutions, among others, shall be discussed. In addition, experienced practitioners shall provide their insight on the ADR scheme of alternative jurisdictions.

Thursday 1430 – 1730

What young lawyers can teach senior lawyers

Presented by the Senior Lawyers' Committee and the Young Lawyers' Committee

This is a reversal of the norm.

The profession is adapting rapidly to reflect market changes and expectations.

The new generations harbour different aspirations and hopes. For law firms to keep abreast of these developments, senior lawyers need to listen more carefully to young lawyers.

This session, being prepared jointly with the Young Lawyers' Committee, will provide just such an opportunity.

Thursday 2200 – late

(BK) Young Lawyers' 'Night Out'

Boombox, Marquee Sydney @ The Star, Level 2 Harbourside, Pirrama Road, Pyrmont, Sydney NSW 2009

All registered delegates and accompanying persons, aged 18 and over, are welcome to attend on a first come, first served basis. Entry is not guaranteed.

In line with NSW law, photo ID is required for admittance to this venue.

Driving licence in English or your passport will be accepted. Entry will be refused for people without photo ID.

In addition to your ID, an IBA Sydney Annual Conference badge is required for admission and entry will be refused for anyone not able to provide their IBA badge.

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All programme information is correct at time of print.

To find out more about the conference venue, sessions and social programme, and to register, visit **www.ibanet.org/Conferences/Sydney2017.aspx**.

Further information on accommodation and excursions during the conference week can also be found at the above address.

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Recent amendments in Antitrust law in Austria

If companies have formed a cartel and thereby harmed customers, for example, by high prices, it has been difficult in practice to obtain compensation from the cartel members involved. Often, the injured parties faced almost insoluble problems providing evidence, with companies blaming other cartel companies or procedural problems such as statutory limitation periods.

The most recent statutory amendment in Austria, the Kartell-und Wettbewerbsrechts-Änderungsgesetz 2017 (KaWeRÄG 2017), the most essential parts of which came into force on 27 December 2016, will make it easier for the injured party of a cartel to enforce its claims against cartel members in practice.

The statutory amendment is based on a directive of the European Union and aims to codify the principles of the previous European Court of Justice (ECJ) case law in this regard. In addition, a reform of the Austrian antitrust law is contained in the Government Agreement, which aims to create fair rules for competition.

The most important statutory amendments affect the legal regulation of the following topics:

- disclosure of evidence;
- presumption of cause of damage;
- joint liability of the cartel members;
- incentive for settlements;
- passing on of damages; and
- limitation period.

Disclosure of evidence

Before the statutory amendment came into force, the burden of proof was borne by the claimant only, and by providing sufficient evidence. Only in exceptional cases could a court require the defendant to submit evidence in favour of the claimant.

A lawsuit now has to contain facts and evidence which are accessible to the claimant with reasonable effort and which sufficiently support the plausibility of the claim for damages. In antitrust-compensation cases, the claimant faces difficulties in providing evidence regarding all legal prerequisites for the establishment of a cartel (§ 37j section 1 Kartellgesetz (KartellG)). The recent amendments to the cartel act address this issue.

Moreover, in accordance with § 37j section 2 KartellG, the court may force a defendant to disclose evidence that only he has. Confidentiality issues are considered in the course of a proportionality check carried out by the court, which can also order accompanying measures, for example, exclusion of information to the public.

Most effective for obtaining evidence is the new legislation in accordance with § 37k section 1 KartellG, whereby evidence from a previous public cartel proceeding can also be obtained. Since the Austrian Federal Competition Authority has extensive powers of investigation – such as dawn raids – and the results of these investigations are part of the cartel court file, the injured party must request only the relevant documents of the cartel court file in order to prove the facts necessary for its position.

Presumption of cause of damage

Before the statutory amendment, the claimant had to prove the existence of the purported damage.

Now, it is assumed by law (§ 37c section 2 KartG) that a cartel causes damage. In effect, this is a reversal of the statutory burden of proof for showing that a damage exists. In the case of a cartel, it is no longer necessary for the claimant to prove the damage before the court, and on the contrary, the defendant now bears the burden of proof that there was no damage. This makes the procedure for adducing evidence much easier and thus means a lower litigation risk for the claimant.

Joint liability of cartel members

Before the statutory amendment came into force, an injured party could enforce its claims only against the company that caused the damage.

Jointly acting anti-competitive companies are now jointly liable for the resulting damage (§ 37e section 1 KartellG). A company can now also be sued for the damage caused by another company if both have acted jointly. If, therefore, company A and company B set the price of a product, the party injured by company A can request compensation from company B as well.

Subsequently, company B can seek recourse from company A, subject to certain conditions, by demanding in essence a refund claim for the compensation paid to the injured party. This is particularly advantageous for the injured party because it can apply its claim for compensation against the most solvent company.

Incentive for settlements

If an injured party agrees to a settlement with an infringing party that has acted jointly with other parties, the injured party's claim for compensation against the other infringing parties is now reduced by the proportion by which the settling infringing party was responsible (§ 37g section 1 KartellG). The infringing party is not obliged to compensate the other infringing parties in case of a claim by the injured party (§ 37g section 2 KartellG). The settling infringing party is only liable in relation to the injured party if the claim of the injured party is irrecoverable from the other infringers.

Before the statutory amendment, the infringing party was obliged to compensate the other infringing parties in case of a claim against the other infringing parties by the injured party. As a result of this amendment, those companies alleged to have engaged in antitrust conduct have a strong incentive to agree to a settlement. By doing so, the infringing party can evade the recourse claims of the other infringing parties.

Passing on of damages

Passing on of damages occurs when a party affected by an anti-competitive act has passed on the anti-competitive price mark-up of the infringer to a customer (a third party).

Before the statutory amendment, the party that had passed on the anti-competitive price mark-up to its customer (a third party) could ask for lost profits only in the case of gross negligence or intent. Now if the party has passed on the anti-competitive price mark-up to its customer, the party may claim damages from the infringer for lost profits even in the case of culpable conduct (§ 37f section 1 KartellG).

In addition, the third party, that is the customer to whom the price mark-up has been passed, may claim compensation against the infringer to whom the anti-competitive price mark-up is attributable (§ 37f section 2 KartellG).

The transfer of the anti-competitive price mark-up is presumed if the third party proves that the infringer committed an infringement of the competition law which resulted in a price mark-up for its immediate customers and the third party purchased the goods or services affected by the price mark-up (§ 37f section 3 KartellG). Here, too, the claimant's burden of proof is considerably weakened and the defendant has to exonerate himself from the legal presumption.

§37f KartellG will also apply to cases where the anti-competitive act consists in fixing a predatory low price.

Limitation period

Prior to the new law, the statute of limitations period started with the injured party's knowledge of the infringer and the damage. The claim for damages lapsed within a period of three years after the knowledge of the infringer and the damage. The limitation period was suspended only for the duration of legal proceedings carried out by a competition authority.

Now the limitation period starts as soon as the antitrust infringement ends. The claim for damages lapses within a period of five years starting from the injured party's knowledge of the infringer, the injurious behaviour and the infringement of competition law, but in any case after ten years (§ 37h section 1 KartellG). The limitation period shall be suspended, in particular, for the duration of investigations carried out by a competition authority, a pending proceeding before a competition authority or conciliation negotiations (§ 37h section 2 KartellG).

The new regulation not only clearly defines the beginning of the limitation period, but also provides a comprehensive legal protection for the injured party from claims to be subject to limitation, which is

of interest in settlement discussions. It is therefore more difficult for the infringer to withdraw from the legal consequences of his antitrust infringement by arguing that claims are subject to statutory limitation.

Conclusion

The changes in law will significantly increase the chances of success for the injured party of a cartel to receive damages compensation in the course of a civil trial and will therefore in all likelihood increase the claims for damages resulting from antitrust violations. For the injured party, it is advisable to await the outcome of a public competition proceeding conducted by the public competition authority in order to use the evidence from this proceeding. Whether or not these changes will open the gates for new claims, and whether defendants will want to defend themselves in the face of this new environment, remains to be seen.

