Paradigm

INTERNATIONAL SOCIETY OF PRIMERUS LAW FIRMS

FALL 2017

President's Podium: A Bright Future

Primerus Looks Ahead: Trends in the Legal Industry

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Every lawyer in Primerus shares a commitment to a set of common values known as the Six Pillars:

Integrity
Excellent Work Product
Reasonable Fees
Continuing Legal Education
Civility
Community Service

For a full description of these values, please visit www.primerus.com.

About Our Cover

Throughout 2017, Primerus has been celebrating its 25th anniversary. In the Spring 2017 issue of *Paradigm*, we looked back at the society's history. In this issue, we look ahead to the future of Primerus and the legal industry.

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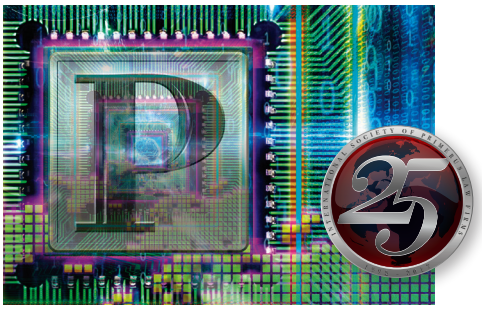
Primerus
The World's Finest Law Firms



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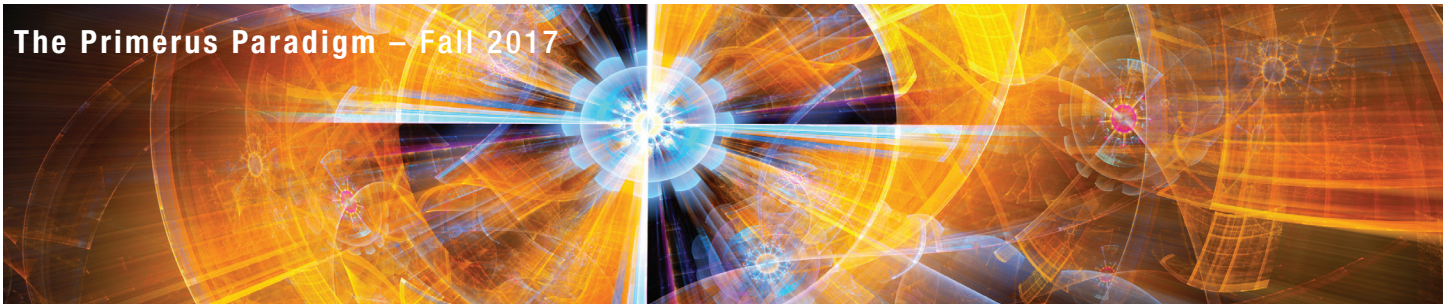


President's Podium

John C. Buchanan

A Bright Future

Throughout this year, Primerus has been celebrating its 25th anniversary. As we look back over the years, we realize there is much to celebrate about our past, and much to look forward to in our future.

When we founded Primerus, we set out to find the highest quality small and mid-sized law firms, all of whom were committed to the high standards we set out in the Six Pillars (integrity, excellent work product, reasonable fees, continuing legal education, civility and community service). Twenty-five years later, we now have 180 member firms with 2,500 lawyers in nearly 50 countries around the world, as well as 45 states in the U.S.

With the legal industry—and the world around us—changing at such a rapid pace with technological advances, it's impossible to predict what our profession will look like in another 25 years. But I firmly believe that the model we have created with Primerus holds the future for small to mid-sized firms and their trusted clients around the world.

As we have seen in so many industries, it's going to be more and more difficult for the small to mid-sized firms to practice in isolation in a global marketplace. By bringing many of the world's finest law firms together under the umbrella of Primerus, we help them not only survive, but thrive, in an increasingly competitive legal environment.

At the same time, we do a great service to clients around the world by showing them how to find exactly what they need—quality legal services at reasonable fees. Just as globalization represents opportunity for many, it comes with its share of challenges. We frequently hear from clients how pleased they are that we can help them when they need representation in a new jurisdiction. No longer do they have to worry about finding law firms and screening them for quality and reasonable fees, because we have done that work for them. They can turn to Primerus firms time and time again, knowing they're getting nothing but the best.

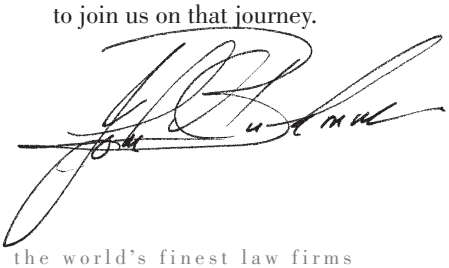
We also encourage members and clients to develop relationships that go far beyond shaking hands. Through events like the Primerus Defense Institute Convocation and other efforts including the Primerus Client Resource Institute, we give attorneys and clients the chance to get to know one another, learn from one another and build trust and loyalty.

Clients also gain the advantage of a worldwide network of firms that often know one another well and are accustomed to collaborating. Our members, whatever their location, have access to international legal services with trusted colleagues—and they will personally see that you get what you need, where you need it.

"The best way to predict the future is to create it." At Primerus, we are working hard to both predict and create our future, as we seek to achieve our ambitious goal of becoming the finest and largest provider of legal services in the world.

As we look ahead to the next 25 years, I cannot help reflecting on Abe Lincoln's famous quote, "The best way to predict the future is to create it." At Primerus, we are working hard to both predict and create our future, as we seek to achieve our ambitious goal of becoming the finest and largest provider of legal services in the world.

I believe the future for our members and their clients is bright. We invite you to join us on that journey.



Primerus Looks Ahead: Trends in the Legal Industry

The list of changes in the legal industry since Primerus was founded 25 years ago is seemingly endless.

Technological advances. Creation of new practice areas to address evolving client needs. The advent of lawyer advertising. Globalization. Upheaval following the world financial crisis of 2008.

With the pace of change only accelerating, legal experts agree it's hard to predict what the legal profession will look like in the next 10 years, let alone 25 years.

According to the 2017 Law Firms in Transition, an Altman Weil survey, 72 percent of managing partners and law firm chairs said "yes" when asked, "Going forward do you think the pace of change in the profession will increase?"

So law firm leaders agree change is coming, and it's coming fast, but are they ready?

As Primerus celebrates its 25th anniversary this year, we take this opportunity to look ahead. What challenges and opportunities lay ahead? And how is Primerus helping some of the world's finest law firms and their clients prepare?

"I believe what we have started with Primerus is where the future is going to be for small to mid-sized law firms," said Primerus Founder and President John C. "Jack" Buchanan. "In a globalized world with rapid technological advances, it's going to be more and more difficult for small to mid-sized firms to practice law in isolation, and for clients to find quality legal representation for a good value anywhere in the world. Primerus is the answer for both."

Trends to Watch

Thomas Clay, principal of Altman Weil with 30 years' experience as a legal consultant, will speak about global trends in the legal industry at the 2017 Primerus Global Conference, October 4-7, in Vancouver, British Columbia, Canada. He'll offer Primerus members a window into upcoming trends, which he said are the "proverbial threat or opportunity," depending on how firms approach them.

"No law firm—small, medium sized, enormous—is going to escape some of the dynamics and trends that are out there. None," said Clay, co-author of the 2017 Law Firms in Transition survey report. "You have to be thinking about what is already going on, and more importantly, what will continue to go on."

At the top of Clay's list of trends that law firms must embrace are three things: commoditization of legal work, advancement of artificial intelligence (AI), and decreasing demand for traditional legal services.

Commoditization of Legal Work

"It goes up and down the scale with every firm and every practice," Clay said about commoditization. "So we're seeing the biggest firms with the most lucrative practices dealing with issues of commoditization, as well as small firms who might be facing things like LegalZoom and other alternative service providers."

To critics who wonder whether the commoditization of legal services is cyclical, Clay says no.

"Once goods and services have been reduced in terms of cost because of efficiencies, the market will never let it go back," he said. "It's the proverbial threat and opportunity. So if you embrace it, and some firms are, and take it to the market, that's great."

Artificial Intelligence

Clay hopes most lawyers have heard of Watson, and are ready to make friends with "him."

Watson, IBM's computer system capable of answering questions, is one form of AI that could have a big impact on the legal industry.

"It's not science fiction. It's in the market," Clay said. "If you look at it, and see what AI will be able to do, if you get in front of it, you can harness that as a tool and use it to your advantage. You will not only survive, but thrive."

Technological advances and AI level the playing field in the legal world, Clay said.

"In the very, very near future, a solo practitioner would have at his or her fingertips all of the information and data that a lawyer in a 1,000-lawyer firm would have at his or her fingertips," Clay said. "And then if you marry it with AI, on our iPhones, everyone will be equal."

Areas like AI also present opportunities for organizations like Primerus to collaborate and help members stay on top of the trends and better serve their clients.

Primerus Senior Vice President of Services Chad Sluss said Primerus offers members partnerships with several legal service providers, including LegalSifter, a company which helps law firms start to embrace AI. Primerus members get a 15 percent discount off the company's products, including ContractSifter, which sifts through stacks of contracts.

Decreased Demand

Another trend clear in the 2017 Law Firms in Transition Survey is the ongoing decreasing demand for traditional legal services.

"If you look at the data from 10 years before the recession [in 2008] and the data now, it's very clear that the amount of traditional hourly legal work has diminished greatly and is continuing to go down," Clay said. "So the hope that demand will return is not rational. Demand isn't going to return to the levels that it was."

That could spell bad news for lawyers, but Clay sees it as an opportunity as well.

He describes four buckets of work lawyers do: advocacy, counseling, process and content.

Process and content (including due diligence, document drafting, research, document assembly, document review) are two buckets where commoditization is happening.

"I think most lawyers will tell you that's not the stuff that's fun or interesting," Clay said. "Now a lot of that, like e-discovery, is being done by alternative service providers or technology."

Advocacy and counseling are the work Clay called "real lawyering."

"I believe in my heart that we will get back to lawyers being more real lawyers," he said.

The Heart of 'Real Lawyering'

John Hemenway, a founding partner of Primerus member firm Bivins & Hemenway in Tampa, Florida, said his firm is watching closely and planning as Florida is exploring an electronic wills act. The act will legalize electronic wills, therefore allowing those with modest estates to get wills faster and cheaper from online services without involving a lawyer.

This will likely cause Bivins & Hemenway to lose some of its introductory estate planning clients, Hemenway said, but they're choosing to see it as an opportunity to build even deeper relationships with their clients.

"This will probably delay some of the initial meetings we have with clients. For that basic document that a computer can do, they might not need to come see us," he said. "But we are focusing on building relationships and deepening relationships we have with existing clients so that they will come see us once their needs evolve a little more … once they decide that they are beyond what a computer can do and they need a human."

In his role as chairman of the Primerus Young Lawyer's Section, Hemenway is passionate about helping young lawyers make the connections and learning the skills needed to succeed in the legal profession of the future. (The section is designed for Primerus attorneys under the age of 40 or who have been admitted to practice for seven years or less.)

When asked what excites him and scares him about the future of the legal industry, he has one answer: "Robots, for both," he said.

"The fear relates back to the pace of development," Hemenway said. "It's harder to keep up. You also don't have the benefit of learning from the mistakes of early adopters because the time frame is crunched down. Going forward we are going to see where you have to be nimble and prepared for these fast developments."

But he's excited because he sees the same opportunity Clay called "real lawyering."

"This gives us the opportunity to be in the counselor role, not just the draftsman," Hemenway said. "We can get involved and have deeper client relationships that are really more rewarding. It gives us a chance to step back, to look at what our role is and where we offer the most value."

