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NEWSLETTER
DISPUTE RESOLUTION
SPRING/SUMMER 2010

Welcome to the third edition of the CMS Dispute Resolution Newsletter. In this new edition we bring you up to date with new developments in Dispute Resolution in Europe and South America. As you will see, there are major developments towards higher efficiency and the control of costs in litigation as well as in arbitration. We hope that you find the topics addressed in this Newsletter helpful in dealing with your potential litigation risks. Please do not hesitate to get in touch with the authors of the relevant articles or your usual CMS contact if you would like to learn more about a particular issue. We would also welcome any feedback you would like to share with us. Thank you.

/
DR DOROTHEE RUCKTESCHLER
EDITOR
PARTNER, CMS HASCHE SIGLE
/
GUY PENDELL
CMS HEAD OF DISPUTE RESOLUTION
PARTNER AND SOLICITOR ADVOCATE,
CMS CAMERON MCKENNA

FINDINGS OF A MAJOR COMPARATIVE STUDY ON LITIGATION FUNDING AND COSTS

A team at Oxford University led by Dr Christopher Hodges of the Centre for Socio-Legal Studies and Professor Stefan Vogenauer of the Institute for European and Comparative Law has carried out a study into Litigation Costs and sources of Funding in 35 countries (Australia, Austria, Belgium, Bulgaria, Canada, China, Czech Republic, Denmark, England and Wales, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Ireland, Italy, Japan, Latvia, Lithuania, the Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Russia, Scotland, Singapore, Spain, Sweden, Switzerland, Taiwan, USA), plus an overview of 14 Latin American jurisdictions by Professor Manuel Gomez of Florida University. The study is based on national reports by academics and practitioners, many of whom are members of CMS firms, available on the project website[1]. Detailed analyses of 19 jurisdictions will shortly be available in a book[2].

The findings were relied on for the influential Jackson Costs Review in England and Wales which reported in January 2010[3], in particular its recommendations to retain the 'loser pays' rule and deconstruct the ten-year English experiment with conditional fee agreements (CFAs) and after-the-event (ATE) insurance premiums, by making their success fees and insurance premiums not shiftable to defendants but payable by claimants out of damages recovered.

This article contains a summary of key findings and conclusions reached from the study.

Findings of the Oxford Study Costs

The essential features of litigation cost systems are universal (provision of court facilities, essential work undertaken to process the litigation, cost of intermediaries) and these features have to be paid for. Finding effective solutions for the most fair and balanced procedure is a current and enduring preoccupation.

The amount payable by litigants in legal costs can frequently be high and disproportionate to the value of the claim. This problem is not new, and although many advanced countries have attempted to address it, no effective solutions have yet been found.

The level of litigation costs is related to the amount of work done by the non-party actors in the litigation process, notably lawyers, judges and experts. Common law and civil law jurisdictions have different architectural features of civil procedure, which give rise to different roles for lawyers and judges, and hence typically to significantly different levels of cost between the two traditions.

In the civil law tradition, typified by Germany, judges have comparably more work to do than judges in common law jurisdictions, whereas lawyers have a greater share of the workload in the common law tradition than in that of the civil law. Hence the percentage of total costs attributable to court fees is higher in most civil law jurisdictions, whereas lawyers' costs are usually the more expensive element in common law systems.

In common law jurisdictions, the major element of litigation costs is lawyers' fees. In those jurisdictions (except the United States of America, which have a distinctive system) the usual factor in such costs is the time spent on a case. In larger cases, the fees can be extremely high. In smaller cases the level of fees risk becoming disproportionate.

Few jurisdictions have historically applied a principle of proportionality to litigation costs, or to lawyers' costs. But proportionality is now becoming a more important issue. Market forces are seeking alternatives to high litigation costs. Dispute resolution mechanisms are appearing that are outside the courts, do not involve lawyers, or involve lawyers less. Within the courts, special techniques are being created, such as procedure-light tracks (e.g. in England and Wales small claims or pre-action protocols), encouraging mediation, or adopting fixed cost regimes. There is evidence of continuing experimentation with a range of techniques, and diversification is far from complete.

'Loser pays' is the norm

Most jurisdictions apply a 'loser pays' rule, although the amount of costs shifted to the loser rarely gives a complete indemnity so as to encourage avoidance of litigation and earlier settlement. In contrast, the United States of America have a distinct procedural architecture that does not include cost shifting, save where one way cost shifting has been expressly provided by Congress under a range of statutes that encourage private enforcement.

Most civil law systems (notably except France) tend to shift costs to the loser on the basis of a tariff based on the amount in dispute. This provides *ex ante* regulation of the level of costs and a high level of predictability for all parties to litigation. The predictability also facilitates the provision of legal expenses insurance.

Funding

Considerable developments are occurring in the mechanisms for funding litigation. This is a time of major change, that is unplanned, market-driven and where the future is uncertain. In England and Wales public funding for legal aid has become unsustainable. Governments are now more likely to investigate further means of private funding for litigation, such as lawyer funding (including contingency fees) and third-party funding.

Contingency fees are well established in the United States and opposition to them has crumbled in Australia and UK, but remains strong elsewhere. Success fees in some form are, however, surprisingly widely permitted.

Private (third-party) funding is a recent development but spreading quickly in some jurisdictions. It seems inherently limited to large or aggregated cases, so does not provide a solution to access to justice for low value individual cases. A number of ethical and practical issues with private finding deserve closer analysis. There is a need to examine and debate the funding options, to consider whether any gaps in access to justice might remain and how they might be filled, and to introduce consistent and effective regulation so as to avoid client detriment. An important aspect to be resolved is the extent to which any funder should control or influence strategic decisions in the litigation of others. As a result Oxford University researchers are now undertaking a further study on litigation funding.

Policy issues

The pressure to reduce costs for smaller claims, increased through governments cutting public expenditure, will continue to generate commoditisation and new dispute resolution pathways. There will be pressure to lower costs, streamline procedures, increase predictability of costs, and deliver speedy services at costs that are proportionate to amounts in dispute. Applying case management techniques which attempt to ensure that procedural steps are minimised consistent with delivery of fair procedures and just results, is an important approach for larger cases, but does not itself deliver cost management or proportionality of costs to the value of cases.

Outside courts, and sometimes in coordination with them, new pathways are being found for particular types of disputes and for lower value claims. Many jurisdictions are encouraging settlement through mediation, other modes of ADR, small claims procedures or other streamlined approaches. Techniques involving ombudsmen, business compliant systems and involvement of regulators are also being more widely examined. A small number of governments are beginning to take an overview of all dispute resolution pathways, especially but not limited to those funded by public funds, so as to evaluate all options and build an integrated framework of pathways for dispute resolution that are appropriately focussed on particular types of disputes.

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DR CHRISTOPHER HODGES
HEAD OF THE CMS RESEARCH PROGRAMME ON CIVIL JUSTICE SYSTEMS

CENTRE FOR SOCIO-LEGAL STUDIES, UNIVERSITY OF OXFORD

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1) *www.csls.ox.ac.uk/COSTOFLITIGATIONDOCUMENTS-ANDREPORTS.php.*

2) *C Hodges, S Vogenauer and M Tulibacka, The Funding and Costs of Civil Litigation: A Comparative Perspective (Oxford, Hart Publishing, 2010).*

3) *R Jackson, Review of Civil Litigation Costs: Final Report (The Stationery Office, 2010), ('Final Report'), at http://www.judiciary.gov.uk/about_judiciary/cost-review/jan2010/final-report-140110.pdf.*

ROME I: WHAT YOU NEED TO KNOW

Regulation (EC) No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations, commonly known as the Rome I Regulation (the "Regulation"), came into force on 17 December 2009 and is applicable to contracts concluded after that date. The Regulation provides for the unification of conflict-of-law rules in the field of civil and commercial law in the Member States of the EU (except for Denmark) and replaces the Rome Convention.