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Discovery of experts in international arbitration: a Canadian perspective

Generally speaking, in international arbitration, there are no formalised rules setting out international standards for the discoverability of experts' work product, their draft reports, or their communications with counsel. After all, international arbitrations, by definition, are not confined by any particular jurisdictional or national rules of evidence or procedure. The general trend in international arbitration, however, has been to limit access by opposing parties to the draft work product of experts and experts' communication with counsel.

There is little doubt, however, that most major international arbitration rules, as well as the widely used IBA Rules on the Taking of Evidence in International Commercial Arbitration, give arbitrators sufficient power to order discovery of experts' work product and communications with lawyers if they deem it appropriate in the circumstances.

For example, Article 22.1(v) of the London Court of International Arbitration Rules provides that an arbitral tribunal may,'order any party to produce to the Arbitral Tribunal, and to the other party's documents… which the Arbitral Tribunal decides to be relevant.' Article 22.1(vi) is even more explicit: arbitrators may 'decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material… on any issue of fact or expert opinion; and to decide the time, manner and form in which such material should be exchanged between the parties and presented to the Arbitral Tribunal.'

How then can parties anticipate what rules will apply to their arbitration, once started? Particularly in the context of international arbitration, where parties may be coming from different legal traditions, or otherwise divergent legal backgrounds, this unknown and potential area of conflict can be a source of trepidation for clients. Notwithstanding the wide disparity in practice across jurisdictions, it is possible to identify trends within international arbitration practice, and, for Canadians, recent court decisions fit compatibly within those trends.

Recently in Canada, Ontario courts have clarified the law with respect to the propriety of communications between counsel and experts and the extent to which privilege attaches to draft expert reports and foundational documents informing those reports. In *Moore v Getahun*,[1] the Ontario Court of Appeal held that it is not only appropriate but essential for counsel to consult and collaborate with expert witnesses in the preparation of expert reports. Counsel must explain to experts their duties to the court, clarify the relevant legal issues, and assist experts in 'framing their reports in a

way that is comprehensible and responsive to the pertinent legal issues in a case.' The court also held that the law currently imposes no routine obligation to produce draft expert reports. Production of an expert's notes and drafts may only be ordered if there is reasonable suspicion that counsel has improperly influenced the expert. (*Bruell Contracting Ltd v J & P Leveque Bros. Haulage Ltd* 2015 ONCA 273; *Nikolakakos v Hoque* 2016 ONSC 4738; *St Onge v St Onge* 2017 ONCJ 156.) The decision is a welcome clarification for Ontario litigators and has brought Ontario litigation practice into closer line with contemporary international arbitration norms.

In the civil law context, the issues addressed by the *Moore* decision would never arise in the first place. In French proceedings, for example, an expert is appointed by the court, not by the parties, and must be chosen from a list of 'approved' experts, such that all experts have already been recognised as experts in their field by the relevant jurisdiction. In France, parties would provide relevant information to the expert and the expert would then decide what is necessary or important to his or her opinion. Thus, the issue of lawyer-expert communications is largely circumscribed, and the risk of apprehension of bias (at least initially) is much lower because the expert owes their appointment to the court, not any one party. Moreover, in France, the practice of 'cross-examining' an expert witness – on his report, the origins and evolution of his opinions, or impeaching his credibility – simply does not exist.

Common law practice, with its heavy reliance on oral testimony and cross-examination, requires a completely different approach by lawyers, and makes certain information and considerations relevant that would not otherwise be relevant in the civil law context; however, even among broader common law jurisdictions, like Canada and the United States, there are divergent approaches to expert evidence.

Chief among those differences is the routine discovery of experts in the US, a practice which is almost never done in Canada. Prior to revisions to Rule 26 of the Federal Rules of Civil Procedure in December 2010, litigants in the US operated under the assumption that *all* materials provided to an expert by a lawyer, whether or not relied upon or even considered by the expert, were discoverable. This included communications between the lawyer and expert, the lawyer's comments on draft reports, as well as all draft reports themselves: obviously, an extremely wide net of discoverability.

The effect on American practice prior to 2010 was that lawyers imposed strict, cumbersome protocols on their experts to avoid generating any written notes during meetings and other discussions, and only drafting single-version, final reports. In addition, wealthy litigants were incurring the expense of retaining two experts – one as a 'consultant' and one to testify at trial – to avoid discovery issues, since communication with and work product of non-testifying witnesses is not discoverable in the US.

The Revised Rule 26 of the Federal Rules of Civil Procedure added explicit protection of draft reports and lawyer-expert communication, subject to the following three exceptions: (1) information related to compensation for the expert's work; (2) facts and data provided by a lawyer to an expert that was *considered* by the expert in forming his opinions; and (3) disclosure of the assumptions provided by a lawyer to an expert and *relied upon* by the expert in forming his opinion.

Thus, the outcome in *Moore* marks a move toward discovery rules and trial practice in the US, though they are by no means identical. Rule 26 in the US clearly protects draft reports and communication, but what about other documents seen, but not relied on, by an expert or other expert work product that is not clearly a 'draft report'? In Canadian litigation, after the *Moore* decision, an expert's entire 'file' enjoys protection from discovery, barring some reasonable factual foundation for suspected bias. This presumably includes the expert's notes, markups, and other work product. In the US, however, such documents do not fall within Rule 26's protection.

American courts have read Rule 26 narrowly: unless a document falls clearly into a category identified in the Rule (ie, a draft report or non-excepted lawyer-expert communication), it must be produced. According to the Ninth Circuit, in *Republic of Ecuador v Mackay,* 'the driving purpose of the 2010 amendments was to protect *opinion work product* – ie *attorney* mental impressions, conclusions, opinions, or legal theories – from discovery' [emphasis added][2]. Thus <u>all</u> documents or information provided to an expert, whether considered or not considered by that expert is producible. In a related

case, *Republic of Equador v Hinchee*, the appeals court held that a testifying expert's 'personal notes' were also discoverable[3]. Because the notes reflected only the expert's theories and mental impressions, not those of counsel, they were discoverable.

The 11th Circuit Court also held that documents 'considered' by the experts were discoverable and that this category was wider than just those documents 'relied' on by the expert. In the US, in contrast to Canada, the prevailing notion appears to be that 'there is no reason to prevent an opposing party from finding out how an expert arrived at his or her conclusions, including discovering the thought processes which led the expert there.'[4]

According to a recent survey, there is an overall presumption of non-discoverability of lawyer-expert communications in international arbitration.[5] Even for the purpose of evaluating an expert's credibility, such documents are very rarely sought or ordered to be produced. According to Friedland and Brown de Vejar, and analogous to the rule articulated in *Moore*, 'a production request of this nature would and should demonstrate that a certain communication exists and that there is a particular reason to conclude that it would be relevant and material to the arbitrators' determination of the case.'

Just as lawyer-expert communications are generally protected in international arbitrations, the scope of discovery of other documents is similarly narrow, much more in line with *Moore* than American trial practice, discussed above. To begin with, wide discovery as practiced in American or even Canadian litigation is by no means guaranteed in international arbitration, and trends indicate it is granted less and less. Instead, we see parties more frequently relying on narrower document production rules like those set out in the IBA Rules, or the use of Redfern Requests, in which parties must make a request for specific documents, and justify in writing why they are material, relevant and necessary to be produced.

Where discovery is granted, the trend in international arbitration parallels *Moore* much more so than it does Rule 26 in the US. Documents included in the list of materials relied upon by an expert would be discoverable, but documents merely reviewed by an expert but not relied on are likely not discoverable.

There seems to be consensus in international arbitration circles that lawyer's assisting experts in the drafting of their reports is more beneficial than not. To the extent lawyers overplay their hand, most experienced arbitration counsel, according to Friedland and Brown de Vejar, are confident that effective cross-examination will reveal any undue influence to the substantial prejudice of the expert's credibility. Moreover, arbitrators should be experienced enough to identify 'hired guns' and keep parties honest – perhaps still a genuine concern in US trial litigation, where many high profile cases are still decided by lay juries.