Primerus in the Next 25 Years

This "real lawyering" is at the heart of what Primerus brings to clients.

"When you see that a firm is a member of Primerus, you know that it meets the highest of standards, without exception," Buchanan said. "But we go beyond even that. Primerus not only provides excellent legal services; it offers attorneys who are strategic partners, trusted advisors and good friends."

Dale Thornsjo, shareholder with Primerus member firm O'Meara, Leer, Wagner & Kohl in Minneapolis, Minnesota, said developing those trusted relationships with clients is why his firm first joined Primerus 10 years ago.

"We came on board because our firm very much believes that the concept of relationships is the most important aspect in the practice of law," Thornsjo said. "We felt Primerus' Six Pillars were very much the same values as ours. It fit with us, and it's been a very rewarding relationship for us."

As a member of the Primerus Defense Institute executive committee, he believes the future will allow Primerus firms to be on the leading edge of helping clients find the best value for legal advocacy and counseling. In the insurance industry, Thornsjo said, metrics and performance markers increasingly drive retention decision making.

"Metrics allow clients to more effectively see what the cost of legal service is and what the value is," he said. Thornsjo believes this trend will only benefit Primerus firms.

"Small and medium-sized law firms can and do provide similar quality, and many times superior quality, work as the major firms do," he said. "We have a better opportunity to represent clients when we not only have a great relationship with the client developed by and through Primerus, but we can also better appreciate their business needs driven by their internal metrics program."

Primerus also offers members the unique opportunity to collaborate to better meet clients' needs.

Arthur Roeca of Primerus member firm Roeca Luria Shin in Honolulu, Hawaii, said that since joining Primerus in 2009, he has been able to better serve his clients if they have a legal problem outside of Hawaii by referring them to fellow Primerus attorneys.

His work for Costco provides a perfect example. Roeca's firm was asked to step in as defense firm on a matter for Costco. After a successful resolution, Tony Jaswal, director of claims for Costco in Issaquah, Washington, wanted Roeca's recommendations for how to find other quality lawyers.

So Roeca put together a team of five Primerus colleagues from around the country—Chicago, San Diego, Tampa, New York and Seattle—to meet with Jaswal and his team. Jaswal later attended the PDI Convocation in Napa, California, and the next year, he brought a colleague as well.

Now, Jaswal is a member of the Primerus Client Resource Institute. Launched last April, the institute brings together in-house legal counsel, risk managers, claims managers and corporate executives responsible for legal affairs from around the world.

Jaswal said he currently works with about four Primerus law firms.

"Primerus is a great organization with very high caliber law firms," Jaswal said. "I'm pleased to have Primerus as a resource when I'm looking for legal representation."

He's also impressed with the quality of the Primerus events he has attended. "The time I have spent at Primerus events has been time well spent," he said.

Now, Jaswal shares his positive experience with Primerus with other corporate counsel.

"I encourage others to reach out to Primerus," he said.

Looking Ahead

As Primerus moves into the next 25 years, Buchanan said the society aims to achieve the ambitious goal of "becoming the finest and largest provider of legal services in the world."

The path to achieving this goal means continuing much of the same efforts of the past 25 years—finding the finest small to mid-sized law firms in cities around the world and banding them together to better serve clients with quality legal work for reasonable fees. Included in this path are internal goals, such as continuing to develop state-of-the-art internet and social media marketing services that make it easier for clients to find Primerus firms; expanding the Primerus Client Resource Institute to foster deeper relationships between clients and their Primerus member attorneys; and continuing to grow around the world. Primerus also plans to expand its efforts to provide outstanding continuing legal education for members and clients, based on interest from those who have participated in Primerus educational events in the past.

Primerus recently appointed a Long Range Planning and Succession Committee to begin the hard work of planning for the future.

"When we founded Primerus 25 years ago, we started with a handful of attorneys who were concerned about the deterioration of the ideals of the legal profession we all loved," Buchanan said. "We wanted to do something about it, and we did. Now, Primerus is a global organization with 180 member firms in nearly 50 countries. I can only imagine what the next 25 years will bring as continue to re-imagine the legal profession we all want for the future."

Don't Fight a Two-Front War

So you've been sued in a business dispute, and there are claims of fraud, conversion or embezzlement. Your civil suit has possible criminal implications. If no criminal action has been commenced, the defendant must be mindful of the risk of future criminal exposure. That could mean asserting the Fifth Amendment Privilege.

If a criminal action has been commenced, don't fight a two-front war. A defendant must consider filing a motion to stay the civil action. In California, the Ninth Circuit's opinion in *Keating* sets forth the factors courts will examine in considering a Motion to Stay. If granted, a motion to stay could profoundly improve your chances of success in both actions.

Potential criminal exposure can be crippling to the defense of a civil case. If you invoke your Fifth Amendment privilege, you cannot tell your version of the disputed events. On the other hand, if you don't invoke the privilege, you expose yourself to potential criminal prosecution and the possibility of being sentenced to jail. The solution is to seek a stay of the civil action until the criminal case is concluded.

In the western U.S., the seminal case on the stay issue is *Keating v. Office of Thrift Supervision* (9th Cir. 1995) 45 F.3d 322. In *Keating*, the Ninth Circuit established five factors that courts should consider when a stay is sought:

1. The interest of the plaintiff in proceeding expeditiously with the litigation or any particular aspect of it, and the potential prejudice to plaintiff of a delay;
2. The burden which any particular aspect of the proceedings may impose on defendants;
3. The convenience of the court in the management of its cases, and the efficient use of judicial resources;
4. The interests of persons not parties to the civil litigation; and
5. The interest of the public in the pending civil and criminal litigation.

One factor is relatively easy to establish. The burden imposed on the defendants if a stay isn't ordered is the reason to seek a stay in the first place. The moving defendant need only show that absent a stay, the defendant will be forced to choose between his Fifth Amendment privilege or defending himself in the civil case.

Although identified in *Keating*, some of the factors either aren't an issue or are also easily established. The interests of persons not parties to the subject action are often absent from a case. So, too, is the interest of the public in the particular criminal and civil litigation.

Similarly, the "convenience of the court" is merely a reiteration of an accepted principal that trial courts have inherent power to stay a case in the interests of justice and to promote judicial efficiency. A party opposing a stay would be hard pressed to convince a trial judge that it would be more convenient to have two cases proceeding simultaneously, with all of the attendant problems it would pose for pre-trial discovery and trial.

The one *Keating* factor that is likely to prompt a strenuous opposition from the plaintiff is "the interest of the plaintiff in proceeding expeditiously." It goes without saying that virtually every plaintiff wants his or her case to proceed expeditiously and will argue against the delay that would be caused by a stay. There are, however, several arguments that the defendant can offer to blunt plaintiff's opposition.

First, the amount of delay caused by a stay is entirely a matter of conjecture. Many criminal cases are resolved without a trial and some are dismissed outright for one reason or another (key witness lost, statute of limitations, etc.). In those cases the delay could be minimal.

Dennis J. Kelly

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Moreover, such speculation about delay to the civil case while awaiting the outcome of the criminal case is contrary to the Sixth Amendment right to a speedy criminal trial in the U.S. Constitution.

In contrast, a plaintiff in a civil case does not have a "right" to a speedy trial. There are many factors which go into when a civil case is set for trial. That is why many courts have trial setting conferences and why the general rule is that setting the date for trial is left to the sound discretion of the court.

Beyond the *Keating* factors, it is important to recognize that a business entity (as opposed to an individual) does not possess a Fifth Amendment right against self-incrimination. Typically, one or more company officers or high-level employees have criminal exposure along with the company. There is case law allowing a stay to be expanded to include a company if certain circumstances warrant it. The individual facing criminal exposure must be *the* source of information that is important to the company's defense. It must be shown that if that individual invokes his or her Fifth Amendment privilege, the company will be unable to adequately defend itself. In that situation, the fate of the company is so dependent upon the individual, courts will usually extend the stay to cover the company.

It is likely that a plaintiff will oppose extending the stay to include the company by arguing that there are other individuals with sufficient knowledge that aren't facing criminal exposure who can testify and not invoke the Fifth Amendment privilege. In order to overcome this argument, you must show that regardless of the availability of other witnesses, the unavailability of a key witness due to the Fifth Amendment critically harms the company's defense. In addition, there is a practical argument favoring extending the stay to the company. It makes little, if any, sense to issue a stay covering an individual defendant, yet allow the civil case to proceed against the company. How could that possibly work in practice?

The surrounding circumstances can impact the strength of a motion to stay a civil action. The motion's chance of success is greater where a criminal action has been commenced as opposed to a situation where it hasn't but is an obvious risk. Often times the plaintiff in the civil action is also the complaining party that caused the commencement of the criminal action. That fact bears mention in the stay motion, as it can be argued that the plaintiff caused the defendant's dilemma.

A plaintiff may even go so far as to try to use the criminal case for an advantage in the civil case. For example, a plaintiff might try to extort a settlement arguing it would earn the defendant leniency in the criminal action for making "restitution." Such conduct is improper per the California Rules of Professional Conduct, Rule 5-100. If that were to occur, it would certainly strengthen a motion to stay the civil action.

A motion to stay a civil action until the disposition of a parallel criminal action is well worth the effort. Each case can be dealt with separately and on its own merits. More importantly, if granted, a motion to stay allows for a full and complete defense of both cases. P

Employers, Get Ready: Paid Family Leave is Coming to a Jurisdiction Near You

Historically in the United States, paid leave time has been a discretionary benefit that employers could choose to offer, or not. In most states and at the federal level, sick leave and other forms of paid time off were matters of employer policy and/or collective bargaining, not state and federal law. On the one hand, employers had the flexibility to design a benefit system that was appropriate for their business; on the other, employees who needed time off for serious illness or to care for a family member had little or no legal protection.

Cindy Lapoff

Cindy Lapoff has over 20 years of experience in labor and employment litigation and consultation for clients throughout upstate New York and nationally. Her areas of expertise encompass a wide range of employment-focused legal matters, including ERISA, the Affordable Care Act ("Obamacare"), wage and hour matters including class and collective actions, harassment and discrimination cases, and labor union arbitrations.

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In 1993, President Bill Clinton signed the Family Medical Leave Act (FMLA), which provides a maximum of 12 weeks of unpaid job-protected leave annually to an employee who is absent because of his or her own serious health condition or that of a family member. The FMLA applies to employers with 50 or more employees. States are free to enact their own, more expansive standards, and many have done so over the years.

Now in 2017, paid leave programs of various kinds are popping up in cities and states throughout the country. Some of these programs are targeted at providing paid sick leave to employees; others address both paid sick leave and family medical leave. As more and more states enact their own paid leave laws, employers with employees in multiple jurisdictions may find themselves subject to a variety of requirements with little rhyme or reason.

This past spring, the White House expressed interest in enacting some form of federal paid family leave, and a rumor is circulating that House Republicans may introduce a bill to exempt employers who provide a certain amount of paid leave time from the growing patchwork of city and state laws. This article will review in depth the provisions of the New York Paid Family Leave Law, which is scheduled to take effect January 1, 2018.

New York Joins the Ranks of States Offering Mandatory Paid Family Leave

As of January 1, 2018, New York will join California, New Jersey and Rhode Island in implementing a comprehensive paid family leave benefit covering most private sector employees. This employee-funded, job-protected, paid leave benefit will be mandatory for private sector employees (unless they opt-out—see below), while public-sector employers will be able to opt their employees in if they choose. Collectively-bargained employees can only be excluded if they have access to a benefit that is at least as favorable as the state-mandated paid family leave law (PFLL).