Why the new Regulation?

The aims of both the old Rome Convention and the new Regulation were to improve certainty of law applicable to a contract, the predictability of the outcome of litigation, and the free movement of judgements within the EU. The reasons for replacing the Rome Convention with the Regulation included providing greater consistency in EU legislation on conflict-of-law rules, enabling direct uniform interpretation of the harmonised rules by the European Court of Justice and simplifying the application of the harmonised conflict rules. In line with the latter objective, the Regulation is directly applicable in all Member States, with the exception of Denmark. Initially, the UK government was sceptical of the new proposals and decided to opt out of the Regulation, whilst continuing to take part in negotiations with the aim of securing amendments that could enable it to participate in the proposal in the future. Following some modifications (which brought the Regulation closer to the original Rome Convention) and consultations with businesses, the UK government opted back in.

Freedom of choice

Originally, the proposed Regulation aimed to extend and reinforce the freedom of the parties to choose the law applicable to their contract, making it possible to select "the principles and rules of the substantive law of contract recognised internationally or in the Community", for example the UNIDROIT principles. According to some opinions, this provision was likely to cause legal uncertainty, especially in international commercial litigation. The adopted version of the Regulation therefore contains a choice of law provision similar to the Rome Convention and party autonomy remains the leading principle, meaning that when parties have chosen the law applicable to their contract, that law shall apply. The parties are also allowed to choose the law applicable to only a part of their contract *(dépeçage)*.

Law applicable in the absence of choice

One of the most significant differences between the Rome Convention and the Regulation appears in Article 4(1) of the Regulation which lists eight specific rules applicable for different types of contracts in the absence of express or implied choice of law. Previously, Article 4 of the Rome Convention referred to the law of the country which was "most closely connected" to the contract or part of the contract. This provision was

subject to differing interpretations in the Member States, which did not assist with promoting legal certainty. Now, under the Regulation, the court will apply one of the rules provided in Article 4(1)(a)–(h), which deal with various specific scenarios, including contracts for the sale of goods and the provision of services, franchise and distribution contracts, and contracts for the buying and selling of financial instruments.

Where the contract in question falls under several or none of the scenarios listed in Article 4(1), the court will identify the applicable law by locating the habitual residence of the party required to effect characteristic performance of the contract (Article 4(2)). The "habitual residence" will be the place of central administration in the case of companies and other bodies, and the principal place of business for a natural person acting in the course of his business activity. If it is clear from all the circumstances of the case that the contract is "manifestly" more closely connected with a country other than that indicated by the rules provided in Article 4(1) or (2), the court may apply the law of that other country. There are further specific provisions contained within Articles 5–8 of the Regulation which apply to certain types of contract such as contracts of carriage, consumer and insurance contracts, and individual employment contracts.

Conclusion

The Regulation is a significant step forward in a program aiming to lay down comprehensive rules in cases that have cross-border implications. It is hoped that the Regulation will remove differences in implementation that arose between the Member States under the Rome Convention and secure greater predictability for parties operating in more than one European jurisdiction, thus helping to reduce legal and transaction costs. Notwithstanding the above, providing an express choice-of-law clause in international contracts remains the best way to avoid unpredictable results.

/
LOUISE POWELL
CMS CAMERON MCKENNA, LONDON
***E** LOUISE.POWELL@CMS-CMCK.COM*
/
EWA FABIAN
CMS CAMERON MCKENNA, WARSAW
***E** EWA.FABIAN@CMS-CMCK.COM*

// **Belgium**

BELGIAN MINISTERS TRY TO BEAT EUROPEAN COLLECTIVE REDRESS INITIATIVES TO THE PUNCH

A new bill of law issued by the government

A bill of law has recently been submitted by the Belgian Minister of Justice and the Belgian Minister of Consumer Protection which aims at finding solutions for collectively redressing "mass" claims.

The bill of law should make it possible for large groups to make a combined claim for the repair of mass damages through one representative. Any association or company with a social – or company – goal which is directly connected to one of the elements of the collective damage – can act as a representative in a claim for collective redress.

The proposed law consists of two different procedures:

1. The simplified procedure.
The proposed law organises a relatively simple procedure in the event that a collective redress agreement could be reached through negotiations.

The agreement must then be approved by one of the five Belgian Courts of Appeal. The court will particularly pay attention to the description of the group of parties which seek monetary compensation. Once approved, the agreement becomes binding for all members of the group.

Afterwards the agreement is made public. Once public, two different systems are outlined for the extension of the agreement to other parties covered by the description of the group given in the court decision but who were not actually a party to the agreement. Two systems are possible and the court has the final say in this: the "exclusive option" establishes an opt-out formula and is the general rule; the "inclusive option" establishes an opt-in system which will be applied whenever the exclusive option is deemed inappropriate.

Parties established outside the Belgian territory must however always explicitly opt in.

2. The claim for collective redress
A claim for collective redress is introduced at one of the Courts of Appeal and will first be examined on its admissibility. At that time the Court of Appeal will also appoint the representative and describe and determine the extent of the collective damage, the group of plaintiffs and the term for opting in or out once the conditions for collective redress are determined.

Once the claim for collective redress is accepted by the Court of Appeal, the group of parties, represented by the representative, has the opportunity to negotiate an amicable agreement with the party responsible for the collective damage (which brings us back to the simplified procedure as described above).

The description of the main elements of the procedure (group of plaintiffs, the representative, collective damage) by the Court of Appeal can prove to be valuable guidelines for negotiating the collective redress agreement.

If a negotiated solution seems unlikely or impossible, a judicial procedure is followed. The court decides on the liability, on the way the collective damages must be repaired, determines the group of parties and appoints a supervisor for the execution of the collective redress.

After this decision the Court will fix a certain period during which other damaged parties belonging to the group as defined by the Court may execute the opt-out (or opt-in) option.

Current state of the legislative process

In May 2010, the proposal issued by the government had not yet been introduced in parliament. However it is already subject to criticism. Most critics fear a development of the Belgian legal system towards an excessive American litigation culture with treble damages.

Furthermore, due to recent political developments in Belgium, the proposal is not expected to be introduced to the parliament before the end of this year.

Does Belgium need a class action procedure?

The need for a specific procedure for collective redress of mass claims was never as high as in the USA. The Belgian system of social security, the relatively easy access to courts, the classical representation of large groups by consumer organisations and trade unions were in the past able to cure major issues.

The Belgian judicial system also allows for civil parties to easily join in on criminal proceedings and bring their claims for damages into the criminal procedure. The Belgian legal culture is not inclined to treble damages. Last but not least, systems of no cure no pay, contingency fees or other conditional fee arrangements are not permitted in Belgium.

In the past some big lawsuits led to a creative case-by-case approach:

In the *Electrabel* case on damages caused by violation of competition law by gas company Electrabel politicians are currently claiming the need for a class action. However, it seems more likely that this case will be settled with financial penalties, laid down by the government.

In the *Lernaut and Hauspie* (speech-technologies) case, a large number of small stockholders were damaged by the fraudulent behavior of the management. Over 230 civil parties joined in on the criminal procedure. One of the parties was Deminor, an organisation specialised in representing small stockholders. Deminor represented 13,000 different Lernaut and Hauspie stockholders. The court of appeal completely reorganised the proceedings in order to deal with such a large number of civil parties.