Notes

1. 2015 ONCA 443.
2. 742 f 3d 860 (9th Circ 2014).
3. 741 f 3d 1185 (11th Circ 2013).
4. *Wenk v O'Reilly* 2014 US Dist LEXIS 36735 (S D Ohio 2014).
5. Paul Friedland and Kate Brown de Vejar, 'Discoverability of Communications between Counsel and Party – Appointed Experts in International Arbitration' (2012) Arbitration International 28(1).

How does the logic of foreign investment reviews differ from regular antitrust and international trade rules?

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In coral reefs one can find well-defined structures between numerous species, plant and animal, where they are dependent on each other mainly on a cooperative basis, providing stability to the relevant ecosystem. Just like in a coral reef ecosystem, one can also find in the economy, either global, regional or domestic, rules on foreign investment, international trade and competition policy – the coexisting species — that are somewhat dependent on one another and tend to share a common goal: creating an enabling and sustainable economic environment. If a species is suddenly missing or performing its function poorly, the coral reef or the market will feel and suffer from the inbalance, but if functioning properly, the environment will perform optimally and, thus, be generally successful.

In a highly globalised economy, where trade and investment liberalisation is the norm, competition policy has surged, particularly in developing countries, as a necessary policy instrument to promote economic progress and ensure general welfare at a domestic level. Although investment, international trade, and competition law coexist with each other to a certain degree in the international, regional and domestic spheres and tend to converge on a common ground, these three fields of economic law differ in their legal scope and, at certain points, they overlap with possible contradicting outcomes.

As a result of globalisation, the geopolitical landscape has changed and new challenges, unpredictable 20 years ago, have risen, such as international cartels, out-bound investment by state-owned enterprises (SOEs) or sovereign wealth funds (SWFs). The evolution of international investment, international trade and competition law at the international sphere are at different stages and levels, and might not even address the current economic challenges. Investment law is a highly fragmented field of law, trade law similarly so through regionalism, though to a lesser extent because it is governed by multilateral rules, while competition law has remained largely domestic.

As a consequence of a fragmented international legal framework between and among these fields of law, more than several questions arise. This article will explore, in particular, the logic behind domestic foreign investment reviews and how it differs from regular antitrust and international trade rules.

Is there a common trait in foreign investment reviews?

As the global economy and geopolitical landscape changes, investment rules and reviews also change, due to nascent challenges and concerns. Developing countries now are essential players in the global economy by having an important share of world trade and performing out-bound investments, either through private parties or SOEs. To understand the logic behind foreign investment reviews, it is crucial to refer to the evolution of the investment legal framework.

International investment law

The international investment regime has radically changed. At its outset, international customary law proved to have constraints as it afforded limited protection to aliens and their investments. As territories were progressively decolonised during the mid-20th century, the principle of *permanent sovereignty over natural resources* was introduced in the General Assembly's Resolution 1803. This principle entails the freedom of states to freely dispose of their natural wealth and even their ability to regulate foreign capital, including its prohibition, as considered necessary for domestic interests.

Notwithstanding the resistance of some

developing countries towards foreign capital, investment treaty-based rules started to gain momentum. As a result of the potential risk of nationalisations, capital-exporting and capital-seeking countries began celebrating international investment agreements (IIAs). In 1959, the first bilateral investment treaty was signed, and ever since IIAs have proliferated, which has led to the fragmentation of international investment. Fragmentation is due to a wide spread of views held among nations in diverse issues, particularly, the resistance to grant national treatment at the admission and establishment stage.

International investment law is nowadays considered as *lex specialis* under international law, a categorisation that entails, naturally, a carve out from international customary law.[1] In the absence of an IIA between states, foreign investment is governed by international customary law. Today, modern IIAs tend to adopt a full liberalisation model, whereby national treatment is extended fully at the pre-and post-admission and establishment phase, for example, the North American free Trade Agreement (NAFTA) and the Transpacific Partnership Agreement. Certain economic sectors, obviously, may be beyond the reach of liberalisation measures, and, therefore, a state may refuse or restrict to grant market access to foreign investors by introducing non-conforming measures.[2] Nevertheless, markets that were historically closed are being opened, and states are naturally interested in screening investments in economic sectors that were once considered strategic.[3]

Foreign investment reviews

Although there is a tendency to liberalise investment, states are still able to restrict access to foreign investment. Foreign investment reviews through the globe are generally triggered when the investment touches sensitive nerves of states, such as strategic areas or essential security interests, notions that are mainly self-judging and that vary from state to state and from time to time.

The United States, for instance, has a national security review conducted by the Committee on Foreign Investment in the United States, referred to as Exon-Florio or the CFIUS review, as well as sector specific reviews of highly regulated industries.[4] The CFIUS review, which is voluntary, applies when 'national security' interest, a concept not defined and broadened by statute and practice due to 9/11, are at stake by considering a series of factors involving the capability, capacity, technological leadership, as well as potential effects affecting, inter alia, national defence requirements and national security-related concerns, and authorises CFiUS or the President to block or impose remedial measures. As for the industry specific reviews, highly regulated sectors, such as aviation, banking, communications, energy and shipping, are normally 'required to obtain a license from the government to operate in the sector, and federal law limits foreign ownership of such licenses'.[5]

Though only two transactions have been prohibited in the US, both involving Chinese investors, cases under review are normally withdrawn when facing difficulties. The most recent prohibition involved a Chinese investment transaction in which the President ordered Ralls Corporation to divest on the grounds of national security because its facilities manufacturing wind turbines were located within or in the vicinity of restricted air space. Chinese firms in the technology sector, such as Huawei Technology and ZTE Corp, have withdrawn transactions or divested following recommendations from CFIUS or due to political pressure that are also grounded in public security concerns because it was deemed that the merger was dangerous, as the merged entity supplied the Pentagon with security network equipment, which could be used for spying purposes.[6]

SOEs and SWFs may be subject to stricter scrutiny during the review process, a situation that is not only present in the US. This particular concern may be explained by the belief that they do not necessarily operate on economic principles, may have an unfair advantage over domestic firms (eg, access to lower credit rates), or simply entail government interference in the domestic market. In Canada, foreign investment reviews involving SOEs are subject to stricter additional considerations that address these concerns.[7] In a similar vein, the takeover of British firm P&O by Dubai Ports World (DPW) in 2006, a subsidiary of an SOE from the United Arab Emirates, exposed the tensions of the US authorities between balancing the interest of attracting capital and avoiding undue interference by foreign governments. Though the takeover was cleared in the CFIUS initial review, controversy fired up in Congress, and DPW eventually divested following a recommendation of CFIUS.

Investment reviews vis-à-vis antitrust and trade rules

Admitting foreign investment can foster a competitive environment within the territory of the host state and attract global value chains, and, therefore, promote economic growth. The decisions prohibiting or restricting foreign investment, however, are not necessarily based on an economic rationale. Such decisions are rooted in domestic concerns, ranging from cultural to even political. It is in this regard that the scope of foreign investment reviews may differ from regular antitrust and trade rules, albeit in trade rules – such as Articles XX and XXI of the General Agreement of Tariffs and Trade (GATT), we can also find similar non-economic rationales.

Regular antitrust rules

Through excellence, antitrust rules seek to foster competitive behaviour among economic agents within its territory by targeting anti-competitive practices that may hinder the functioning of markets. However, in a highly globalised economy, economic agents are normally present and have operations in more than one jurisdiction, thus challenging the enforcement of antitrust rules that remain largely domestic.[8] Antitrust rules can be broken down into three major pillars that address anti-competitive behaviour, namely abuse of dominant position, cartels, and anti-competitive market concentration.

The difference between the logic of foreign investment reviews and antitrust rules can be clearly appreciated in the acquisition of a domestic business by a foreign entity when it triggers a foreign investment and merger review. In Canada, for instance, it is recognised that its competition and investment legal frameworks serve distinctive purposes; however, at certain points they may overlap.[9] Accordingly, the Canadian competition authorities will assess the anti-competitive effects that can result from a merger by examining whether the merged entity may either exercise market power either unilaterally or in coordination with another firm. Consequently, concerns may rise when a foreign investor already has a competitive presence in the relevant market. The nationality of the foreign investor is, therefore, irrelevant in Canada and elsewhere, provided that the analysis undertaken is based on economic theory relating to market power.