Unlike the FMLA, this new law will apply to most private sector employers in New York regardless of how many employees they have. Employers who are accustomed to administering leave under the FMLA will find many of the PFLL provisions familiar. Smaller employers may be more challenged by aspects of this law. Employees will need education regarding this new benefit and how it can be used. Aligning existing leave laws and benefits with the new PFLL will present challenges to all.

The PFLL will be administered by the Workers Compensation Board, which issued proposed regulations on February 22, 2017. Revisions to the proposed regulations, with an additional 30-day comment period, were issued in May, and the regulations were finalized July 10.

What Can Leave Time Be Used For?

The PFLL is *not* a paid sick leave program. Under the PFLL, leave time can be used only for a family illness or other specified situations, including:

- Providing care for close family members with serious health conditions

- Bonding with a newborn during the first 12 months following birth or adoption (even if the child was born or placed for adoption before January 1, 2018)
- Meeting birth, adoption or foster care obligations
- Attending to a qualifying exigency (as defined under the federal FMLA) arising from the service of a family member in the Armed Forces of the United States.

"Family members" are defined as spouse, domestic partner, child, parent, parent-in-law, grandparent or grandchild.

Who is Eligible?

Full-time employees who work 26 weeks for a covered employer are eligible to file a claim for leave. Part-timers (defined in the regulations as those who work less than 20 hours per week) are eligible after working 175 days for a covered employer within a 52-week period. Claims will be filed with the insurance carrier and must be supported with medical or other relevant proof.

What is the Timeline and How Much is the Benefit?

PFLL is to be phased in over four years. In 2018, qualifying employees will be eligible for eight weeks of PFL; this will increase by one week per year and by 2021, the benefit will reach its maximum of 12 weeks.

The benefit amount will start at 50 percent of the employee's average weekly wage, and will rise each year through 2021 until it equals 67 percent of the employee's average weekly wage. Benefits are capped by the statewide average weekly wage published by the state Department of Labor each year.

Who Pays for It?

The leave benefit will be paid for with post-tax employee payroll deductions that will fund premiums for an insurance policy purchased by the employer through their disability carrier. Employers may also choose to self-insure. The initial payroll deduction is .126 percent of an employee's average weekly wage, and is capped at .126 percent of the statewide average weekly wage, which is calculated each year by the New York State Department of Labor. In 2017, the state average weekly wage is $1305.92, so the maximum deduction per week will be $1.64. Employers may, but are not required to, begin withholding contributions after July 1, 2017 for coverage to begin effective January 1, 2018.

What Are Employers Required to Do?

The proposed regulations require employers to continue health insurance coverage (the employee is still liable for his portion of the premium) and to restore the employee to the same or a comparable position without loss of benefits that would have accrued while he was on leave. Employers are also required under the proposed regulations to post notices and provide information to employees about PFLL in handbooks or other written policy documents, including information about how to file a claim.

Almost all employees are required to participate in the program, including part-timers. Employees who are not expected at the time of hire to work for 26 weeks or 175 days (such as seasonal workers) must be provided the opportunity to file an opt-out form and be exempt from the deductions. The employer will likewise be exempt from providing leave to these workers.

The proposed regulations provide that disputes related to eligibility, benefit rates and duration of paid leave will be resolved via arbitration. Discrimination and retaliation is prohibited and will be actionable under Section 120 of the Workers Compensation Law.

The proposed regulations provide significant penalties for employers who fail to obtain coverage, including fines based on weekly payroll, direct liability to employees for payment of benefits, and direct liability for the employee's health costs if the employer fails to continue medical coverage as required.

Next Steps

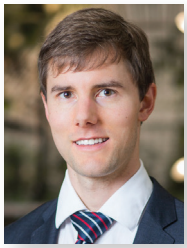
Employers with employees in New York need to be alert to the requirements of the PFLL. Employers who choose to insure this benefit will do so through their statutory disability policy. Employers may also choose to self-insure the benefit or offer more favorable benefits to their employees. Any policy changes should be reviewed by counsel knowledgeable about the PFLL.

A new informational website (ny.gov/programs/new-york-state-paid-family-leave) has been launched to provide guidance about the PFLL to employers, employees, medical providers and unions. The regulations are published on the website, along with a hotline for questions. Employers should anticipate questions from employees as the implementation date approaches, and revise and update leave policies to reflect the new requirements.

The Defend Trade Secrets Act: Year One

Jeff Horst

Michael Boutros



Cameron Ellis

Jeff Horst has a business litigation practice encompassing appeals, business torts, contracts, corporate governance, covenants not to compete, employment, entertainment, franchise, insurance coverage, intellectual property, officer and director liability, professional liability, securities litigation, shareholder disputes and trade secrets.

Michael Boutros handles a wide variety of business and complex litigation in the areas of business torts, appeals, contract, intellectual property, corporate governance, restrictive covenants, securities and trade secrets.

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One of the most significant developments in the area of trade secrets is the recent passage of the federal Defend Trade Secrets Act (DTSA). Until 2016, trade secrets were the exception to the federal approach to protecting intellectual property. In this article, we give an overview of the DTSA, compare it to the Georgia Trade Secrets Act (GTSA), and note some of the case law developments in the first year since the DTSA's passage. While state law on trade secrets varies widely, a comparison of the DTSA to the GTSA will illustrate some of the possible nuances in the pre-DTSA state trade secrets regimes.[1]

Applying to misconduct occurring after May 11, 2016,[2] the DTSA amends the Economic Espionage Act of 1996 to create a federal private civil cause of action for theft or misappropriation of trade secrets, provided the trade secret "is related to a product or service used in, or intended for use in, interstate or foreign commerce."[3] Like the origins of the GTSA, the DTSA was Congress' much-anticipated response to the growing problem and harm caused by trade secret theft. The DTSA passed with nearly unanimous congressional support.

The DTSA does not preempt existing state law, and so it will not preempt the GTSA.[4] Unlike the GTSA, it also does not preempt separate claims for tort, restitution or other civil remedies under Georgia law for misappropriation of trade secrets. Rather, the DTSA exists alongside state law and is a separate cause of action that provides additional protection for businesses' trade secrets.

Like the GTSA, the DTSA prohibits the actual or threatened misappropriation of trade secrets, and it provides for a number of remedies, including: *ex parte* seizure;[5] injunctive relief; actual damages; damages

for unjust enrichment; in lieu of damages, a reasonable royalty for unauthorized disclosure or use; exemplary damages up to two times the amount of awarded damages in cases of willful or malicious misappropriation; and reasonable attorneys' fees in cases of willful and malicious misappropriation.[6] Importantly, attorneys' fees are also available to a defending party who is able to establish that a claim for misappropriation was made in bad faith.[7]

The DTSA also provides civil and criminal whistleblower immunity to individuals in three key instances: (1) for any confidential disclosure of a trade secret to a government official for the sole purpose of reporting or investigating a suspected violation of law; (2) for a disclosure of a trade secret that is made in a complaint or other document filed in a lawsuit or proceeding if the filing is made under seal; and (3) for disclosing a trade secret to an attorney or in a court proceeding in a retaliation lawsuit brought against an employer for reporting a suspected violation of law, provided that any document containing a trade secret is filed under seal and not disclosed except pursuant to court order.[8]

Business owners must publicize this whistleblower immunity to an employee before receiving any award of exemplary damages or attorneys' fees in an action against the employee.[9] Specifically, the DTSA creates a requirement for employers to provide notice of this immunity "in any contract or agreement with an employee that governs the use of a trade secret or other confidential information."[10] The notice requirement may be satisfied by providing a cross-reference to a policy document provided to the employee that sets forth the employer's reporting policy for a suspected violation of law, and it applies to contracts or agreements entered into or updated after the effective date of the DTSA (May 11, 2016). For purposes of this notice requirement, "employee" includes not just employees, but contractors and consultants as well.[11]

There are several key distinctions between the DTSA and the GTSA. Most significantly, the DTSA permits, under extraordinary circumstances, ex parte seizure of property necessary to prevent the propagation or dissemination of the trade secret.[12] The property potentially subject to seizure goes beyond just the trade secrets themselves.[13] The party requesting such extraordinary relief must submit an affidavit or verified complaint satisfying the rigorous requirements of the statute, and the court must set a hearing "at the earliest possible time, and not later than seven days after the order has issued" unless the seized party consents to another date.[14] To award this "extraordinary" relief, a court must make specific findings beyond the requirements for an injunction or temporary restraining order.[15] Specifically, a court must find that any other form of equitable relief could not satisfy the need for relief "because the party to which the order would be issued would evade, avoid, or otherwise not comply with such an order."[16] In the DTSA's first year of passage, courts were reluctant to find extraordinary circumstances and to grant requests for seizures.[17]

Although injunctive relief is permitted, an injunction may not "prevent a person from entering into an employment relationship," and any conditions or restrictions placed on any employment "shall be based on evidence of threatened misappropriation and not merely on the information the person knows."[18] This is often referred to as the "inevitable disclosure" doctrine, *i.e.*, enjoining a former employee from entering into an employment relationship based on the argument that the individual will "inevitably disclose" the alleged trade secrets as part of his or her new employment.

The DTSA provides only a three-year statute of limitations from the date of discovery or when such misappropriation should have been discovered, as opposed to five years under the GTSA. Yet the GTSA provides no whistleblower immunity.

So far, state and federal courts in Georgia and the Eleventh Circuit tend to analyze DTSA claims alongside state trade secret claims without noting any differences.[19]

In determining whether to bring DTSA claims in federal court, a Georgia practitioner should consider the following, among other considerations: (1) how soon the federal court could be expected to act on a request for emergency relief compared to a state court; (2) the existence of state law claims that could not be brought because of the GTSA's preemption; (3) the need for nationwide discovery; (4) the necessity and practicality of an *ex parte* seizure; (5) whether the specific trade secret claims actually involve products or services in interstate commerce;[20] and (6) any relevant substantive differences in the statutory language of the DTSA compared to the GTSA.[21]

1 The GTSA is modeled on the Uniform Trade Secrets Act, which essentially all states excepting New York and Massachusetts have—with some tweaks—enacted.

2 *See Adams Arms, LLC v. Unified Weapon Sys., Inc.*, No. 8:16CV1503T33AEP, 2016 WL 5391394, at *6-*7 (M.D. Fla. Sept. 27, 2016) (denying the motion to dismiss but limiting the DTSA claim to prohibited acts after the effective date of the DTSA).

3 18 U.S.C. § 1836(b)(1).

4 18 U.S.C. § 1838.

5 18 U.S.C. § 1836(b)(2).

6 18 U.S.C. § 1836(b)(3).

7 18 U.S.C. § 1836(b)(3).

8 18 U.S.C. § 1833(b).

9 18 U.S.C. § 1833(b)(3).

10 18 U.S.C. § 1833(b)(3)(A).

11 18 U.S.C. § 1833(b)(4).

12 18 U.S.C. § 1836(b)(2).

13 18 U.S.C. § 1836(b)(2)(A).

14 18 U.S.C. § 1836(b)(2)(B).

15 18 U.S.C. § 1836(b)(2)(A)(ii).

16 18 U.S.C. § 1836(b)(2)(A)(ii)(I).

17 *See, e.g.*, *OOO Brunswick Rail Mgmt. v. Sultanov*, No. 5:17-CV-00017-EJD, 2017 WL 67119, at *2 (N.D. Cal. Jan. 6, 2017) ("[S]eizure under the DTSA is unnecessary because the Court will order that [defendant] must deliver these devices to the Court at the time of the hearing[.]").

18 18 U.S.C. § 1836(b)(3).