Even recently with regard to the claims of the small stakeholders in the *Fortis* case during the financial crisis Belgian courts had to deal with large numbers of claimants. Several decisions of the board of directors to sell off Fortis to the French BNP Paribas influenced the value of the stocks. These decisions were contested by Deminor which acted as a representative for the small stakeholders.

General conclusions: Why rush into things?

In view of these developments, one does indeed wonder if it would not be better to await the result of the investigations of two Directorates-General of the European Commission on the matter and take into account the European white paper of April 2008 before rushing into national legislation.

/
ANDRÉ LOMBART
CMS DEBACKER, BRUSSELS
***E** ANDRE.LOMBART@CMS-DB.COM*
/
STIJN CLAEYS
CMS DEBACKER, BRUSSELS
***E** STIJN.CLAEYS@CMS-DB.COM*

VALIDITY OF ARBITRATION CLAUSES IN THE CZECH REPUBLIC

Increased trend for arbitration clauses

There has been an increased trend in recent years in the Czech legal environment to incorporate arbitration clauses into various types of contracts. This has developed both as a response to the laborious civil judiciary system, but also due to the fact that, particularly for consumer contracts, the party with a stronger bargaining position may, at its own discretion, choose some private arbitration company to resolve its disputes in arbitration proceedings. Such arbitration clauses are often overlooked by consumers due to their brevity; these clauses only refer to a particular private arbitration company (i.e. any company which is not a standing arbitration court established by law), its private rules of arbitration and rules regarding the costs of arbitration proceedings.

Breakthrough court decisions

Last year, the High Court in Prague issued landmark decision No. 12 Cmo 469/2008 dated 28 May 2009 following the decision of the Supreme Court of the Czech Republic No. 32 Cdo 2312/2007 dated 21 January 2009. Both these decisions greatly affect the validity of arbitration clauses which refer to private arbitration companies. Please note that this type of arbitration clause is mainly to be found in consumer contracts, i.e. in relations between a customer – entrepreneur or provider of financial services/loans.

Standing arbitration court

Pursuant to the Czech law on arbitration proceedings, the parties to an arbitration clause (arbitration agreement) decide whether their disputes will be resolved by *ad hoc* arbitrator(s) or by a standing arbitration court established by law (e.g. Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic).

If the parties appoint a standing arbitration court established by law and empowered to issue its own rules (statutes and orders) which require mandatory publication in the Commercial Bulletin (i.e. a publicly accessible periodical for publishing notifications), the arbitration clause does not need to contain any reference to these rules as they apply automatically (unless agreed otherwise). The rules of a standing arbitration court may determine the number of arbitrators and their mode of appointment and they may also restrict the selection of arbitrators to an arbitrators' list held by the standing arbitration court. The statutes and orders may also determine the manner of conducting proceedings and decision-taking as well as any other issues related to the activities of a standing arbitration court and arbitrators, including rules related to the costs of proceedings and arbitrators' fees. The parties generally submit to the rules applicable at the commencement of the proceedings before the standing arbitration court, unless expressly agreed otherwise in the arbitration clause.

Private arbitration company

With reference to private arbitration companies, both the Supreme Court of the Czech Republic and the High Court in Prague held it inadmissible for an arbitration clause to only refer to the rules of arbitration procedure or rules relating to arbitrators' fees of such private arbitration company, and further held that these rules do not automatically become a part of the arbitration clause, thus binding on both parties. Why is this the case? Because private arbitration companies are not established by law to resolve arbitration disputes and the law does not allow private arbitration companies to create their "own rules" and at the same time oblige them to publish such rules in the Commercial Bulletin as is the case for standing arbitration courts.

This prohibition on making reference to the rules of procedure or rules relating to fees cannot even be rectified by a declaration by the parties made in the arbitration clause that they were "acquainted" with these rules. Therefore if the parties wish

to deviate from the law **the arbitration clause must state the number of arbitrators, their names or the nature of their appointment and the manner of conducting proceedings.** For instance, the Czech law on arbitration proceedings stipulates that arbitration proceedings are essentially oral, unless the parties agree otherwise. Thus, in light of the above judgments, an agreement to exclude the oral form must be incorporated directly in the arbitration clause i.e. not in the rules of procedure of a private arbitration company referred to in the arbitration clause.

Invalidity of arbitration clauses

The High Court held that an arbitration clause will be deemed invalid if it does not provide for the direct appointment of *ad hoc* arbitrator(s) or any other specific manner of appointment, or if, in relation to the selection of arbitrator(s) and setting of rules of the arbitration proceedings, the arbitration clause only refers to a legal entity (private arbitration companies) which is not a standing arbitration court and refers to the statutes and orders created by such a legal entity with regard to the appointment and selection of arbitrators as well as the manner of conducting the proceedings and rules regarding the determination of the costs of proceedings. Similarly, the Supreme Court held that mere reference to the "rules" of private arbitration companies could be construed as an ambiguous arrangement and therefore invalid.

Decisions of Czech courts in line with the European Court of Justice decisions

Although the decisions of the Supreme Court and the High Court in Prague are not generally binding and the same courts may decide otherwise in the future with regard to the same issue, these decisions (in particular decisions of the Supreme Court) provide legal guidance for courts of lower instance and there is an interest that they be in mutual conformity for the purposes of legal certainty. In summary, there is a risk that arbitration clauses containing reference to the rules of private arbitration companies could be declared invalid by a Czech court and therefore, the final dispute would not be resolved in arbitration proceedings.

The above decisions are in accordance with the requirements of the Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, although they do not directly refer to the Directive. The Czech courts also seem to have taken into account the recent decisions of the European Court of Justice addressing the issues of the annulment of an arbitration award by national courts on the grounds that the arbitration proceedings were based on arbitration clause as an unfair contract term under the Unfair Terms in Consumer Contracts Directive.

Message to the businesses

Notwithstanding the different opinions on these cases, the message from the European Court of Justice and the Czech national courts is clear. Arbitration as a means to resolve disputes is intended mainly for disputes between business entities. On the other hand, disputes between a business and a consumer should be resolved before ordinary national courts or by way of Alternative Dispute Resolution. If the dispute between a business and consumer is to be resolved by arbitration, this should be done under strict terms of equality and based on rules of procedure that are fair and demonstrably known to both parties.

/
BOŘIVOJ LÍBAL
CMS CAMERON MCKENNA, PRAGUE
***E** BORIVOJ.LIBAL@CMS-CMCK.COM*
/
TOMÁŠ MATĚJOVSKÝ
CMS CAMERON MCKENNA, PRAGUE
***E** TOMAS.MATEJOVSKY@CMS-CMCK.COM*

// **England**

THE END OF THE LAW LORDS AND THE INTRODUCTION OF THE SUPREME COURT: ALL CHANGE FOR THE UK'S HIGHEST COURT?

On 1 October 2009, the United Kingdom's new Supreme Court was opened with the swearing in of its 11 justices in a ceremony in London. Set up under the Constitutional Reform Act 2005, the Supreme Court is housed in Middlesex Guildhall and replaces the House of Lords as the highest court of appeal in the UK. The House of Lords' judicial business had previously been conducted by the 12 Lords of Appeal in Ordinary (the "Law Lords") sitting as the Judicial Committee. Indeed, the House of Lords have presided over appeals in one form or another for over 600 years.

The major change is constitutional: Parliament's law makers and the judges charged with overseeing legislation have finally been separated. As the chairman of the bar council wrote in The Times newspaper in 2003 when criticising the previous system *"Judges should have no part of the legislature. [...] It is very difficult to understand why our Supreme Court (the Law Lords) should be a committee of the second house of parliament."* Further, the considerable growth of judicial review cases in recent years has brought the judges further into the political arena and forced them to make frequently controversial decisions. It was not always understood that decisions of the "House of Lords" were in practice decisions of an appellate committee and that non-judicial members of the House never sat as judges. Equally it was not widely known that the Law Lords (usually) refrained from getting involved in political issues concerning draft legislation on which they might later have to adjudicate.