In contrast, foreign investment reviews in Canada are concerned not only with national security issues, but also whether the investment confers 'net benefits' to the country. If a foreign investor gains control and a financial threshold is met, the relevant authorities will conduct a net-benefit test assessing, inter alia, the effects of the investment on the economy, employment, and technological development, including competition within an industry. It is noted that although foreign investment reviews overlap to a certain extent with competition policy, it is still possible that investment and competition authorities arrive at different conclusions as the former authorities may give more weight to non-competitive concerns.[10]

Traditional trade rules

The trade rules for goods are to be found in GATT 1994, and for services in the General Agreement on Trade in Service (GATS), and their object and purpose, if read in the light of the third recital of the Wolrd Trade Organization (WTO) Agreement, is to substantially reduce tariffs and other barriers, as well as to eliminate the discriminatory treatment in international trade relations. Both set of rules address market access and trade opportunities, so the multilateral trade regime aims at lowering costs and increasing trade opportunities at a global scale by creating a predictable rule-based regime. Conversely, in investment reviews one may find an unpredictable logic, where non-competitive concerns and discriminatory or arbitrary determinations may a rise as the result of unfounded beliefs or a sudden hostile political atmosphere against foreign investors.

WTO rules can be classified into five groups, non-discrimination and market access rules being relevant for the present analysis.[11] However, one must bear in mind that significant differences exist in the rules concerning trade in goods and services. Under GATT 1994, trade in goods is fully liberalised, as they are granted market access and must be accorded national treatment, but the same does not occur to services under GATS, since one must refer to specific market access commitments inscribed in WTO members' schedules, a model known as 'positive' listing. Bearing this nuance in mind, the non-discrimination principle aims at ensuring equal competitive opportunities

between products or services and suppliers of different origins that are in a competitive relationship. WTO members, therefore, may not modify through taxation or measures the conditions of competition to the detriment or advantage of certain products.

As for rules on market access, under GATT 1994, for instance, one can find a general prohibition on quantitive restrictions as well as rules that address other non-tariff barriers that have an adverse effect on trade. The rational behind the general prohibition of quantitive restrictions and the preference towards custom duties or tariffs is rooted in economic grounds. Contrary to tariffs, which do not limit the quantity of a product that may be imported or exported and may take the form of an *ad valorem* or specific rate duty (or a combination of both), quantitative restrictions may affect the prices of the imported product by limiting its supply, thus distorting the market. Finally, GATT 1994 also addresses issues relating to transparency, the application and administration of trade measures, including customs formalities, as well as other non-tariff barriers (eg, pre-shipment inspection, marks of origin, trade-related investment measures), to create a predictable and transparent trade-related framework in the territory of WTO members.

In a nutshell, the trade regime focuses on macro economic issues ranging from market access to trade opportunities. In its core, the trade regime aims at prohibiting measures that distort the proper functioning of markets or lack of an economic rationale, by promoting a transparent and predictable set of enforceable rules. On the other hand, the logic behind foreign investment focuses on a case-by-case analysis, which at times may be unpredictable, non-transparent and not necessarily based on an economic rationale.

Conclusion

Like coral reefs, domestic markets also need to safeguard their essential interests from foreign intruders. It is clear that invasive species, such as humans, may indeed create an inbalance in coral reefs and jeopardise their existence. Likewise, unrestricted investment liberalisation may indeed affect essential interests in developed and developing countries, either by posing a threat to national security or the provision of strategic goods and services. This is the reason why international customary law, as well as IIAs, allow states to restrict, regulate and prohibit foreign investment.

The logic behind foreign investment, therefore, has a purpose. It is widely accepted by scholars that government intervention is necessary to prevent or correct market failures. The fact that foreign investors, either private or SOEs, may invest in strategic sectors surely raises reasonable concerns as to the potential adverse effects to its essential interests. In that sense, government intervention is amply and naturally justified when reviewing the admission and establishment of foreign investment. Government intervention, obviously, is not unique to foreign investment, the trade regime also introduces General and Security exceptions that WTO members may invoke under both GATT and GATS.

Nevertheless, the logic behind foreign investment reviews in some countries may reflect the resistance to the always-changing geopolitical and global economy landscape or liberalisation forces. Indeed, foreign investment reviews may be used as a political tool in international economic relations by introducing non-transparent or unpredictable rules, such as 'national security' or 'net benefits' criteria. In that sense, investment reviews with discriminatory or arbitrary effects are not justifiable from an economic standpoint of view. It is at this point that the logic of foreign investment collides with traditional antitrust and trade rules, which seek to create an enabling and sustainable business environment.

Notes

1 Jorge E Viñuales, 'Sovereignty in Foreign Investment Law' in Zachary Douglas, Joost Pauwelyn, and Jorge E. Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP, 2014) at p 344.
2 UNCTAD, 'International Investment Agreements: Key Issues', (UNCTAD/ITE/IIT/2004/10 Vol I, UN 2004) at p 85.
3 John H Dunning and Sarianna M Lundan, 'The Changing Political Economy of Foreign Investment: Finding a Balance Between Hard and Soft Forms of Regulation' in Jose E Alvarez et al (eds) *The Evolving International Investment Regime: Expectations, Realities, Options* (OUP, 2011) at p 132.
4 Robert Schlossberg and Christine Laciak, 'United States' in Brian A Facey (ed) *The Foreign Investment Regulation Review* (Law Business Research, 2014) at p 288.
5 *Ibid* at 289, 294–297.
6 Eric Pekar, 'The Chinese Investment Regime and the US-China BIT Negotiations' in Wenhua Shan and Jinyuan Su (eds) *China and International Investment Law: Twenty Years of ICSID Membership* (Brill, 2012) at pp 280–281.
7 Jason Gudofsky, Navin Joneja, Julie Soloway and Cassandra Brown, 'Canada' in Brian A Facey (ed) *The Foreign Investment Regulation Review* (Law Business Research, 2014) at p 27 and pp 36–39.
8 Eduardo Pérez Motta, 'Competition Policy and Trade in the Global Economy: Towards an Integrated Approach',

E15 Expert Group on Competition Policy and the Trade System — Policy Options Paper, (International Centre for Trade and Sustainable Development and World Economic Forum, 2016) at pp 4–5.

9 Neil Campbell, Jun Chao Meng and Stephen Wortley, 'Competition and Foreign Investment Reviews of Asian Investments into Canada' (1st Annual Antitrust Symposium – CIIAI 2013).

10 *Ibid* at p 505.

11 Peter Van den Bossche and Werner Zdouc *The Law and Policy of the World Trade Organization* (CUP, 2013) at p 35.

FinTech/RegTech, Financial Action Task Force and anti-money laundering/ counter-terrorist financing

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New technologies are transforming the financial sector

On 1 July 2016, the Financial Action Task Force (FATF), the world anti-money laundering body, specified that technological innovations in financial services have the potential to dramatically improve financial integrity and stability. They reduce dependency on the small number of global financial institutions, where risk is currently most concentrated. They provide new and more robust ways to increase the transparency of transactions. At the same time, they are increasing financial inclusion, which is a prerequisite to being able to detect and disrupt money laundering (ML) and terrorism financing (TF). In terms of the fundamentals of anti-money laundering/ counter-terrorist financing (AML/CFT) – customer due diligence, knowing the source and destination of money flows and identifying suspicious activity – these technological innovations provide an opportunity to bring AML/CFT into the 21st century. They fall into two categories: FinTech and RegTech.