19 *See, e.g.*, *M.C. Dean, Inc. v. City of Miami Beach, Florida*, 199 F. Supp. 3d 1349, 1357 (S.D. Fla. 2016) (dismissing both state and DTSA trade secret claims); *see also Agilysys, Inc. v. Hall*, No. 1:16-CV-3557-ELR, 2017 WL 2903364, at *11 (N.D. Ga. May 25, 2017) ("[H]aving found that Plaintiff's GTSA claim will proceed . . . Plaintiff's DTSA claim will also proceed[.]").

20 For example, the DTSA may cover negative know-how about processes that do not work.

21 For example, the GTSA defines "trade secret" to include "a list of actual or potential customers or suppliers" while the DTSA does not specifically include a customer list. Compare O.C.G.A. § § 10-1-761(4) *with* 18 U.S.C. § 1839(3). As another example, as noted, the DTSA—but not the GTSA—expressly limits injunctive relief that encroaches on one's ability to work. *Compare* 18 U.S.C. § 1836(b)(3)(A) *with* O.C.G.A. § 10-1-762.

Bitcoin and Blockchain Technology: What You Need to Know

Many have encountered the term Bitcoin in media stories of illegal transactions and ransomware payments. However, the prevalence of Bitcoin and its underlying blockchain technology presents growing and difficult challenges for even general practitioners.

What is Bitcoin?

Bitcoin is the first application of what is known generally as blockchain technology. Bitcoin is a computer protocol created in 2009 that can generally be described as a shared, digital ledger book. Units on the ledger are called bitcoins. Bitcoins are "mined" by owners of computer hardware that run the open-source Bitcoin program.

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A Federal Court described the purpose of the program as follows: "Bitcoin was designed to reduce transaction costs and allows users to work together to validate transactions by creating a public record of the chain of custody of each bitcoin."[1]

Transactions on the Bitcoin network are peer-to-peer, require no third party, are virtually instant and cannot be rescinded. Transactions are recorded and gathered in a "block" of transactions. The succession of blocks tied together through cryptography creates the "blockchain."

Because Bitcoin is open source, its technology is available for anyone to use. There are hundreds of variants of bitcoin with a variety of different features and uses.

(Generally, the term "Bitcoin" with a capital "B" is used to refer to the software and computer protocol. The term "bitcoin" with a lowercase "b" is used to refer to units of measure on the ledger book created by the Bitcoin software.)

Smart Contracts and Other Applications of Blockchain Technology

Blockchain technology has been applied to various fields. For example, a shared digital ledger book can be used by a number of banks as an alternative to ACH (automated clearing house) wire transfers that take time to prepare, send and confirm. One example is the R3 project, where Bank of America, Merrill Lynch and HSBC, as well as dozens of other financial institutions, are jointly developing distributed ledger technology for asset trading and interbank transfers.

Another application is "smart contracts." While claiming to be able to replace lawyers, smart contracts are agreements converted into software protocol that can be self-enforcing. When the money involved in an agreement is itself programmable, parties to a transaction can direct where the money goes under agreed-upon circumstances, without the intervention of a third party such as an escrow agent. One such program, known as BitHalo/BlackHalo, uses a double-escrow feature and a timing function. Ethereum is a program similar to Bitcoin that promises advanced contracts and programmable tokens.

Blockchain technology can be used to record the time and content of documents such as wills, deeds, contracts, insurance policies or messages. Another application includes logistics, whereupon an item can be assigned a token on a blockchain and participants in the production, transportation and sale of the item can track and contribute information throughout the process.

Problems with Bitcoin and Blockchain Technology

While it is virtually impossible to hack Bitcoin, it is possible to invade a computer that holds bitcoins, steal a private key and transfer bitcoins to a new wallet. Bitcoin's value often fluctuates wildly. Bitcoin and its variants are often used by criminals, smugglers and members of the "dark web" because of its pseudonymous nature. Recent examples include the use of bitcoin by the operator of the Silk Road website. More recently, ransomware such as WannaCry and Petya

programs cause computer files to be encrypted with the payment required for decryption.

One of the primary ways to obtain bitcoins is to purchase them on exchanges, but these exchanges are often unstable themselves with catastrophic results. Failures such as the Mt. Gox exchange based in Japan and the Cryptsy exchange based in Florida are two such examples which caused account holders to lose millions of dollars worth of coins. Consumer protection concerns gave rise to new regulatory efforts.

Regulatory Issues

Bitcoin has always been subject to applicable money transfer laws by the U.S. federal and state governments, as well as other nations. Internationally, a number of countries have embraced the free use of digital currency while other countries, such as China and Russia, have discouraged it. Other nations such as Venezuela banned it entirely.

In the U.S., digital currencies such as bitcoin are legal and used for a variety of legal transactions. Due to the small cost in processing transactions, companies such as Microsoft, Overstock.com, Expedia.com, Gyft, Bloomberg.com and Dell computers accept bitcoins as payment.

As a store of value, the people or companies transferring bitcoins are often treated as money transmitters by U.S. regulators. The U.S. federal government requires those who commercially sell digital currencies to comply with the know-your-client and anti-money laundering regulations of the FinCEN and the Treasury Department.

State regulation varies wildly, ranging from the lack of any money transmitter statutes in states such as Montana and New Mexico, to the New York State Department of Banking and Finance "BitLicense" requiring developers and transmitters of virtual currencies (but not merchants accepting them as payment) to register, obtain approval, maintain bonds and closely follow prescribed procedures, all at significant cost. In July 2017, New Hampshire exempted virtual currency traders from money transmitter requirements. The SEC is developing guidelines and regulations of the issuance of new digital currencies known as "initial coin offerings" (ICOs). The Treasury Department and state regulators have in a number of states arrested and prosecuted individuals and companies selling bitcoins for failure to comply with federal or state money transmission laws.

Accounting and Tax Issues

Because bitcoin is not treated as official currency of any particular country, bitcoin and other digital currencies have been classified by the Internal Revenue Service (IRS) as capital assets that qualify for capital gains tax rates if held in the long-term. The tax basis in bitcoins is the cash purchase price. Fair market value (FMV) is considered and the prevalence of numerous exchanges allows the determination of FMV in U.S. dollars to be relatively easy. As with similar assets, taxable gain or loss in dollars received on the sale is considered. Gain can be long-term if owned for 12 or more months and wash sale rules apply for assets with a similar nature repurchased within 30 days. Bitcoin is treated no differently than an investment in any other asset such as his share of stock and no taxes due on the investment as it increases the value until the investment is actually sold in U.S. dollars or other official currency. Many digital currency exchanges help users maintain the complicated records needed to track the basis of their digital currency investments.

Digital Currencies in Law Practice

Bitcoin and other digital currencies are becoming a necessary part of the average attorney's legal practice. Its rise in use for payment and as an investment creates estate planning problems. Estate planning clients should disclose in great detail to their attorneys the locations of their digital assets, as well as the location of their private keys, whether in the form of a computer program or a hard copy known as a "paper wallet." Wills with provisions from the Uniform Fiduciary Access to Digital Assets Act can allow fiduciaries, personal representatives and trustees to access and control digital currency. Exchanges and other custodians of Bitcoin accounts can similarly be compelled to provide a fiduciary with records of the digital assets and access to such accounts.

Digital currencies also create opportunities for debtors, divorcees and others who hide assets. It is important that in the course of discovery, litigants serve interrogatories and requests tailored to virtual currencies. For example, demands should include references to disclosure of digital currencies and virtual currencies including, but not limited to, bitcoin. The requests should also identify any exchanges that have been used to purchase bitcoins in the past.

Bankruptcy and Uniform Commercial Code issues have also been presented by merchants who accept bitcoin. If bitcoin is neither money nor a deposit account, it may be considered to fall within the category of "general intangibles" which is defined as personal property not falling in any other category. Article 9 security interests may potentially attach bitcoins, even after they are transferred, to buyers in the ordinary course of business when the secured party perfected its security interest by filing a financing statement.[2]

According to a recent opinion issued by the Nebraska Ethics Advisory Panel, the Code of Professional Conduct allows attorneys to accept digital currencies such as bitcoins as payment for legal services so long as the fee charged remains reasonable under Neb. Ct. R. Prof. Cond. § 3-501.5(a) and volatility risk is mitigated.

Conclusion

Bitcoin is rapidly becoming a recognized form of payment internationally. The unique features of digital currencies and blockchain technology create new problems and the need for additional awareness by any attorney dealing with finances in a modern age.

1 SEC v. Shavers, Case No. 4:13-CV-416 (E.D. Texas, Sherman Division 2013)

2 See Schroeder, Jeanne L., Bitcoin and the Uniform Commercial Code, Benjamin J. Cardozo School of Law, Jacob Burns Institute for Advanced Legal Studies, Faculty Research Paper 458 (August 2015)

Going Old School: Lack of Subject Matter Jurisdiction Is a Thing, Again

Two reasons dominate why commercial litigators rarely challenge subject matter jurisdiction when defending business cases. First, absent federal jurisdiction, contract cases appropriately are decided in state courts of general jurisdiction, where plaintiffs usually file. Second, since a lack of subject matter jurisdiction can be raised by either party or the court, the right to challenge survives a delayed lightbulb click. So, there's little "speak now or forever hold your peace" worry.

But, a number of recent cases remind us that applying the pressure defense of this old school gem can shake the rafters of the old school gym. Seemingly, subject matter jurisdiction is making a comeback as it answers the age-old question believed to be posed by jurists: *How might we get rid of this case?*

From law school classes, lawyers remember that there are a couple of ways to challenge subject matter jurisdiction. One is whether *the court* can decide the type of case; the other is whether the court can decide a case when *this litigant* cannot assert the claims. Calling foul when litigants fail on this second play, state and federal courts have ejected plaintiffs and reminded us to reconsider asserting good ole Rule 12(b)(1).

How might a plaintiff fail to qualify? A party must have standing to assert the claims made in the complaint. Lacking a plaintiff with standing, the court cannot properly exercise subject matter jurisdiction. "If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Wilson v. Pershing*, No. COA16-803, filed 16 May 2017, 2017 N.C. App. LEXIS 388, quoting *Estate of Apple v. Commercial Courier Express Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005). Sounds reasonable, but you may think "how might this help me?" A typical inter-company dispute provides an easy example. Derivative actions require that an owner first make demand on the business to take action against another shareholder or member. If the demand is not given, or is insufficient, the complaining owner has no right to assert derivative claims. Hence, the court has no subject matter jurisdiction. *See Petty v. Morris*, N.C. Super. Ct. Dec. 16, 2014, Order of Hon. James L. Gale, Chief Special Superior Court Judge for Complex Business Cases, 2014 NCBC 66, 2014 WL 7591073 (recognizing standing requirement but denying dismissal where demand made). [If you find this scenario riveting, take a look at the 7th Circuit case of *Doermer v. Callen*, 847 F.3d 522, 2017 U.S. App. LEXIS 1807, in which the appellate court upholds the district court's dismissal of a derivative suit, but notes that the shareholder-standing rule is not technically a subject matter jurisdiction argument under U.S. Const. art. III., but rather is addressed as prudential jurisdiction. Still works.]

A second example of a challenge to standing was the basis of the 2016 U.S. Supreme Court decision, *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016). Mr. Robins alleged a violation of the Fair Credit Reporting Act (FCRA) when Spokeo, alleged to be a consumer reporting agency, published inaccurate information about him. A federal question existed. However, the district court dismissed the case for lack of subject matter jurisdiction. The Ninth Circuit disagreed. Considering Robins' assertion of a "bare procedural violation," the Supreme Court remanded the case to the Ninth Circuit to determine whether Robins suffered a "concrete and particularized" injury, required to give him standing to bring his claim.