The appointment process

The Supreme Court's appointment process was crafted to try to immunise the selection process from partisan politics. The choice of members of the court and the selection of its two lead judges, the president and deputy president, will be made by a five-man commission chaired by the president of the court. They will carry out their task in private along with three further members drawn from the judicial appointments commission. The names of the new justices will then emerge after private soundings. The public will simply learn the identity of a new justice at the end of the decision-making process with the issue of a brief press release. However, this lack of outside scrutiny may well become controversial as there are wide differences in judges' approaches to important issues of legal policy such as the proper scope of judicial review and the width of discretion which should be accorded to public bodies in applying the Human Rights Act. Contrast the American President's power to select Supreme Court justices, exercised with the "advice and consent" of the Senate. For four days in the summer of 2009 President Obama's first nominee for the US Supreme Court appeared before the judicial committee of the United States Senate. Judge Sonia Sotomayor answered questions from senators concerning her appointment live on television and online. The UK appointment model certainly protects the independence of the process from the danger of partisan meddling, but as the function of the Supreme Court includes the review of legislative and executive action, the question arises as to whether the UK appointment process provides

an appropriate level of accountability. By contrast, newly selected members of the Bank of England's Monetary Policy Committee appear before the Treasury Select Committee, providing both written responses to a standard questionnaire and oral evidence. The Treasury Select Committee explains the rationale of this process as enhancing *"the transparency of the appointment process and [increasing] the level of information available to the public and to parliament about the functioning of the MPC."* Decisions of the Supreme Court are at least as important as MPC decisions, thus appearances by prospective Supreme Court justices before a Parliamentary Committee would arguably enhance confidence in the appointment process and the new court.

The future

The new Supreme Court will handle appeals in a similar way to the House of Lords. Greater separation of the judiciary from the legislature is to be applauded, as is the greater transparency that the new Court will allow. Whether this is worth the estimated GBP 60 million cost of setting up the Supreme Court is another matter. Since its formation the Supreme Court has been busy. For example, some 21 judgments were handed down before the end of 2009. Questions regarding the lack of scrutiny of the appointment process for Supreme Court justices, however, remain unanswered. Do not expect any further change any time soon as this is not a fast-reforming institution: the House of Lords heard appeals for over 600 years yet the first female Law Lord was only appointed in 2004!

/
TIM RICHARDS
CMS CAMERON MCKENNA, LONDON
***E** TIM.RICHARDS@CMS-CMCK.COM*

// **England**

WEB-CRAWLING ROBOTS: GOOGLE OFF THE HOOK FOR DEFAMATION

Whether a statement is defamatory or not is decided on its own particular facts. However, defamation is often described as "a false statement about a man to his discredit" or "words which tend to lower the person in the estimation of right-thinking members of society". The potential liability in defamation of internet search engines was examined by the English courts in the case of *Metropolitan International Schools Limited v Google Inc.* [2009] EWHC 1765 (QB).

Background

The claimant, Metropolitan International Schools Ltd (MIS), provided distance-learning courses. MIS sued a website owner in respect of certain allegedly defamatory bulletin board postings that appeared on its website. These postings included a thread that alleged MIS was fraudulent and that its courses were a scam. Internet users who entered certain search terms in the Google search engine were, in the usual way, offered hyperlinks to the postings as well as a "snippet" of text from the discussion thread.

MIS notified the website owner and Google of its complaint and requested that the offending material be removed. However, when they did not comply, MIS brought proceedings against the website owner, Google UK and its US parent company, Google Inc.

Google a "facilitator" not a publisher

The central issue in the case was whether Google could be considered the publisher of a defamatory statement and whether it could therefore be liable to MIS in "publishing" the snippet. The court held that Google was not a publisher because it *"had no role to play in formulating the search terms"; it was a "facilitator"* and not a publisher.

The judge noted that there was no authority in English law dealing with this *"modern phenomenon"* but considered that an analogy could be drawn between an internet search engine and a conventional library where a scholar consults a library catalogue. In his view, unlike a librarian, Google would not have consciously prepared the wording of any snippets as there was no *"human input"; "it has all been done by the web-crawling robots".*

Notification

Under English law, a person can be liable for allowing the continuing publication of a defamatory statement once that person has the power to remove it. Therefore, having found that Google had not actually published the snippet, the judge went on to consider whether Google was liable for the defamatory snippet by failing to remove it once it had been notified. He concluded that it was not.

While Google could prevent searches returning links to specific website addresses which MIS had identified, it was not technically able to put in place a more effective block on the words about which complaint had been made without at the same time disabling access to a huge amount of other material on the internet. The judge found that Google's "take down" procedure might not have been as fast as it could have been. However, he concluded that this did not mean, as a matter of law, that Google was, or continued to be, liable as a publisher of the offending material between notification and "take down" of the material.

The judgment does not directly deal with the issue of what an internet search engine such as Google is expected to do if it is put on notice of a defamatory snippet but does not take it down. However, it seems that Google is still expected to impose blocks on webpages that specifically contain allegedly defamatory statements, but would not be expected to take any further steps.

Defences

The judge could not see how the statutory defence of innocent dissemination contained in Section 1 of the Defamation Act 1996 would apply to Google. This provides a person with a defence to a defamation action if he can show that:

— he was not the author, editor or publisher of the statement complained of;

— he took reasonable care in relation to its publication; and

— he did not know, and had no reason to believe, that what he did caused or contributed to the publication of the defamatory statement.

In particular, the judge could not see how Google could be expected to exercise reasonable care in publishing a statement if publication had taken place without any human input.

Conclusion

This decision will no doubt be welcomed by search engine providers. However, the case will be of little comfort to individuals and corporates alike whose reputation is threatened online, especially because the courts have not clearly dealt with the issue of what steps a search engine provider is required to take when put on notice of a defamatory snippet. While the case has not been appealed, it seems unlikely that this decision will mark the end of the debate as to search engine provider liability and it is likely that we will see more cases this year in relation to internet defamation.

/
JOE SMITH
CMS CAMERON MCKENNA, LONDON
***E** JOE.SMITH@CMS-CMCK.COM*

ENGLISH LANGUAGE IN GERMAN COURTS

Germany has progressed with leaps and bounds in recent years in offering competitive corporate legal structures, but it still has a long way to go before it can compete internationally as a legal forum. First and foremost, certain procedural rules must be adapted to change communication practices in the modern business world.

The German language barrier

As regrettable as this may be from a German perspective, globalisation heralds the waning importance of the German language in comparison to English as the *lingua franca* of the world. English has almost without exception become the international language of negotiation and contracting for most major transactions, regardless of whether any Anglo-American parties are involved. These days, the younger generation of German lawyers in commercial law firms and even in-house corporate counsel speak nearly perfect English, whether thanks to extended stays or studies abroad in English-speaking countries or as a result of years of experience negotiating and drafting contracts and other documentation in English. Yet when it comes to litigating disputes in connection with such documentation, parties are often reluctant to contractually stipulate Germany as the forum for resolving them. Their concern is that the requirement of translating all the relevant pleadings and supporting documentation into German and retaining court interpreters for witness testimony will make settling the dispute significantly more complicated and costly. This, coupled with the uncertainty associated with the ability of German judges to grasp the nuances of the English language in the translations, often causes parties to opt for arbitration instead or to select e.g. English or US law and a foreign venue as the legal forum right from the outset, regardless of the fact that, in many cases, litigating in Germany would be the cheaper and faster alternative.