Definitions

FinTech may be understood as finance enabled by new technologies, covering the whole range of financial services, products and infrastructure. More specifically, FinTech refers to technology-enabled provisions of financial services, including by alternative providers who use technology-based systems in some way to either provide financial services directly or to make the financial system more efficient. The speedy development of FinTech brings new opportunities for both consumers and companies. It has the potential to improve consumers' access to financial services across the Single Market, open up national barriers and improve efficiency.[1]

FinTech includes RegTech, the application of new technologies for regulatory compliance. In particular 'RegTech' stands for 'regulatory technology' and a business model where technology enables firms to better comply with regulation; RegTech can also enable government bodies to implement, monitor, or enforce regulation in a more effective, more efficient manner, or in a user-friendly manner.[2]

ML is the processing of assets generated by criminal activity to obscure the link between the funds and their illegal origins. TF raises money to support terrorist activities. ML and TF are financial crimes with economic effects. They can threaten the stability of a country's financial sector or its external stability more generally. Effective regimes to combat these threats are essential to protect the integrity of markets and of the global financial framework as they help prevent financial abuses. Action against ML and TF thus responds not only to a moral imperative but also to an economic need.[3]

The FATF, a 37-member inter-governmental body established by the 1989 G7 Summit in Paris, has primary responsibility for developing a worldwide standard for AML/ CFT. It works in close cooperation with other key international organisations, including the International Monetary Fund (IMF), the World Bank, the United Nations, and FATF-Style Regional Bodies (FSRBs).[4]

Links between FinTech/RegTech and FATF

With regard to FinTech and RegTech, in particular, the FATF has highlighted that:

- FinTech innovation can improve the access and delivery of financial services to customers, businesses, and communities. The financial services paradigm may be reorganised around new platforms, infrastructures, and customer-service provider relationships. The FATF's perspective is to understand how these developments change the landscape of financial services, and how that in turn affects the vulnerabilities of and threats to the integrity of the financial system in order for those risks to be mitigated or contained. The FATF needs to be careful that FinTech does not become the method of choice for criminals and terrorists to move money.
- RegTech offers opportunities to reduce the cost of compliance and improve the efficiency and effectiveness of customer due diligence. These solutions will help big and small players alike to provide financial services safely and transparently, and support growth and innovation.
- Technology-based innovations are starting to radically change the financial industry and have the potential to be utilised to better fight ML and TF. For example, big data, artificial intelligence, and machine learning could improve the detection of suspicious activities, potential illegal activity and criminal networks.
- The FATF has already undertaken a large body of work to understand the risks and vulnerabilities of new payment products and services, and to ensure that AML/CFT measures remain up to date as new technologies emerge. The next step and one of the key priorities of the FATF is to develop a partnership with the FinTech and RegTech community to support innovation in financial services, while maintaining transparency and mitigating the associated risks. Building such a partnership will enable FATF to become more proactive in the development of standards, guidance and best practice, anticipating and being involved in these new developments rather than responding to them.[5]

The San Jose Principles

On 25–26 May 2017, the FATF held a FinTech and RegTech Forum in San Jose, United States. The meeting, hosted by PayPal at its headquarters, was attended by over 150 representatives from the FinTech and RegTech sectors, financial institutions, and FATF members and observers.

Participants, among other things, discussed how the public and the private sectors could move forward to promote further constructive dialogue and engagement on issues related to financial innovations and help strike the right balance between supporting innovation and managing any ML/TF risks that arise in the framework of the following high-level, guiding principles.

Fight terrorism financing and money laundering as a common goal

Combatting ML deals a significant blow to the many profit-driven criminal activities, while countering terrorism financing limits the capabilities of terrorist groups to prepare or carry out attacks. The stakeholders have a shared interest to prevent the misuse of the financial system from the threats of ML and TF, thereby strengthening financial sector integrity and contributing to safety and security. Only by working together may governments and the private sector effectively achieve these goals.

Encourage public and private sector engagement

Close engagement between governments, the private sector and academia on financial innovations helps to foster a shared understanding of these developments, identify pertinent issues, and facilitates collaboration to address any concerns as they arise.

Pursue positive and responsible innovation

Be on the lookout for innovations that present opportunities to mitigate risks, increase the effectiveness of AML/CFT measures, and benefit society in general.

Set clear regulatory expectations and smart regulation, which address risks as well as allow for innovation

Better understanding of how existing AML/CFT obligations apply to new technologies, products, services, and new paradigms for the provision of financial services is best achieved by governments and the private sector working together to increase awareness and establish clear guidelines as needed.

Fair and consistent regulation

Aim for a regulatory environment that is commercially neutral, respects the level playing field and minimises regulatory inconsistency both domestically and internationally.

Going forward

Outreach to the FinTech and RegTech community is one of the FATF's priorities in 2016 – 2018, which aims to provide a platform for a constructive dialogue and support innovation in financial services while addressing the regulatory and supervisory challenges posed by emerging technologies. The objective is to increase awareness on all sides, to identify risks and design risk mitigation measures.

G20 leaders at the summit in Hamburg on 7–8 July 2017 expressed their determination to fight TF. The G20 will focus on FinTech, financial intelligence units and banks in developing new tools and technologies to track TF. This echoes the efforts that FATF has undertaken over the last year, which resulted in the San Jose Principles.

Notes

1 See the European Parliament 'Report on FinTech: the influence of technology on the future of the financial sector' (28 April 2017) and the European Commission Communication 'Consumer Financial Services Action Plan: Better Products, More Choice' (COM(2017) 139 final – 23 March 2017).
2 *Ibid.*
3 See the International Monetary Fund Factsheet 'The IMF and the Fight Against Money Laundering and the Financing of Terrorism' (31 May 2017).
4 *Ibid.* See also the FATF website – www.fatf-gafi.org.
5 See 'Guidance for a Risk-Based Approach to Prepaid Cards, Mobile Payments and Internet-Based Payment Services' (FATF, June 2013) and 'Guidance for a Risk-Based Approach to Virtual Currencies' (FATF, June 2015).

The function of oral hearings in German civil procedure: does a principle lose its ground?

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The right to be heard guaranteed by the German Constitution

The right to be heard is one of the fundamental procedural principles and essential for fair proceedings under the rule of law. In German civil proceedings, the right to be heard comprises the right to submit requests, to assert facts, to submit evidence and to answer allegations made by the other party.

However, the right to be heard is an abstract term which only takes shape by the concrete provisions of the German Code of Civil Procedure. In this regard the necessity of oral proceedings depends on the choices the legislature made when enacting the German Code of Civil Procedure in 1879.

The principle of oral hearings in German civil proceedings

With enactment of the German Code of Civil Procedure, the legislature chose to favour oral proceedings over written ones. Parties shall negotiate orally before the competent court. Arguments put forward during a hearing shall in general override written statements. The court's decision can only be based on the parties' presentation in the oral hearing. According to the German Code of Civil Procedure, disputes shall be settled in a single hearing, the so-called main hearing. This prevents a fragmentation of the trial, thereby improving the proceeding's efficiency.

There are several provisions that specify the manner in which oral hearings shall be conducted. The court shall discuss the disputed matter with all parties in terms of both law and facts. The oral hearing is supposed to facilitate the communication between the parties. If the court fails to discuss relevant facts or circumstances with the parties to the extent required by law, the aggrieved party's right to be heard will

be violated. The aggrieved party will be incapable of defending itself in a proper manner if the court fails to inform the parties about circumstances relevant to the case. This was recently confirmed by the higher regional court of Bamberg in a decision dated 18 August 2016 (file no 1 U 24/16).

Furthermore, any civil court is obliged to take all arguments pleaded by the parties into account for its decision. However, it is for the parties to produce evidence and to present all facts in their interest. The court will usually not investigate on its own. Nonetheless it is obliged to give notice to a party if that party failed to provide sufficient evidence to support its claim. Each party has the chance to provide further evidence such as documents or a witness's testimony. If a party requests that a particular witness is heard, the court will be obliged to hear the witness in an oral hearing. The court may only decline the request if it deems the witness's testimony irrelevant to the case. However, since the denial of a witness by the court is a considerable infringement of the party's right to be heard, the court may exercise this right only under very strict requirements. For example, in March 2016 the higher regional court of Munich quashed a lower court's judgment in which the court declined to hear a witness even though a party requested it (file no 10 U 4087/15). The court has denied the request to hear the witness and, additionally, neglected to mention the reasons for doing so in the decision. The lower court's behaviour was considered a severe violation of procedure, especially of the constitutional right to be heard.

Exceptions to the principle

Every rule has its exceptions, three of which can be witnessed frequently in German courts.