A plaintiff who failed to exhaust administrative remedies provides a third example where subject matter jurisdiction blocks the shot. This played out recently in the Fourth Circuit, which upheld the district court's grant of a motion to dismiss mortgagors' claims against J.P. Morgan, which acquired the Washington Mutual mortgage through an FDIC receivership. Under the Financial Institutions Reform,

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Recovery and Enforcement Act of 1989 (FIRREA), an administrative claims process was established for the settlement of claims and liquidation of assets of the failed institution. Taking the floor of the wrong court, the plaintiffs never had a chance. With the deadline passed to file claims in the administrative process, the plaintiffs got slammed because "FIRREA operates as a jurisdictional bar to claims that parties did not submit to the FDIC's administrative process." *Willner v. Dimon*, 849 F.3d 93, 2017 U.S. App. LEXIS 2737.

A final example of a litigant lacking standing arises when plaintiffs make claims in another court after their bankruptcy. Remember that bankruptcy spawns a new creature, the "estate," which basically becomes the owner of all assets of the debtor, even contingent claims. Before, the North Carolina Court of Appeals was a plaintiff's claim against his employer. *Wiley and Gilman v. L3 Communications*, 795 S.E. 2d 580, 2016 N.C. App. LEXIS 1314, *cert. denied*, 797 S.E. 2d 17, 2017 N.C. LEXIS 185. The defendant had failed to answer and the lower court had entered judgment and an award in favor of Gilman, a plaintiff. If you think time had run out for the defendant, think again. Heaving from half-court, the defendant swished a miracle shot using Rule 12(b)(1). Judge Richard Dietz for the appellate panel found that Gilman lacked standing to sue for labor law violations because he had a pending Chapter 13 bankruptcy and had failed to inform the bankruptcy court (in his schedules or otherwise) of the existence of his legal claims. Those claims against the defendant would have been property of the estate and could have been pursued by Gilman or the trustee—*for the estate*. So, the claims were not Gilman's and thus Gilman had no standing. The judgment was vacated by the appellate court citing an old case, *High v. Pearce*, 220 N.C. 266, 271, 17 S.E.2d 108, 112 (1941): "[w]here there is no jurisdiction of the subject matter the whole proceeding is *void ab initio* and may be treated as a nullity anywhere, at any time, and for any purpose." Boom. Subject matter jurisdiction is what I'm sayin'.

And what about more remote plaintiffs? Those lacking privity? Ones who have not exhausted their contractual remedies? Ones whose claims are moot? Ones who can't link their damages to the wrong? Depending on the cause of action, such barriers also may prove insurmountable, resulting in dismissal for lack of subject matter jurisdiction.

What's cool about challenging subject matter jurisdiction using *the litigant's* shortcomings is that, unlike cousin 12(b)(6), other stuff can be presented to the court without converting the motion to a summary judgment. But, there is a catch. A dismissal based on lack of subject matter jurisdiction typically is without prejudice. Nonetheless, while some plaintiffs might return to the locker room to cook up a new game plan (for example, send a new demand to the business), others may lack a route to rehabilitation, or the game clock expired.

So, pull out your Converse Chucks, dust off your hornbooks, and scrutinize *all* your 12(b) defenses. An early or late dunk based on lack of subject matter jurisdiction could be your game changer. P

A New International Standard for Anti-Bribery Systems

ISO 37001—the newly created standard addressing anti-bribery management systems published by the International Standards Organization in 2016—is starting to be embraced by many countries and organizations, including major U.S. companies that may soon require the same of their suppliers.

Because the new standard offers practical guidance and clear auditable compliance measures to combat bribery, it is being promoted as an improved tool for management and enforcement authorities.

Companies and business associations are urging the U.S. and foreign governments to regard ISO 37001 compliance systems as a verifiable indication of compliance commitment meriting consideration in mitigating penalties.

The ISO 37001 standard is intended to address the growing international consensus for an improved system to combat bribery. By offering a framework of measurable compliance criteria that meet the needs of individuals, small and large companies, and governments, it aims to reduce confusion and subjectivity in interpreting and enforcing these laws.

This article discusses why the new standard may become one of the most important tools for businesses seeking to deal with issues of bribery and corruption.

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Anti-Corruption and Anti-Bribery Laws Are Expanding; Enforcement is Robust; and Detection is Easier

When first passed in 1977, the U.S. Foreign Corrupt Practices Act (FCPA) was one of the few active international anti-corruption regimes. It aimed to curtail corporate bribery of foreign officials, authorizing the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) to work in tandem to enforce the criminal and civil elements of the Act.[1] With increased recognition of the social costs of bribery and corruption—the World Bank estimates that roughly $1.5 trillion in bribes are paid each year equaling about 2 percent of global GDP[2]—many other countries have adopted similar laws. Notable among them are the United Kingdom Bribery Act, France's "Sapin II" law, Mexico's 2016 anti-corruption reforms, and China's wide-ranging and at times harshly-enforced efforts.

Enforcement of anti-bribery laws remains robust. In the U.S., there were over 50 FCPA actions brought by the DOJ and SEC during 2016, with nearly $2.5 billion in corporate fines and penalties collected, including several record settlements. Some cases involved enforcement authorities from multiple countries, such as the case against Brazil's Braskem and its corporate parent, Odebrecht, which yielded the largest penalty for a foreign bribery case in history, $3.5 billion collectively levied by U.S., Brazilian and Swiss authorities.

There is every reason to believe these enforcement trends will continue. In April 2017, U.S. Attorney General Jeff Sessions said at the annual Ethics and Compliance Initiative Conference that the DOJ "will continue to strongly enforce the FCPA and other anti-corruption laws."[3] In addition, anti-bribery enforcement is expanding because transactions are increasingly traceable due to proliferation of electronic banking and commerce, as well as enhanced government surveillance, enabling government investigators to more easily detect and prosecute corruption schemes.

ISO 37001 Is a Global Standard, Applicable in Multiple Jurisdictions

The U.S. experience with the FCPA has shown that there can be significant subjectivity in the interpretation, implementation and enforcement of national anti-bribery laws. Further, the shifting policies of enforcement authorities can create troubling and expensive uncertainties for even the most conscientious corporations struggling to comply with varying anticorruption laws and local customs. For example, DOJ announced a new policy with the September

2015 Yates Memorandum, saying it would "fully leverage its resources" to hold individuals accountable for corporate misconduct. DOJ may have deemed the policy announcement as helpful guidance but companies were left wondering what new legal burdens they faced.[4]

The new ISO 37001 standard not only provides clear measurable processes for businesses to adopt, it also is being promoted to DOJ as a tool for measuring an organization's commitment to compliance with relevant laws. In this way, the standard assists in both implementation and assessment of compliance when mitigating penalties.

Moreover, ISO 37001 is a global, rather than national, standard. According to Worth MacMurray, a member of the U.S. Technical Advisory Group that participated in its drafting, ISO 37001 was built on systems identified as "anti-bribery leading practices" by a project committee featuring persons from over 60 countries. Governments worldwide are implementing ISO 37001 to make it harder to hide bribes and payments. The United Arab Emirates' Classification Society took the lead in the Middle East and issued a certification to Robert Bosch, the "first anti-corruption standard of its kind" in the region. Entities in Peru, Singapore, Canada, Ecuador, Indonesia, Morocco, and the Philippines also have begun certifying under 37001.

With such rapid international adoption, a company engaged in international transactions can use 37001 to implement systems that address compliance obligations in multiple jurisdictions. Several major U.S. companies and audit firms also have announced their intent to seek certification under 37001 and will likely soon require the same of their suppliers. Microsoft, with an international supply chain, announced it will be the first to do so, as Vice President David Howard explained: "Corruption is a cross-border problem and demands a common language to help solve it." Walmart also is seeking certification.

U.S. trade groups are now studying ISO 37001 and Attorney General Sessions has reportedly discussed how the U.S. might treat companies that adopt the standard with the U.S. Chamber of Commerce and National Association of Manufacturers.

These developments suggest there is a global appetite for anti-bribery reform, which could lead to an unusually rapid cascade of ISO 37001 adoption.

Implementation of ISO 37001

The standard provides clear implementation processes and performance measures, removing much uncertainty about what individuals and companies must do to adhere to anti-bribery laws. MacMurray says the standard was "created by business, for business," and that it is not a "myopic, legalistic process." It addresses bribery by and of the organization, its personnel, and its business associates. It is designed for easy integration with existing corporate management processes, imposing what MacMurray described as "reasonable and proportionate risk-based implementation of financial and personnel controls, training, risk assessments, due diligence, monitoring and managerial leadership." The standard considers the organization's size and nature, geographical footprint, and business associates in assessing the appropriate systems for adoption. ISO 37001 is also designed to seamlessly mesh with other certification standards, like the widely popular ISO 9001 for quality management. Although MacMurray cautioned that ISO 37001 is not a "silver bullet" to prevent bribery, nor a "liability shield" against prosecution, it builds on well-understood foundations of business operations and methodologies to create credible anti-bribery systems that are an adaptable risk-based approach to developing compliance programs for organizations in any country, of any size, whether public or private.

Benefits of Certification

Like any ISO standard, participation in 37001 is voluntary, but earning a third-party certification can provide significant and tangible benefits for companies.

First, companies already subject to bribery investigations have incentive to certify under ISO 37001 and show that their hands are clean or that they are taking necessary preventative steps. Companies in the same sector as one under investigation also can benefit from taking precautionary steps. Similarly, governments, particularly those that have struggled with bribery, can reassure investors by requiring certification to win government contracts.

Second, companies operating in high-risk areas such as the Middle East and North Africa region, Central Asia, or elsewhere, have a strong incentive to seek certification. Clients who rely on subcontractors in high-risk regions stand to gain even more. MacMurray noted that companies do not have to certify organization-wide; instead, they can "stick their big toe into the compliance pool" by certifying high-risk parts of a business, such as regional sales operations.

Third, companies that are operating in traditional at-risk fields such as energy, pharmaceuticals or mining would likely benefit from certification. Companies that combine an industry risk with a geographical risk, such as oil companies operating in Central Asia, have multiple reasons to seek certification.

Fourth, given that ISO 37001 was just released last year, there is an opportunity at present for companies and individuals to assume a leadership role in global anti-bribery efforts for their respective industries. "Socially-conscious" investment and partnering are becoming increasingly important for both large and small companies as part of their branding.

Conclusion

There is a groundswell of support in the U.S. and worldwide for anti-bribery efforts, and ISO 37001 was designed to standardize existing best practices. This new standard presents an opportunity to certify for a host of legal, leadership and risk-based reasons.

1 Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. §§ 78dd-1, et seq. ("FCPA"), makes it unlawful to make payments to foreign government officials to assist in obtaining or retaining business.

2 The World Bank, "Combating Corruption," (May 11, 2017worldbank.org/en/topic/governance/brief/anti-corruption); see also IMF Staff Discussion Note: Corruption: Costs and Mitigating Strategies, (May 2016imf.org/external/pubs/ft/sdn/2016/sdn1605.pdf)

3 Jeff Sessions, Attorney General, Remarks at Ethics and Compliance Initiative Annual Conference (Apr. 24, 2017) (justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-ethics-and-compliance-initiative-annual?_ga=2.101723521.1282231261.1497450600-1991356329.1497450600).

4 Sally Quillian Yates, Deputy Attorney General, Memorandum: Individual Accountability for Corporate Wrongdoing (Sep. 9, 2015) (justice.gov/archives/dag/file/769036/download)

Social Media Endorsements in the Age of Fyre

On April 27, 2017, thousands of affluent millennials descended on the Bahamian Island of Great Exuma to attend a three-day concert event known as the Fyre Festival. Paying upwards of $12,000 a ticket, concertgoers were promised an ultra-glamorous, highly-exclusive Coachella alternative that was to include "first-class culinary experiences and a luxury atmosphere," along with performances by G.O.O.D. Music, Major Lazer, Migos and more. What they got instead were Styrofoam box lunches, disaster relief tents and feral dogs.