Accepting the English language for litigation before special German court divisions

Globalisation has left its mark on the judiciary as well. For some time now Germany has had special court divisions, e.g. for patent cases, where judges are completely capable of assessing and adjudicating English-language documents without any additional German translations and hearing witnesses without the aid of interpreters. These judges have an excellent command of English because they had once practised at international law firms or were educated abroad. Only the court's judgments and orders themselves must still be in German.

From this starting point, Germany is now preparing to take a quantum leap: some German States like North-Rhine Westphalia and Hamburg have started an initiative to amend the German Judiciary Act *(Gerichtsverfassungsgesetz)* and certain provisions of the German Code of Civil Procedure *(Zivilprozessordnung)* to provide

for the creation of special "court divisions for international commercial matters" where the parties may elect to have English as the official language of the proceedings instead of German. Litigation before such court divisions will be conducted solely in English, i.e. all pleadings and supporting documentation may be submitted in English and even the judgment itself will be rendered in English. A German translation of the judgment along with the English original would be required only for purposes of enforcement. These special statutory rules for "court divisions for international commercial matters" would apply for all phases of litigation, from the trial level all the way to final appeal, if the parties so choose. Of course, under the initiative proposed by the States of North-Rhine Westphalia and Hamburg, German courts may order at any time during the course of the proceedings that they be continued in German and that interpreters be used, if they believe this to be necessary in the interests of a fair trial and to afford each party equal access to due process under the law.

Outlook

If this legislative initiative is indeed adopted, Germany, with key venues such as Duesseldorf, Frankfurt, Hamburg or Stuttgart, will be on an equal footing with international venues such as London or Paris by providing a court system (i) structured to settle even complex litigation quickly and efficiently (ii) at significantly lower legal and court fees in comparison to that of common law litigation and (iii) with the added option of conducting the proceedings in English, i.e., in the language of contracting, thus ensuring optimum transparency. In some cases, this would make litigating in Germany even more attractive than the arbitration-only option, where parties can also choose English as the language of the proceedings. The new legislation could – as with patent disputes – make Germany a significant forum for major, high-profile cross-border disputes, granting German courts and their rulings a new measure of respect even in comparison to their international counterparts.

While it remains to be seen how quickly the German government and parliament will adopt this initiative, it bodes well that prominent supporters from the judiciary, the bar and the legislature are all on board and heading in the same direction.

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JOACHIM GRES
CMS HASCHE SIGLE, FRANKFURT
***E** JOACHIM.GRES@CMS-HS.COM*

GERMAN COURTS FORBID DOUBLE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Until recently it was possible in Germany to enforce a foreign arbitral award in two ways. First, the successful party in a foreign arbitration case could try to enforce the arbitral award itself before the German Higher Regional Courts. Alternatively, the prevailing party could seek a declaratory judgment confirming and recognising the arbitral award in the country in which the arbitral award was rendered. Having obtained the declaratory judgment, it could then apply for the foreign State court judgment to be enforced in Germany.

In the past the enforcement of foreign arbitral awards by enforcing declaratory judgments of foreign State courts was possible if the arbitration proceedings had taken place in a country which followed the "doctrine of merger". The German Federal Court of Justice *(Bundesgerichtshof (BGH))* held that if an arbitral award was converted to a court judgment ("doctrine of merger") the foreign judgment could then be enforced in Germany under the general rules of enforcement of foreign judgments (BGH, decision dated 27 March 1984, ref. No. IX ZR 24/83; BGH, decision dated 10 May 1984, ref. No. III ZR 206/82).

This practice was prohibited by the German Federal Court of Justice in its decision of 2 July 2009 (BGH, decision dated 02 July 2009, ref. No. IX ZR 152/06).

The German Federal Court of Justice reasoned that the enforcement of a declaratory judgment confirming an arbitral award would circumvent the conditions required by German law and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It considered that in enforcing a foreign judgment German courts would not assess whether the foreign State court had applied the requirements of the New York Convention correctly. If, for example, the arbitral award was invalid because the respondent was not given proper notice of the commencement of the proceedings, or if the respondent was not given the opportunity to present its case, there was, the court considered, a risk that a German court might nevertheless grant enforcement if that request was based on a foreign declaratory judgement.

Therefore, the German Federal Court of Justice now holds that the party seeking enforcement has to request enforcement of the arbitral award itself and is no longer entitled to a "second chance" by enforcing a foreign judgment which converts the arbitral award into a declaratory judgement.

As a result, a claimant wishing to enforce a foreign arbitral award in Germany can no longer gain an advantage by initiating recognition proceedings in a foreign court in the hope of obtaining a second award which would then be enforceable in Germany. A judgment of that type will now be of no help to the claimant, as it will not be enforceable in Germany.

/
DR THOMAS LENNARZ
CMS HASCHE SIGLE, STUTTGART
E THOMAS.LENNARZ@CMS-HS.COM

NEWS ON ANTI-CORRUPTION RULES IN ITALY

In applying the provisions of the OECD Convention (Organisation for Economic Co-operation and Development) in the fight against the corruption of foreign public officials in international business transactions, signed in Paris on 17 December 1997, the Italian Legislative Decree No. 231 of 8 June 2001 introduced in Italy rules and regulations concerning the administrative (to be precise, criminal) liability of companies. In accordance with the Decree, companies can be held responsible as a consequence of criminal offences committed or even just attempted directly by their chief executive officers or employees, in the interest of and/or to the advantage of the company itself.

In detail, companies shall be deemed to be liable if:

1. criminal acts have been performed either by a) chief executive officers or individuals with organisational or managerial roles within the company, or b) employees subject to the control of the person listed under *(a)* above;

2. the author of the offence has operated in its interests or to its advantage;

3. the crime committed is included in those listed in the Decree (for example offences against public officials, corporate crimes, computer crimes, offences against the public economy, industrial and commercial systems, market abuse, murder or injuries committed infringing the rules for the protection of employees' health and safety, violation of copyrights).

In order to avoid the above liability, pursuant to Article 6 of the Decree, companies are required to provide evidence that models of organisation, management and control were introduced and implemented before the crime was committed, that these models can prevent criminal actions equal to the crime occurred and that the crime has been executed infringing the rules set forth in the models.

Nevertheless, Italian courts have never found that models enforced by companies involved in proceedings concerning the matter under examination can prevent such crimes being committed and, as a consequence, exclude company liability. As a matter of fact, until now Article 6 of the Decree has always been considered as a non-effective provision.

Only with a recent decision of the Court of Milan under examination, have the enforceability of Article 6 of the Decree and, therefore, the effectiveness of the models been admitted and declared for the first time. On 17 November 2009 the Court of Milan issued a decision whereby, for the first time, it was expressly held that pursuant to Article 6 of the Legislative Decree No. 231/01 an Italian company was **not** liable for the corporate crimes committed by the President of the Board of Directors and the Chief Executive Officer. This decision was well received in Italy, since the Court of Milan, against the trend of recent years, substantially reasserted and confirmed the importance of the adoption by the companies of an organisational, management and control model as provided for under this Decree. Indeed, the Court of Milan first rejected the objections raised in the past years regarding the impossibility to demonstrate the effectiveness of the models and emphasised that the behaviour of the company must be distinguished from that of those subjects who committed the crime

since the declaration of an administrative liability pursuant to the Decree *"is not the automatic consequence of the commission of a crime – indeed such conclusion would imply the admission of a 'strict liability' of the company for criminal offences committed by its executive officers".*

Moreover, the Court specified that it would not make sense to consider an organisational model ineffective as such, due only to the fact that an offence was committed by the executives of the company, as a matter of fact this would imply the practical impossibility to enforce the rule set out under Article 6 of the Decree.