First, in so-called written preliminary proceedings it is not necessary to orally repeat the content of written statements that have been submitted to the court prior to the hearing. As it has already been pointed out, proceedings are supposed to be settled in one main hearing. To ensure that this main hearing is as efficient as possible German civil procedure allows either an early first hearing or written preliminary proceedings. In legal practice, the written preliminary proceedings are most common. In the subsequent oral proceedings the parties may simply refer to documents submitted to the court in those written preliminary proceedings. In consequence, many statements remain unspoken as lawyers respond to a question by simply referring to a certain page of their written correspondence. If the proceedings are conducted in writing after an initial oral argument, even pleadings submitted after the hearing have to be taken into account by the court as was recently acknowledged by the higher regional court of Schleswig in its decision of 5 May 2015 (file no 3 U 98/14).

Simply referring to written statements without further explanations, however, might cause severe misunderstandings. Hence, the possibility of simply referring to a document may be seen as a contradiction to the objective of an oral hearing.

Secondly, the German Code of Civil Procedure allows the court to entirely abstain from oral hearings under specific circumstances. Where the amount in dispute is below €600, oral hearings are not mandatory. In such cases an oral hearing will be convened only if it is requested by a party, and if requested, the court will be obliged to convene a hearing. Otherwise the requesting party's right to be heard will be violated, as the German Federal Court of Justice ruled in its decision of 24 July 2014 (file no III ZB 83/13). In all other cases, the court may only decline a hearing as long as both parties agree to it. On the other hand, the court is not bound by the parties' will. If the court deems it necessary, an oral hearing will be convened, even if the parties would prefer written proceedings without any hearing at all.

Finally, in some cases of interim relief such as preliminary injunctions, it may be necessary to render a decision without an oral hearing due to the urgency of the matter. In order to accelerate the proceedings an oral hearing is not needed. Due to the provisional nature of interim relief the right to be heard may be deferred for some time. However, that does not mean that defendant has no option to be heard. Depending on the circumstances and on how severe the violation of defendant's rights is, an oral hearing will be deemed necessary.

A tendency towards written proceedings?

These are only some examples of how an oral procedure might be replaced by written proceedings. But do those provisions really show that the German civil procedure has a new tendency to prioritise written procedural measures?

By enacting certain provisions that allow written instead of oral legal measures, the German legislature did not decide to prioritise written proceedings over oral ones, but found a way to combine oral and written measures, thereby creating a synergy between them in order to maximise the efficiency of trials. The principle of oral hearings is part of the constitutional right to be heard. Therefore, restricting a mandatory oral hearing or the way a hearing is conducted is only admissible under very strict conditions.

These strict requirements and German jurisdiction show that oral hearings are far from being considered unnecessary, even if some voices suggest otherwise. Those voices claim that the number of cases pending as well as the number of default summons are declining. However, there is no evidence proving this is caused by a declining importance of oral hearings. There might be cases in which an oral hearing may be considered an annoyance by the parties, but in most cases the right to be heard is held in high regard. This can be seen by the number of decisions made by the highest German courts regarding the right to be heard. The oral hearing is and will remain a substantial element of German civil proceedings.

The shifting standards of review under Delaware's 'national' corporate law

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Delaware corporate law

The General Corporation Law of the State of Delaware (DGCL) is often referred to as the national corporate law of the United States. Over 65 per cent of the US Fortune 500 companies are incorporated in Delaware and over half of all US public companies are listed in Delaware. Moreover, many international companies trust the Delaware brand and have chosen to organise their US-based companies in Delaware. In fact, recent statistics show that international businesses – those headquartered in another country but incorporated under Delaware law – account for 82 per cent of non-Delaware businesses incorporated in Delaware.

Reasons behind Delaware's success as international corporate headquarters

There are numerous reasons why companies across the globe have chosen and continue to choose to organise their US-based operations under Delaware law. These reasons include the following: (1) the DGCL is the most flexible and well-developed corporate statute in the US; (2) the Delaware legislature works closely with the state's most experienced corporate attorneys to annually update the DGCL to account for real-world issues as they arise; (3) Delaware has a separate business court, the Delaware Court of Chancery, which is world-renowned for its expertise in the corporate realm; and (4) Delaware has an extensive and continuously evolving body of judicial decisions that interpret and explain the provisions of the DGCL. Additionally, Delaware does not require any business activities or offices to be located in the state, aside from maintaining a registered agent, and the directors and managers of a Delaware corporation need not be US citizens.

International companies that seek to organise US corporations are also attracted to the DGCL's efficient and simple procedures of business combinations and other transactions, including mergers, acquisitions, transfers, and conversions. When effecting such transactions, the management of a Delaware corporation desires assurances that it will be sufficiently protected from liability stemming from unwarranted stockholder challenges. Stockholders regularly challenge mergers by alleging that the board of directors of the target company or the acquiring company breached its fiduciary duties in approving or negotiating the merger. Delaware law accounts for this issue by providing significant procedural protections to limit the liability of a Delaware corporation's management.

Standards by which Delaware courts will review challenged transactions

Delaware courts generally have three standards of review for evaluating director decisions. Which standard of review will apply in a given case depends upon the type of action being taken by the corporation's board of directors.

Business judgment

The business judgment rule is the most deferential standard of review a Delaware court will apply and is generally applicable to all decisions not subject to enhanced scrutiny or entire fairness. The business judgment rule is a presumption that, in making a business decision on behalf of the corporation, the directors acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company. Because directors are presumed to have acted properly, it is extremely difficult for a plaintiff-stockholder to overcome the steep burden of the business judgment rule.

Enhanced security

Enhanced scrutiny is a standard of review that is less deferential to the actions of a corporate board than the business judgment rule. Delaware courts will apply enhanced scrutiny to certain transactions such as a board's choice to sell a corporation or to activate defensive measures to prevent the takeover of a corporation.

Entire fairness

Entire fairness is Delaware's least deferential standard of review and applies when actual conflicts of interest taint a board's decision-making process or a controlling stockholder's actions. Entire fairness review encompasses two prongs: fair price and fair dealing. Fair price relates to the financial considerations of a transaction. Fair dealing requires a review of the timing of a transaction, as well as an examination of how it was initiated, structured, negotiated, disclosed to the directors, and how the approval of the directors was obtained.

Summary

In summary, 'the business judgment rule applies when a board was independent and disinterested in making a business decision, enhanced scrutiny applies when there was an "omnipresent specter" of improper interests due to the nature of the situation, and entire fairness applies when actual conflicts of interest tainted a board's decision-making.'[1]

Shifting standards of review

A number of recent Delaware court decisions make clear that a corporation's management may utilise certain procedural protections to warrant the application of a more deferential judicial standard of review than would ordinarily apply. It is imperative that the management of corporations organised in Delaware be aware of and understand how to properly utilise these procedural protections.

Conflicted controlling stockholder transactions, which are generally subject to entire fairness, will be subject to the business judgment rule if approved by (1) a special committee of the board of directors; and (2) the majority of the minority stockholders.

A minority stockholder challenge to a transaction featuring a conflicted controlling stockholder is generally subject to entire fairness review. A controlling stockholder is conflicted when he engages in any conflicted transaction, which include those where the stockholder stands on both sides of the deal (for example, when a parent acquires its subsidiary), as well as those in which the stockholder stands on only one side of the deal but competes with the common stockholders for consideration. However, the business judgment standard of review will apply to such transactions when the transaction is conditioned on the approval of both an independent special committee of the board and the majority of the minority stockholders, and: (1) the special committee is empowered to freely select its own advisers and to say no definitively; (2) the special committee meets its duty of care in negotiating a fair price; (3) the vote of the minority is informed; and (4) there is no coercion of the minority.

All other transactions generally subject to enhanced scrutiny or entire fairness will irrebuttably be subject to the business judgment rule if they are approved by a fully informed, disinterested, and uncoerced stockholder vote.