Not surprisingly, a flurry of lawsuits against the festival's promoters promptly followed—six at last count—each seeking millions of dollars in damages. Interestingly, in addition to the promoters, one of these lawsuits also takes aim at a number of unnamed Doe defendants for allegedly engaging in unfair trade practices by endorsing the event on social media without disclosing their financial interest.

This allegation springs from the almost exclusive reliance by the festival's promoters on social media influencers to market the event. The promoters paid these celebrity influencers, or "Fyre Starters," as they were called in the festival's leaked pitch deck, including models Kendell Jenner, Emily Ratajkowski and Hailey Baldwin, hefty sums for their Instagram stamp of approval. (Jenner, in particular, reportedly received $250,000 in exchange for a single promotional Instagram post.) In virtually no case, however, did these influencers disclose that they had been paid.

As the above lawsuit indicates, by failing to disclose their financial interest, these influencers likely ran directly afoul of the Federal Trade Commission (FTC). According to the FTC's Endorsement Guides, anytime there is a "material connection" between a person endorsing a product and the advertiser, "that connection should be clearly and conspicuously disclosed, unless it is already clear from the context of the communication." A "material connection," in turn, is defined by the FTC to include "a business or family relationship, monetary payment or the gift of a free product."

Rampant non-compliance with the FTC's Endorsement Guides is nothing new. Indeed, just one month prior to the ill-fated Fyre Festival, the FTC sent letters to 90 celebrities and social media influencers concerning this very issue. While the specifics of each letter varied, the FTC's basic message was the same: Anyone using their fame to promote products must disclose a "material connection" between the endorser and the product's marketer.

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It pays to be alert here, lest one be misled into a false sense of complacency and conclude that these actions by the FTC amount to little more than yet another bureaucratic exercise—all bark and no bite. Despite the seemingly innocuous choice of title, the FTC's misnomered "guides" are actually codified regulations located in the Code of Federal Regulations (16 CFR § 255 et seq., for those keeping track at home). These regulations, in turn, are promulgated by the FTC pursuant to 15 USC § 45, which empowers the Commission to prevent the use of "unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."

In other words, rather than merely serving as a friendly reminder of best practices, the FTC's Endorsement Guides carry the full force of law. The penalty for their infraction? Up to $16,000 per violation.

Unfortunately, given the increasingly scattered nature of online influencers, it becomes very difficult to determine what violates the FTC rules. In the case of the Fyre Festival, only Emily Ratajkowski included "#ad" in her post to indicate that it was sponsored content. Is this enough?

According to the FTC, maybe.

Then again, maybe not.

To help answer this question, consider a recently-issued public statement by the FTC, wherein the Commission observes that "when multiple tags, hashtags or links are used, readers may just skip over them, especially when they appear at the end of a long post—meaning that a disclosure placed in such a string is not likely to be conspicuous." In addition, the Commission points out that "consumers viewing Instagram posts on mobile devices typically see only the first three lines of a longer post unless they click 'more,' which many do not." Thus, says the FTC, endorsers "should disclose any material connection above the 'more' button."

In the case of Ratajkowski's "#ad" hashtag then, the question of compliance likely turns on whether it stood alone, or whether it was part of a longer string, and/or whether it appeared above or below the "more" button. If alone and above, it likely complied. If it failed to satisfy either of these conditions, it probably didn't. Then again, depending on the circumstances, maybe it did.

So much for guidance.

Fortunately, thanks to Instagram, brands and influencers looking to avoid the FTC's wrath are not left completely in the dark. In the wake of the Fyre Festival, the social media juggernaut announced a new feature intended to make those hidden hashtags easier to spot: a "Paid Partnership With" tag that easily alerts users that a post has been paid for. Best practices dictate taking advantage of this feature, as it could well become the gold standard of compliance once users become accustomed to seeing it.

Of course, whether or not the new Instagram feature will ultimately satisfy the FTC is something only the Commission itself can decide. Hopefully, the public will get some clear guidance on this question soon. Just don't expect it to come from the FTC.P

Arbitration Agreements in the Employment Context

The practice of mandating arbitration of employment disputes has become widespread. While some employers offer employees the ability to "opt out" of mandatory arbitration, many require that employees agree to arbitration as a condition of employment. Whatever the precise structure of an arbitration agreement or policy, before proceeding, it is important to understand the advantages and disadvantages of resolving these disputes outside of a judicial forum.

Many of the benefits of arbitrating employment disputes are well known, and are the same as would apply in a commercial setting. Arbitration proceedings can yield results more quickly than traditional litigation, especially since there are limited grounds to appeal the decision of an arbitrator. In addition, many employers prefer employment disputes to be decided by an arbitrator rather than a jury, fearing that jury sympathies may lie with employees. Likewise, arbitration usually offers the opportunity to maintain the confidentiality of employment disputes. Finally, many arbitration agreements or policies include class or collective action waivers, which limit the ability of employees to bring anything other than individual claims. The enforceability of these class or collective action waivers have been the subject of substantial controversy, and the United States Supreme Court is set to rule on the issue in its next term.[1]

While there are advantages to arbitration, it is important not to overlook its disadvantages. Arbitration can be very expensive. In addition to administrative fees, parties to an arbitration agreement must pay the arbitrator. Arbitrators usually charge hourly fees similar to those charged by attorneys; a week-long arbitration can cost in excess of $20,000 in arbitrator fees alone. Courts generally will not enforce an arbitration agreement that would require an employee to bear a substantial portion of these costs on the grounds that it does not provide the employee meaningful access to a forum in which to bring claims. As a result, in the employment context, the employer generally bears the most if not all of the costs of the arbitration.

Another potential disadvantage to arbitration is the lack of appellate rights. If an arbitrator misapplies the law or makes an excessive damages award, there is likely no remedy beyond asking the arbitrator to reconsider. Under the Federal Arbitration Act (FAA), the following are the limited grounds on which a court may decide to vacate an award:

1. the award was procured by corruption, fraud or undue means;
2. there was evident partiality or corruption in the arbitrators;
3. the arbitrators were guilty of misconduct in refusing to postpone the hearing or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
4. the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

While arbitration is often billed as a streamlined dispute resolution process, it too can become bogged down in procedural and discovery matters.

Edward P. Timmins

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Moreover, arbitration generally requires a trial to resolve the dispute because arbitrators are often not willing to grant motions to dismiss or for summary judgment. These factors often work to increase the time and expense needed to resolve employment disputes.

Finally, if an employee files a case in a judicial forum, the employer must incur fees in seeking to compel arbitration and in defending the validity of the arbitration agreement. If the court denies the motion, the employer may appeal; if the motion is granted, however, the employee has no right to appeal that decision.[3]

If, after weighing the advantages and disadvantages of arbitration, an employer decides to implement a policy to arbitrate employment-related disputes, the employer should consider the following steps to reduce the prospects of a successful challenge to the validity and enforceability of the agreement or policy. First and foremost, the agreement should be in writing and signed by the employee (this can include the employee's signed agreement to abide by the employer's arbitration or dispute resolution policy). Agreeing to arbitration can be made a condition of employment, but the prospective employee should be made aware of and explicitly agree to the arbitration policy. It is prudent to include an explanation of the basic features of arbitration as well as the fact that agreeing to arbitration means that the employee is giving up his or her right to have a dispute heard by a jury. Some companies even go so far as to allow an employee the opportunity to "opt out" of the arbitration agreement, and also provide that no employee will suffer retaliation for exercising an opt out right. Employers should also be careful not to include a broad reservation of rights to amend or alter the arbitration agreement or policy, as such provisions have been used to invalidate arbitration agreements as illusory.[4]

The arbitration agreement or policy should specify the venue as well as applicable procedural rules. The American Arbitration Association has adopted a comprehensive set of Employment Arbitration Rules and Mediation Procedures, which can provide a useful framework for resolving disputes. The agreement or policy should also:

- specify the qualifications and number of arbitrators;
- specify the employees to be covered;
- specify the nature of the claims to be covered;
- provide time frames for filing a claim that are consistent with applicable statutes of limitation;
- provide for fair and adequate discovery;
- allow for the same remedies and relief that would have been available to the parties had the matter been heard in court; and
- state clearly that employees are not precluded from filing complaints with federal, state or other governmental administrative agencies.[5]

Finally, the agreement or policy should specify applicable law. While the FAA preempts conflicting state laws, some state laws set forth procedural rules that are consistent with the FAA and that may offer provisions that are attractive to companies. Colorado law, for instance, precludes awards of exemplary damages in an arbitration.[6] While this statute likely would not apply to preclude a punitive damages award in a federal employment discrimination case, express adoption of Colorado law could preclude the award of punitive damages for state law claims.

Before adopting a dispute resolution policy that includes arbitration of employment claims, employers should carefully consider the advantages and disadvantages of litigating those claims outside of a judicial forum. Arbitration agreements need to be carefully crafted to withstand judicial challenge, and counsel should be consulted to determine the best course of action under applicable state and federal laws. P

1 In 2012, the National Labor Relations Board concluded that an arbitration agreement containing a class action waiver "unlawfully restrict[ed] employees' Section 7 right to engage in concerted action for mutual aid or protection, notwithstanding the Federal Arbitration Act, which generally makes employment-related arbitration agreements judicially enforceable." *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012). The Fifth Circuit Court of Appeals disagreed, and the Supreme Court granted the NLRB's petition for writ of certiorari. The Court also agreed to hear two other cases raising the same issue, *Epic Sys. Corp. v. Lewis* and *Ernst & Young LLP v. Morris*.

2 9 U.S.C. § 10. Employers and employees may agree to the application of state law to their arbitration agreement. State arbitration laws generally provide similar limited appellate rights.

3 9 U.S.C. § 16.

4 *Carey v. 24 Hour Fitness, Inc.*, 669F.3d 202 (5th Cir. 2012).

5 The AAA Checklist to Drafting Alternative Dispute Resolution Clauses for Employment Arbitration Programs (American Arbitration Association) (available at adr.org).

6 C.R.S. § 13-21-102(5).

Cybersecurity: It's All About the Holes

Cybersecurity is about what is not secure. It's about the blind spots, the weaknesses, the potential problems with the systems and the people. These are things many businesses don't think about because they think someone else is thinking about it, or worse, they haven't considered it at all. It's not about the security so much as it is the vulnerability. Someone has to be able to spot the vulnerability before it gets exploited. All business leaders should be thinking about good cybersecurity practices because data is valuable, be it customer Personally Identifiable Information (PII) that must be legally protected in the vast majority of states, or specialized knowledge and techniques, such as intellectual property or trade secrets.

When some business people consider cybersecurity, they may think of something the "IT guy" or specialized computer programs address, when, actually, the opposite is true. Yes, the IT department procedures and data security protocols must be cutting edge, but the real danger is in complacency, the failure to keep up with changes and, now, the availability of information about the user, which can be exploited as easily as outdated encryption or an old server. Everything is secure until someone breaches it, and when that someone has nothing better to do all day than to let their computers search for vulnerabilities on your computers, you have the potential for serious cyber-insecurity.