The Court has therefore introduced the innovative approach of evaluating the effectiveness of an organisational model, making reference to the time of its implementation, with the consequence that there shall be no administrative liability of a company which, before the offence is committed, has duly adopted and effectively implemented a model of organisation, management and control *suitable to prevent crimes similar to that actually committed.*

Moreover, in the light of the increasing attention to the implementation of the organisational models, it is also worth noting that Legislative Decree No. 81 of 9 April 2008 introduced, on the one hand, stricter requirements concerning the reduction of risks to health and safety in the working environment for employees, customers and the general public which must be met under Legislative Decree 231/2001. In this Decree 231/2001 it is expressly stated that those organisational models adopted in compliance with the British Standard OHSAS 18001:2007 certification are deemed to be compliant with the above-mentioned stricter requirements. On the other hand, in order to stimulate the adoption of such models, Legislative Decree No. 81/2008 also introduced public financing covering the adoption and implementation of organisational models in favour of companies with fewer than 50 employees as well as tax relief for the costs spent on employees' occupational health and safety training courses.

Conclusions

In the light of the above, it is much clearer that the adoption of the organisation, management and control models provided for by the Decree 231/2001 is not, as often deemed by the companies, just an additional cost to be endured but, on the contrary, it could result in a very useful and effective means of organisation and, at the same time, protection for the companies.

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LAURA OPILIO
CMS ADONNINO ASCOLI &
CAVASOLA SCAMONI, ROME
***E** LAURA.OPILIO@CMS-AACS.COM*

NEW RULES FOR CORPORATE DISPUTES IN RUSSIA

Commercial disputes in Russia are usually decided by Russian commercial courts which, albeit State courts, are called "Arbitrage courts". The procedure to be applied by these courts is governed by the Russian Code of Arbitration Procedures (APC). New rules for the resolution of corporate disputes have been implemented in several amendments to the APC which came into force in October 2009.

Definition of a corporate dispute

First the APC provides a legal definition of the term "corporate dispute". A corporate dispute is any dispute relating to the shareholding in a business company as well as to the shareholding in a non-commercial association of business entities or individual entrepreneurs. The APC defines the following matters as being corporate disputes:

— disputes relating to the formation, the re-organisation and the liquidation of a legal entity;

— disputes relating to the ownership of shares in business companies and partnerships or in cooperatives and any encumbrances of such interests as well as disputes over the rights attached thereto;

— other important matters of corporate relationships.

Exclusive local jurisdiction over corporate disputes

Whereas in the past interested parties could forum shop for decisions from remote regional courts regarding corporate disputes and then use such decisions as a tool for hostile take-overs, the new rules of the APC on corporate disputes now provide for exclusive local jurisdiction of the local commercial court situated in the same area where the legal entity is registered. It is expected that due to this new jurisdiction corporate disputes will be decided by judges who are well aware of the origin and the development of such disputes and as a result the rights of the legal entities involved will be better protected.

Access to information

Furthermore, the amendments to the APC also mean essential innovations regarding the legal entities' right to access to information and to timely notification. The courts are now obliged to inform the legal entity about the acceptance of an action against it and the status of the judicial proceedings. The court is also obliged to put such information on its website. Thus, for the first time, it is mandatory to publish information about the development of proceedings as a consequence of the current process of implementing and developing the principle of transparency of judicial proceedings which has been taking place in Russia in recent years.

Further amendments to the APC

There are further changes to the APC regarding such important instruments as preliminary injunctions intended to make the applications for such measures more consistent and to minimise the abuse of this procedural remedy. Also the possibility of forcing a legal entity to convene a general meeting via a court decision was established.

Conclusions

These amendments made to the Russian Code of Arbitration Procedures are definitely positive. In particular, the granting of exclusive jurisdiction to the local courts and obliging them to inform the legal entities about all phases of judicial procedures are necessary measures to enhance the protection of business owners' rights and prevent intransparency of decisions on corporate disputes.

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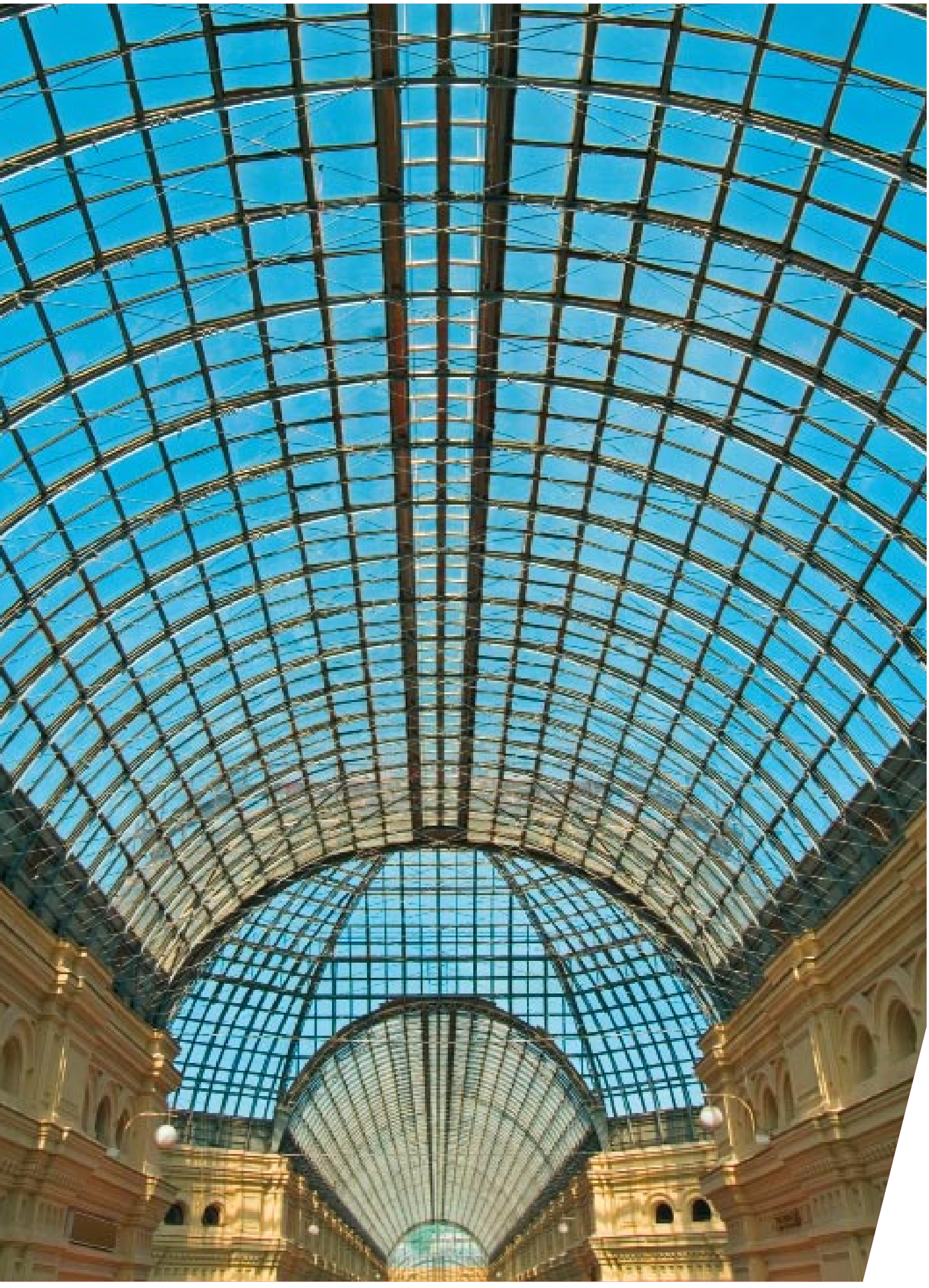
KONSTANTIN KANTYREV
CMS, RUSSIA, MOSCOW
E *KONSTANTIN.KANTYREV@CMSLEGAL.RU*



PROCEDURAL LAW REFORM LAW 13/2009 ON THE ESTABLISHMENT OF THE NEW JUDICIAL OFFICE

Background

The reform of the judiciary in Spain had become a crucial objective which could not be postponed any longer. The Ministry of Justice has now presented the proposal for the establishment of the new judicial office which will reform a total of 22 statutes, in order to guarantee the right of citizens to have access to a service which is dynamic, transparent, responsible and completely in accordance with constitutional values. After more than 30 years of constitutional regime the establishment of the new judicial office creates a very important starting point in the essential and historic modernisation process of the justice administration in Spain.