Delaware has a long-standing policy 'to avoid the uncertainties and costs of judicial second-guessing when… disinterested stockholders [of a corporation] have had the free and informed chance to decide on the economic merits of a transaction for themselves.'[2] Delaware courts have recently reiterated and extended this policy. Today, any post-closing claim against a corporate board related to a transaction that did not involve a conflicted controlling stockholder

will be irrebuttably subject to the less-demanding business judgment standard of review if the transaction was approved by a fully informed, disinterested, and un-coerced stockholder vote.[3] Therefore, even if a transaction involved a conflicted board of directors and would otherwise be subject to entire fairness or enhanced scrutiny, a Delaware court will apply the business judgment rule if the transaction was approved by an informed, disinterested, and uncoerced stockholder vote.

A challenge to a two-step merger under Section 251(h) of the DGCL will also irrebuttably be subject to the business judgment standard or review when a majority of the fully informed, disinterested, and uncoerced stockholders approve the merger by tendering their shares pursuant to the first-step tender offer made in connection with the 251(h) merger.

Under Section 251(h) of the DGCL, an acquiring company may consummate a merger without a target company stockholder vote after acquiring a certain percentage of the target company's shares of stock pursuant to a tender or exchange offer for all of the target company's outstanding shares, subject to certain conditions. Although such transactions are often subject to enhanced scrutiny, Delaware courts have recently made clear that the acceptance of the tender offer by the majority of fully informed, disinterested stockholders has the same effect as an informed, uncoerced vote of the disinterested stockholders.[4]

Conclusion

A corporate board seeking the benefits of the business judgment standard of review should disclose all material information and board conflicts to the corporation's stockholders so that the stockholders may approve the transaction at issue on an informed basis. This approval will result in more deferential treatment of the corporate board's ultimate decision in post-closing actions related to a transaction generally subject to enhanced scrutiny. In addition, an informed and uncoerced stockholder vote will result in the application of the business judgment standard in all stockholder claims related to transactions generally subject to entire fairness except those involving a conflicted controlling stockholder. If these procedural protections are utilised properly, the plaintiff-stockholders will only be able to survive a motion to dismiss by pleading facts showing the stockholder vote was not informed or uncoerced, or that the transaction constituted 'waste' under Delaware law.

Notes

1 *In re Novell, Inc. Shareholder Litig* 2014 WL 6686785, at *6 (Delaware, 25 November 2014) (citations omitted).
2 *Corwin v KKR Financial Holdings LLC* 125 A 3d 304, 313 (Delaware 2015).
3 See, eg, *Larkin v Shah* 2016 WL 4485447, at *10 (Delaware Ch, 25 August 2016).
4 *In re Volcano Corp Stockholder Litig* 143 A 3d 727 (Delaware Ch 2016) (2017 WL 563187 (Delaware 9 February 2017)); *Larkin*, 2016 WL 4485447, at *7–12.

The rise and regulation of FinTech in Thailand

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The exponential rise of FinTech in the last few years, coupled with the vast opportunities it represents, heralds the advent of exhilarating times for those practitioners and stakeholders concerned about the legal implications it holds in store. As technological advancement continues and accessibility increases in this burgeoning sector, the legal profession has been forced to rapidly adapt to the rise of FinTech. Governments and legislators have similarly been affected, finding themselves being thrust into precarious positions and having to judge conflicting interests.

The term 'FinTech' entered the public lexicon in 2011, despite such services being available long before. FinTech is now used to describe the evolving intersection of financial services, software and innovative technologies. From startups to established technological and banking giants, there is a plethora of interest in FinTech, and in turn, legislators and legal systems across the world are finding themselves inadequately prepared to adapt to this rapid progress. A specific catalyst to the FinTech revolution has also been attributed to a mistrust of conventional banking institutions. Indeed,

traditional banks' ancient and complex security practices, combined with obscure impenetrable monetary institutions processes, are now challenged by young innovative start-ups that offer the public a nd investors more accessible and personalised services at much more transparent levels and lower costs.

In recent years, FinTech companies, which are mostly startups, have increased dramatically in number – from about 1,000 in 2005 to over 8,000 in 2016. The FinTech industry was worth about US$5.5bn in 2006. Today's FinTech industry is estimated to be worth around US$79bn, according to the Boston Consulting Group's FinTech database.

Groups of innovative people, who have never before made an impact on banking and financial services, are leading the FinTech revolution. As a result, some commentators have posited that the firms representing the FinTech revolution are 'unregulated and in need of significant limitations akin to those restriction traditional providers of financial services' (such as banks). It is safe to say that FinTech will change the face of banking and financial services for years to come.

Thailand and the ASEAN region

With a total population of over 68 million (with 28 million active users of the internet and social media users) and with roughly 84.8 million mobile subscriptions, Thailand is poised to be at the vanguard of the tech revolution. At the forefront of Thailand's FinTech revolution is the Royal Thai Government's Thailand 4.0 economic model. A core element of this economic initiative involves the government tangibly promoting the formation of its digital economy and the promise of US$88m from investors into a range of FinTech startups.

While more than 90 per cent of the 743 million population of Europe have access to financial services, the contrast with the Association of South East Asian Nations (ASEAN) countries is striking: out of 625 million people, less than 50 per cent do not have access to a bank account.

Thailand has around 1,000 FinTech startups with corporate venture capital investment worth around US$200m. Just recently, Kasikorn Bank, the third largest bank in Thailand, has also recognised the significance of FinTech and has recently introduced a US$30m fund to assist FinTech startups. In addition, numerous initiatives such as Piggipo (finance management application), StockRadars (trading platform), PeakEngine (online accounting software aimed at small-medium enterprises), Masii (comparison of financial products) and Omise (online payment gateway) are just a small percentage of FinTech products that are the backbone of the government's initiative of essential upgrade of Thailand's economy.

As the third largest economy in ASEAN, Thailand faces stiff competition in a region which is saturated by high-performing economies that have the ability to be at the forefront of the FinTech revolution. Governments across Asia, most notably Hong Kong, Singapore, Malaysia and Taiwan have initiated a series of programmes to grab a slice of the US$100bn invested in FinTech globally. In addition, the smaller economies in the region, such as Cambodia, Lao PDR, and Myanmar are currently undergoing their own FinTech revolutions.

FinTech and Thai legal development

The increase in the popularity and availability of FinTech products with consumers leads to countless legal questions and considerations. Like most other jurisdictions around the world, Thailand is in an adolescent phase of legal development in regards to FinTech. In Thailand, the legal system needs substantive development to ensure it is progressing alongside the FinTech revolution. Failure to keep updated, in turn, can have a knock-on effect on the economy, such as interrupting business progress and creating headaches in terms of costly compliance procedures. Furthermore, the rapid rate of progression in technological terms can be left unchecked and unregulated. Therefore, it is essential that policy-makers continuously push for reform in their legal frameworks to support the advancement of Thailand's economy in terms of FinTech.

The government has introduced the National E-Payment Master Plan to support the aims of the government in taking Thailand towards a digital society. The plan consists of the following five elements: (1) promoting an efficient payment system, known as PromptPay; (2) encouraging the use of debit cards; (3) developing an efficient e-Tax system; (4) improving the government e-Payment System; and (5) creating great e-Payment literacy. The steps taken by the Government to achieve a 'digital society' alongside Thailand 4.0 have included the following.

Introduction of Regulatory Sandbox

On 8 December 2016 , the Office of the Securities and Exchange Commission (SEC) issued Consultation Paper No OrNorPhor 55/2559 Re: Regulatory Sandbox for Securities and Derivatives Business, which was followed by the Bank of Thailand's (BOT) regulatory Sandbox Guidelines. The purpose is to give FinTech firms the opportunity to test their financial innovation in capital markets without being restricted by regulatory hurdles under the current regime and prior to its introduction to the public. FinTech start-ups looking to participate in the regulatory sandbox are currently not required to obtain licences from the SEC or BOT during the designated participation period of one year.

Draft bill on FinTech

Currently, a committee led by Vorapol Socatiyanurakk, a former Secretary-General of the SEC is drafting a bill on FinTech that will pave the way for infrastructure and create an ecosystem that is capable of strengthening local competitors' competitiveness in a market which is currently saturated with foreign competitors. The bill has the backing of the Thailand FinTech Association (TFA) and various others, including the SEC, the BOT, and commercial banks. However, it must be acknowledged that the law is in a draft bill phase and the contents of such bill are yet to be fully disclosed. The draft bill can be criticised to an extent, as it sets out with the intent to diminish the risk of foreign competition in a market that thrives on internationalism, regionalisation, and globalisation. However, on the other hand, the government is attempting to protect its own interests just as the governments of Hong Kong and Singapore are vying for startups.