Hackers are criminals. They are thieves and terrorists, and they are getting better at what they do, which is stealing, ransoming and exploiting insecure data. Unfortunately, they love the data from businesses because it tends to contain sensitive personal information that they can sell, such as credit card numbers and banking information or ransom, such as an entire database or operating system, and disrupt the whole company. The worst part is that criminals are using public information to make the computer systems easier targets. Several recent breaches included the use of information from employee social media accounts and company websites to make it appear as though the message containing the malware, spyware, virus or worm came from a legitimate source. Unfortunately, even good employees can fall prey to clever infiltration schemes.

To stay ahead of potential infiltration, business professionals must look at the data system like a hacker. Don't think about how secure your network, software applications or web portals are; instead, look at how secure they aren't. What information is there and how could someone get it? For example, customer portals and payment systems are wonderful tools, but many industries are way behind when it comes to cybersecurity. Businesses have gotten far better at gathering and data-mining customer information through these vehicles than they are about protecting it. A cyber-criminal works on that portal day and night, which means it needs to be constantly monitored to avoid infiltration.

If much of this information seems foreign to you, or if you think this stuff only happens to other businesses, then you probably have some holes in your system. To initiate an effective cyber-security plan every business must: (1) find everywhere data resides or is transmitted; (2) ask questions of IT professionals and require a full analysis; (3) educate the entire workforce.

For any useful analysis, it must look at both ends of the transaction. Consider the network storing and/or transmitting the data and the people who input and/or use the data. People and technology have to work together to form a successful cybersecurity system. The network must be constantly monitored. Whether you have internal or external IT professionals at your disposal, you have to ask questions regularly because the status

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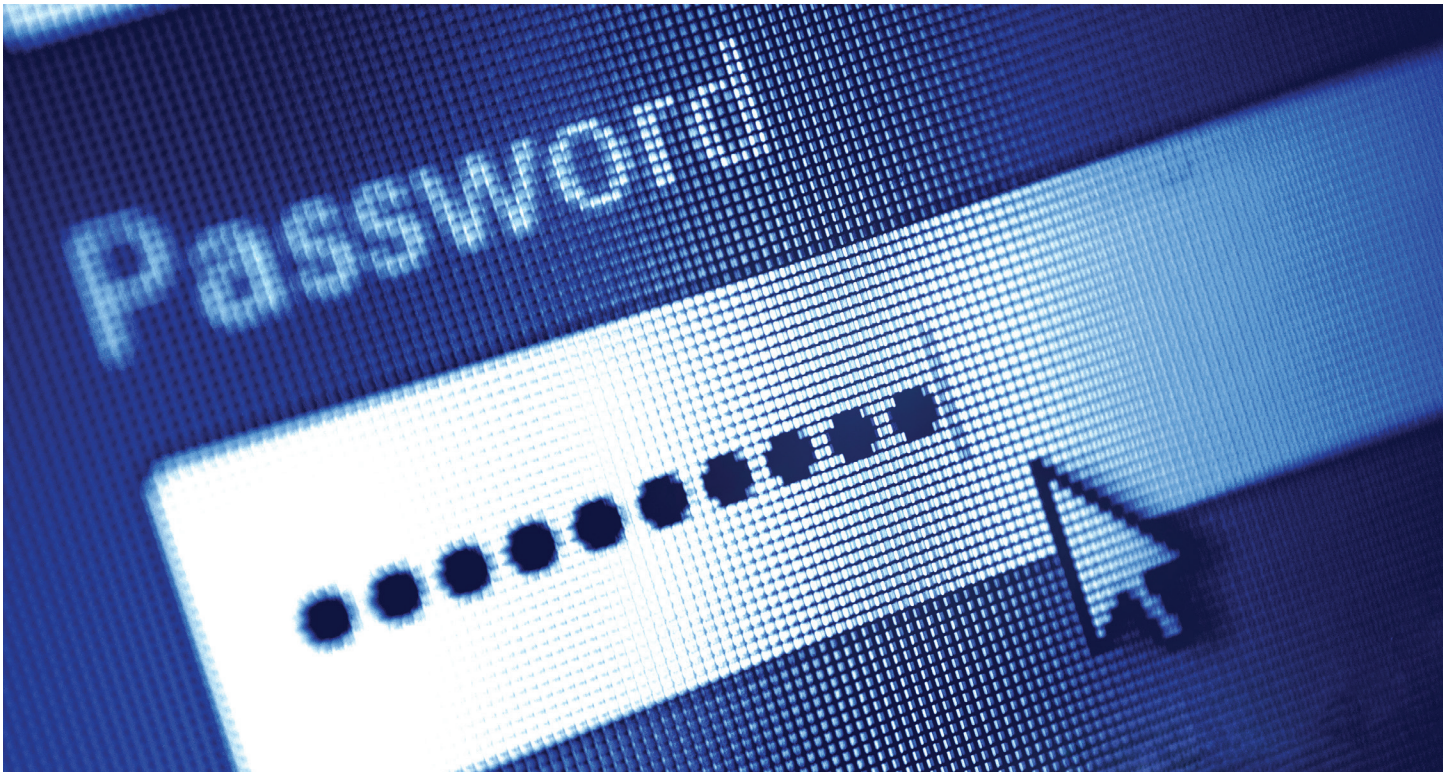

of cybersecurity changes every time the criminals find and exploit a new tool or weakness.

Hackers get information from unintended leaks, like New York University publishing the U.S. Military code breaking mechanism, or the constant and relentless probing of the security mechanisms of tech companies like Microsoft. Business must regularly analyze all means of access to the system, such as servers (cloud-based or internal), stationary computers, laptops, iPads, tablets and smart phones. Someone in the workforce probably has customer data or other sensitive information, such as passwords, on a smart phone. Then there are all the plug-ins, like scanners, printers, fax machines, security systems, and the "internet of things," such as thermostats and card key readers (yes, anything that can be controlled remotely is a potential hole in your security), not to mention all the new wearables and implantables. As those devices become more common, every company has to know how those technologies are communicating with their network. Security patches and updates can be a hassle, but mis-configured data ports and bad server configurations are some of the easiest ways to lose a lot of data or to have your system rendered useless.

Companies must also continue to invest in personnel training because people are sometimes more difficult to control than the computer network. Owners, managers and supervisors must create a real culture of cybersecurity. Businesses need to invest in personalized training for all employees, including the owners and managers. Companies should recognize that internet tools such as video presentations, webinars, online curricula and quizzes are all good interim reminders. But, as a recently reported large data breach proved, a workforce member who just attended an online training session, which included instruction on an almost identical phishing scam, was not enough when the workforce did not take the instruction seriously. Personnel training cannot be an afterthought. The culture of the office will ultimately determine its level of cybersecurity or cyber-insecurity, so businesses need to start looking for holes and constantly evaluate their systems to become truly secure.

And for those who transact globally, the European Union (EU) is counting down the time when the new General Data Protection Regulation (GDPR) goes into effect in May 2018, as well as the new ePrivacy regulations that go along with it. Those regulations will impact any offering of products or services to individuals in the EU member states and any processing of personal data associated with citizens of EU members. There are penalties for violations and opportunities for class actions which will provide potential compensation to individuals from the party collecting the data, as well as those who process it on behalf of another organization.

Using some of the same methodologies as in the U.S. for health care compliance, now EU organizations will have to perform compliance reviews and gap analyses to determine deficiencies in any data protection plan. Similar too, is the potential for the mandatory appointment of a Data Protection Officer (DPO) whose role looks much like that of a medical provider's Privacy and Security Officer. Currently, the requirement for appointing a DPO appears to be fairly limited and the most onerous GDPR requirements affect large organizations, but, with cybersecurity, businesses can be certain things will always change and the bad guys will always be looking for holes. P

SPECIAL SECTION
Cybersecurity

Prevention and Cybersecurity

We are frequently startled by international cyberattacks. Hackers steal confidential information and ransomware shuts down companies, hospitals and governments. Since company computer systems are increasingly connected to the Internet (online stores) and also rely on Information Communication Technology (ICT) for internal processes, they are not just more vulnerable to attacks, but the impact of such attacks is higher. Orders cannot be processed, documents cannot be accessed, (manufacturing) processes are interrupted, and client data is made public with the risk of high regulatory fines. Obviously, you can prevent that by taking IT measures. Less obvious, but still as important, is that you can take preventive legal measures to reduce the risk of an attack, limit the potential consequences of a hack and invest in your cybersecurity.

This article deals with concrete preventive legal measures you, as a director or supervisor, can take to guarantee the safety of the company to the greatest extent possible, and thereby comply with your duty of care. A breach of the duty of care may lead to directors' liability.

Management

Cybersecurity must be dealt with at the highest level. In addition, there has to be the required expertise. It has to be discussed at management level what kind of systems will be used and what the risks involved in using them are. This has consequences for the structure of the organization, the management and the company.

Chief Information Officer

Appointing a chief information officer (CIO) is a good way to acquire digital knowledge, centralize it and use it effectively. Many large and medium-sized companies have CIOs as the ICT has no longer only a supportive role but is leading in all company processes. The CIO is a member of the management and has the ultimate responsibility for the ICT policy of the entire organization. This is necessary for the company and will reduce the risk that the company and director are liable in the event of infringements relating to cybersecurity.

Maybe your company is too small to employ a CIO. This does not change anything regarding the distribution of responsibility. The management or board of directors will be ultimately responsible for cybersecurity and the application of privacy regulations and will therefore have to make sure to possess the competence required in this field.

Supervisors

In appointing supervisors and non-executive directors, make sure to consider people who are familiar with digital risks so that they will be able to exercise their supervisory and advisory role sufficiently. After all, it is their task to advise the management board on digital security and to control the processes within the company in this respect too. In addition, the supervisors can benefit from this knowledge as they could be liable in case of insufficient supervision.

Corporate Structure

Risks can be reduced by incorporating the development of a new product or service, such as a new app, in a separate legal entity, whether or not with a separate ICT network. If matters turn out to be undesirable, the consequences for the remaining company will be limited.

Personnel

Most problems in the area of ICT arise accidentally, by human errors. All people involved in the company, employees but also contractors and agency workers, therefore have to be aware of the importance of cybersecurity. This is called security awareness. Security

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awareness exceeds merely reacting to incidents: it has to be guaranteed via a continuous process in which an organization can reduce risks to an acceptable level. This could be, among other things, by drafting a personnel handbook including guidelines on internet usage, emails and passwords. Further, it should be clearly defined that employers have to report abuses, how they have to be reported and what the time limit is. Otherwise, companies would have to depend on the reasonable conduct of their employees instead of being able to require such conduct.

Contracts

When concluding all contracts, not just ICT contracts, it is important to distribute responsibility and limit liability. After all, your company is responsible for the ICT you use. This does not change if your ICT only has a supporting function or if you have not developed the ICT yourself.

Check for instance your General Terms and Conditions, where liability can be excluded, limited or transferred to a third party but also concrete arrangements such as Service Level Agreements (SLAs). The scope for agreements will be more limited if the counterparty is a "consumer." A provision in the General Terms and Conditions of an agreement has no legal consequences (it is "voidable") if it is extremely disadvantageous ("unreasonably onerous") for the consumer. A provision stipulating that your company has no or limited obligations in the area of cybersecurity will probably be unreasonably onerous. Besides, arrangements agreed upon only apply with regard to the party you concluded the agreement with.

It is crucial to phrase agreements clearly. Vague agreements bear the genuine risk that a court will interpret provisions, at least in the event of a conflict, to the detriment of the company. Suppose that your company determines in an agreement that it shall not be liable if a cyberattack causes its being too late in fulfilling its obligations. Without a more detailed description of this term, a conflict could arise on the question as to whether a certain kind of malware would constitute a cyberattack.