The Judicial Office

The judicial office comprises personal, material and technological resources to support the judge in his daily work. The new judicial office will be the result of a reform which will adapt these resources to today's requirements and which specifically seeks to modernise and rationalise this structure.

The central aim of this reform is to guarantee that judges and magistrates comply with their constitutional duties (to judge and to enforce the law), relieving them from other tasks which are not of a jurisdictional nature, such as the documentation of cases, the court calendar or the enforcement of sentences which have been passed. These will become the responsibility of other civil servants, belonging mainly to the superior body of judicial secretaries. These civil servants are legal specialists whose knowledge enables them to assume the responsibility for certain matters which, although they are beyond the legal authority exclusively conferred to judges and courts, are equally relevant for achieving maximum efficiency of the public service which constitutes the justice administration.

The main shared objective in the reform of all the procedural laws

In order to speed up the provision of the justice administration service it is essential to reform procedural laws so that the judicial secretaries are not only given formal procedural functions to expedite matters, but also other roles which are supplementary to the jurisdictional functions but which are equally important. The main shared objective in the reform of all the procedural laws is to regulate the distribution of the responsibilities between judges and courts on the one hand and judicial secretaries on the other.

Apart from those cases in which a procedural decision strictly concerns the jurisdictional function, it was decided to confer the procedural processing role on the judicial secretary, thus guaranteeing that the judge or the court can concentrate their efforts on the functions that the constitution and laws exclusively confer upon them: to judge and enforce the law. In this sense, some points need to be

addressed concerning the opening and the closing of the proceedings.

Following the procedural reform, the responsibility for accepting lawsuits, with the exception of some special actions (for example for insolvency proceedings) and criminal complaints, will lie with the judicial secretaries, as this concerns a mere verification of formal requirements.

However, as the right of access to justice forms part of the right to effective legal protection under the constitution, it is the secretary's duty to determine whether the requirements of the lawsuit have been met, and if not the judge must be informed to enable the latter to decide definitively whether the lawsuit is to be admitted.

Regarding the termination of proceedings, in those cases where the proceedings are terminated due to the parties' lack of activity or because an agreement is reached, the judicial secretary will issue a decree terminating same, as this is merely the confirmation of the parties' will.

The technological modernisation of the justice administration

The success of the new judicial office depends to a large extent on the technological modernisation of the justice administration. The government hopes to have a completely computerised judiciary where lawyers and court advocates can send their lawsuits to the courts via e-mail and the various judicial office authorities can communicate through a computer network, thus slowly eliminating paper from legal proceedings. To ensure the efficient operation of the new judicial office, the Legal Transparency Plan will also provide transparency and information for users. It will also facilitate the monitoring of jurisdictional activity and the detection of mistakes thus assisting their correction.

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JUAN IGNACIO FERNÁNDEZ AGUADO
CMS ALBIÑANA & SUÁREZ DE LEZO, MADRID
E *JUANIGNACIO.FERNANDEZ@CMS-ASL.COM*

DISTRIBUTION AGREEMENTS IN ARGENTINA

In Argentina, distribution agreements have no specific regulation. Consequently, domestic case law and legal doctrine set forth guidelines for the validity and enforceability of such contracts.

When a dispute arises from or in connection with an international distribution agreement, the national courts intervene which can sometimes result in unexpected outcomes. Therefore, a general review of the Argentine jurisprudence in relation to some of the key provisions contained in distribution agreements is an instructive exercise.

Termination on short notice

In the decision *Bonet Adrian Javier* ("Distributor") *v. Kraft Foods Argentina S.A.,* ("Supplier"), dated 10 October 2007, Panel C of the National Commercial Court of Appeal granted compensation to the Distributor due to the decision of the Supplier to terminate the agreement with only one month's prior notice.

Although no written contract had been entered into between the parties, the Court of Appeal considered that, even if distribution agreements are not deemed to be perpetual and each party has the right to terminate, the notice period for such termination should be reasonable and in good faith.

As a result, the Court of Appeal held that the Supplier should pay compensation to the Distributor. This compensation amounted to one month's estimated profits, corresponding to the additional month's notice that the Court deemed that the Supplier should have given prior to termination of the agreement with the Distributor.

Cause for termination

On 8 November 2007, in *Rodriguez Ciro Humberto* ("Distributor") *v. Compañía Industrial Cervecera S.A.,* ("Supplier"), the Civil and Commercial Court of Appeals of Cordoba dismissed an appeal against a first instance decision that had rejected a claim for compensation filed by the Distributor.

The Distributor sought to obtain compensation from the Supplier in respect of the latter's decision to terminate the agreement between the parties on the grounds that the Distributor had failed, on several occasions, to pay sums owed to the Supplier.

The Distributor alleged that, since there was no written contract expressly providing for the possibility to terminate the agreement on the basis of payment defaults, such defaults could not be regarded as constituting a material breach of the agreement by the Distributor. The

Distributor, therefore, considered that the termination of the agreement by the Supplier was not justified.

The Court of Appeals stated that, in the absence of a written contract, the general principles of the Argentine Civil and Commercial Codes applied and confirmed the right of the Supplier to terminate the agreement due to the Distributor's default in payment.

Exclusivity provisions

In *Cediem S.R.L.* ("Distributor") *v. Pirelli Neumáticos S.A.* ("Supplier"), on 16 June 2008, Panel B of the Commercial Court of Appeals rejected a claim by the Distributor against the Supplier in respect of the Supplier selling products in a territory where the Distributor had been the sole distributor.

The Court affirmed that, even though exclusivity is a usual provision in a distribution agreement, such a provision shall not be construed as an implied term if there is no express stipulation to that effect in the agreement. The Court held that this was the case even if the course of conduct of the parties indicated that the Distributor had been in fact acting on an exclusive basis in a specific territory for a certain period of time.

Employment liability

Pursuant Section 30 of Argentine Contract Law, when a company delegates certain tasks directly related to its activity to a third party, it remains liable for any employment law matters.

In a decision, dated 26 February 2009 Panel IV of the National Labour Appeals Court rejected a claim initiated by an employee of a distributor *(Cipres Ignacio Blas* ("Employee") *v. Siciliano Hnos. S.R.L* ("Supplier")). The Appeals Court determined that the Supplier's activity ceased upon the sale of the products to the Distributor.

In *Zoppi Jorge Alberto* ("Distributor") *v. Akapol* ("Supplier"), dated 3 June 2009, the Labour Appeals Court rejected a claim of a Distributor, who sought to be considered as an employee of the Supplier. The Appeals Court considered that, notwithstanding the fact that the Distributor had to align his activities to the guidelines set forth in the distribution agreement, the Distributor nonetheless acted of his own will without being subject to direct orders or instructions from the Supplier.