Promoting investment in FinTech

Thailand's Board of Investment (BOI) operates under the Prime Minister's Office, being the principal government agency for encouraging investment in Thailand. The BOI provides investors with not only business support services but also by providing investment facilitation and incentives. The BOI in 2016 introduced the promotion of digital services as an eligible activity for investment promotion. The term 'digital services' is a broad one and is intended to cover services such as FinTech, medical technology services (MedTech) and agricultural technology services (AgriTech) among others. Investment in the 'digital services' industry will permit qualified business operators to apply for investment promotion to receive incentives (which includes five years of corporate income tax exemption for up to 100 per cent of the investment amount). A precondition to investment promotion is that a potential project must also obtain an approval from the Ministry of Information and Communication Technology (recently renamed as the Ministry of Digital Economy and Society).

Access to credit information

Under the Credit Information Business Act B. E. 2545 (A.D. 2002), only certain types of business operators were able to seek membership of a credit bureau. In 2016, the Credit Information Committee opened a public hearing on the draft amendment to the Credit Information Business Act wherein it is envisaged that a provision would be added allowing any business operator whose business involves financing (during its normal course of business) to become qualified members of a credit bureau. The amendment to the Credit Information Business Act became law in early 2017 and permits intermediary businesses like peer-to-peer (discussed below) lending platforms to qualify for a membership and derive the benefit of credit information that is shared amongst the members.

Liberalising Peer-to-Peer (P2P) lending

The BOT issued its Consultation Paper Re: Regulatory Framework for Peer-to-Peer Lending Via Electronic Network System on 30 September 2016 with the aim of drafting formal regulations covering P2P lending in Thailand. Currently it is envisaged that both financial institutions and non-financial institutions (including companies and individuals) will be able to operate P2P lending platform. The consultation paper discusses interest rate caps for P2P lending to be a maximum of 15 per cent per annum. It is expected that liberalisation of this sector will allow for new lending channels for borrowers to access funds and a new alternative investment for investors (including retail investors, high net worth investors, institutional investors, private equity, venture capital, etc.) who can enter into transactions

directly via P2P lending platforms.

Therefore, Thailand is bracing itself for a FinTech revolution and beginning to introduce the necessary legal checks and balances to regulate and liberalise this growing sector. Meanwhile, both the public and the private sector in Thailand are actively seeking investors to further their FinTech ambitions.

Note

1 Vinay Ahuja was assisted by Kunal Bir Singh Sachdev and Joseph Oliver Willan.

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Catching up with 2016 Outstanding Young Lawyer of the Year, Remy Choo

At last year's IBA Annual Conference in Washington, DC, the IBA presented Zheng Xi (Remy) Choo with the 2016 Outstanding Young Lawyer of the Year Award, recognising the Singaporean lawyer for his work in human rights litigation and, in particular, for his work in connection with a case against the Singaporean Government.

Back in 2005, Dr Ting Moon Cheng patented his idea for a mobile emergency clinic and later spoke of it to officials from Singapore's Ministry of Defence. Alleging that the officials stole his idea, Dr Ting and his company sued the Ministry of Defence in 2011 instead of the company manufacturing the mobile clinics. In January 2014 Dr Ting discontinued his lawsuit, stating that he no longer had enough funds, and the Singaporean Government ruled that his patent was invalid and revoked it.

In 2014, Dr Ting gave an interview to *The Online Citizen*, a website that had been co-founded by Remy in 2006, providing independent coverage and commentary of social and political news in Singapore. In the interview, Dr Ting explained his reasons for the lawsuit, and criticised the Ministry's conduct of the lawsuit.

A month after the interview, the Ministry of Defence sued Dr Ting, *The Online Citizen* and Remy under Singapore's Protection from Harassment Act, stating that the interview contained falsehoods and applying for a court order finding interview excerpts to be false. The Protection from Harassment Act, which presumably was intended to protect the Singaporean individual, was now being used against him.

Remy, by then an attorney for Peter Low, was both defendant and attorney for Dr Ting and argued that the Singaporean Government was not a person under the Protection from Harassment Act. In May 2015, the Court of First Instance ruled in favour of the Government. However, in December 2015, the appellate court (High Court) reversed that decision, and at the time of the IBA Award given to Remy, the case was pending before Singapore's highest court, the Court of Appeals.

Remy, please tell us about what happened in this case since last year

We won! The High Court, in a rare two–one split, determined that the Singaporean Government is not a person under the Protection from Harassment Act, and dismissed the case against Dr Ting, *The Online Citizen* and me. It was a very important and novel point of law that could have wide-ranging implications on free speech: whether or not the government can take advantage of harassment legislation and be characterised as a 'person' under the statute.

The reasoning turned on a question of how parliamentary intention was to be discerned from statutory text: the majority took a broader view and looked to parliamentary debates while the minority hewed more closely to the specific text of the Protection from Harassment Act.

What effects will this decision have in terms of future Singaporean law, especially in terms of free speech?

The case has since become one of the leading

precedents on discerning parliamentary intention in statutory interpretation. However, beyond the narrow legal point, it's made a broader statement that the government isn't infallible (a common misperception) and that David can have his day in court against Goliath, and emerge victorious.

Was there any point during that process where you lost faith in the system?

I've always kept my faith with the legal system. The day I lose faith in the system is the day I put my robes away and quit litigating. While the imbalance in resources between the state and the individuals is large, I believe it's surmountable with doggedness and determination.

Has there been any reaction, positive or negative, since you've received your award?

The support from the legal community back home has been pretty overwhelming: many lawyers who congratulated me told me that they were proud that a Singaporean lawyer's work in human rights litigation was being recognised.

What are some of the other cases that you have undertaken since the Harassment Act case began?

Recently, in 2017, I acted in a last-ditch appeal to save a Malaysian drug trafficker from the gallows. It was a heart-wrenching case: my client was a young man convicted of trafficking enough drugs to trigger the mandatory death penalty provisions under Singapore law, and had exhausted all remedies before the Singapore courts.

His last hope was a pending appeal in the Malaysian Courts to compel the Malaysian Government to take the case to the International Court of Justice. We got notice that he was due to be hanged in Singapore seven days before the execution, and immediately applied to the Singapore Courts to have his execution stayed. The hearing took place the day before his execution, and was unfortunately unsuccessful.

It took me weeks to come to terms with how a healthy man giving me instructions on Thursday could be lying in a coffin on Friday. It was one of the most painful experiences of my professional life.

In addition to the human rights work, I also handle a portfolio of international commercial and criminal cases.

More recently, I put together a legal team that defended the consignee of a cargo of Madagascan Rosewood which was shipped to Singapore *en route* to Hong Kong. The cargo was seized by the Singapore authorities as it was alleged that the shipment was an illegal 'import' into Singapore, under Singapore legislation giving effect to the Convention on the International Trade in Endangered Species. It was one of the largest international seizures of Madagascan Rosewood, and the market value of the cargo was, on one estimate, worth $50 million. The defence we ran on behalf of the consignee was that the cargo was merely in transit, and therefore the import requirements under the Singapore Endangered Species Act did not come into play.

Our legal team succeeded twice at the Court of First Instance but was reversed on different issues twice by the Singapore High Court. At the moment, the case is pending final determination before the Singapore Court of Appeal.

I also understand that the firm you work for is no longer Peter Low LLC, but Peter Low & Choo LLC.

Yes, in March of 2017 my founding partner let me put my name on the door next to his. It was one of the greatest honours of my professional career. My partner, Peter Low, is a former President of the Law Society of Singapore and was one of the most prominent public interest lawyers in his generation, defending alleged Marxists in *habeas corpus* applications when they were detained without trial. Peter is many decades my senior, but the vigour and passion with which he practices is an inspiration to me.