Regardless of the close nature of the relationship that the parties to a distribution agreement may have, the Argentine courts generally consider that distribution agreements do not trigger employment liability, unless the claimant can show that said agreement was entered into with a view to defraud or to subvert applicable employment legislation or regulation.

Conclusion

Argentine case law is consistent with many civil law jurisdiction countries; nevertheless companies would be well-advised to seek professional advice prior to entering into distribution agreements.

/
MARCELO CIPPITELLI
CMS BUREAU FRANCIS LEFEBVRE, BUENOS AIRES
E *MCIPPITELLI@CMS-BFL.COM.AR*
/
NGOWARI ADIKIBI
CMS BUREAU FRANCIS LEFEBVRE, BUENOS AIRES
E *NADIKIBI@CMS-BFL.COM.AR*

// **Brazil**

CAN STATE COURTS ORDER IMMEDIATE EXECUTION MEASURES WHEN THE PARTIES HAVE AGREED ON ARBITRATION?

Since 1996 when the Brazilian Arbitration Act came into effect, contractual disputes can be settled by means of arbitration if the contract contains an arbitration clause. However, there have been and still are many disputes regarding whether an arbitration clause in a contract estops a creditor from filing a request for immediate execution measures against a debtor before Brazilian State Courts based on the contract as an *"extrajudicial executive title"*. Extrajudicial executive titles, such as contracts, promissory notes, bills of exchange or cheques, are titles which under the Brazilian Code of Civil Procedure allow the creditor to proceed against a debtor in State Courts requesting immediate execution enforceable by means of attachment. Obviously, such immediate execution is able to protect a creditor much better and faster than any arbitration proceedings could do.

It has been argued, however, that when a contract contains an arbitration clause, the creditor is not allowed to apply to state courts for immediate execution.

In the authors' view, an arbitration clause in a contract should not be interpreted as estopping a party from immediate enforcement of such a contract before a State Court. The arbitration clause cannot be construed to imply that a creditor waives its right to enforce an executive title. This would leave him without any possibility of immediate enforcement and allow the debtor to transfer its assets to third parties in the meantime, thus possibly avoiding the enforcement of a later arbitral award. Furthermore, there would also be no way to evidence fraud against creditors since arbitration proceedings are not registered in the public registries.

Two decisions handed down lately confirm the view of the authors and allow parallel proceedings for immediate execution before State Courts (Interim Injunction No. 13.174-SP (2007/0225507-1) from the Superior Court of Justice and the Bill of Review 2006.7.118.935-2, of the Circuit Course of Barueri, 22nd. Chamber of Private Law of the Court of Justice of the State of São Paulo).

These decisions have been very helpful in promoting arbitration in Brazil. Today, among the Latin American countries, Brazil has the greatest number of arbitration proceedings in progress in the International Court of Arbitration in Paris. If immediate execution in State Courts were no longer possible, arbitration would certainly end up not being used.

/
PATRICK PATELIN
CMS BUREAU FRANCIS LEFEBVRE, SÃO PAULO
***E** PPATELIN@CMS-BFL.COM.AR*
/
CARLOS MAFRA DE LAET
CMS BUREAU FRANCIS LEFEBVRE, SÃO PAULO

ENFORCEMENT OF ARBITRAL AWARDS IN URUGUAY

In recent years, arbitration has proved to be an efficient form of dispute resolution in Uruguay. Uruguay has also shown itself willing to enforce international and domestic awards alike, having ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 and many other important international arbitration treaties in the matter.

In the following we review certain national decisions, regarding the recognition and enforcement of arbitral awards in Uruguayan courts, which have defined some key issues in relation to the exequatur procedure for such awards.

Mandatory conciliation procedure prior to arbitration

In the decision *Cooperativas de Vivenda Bauzá c/ Rodriguez Geigetz, Nictor,* dated 26 June 2002, Civil Court No. 2 set aside an award on the grounds that the arbitral tribunal had failed to hold a hearing encouraging the parties to seek an amicable settlement to their dispute.

Pursuant to Section 460 of the General Procedural Code *(Código General del Proceso Uruguayo,* GPC*)* whilst the parties are free to agree upon the conduct of the arbitral procedure as they deem fit, in all cases prior to commencing the proceedings the arbitral tribunal must attempt to encourage the parties to consider settlement through conciliation.

In view of the fact that, during the course of the action to set aside the award, the defendant did not challenge, the claimant's assertion that such an omission had taken place within the arbitral proceedings, the court declared the award null and void.

Restrictions to setting aside awards

In *Tsakos Industrias Navales c/ Pagliettini S.A.,* dated 6 September 1996, Civil Court No. 5, Pagliettini, the losing party in the arbitral proceedings, sought to obtain annulment of an award on the basis that (i) the award contained decisions on matters beyond the scope of the *Compromiso Arbitral* entered into between the parties and (ii) the award was granted after the stipulated 30-day time limit for rendering an award.

In domestic Uruguayan arbitration, the parties must formally commit to pursue arbitration proceedings by signing *a Compromiso Arbitral.* The *Compromiso Arbitral* is an agreement that indicates (amongst other matters) the name(s) of the designated arbitrator(s), the procedure to be followed and the issues to be resolved by the arbitral tribunal (this is similar to terms of reference).

The court rejected both arguments:

(i) regarding the supposed argument that the arbitral tribunal decided upon matters beyond its remit, given that such matters were ancillary to the principal dispute, the court held that the arbitral tribunal did not exceed its jurisdiction, but merely referred to matters that implicitly fell within the scope of the arbitration agreement. In addition, the court stated that, had the arbitral tribunal exceeded its powers, annulment would be partial and limited to the matters that exceeded the *Compromiso Arbitral:* the rest of the award would be valid and enforceable;

(ii) finally, regarding the specified 30-day time-limit, the Court understood that the parties agreed that the term was 30 days after the closing arguments, and not 30 days from the commencement of arbitration. The court stated that it was impossible for the parties to produce all the evidence required in only 30 days. Such an interpretation was not

challenged by the claimant during the arbitral proceedings; hence, the court considered that the request to set aside the award was in bad faith. Consequently, the court handed down a costs orders against the claimant, requiring the latter to bear all the court costs.

Grounds for annulment during arbitral proceedings

In *Bersabel S.A. c/ Yinca S.A.,* dated 27 May 2007, the losing party in the arbitral proceedings sought to obtain the annulment of an award claiming, *inter alia,* that the *Compromiso Arbitral* was not executed in front of a public notary.

The Court affirmed that, even though section 477 of GPC sets forth specific formalities for the execution of the *Compromiso Arbitral,* the parties' failure to respect such requirements does not trigger the annulment of the entire proceedings *per se.*

In addition to the existence of such failure, the party challenging an award on this basis must also provide evidence of the loss suffered and the legal remedy of which it has been deprived as a consequence.

In addition, the court stated that it was impossible for a party who had been directly involved in the execution of an irregular legal instrument (i.e. the party seeking annulment was a signatory to the *Compromiso Arbitral*) to subsequently consider it null and void.

Conclusion

The current legal framework in Uruguay and the willingness of the local courts to respect national and international arbitral jurisdiction, make Uruguay a secure forum for either electing it as a seat of arbitration or enforcing foreign awards.

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MATÍAS CAMPOMAR
CMS BUREAU FRANCIS LEFEBVRE, MONTEVIDEO
***E** MCAMPOMAR@CMS-BFLMERCOSUR.COM*
/
MARCELO CIPPITELLI
CMS BUREAU FRANCIS LEFEBVRE, MONTEVIDEO
***E** MCIPPITELLI@CMS-BFL.COM.AR*