Your company can lastly not exclude all liability. Obviously, hardware and software, apps and web-based tools must comply with the latest requirements in the fields of security. Therefore, despite exoneration clauses the company remains liable regarding, for instance, if it uses, with the knowledge of the management, ICT whose cybersecurity falls short. A company using obsolete software to save costs and not taking measures to protect its computers and networks will probably not be able to invoke a stipulation excluding liability if a lack of security causes damage.

If legal means are not sufficient to limit the liability of a company and directors, the financial consequences can be limited by cyber insurance and directors' liability insurance.

Privacy

The importance of cybersecurity is underlined by the privacy laws and high penalties for infringement on privacy.

Personal data is usually processed by means of ICT. In Europe, strict rules apply to this that can affect companies worldwide. The basic principle of the regulations is that they apply to the processing of personal data from Europeans even if the processing takes place outside Europe.

A breach of the security obligations has severe financial consequences. The Dutch Data Protection Authority (Autoriteit Persoonsgegevens; AP) can currently impose a maximum fine of EUR 820,000 per breach or 10 percent of the annual turnover.

As of May 25, 2018, the AP will be able to impose a maximum fine of 20 million euros or a fine of 4 percent of the worldwide annual turnover should this amount be higher.

Conclusion

The board of a company has the ultimate responsibility for cybersecurity and can be held personally liable in the event of breaches. The board has to examine the organization and (ICT) company processes for compatibility with the existing regulations. In addition, the board has to make sure that both managers and supervisors have expertise in this area, for instance by appointing a chief information officer to the board. Employees must be familiar with the cybersecurity policy, for instance via the staff handbook or internal training. In contracts, liability for cybersecurity problems can be limited to the greatest extent possible. Should this not be enough, insurance can also be a solution. P

SPECIAL SECTION
Cybersecurity

China's New Cybersecurity Law and its Impact on Doing Business in China

China's new cybersecurity law came into effect on June 1, 2017. The new law promotes two key objectives:

- protect China against cyberattacks, and
- protect the rights and interests of Chinese citizens from cyberattacks and the misuse of personal information.

The new law not only has a comprehensive framework on cybersecurity but also gives privacy protection to Chinese citizens.

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A number of legal measures that relate to cybersecurity also came into effect on June 1, 2017. On April 11, 2017, the Cyberspace Administration of China (CAC) released a draft (Draft) Measures for Security Assessment of Outbound Transmission of Personal Information and Important Data (Local Data) to solicit public comments. The consultation has ended and it is expected that the finalized measure for security assessment of outbound transmission of Local Data will be issued soon.

Key Provisions of the Cybersecurity Law

The new law operates under a data localization rule that imposes an obligation on operators of "Critical Information Infrastructure" (CII) to store personal information and other important data collected and generated during operations within China.

For outbound data transfer of Local Data, the new law requires CII operators to undertake security assessment before transferring such data abroad. The security assessment shall be conducted by the CAC and the State Council (unless permission for the transfer is already provided under another law).

CII is defined broadly as "infrastructure that, in the event of damage, loss of function, or data leak, might seriously endanger national security, national welfare or the livelihoods of the people, or the public interest." It includes public communications and information services, energy, transportation, water conservancy, finance, public services and e-government.

CII also covers operators who operate networks used for critical public services and private sector operators who operate networks which, if breached, would cause serious damage to state security, the Chinese economy or to the public at large.

The new law also covers "Network Operators" (NO), which is widely defined to include any business that owns and operates IT networks in China including a computer network, website, app or other electronic platform where information collected from third party users in China is stored, transmitted, exchanged or processed.

Under the new law, NOs need to:

- make public all privacy notices
- obtain individual consent for collecting and processing personal data
- implement technical safeguarding measures to secure against loss and destruction of personal data, data minimization, confidentiality and rights to accuracy and restriction on processing of personal data.

Under the new law, personal information is defined as including all kinds of information, recorded electronically or through other means which is sufficient to identify a person's identity, including but not limited to:

- full names
- birth dates
- identification numbers
- personal biometric information
- addresses
- telephone numbers.

NOs must provide internal security management systems that include:

- appointment of dedicated cybersecurity personnel
- retention of network logs
- reporting risks on network services and products to users and authorities
- having contingency plans for network security incidents and reporting such incidents to the authorities
- providing assistance and cooperation to public security bodies and state security bodies to safeguard national security and investigate crimes.

The third category of operators covered by the new law is IT Product Suppliers and they are required to:

- provide security maintenance for all services and products for the full term of the contract—security maintenance cannot be terminated within the contract term.
- prior to being sold or produced in the PRC market, cybersecurity products and services will be required to obtain a government certification and/or meet prescribed safety inspection requirements and national standards.

Proposed Security Assessment for Cross-Border Transfer of Local Data under the Draft

The Draft seems to extend the applicability of the data localization rule from CII operators to all NOs. The implication is that virtually all entities established in China that access and use Internet in the course of business operation might be caught and could be required to keep a copy of personal data and other important data collected and generated in the course of the NO's operation in China (Local Data).

If an NO seeks to transfer the Local Data overseas for business needs, it must undergo a security assessment. The Draft provides for two types of security assessments: (i) self-assessment; and (ii) government-administered assessment (GAA).

NOs must conduct a security self-assessment before transmitting Local Data overseas (unless a GAA is triggered) and be responsible for the results of the assessment.

A GAA is triggered if the intended outbound cross-border data transmission involves any of the following circumstances:

- contains or accumulatively contains personal information of more than 500,000 individuals
- the amount of data exceeds 1,000 GB
- contains, among others, data regarding sectors such as nuclear facilities, chemical biology, national defense and military and population health, as well as data related to large-scale engineering activities, marine environment and sensitive geographic information
- contains cybersecurity information such as system vulnerabilities or security protection in respect of CII
- provision of personal data and other important data to overseas recipients by operators of CII
- other circumstances that may affect national security or public interests.

NOs must, based on its business development and network operation status, conduct a security assessment on outbound data transmission at least once a year and report the assessment results to the relevant industry regulator.

In addition to the annual security assessment, NOs are required to conduct a new security assessment each time:

- There is a change in the data recipient or significant change in the purpose, scope, volume or type of the outbound data transmission; or
- There is a major security incident involving the data recipient or the data transmission abroad.

Industry regulators shall be responsible for organizing and administering GAA. If a GAA is triggered but the competent industry regulator cannot be identified, CAC shall take charge of the GAA.

The Draft provides a definition of what is "Important Data." It refers to data that is closely related to national security, economic development and public interest.

In terms of privacy protection, in general, NOs shall inform data subjects of the purpose, method and scope of collection and use of personal data and obtain data subjects' consent.

The Draft provides that, in order to transmit personal information out of China, NOs must inform data subjects of the purpose and scope of the outbound data transmission, the content and the recipient(s) (countries or regions) of the information transmitted and need to obtain consent.

Under the Draft, outbound transmission of Local Data is prohibited:

- if data subject has not consented or the transmission could infringe the data subject's interests
- the intended transmission would create a security risk in terms of national politics, the economy, science and technology, or national defense, etc. and could affect national security or harm public interest.

Conclusion

Organizations that conduct business in China should start to review their data privacy and cybersecurity policies to ensure compliance with the incoming law and measures. NOs with a need to transmit personal data collected within China and abroad should review and amend their existing privacy policies or statements in order to ensure compliance.

It is not known whether a transmission of Local Data from mainland China to Hong Kong would be construed as "cross-border" transfer and we may need to wait for further measures or Court explanation before this will be clear. But given that the new cybersecurity law does not apply to Hong Kong under the "One Country, Two Systems" principle, it would defeat the purpose of the data localization rule and privacy protection if Local Data can be transferred from mainland China to Hong Kong without any security assessment. P

Do Shops Located In Malls Dream Of Their Own Goodwill?

Shopping malls are enjoying important growth in Europe, acting as a magnet for customers and, at the same time, contributing to the economic development of this sector. Data shows that in the first half of 2016, malls reached an area extension of 153.6 million square meters (SQM), with further growth forecasted for 2017, up to an overall 164 million SQM.[1]

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Italy is ranked fourth in Europe for SQM. Recently, however, significant developments have taken place and others are coming.

More than one year has passed since the opening of the new shopping mall in Arese, near Milan ("il Centro"). Opening in April 2016 and composed of 200 shops, 25 restaurants and various service providers, this mall was one of the largest in Italy and one of the biggest in Europe.

Recently the shopping mall at Orio Al Serio (Bergamo airport) has undergone a 35,000 SQM expansion, reaching an overall surface area of 105,000 SQM. Exceeding a total investment of 100 million Euro, this shopping mall is composed of more than 280 shops, 50 restaurants, miscellaneous services and one multi-cinema with 14 screens.

In the very near future, Italy will also enjoy the opening of the shopping district in City Life, slated for November 2017 with total 32,000 SQM. Then, in December 2019, the challenging project of the Westfield shopping center in Segrate will be completed, with 300 shops, including Galeries Lafayettes, and one multi-cinema with 16 screens. It will be open 365 days a year and cost more than 2 billion Euro.

These shopping malls are to be considered great poles of attraction by representing brands of national and international stature.

The juridical measure in Italy by which the owners of these malls regulate the stores located inside, are the "commercial property lease agreement" (regulated by Law 392/78) and, mostly utilized, the "business unit lease."

No matter the agreements utilized, it is standard practice for the lessee, however, to accept a written pre-emptive waiver to any indemnity for loss of goodwill at the end of the lease period or in case of termination by the owner.

The matter is referred to in Law 392/1978, which regulates the property lease agreement. Law 392/1978 provides that, as goodwill indemnification, the lessee has the right to receive a remuneration equal to 18 months of the last rent paid.[2]

Any exemption to the above provision is null and void, even though recent case laws have recognized that a preventive waiver to a goodwill indemnification is possible if remunerated by a discount of the rent favoring the tenant.

The rule is, however, not applicable for commercial activities located in airports, railway stations and road services areas.[3]

The law does not regulate specifically if the tenant of a shop located in a mall is or is not entitled to such indemnity. Case law addressed the situation excluding it on the grounds that a shop in a mall is similar to shops in airports and railway stations which are located in a sort of mandatory route and which benefit consequently from a "parasitic goodwill."

On the other hand, since "lessee protective provisions" inherent to law 392/1978 are not applicable to contracts regulating the lease of business units,[4] the parties to such agreements are free to regulate all their respective rights, including the possibility to agree to a preemptive waiver for goodwill indemnification (without penalty of legal invalidity).[5]

In brief, up until now operators did not need to address the specific problem of whether the tenant was or was not entitled to any goodwill for his/her shop located in the shopping mall because it was not even a consideration.

The new decision of High Court issued in September 2016 overturned the former situation and recognized that the tenant of a shop in a mall is entitled to an indemnification for goodwill.

The Court recognized that there is a reciprocal synergy of commercial activity located in the same area. It underlined that the goodwill of the whole shopping mall is not a stand-alone goodwill different from the goodwill of each activity located inside it but, on the contrary, it is the sum of such goodwill.

If not, shops located in areas that "by their own" constitute an attraction could be denied the benefit of such a goodwill indemnity, such as Quadrilatero della Moda (Via Montenapoleone district), or the Mercerie district in Venice, or the Harbour district in Portofino, or many other areas of particular commercial, historical and cultural/artistic interest.

What are/will be the results of the new guidance?

It is more than likely that the owners of shopping malls shall be encouraged to utilize the "lease of business units" measure (with relevant freedom in agreeing a pre-emptive waiver to goodwill).

By contrast, the tenants could use the value of the goodwill and relevant waiver (which is now recognized by case law) as "leverage" to enter into a better economic agreement.

From both perspectives—the owners as well as the tenants—the clause regulating goodwill in shopping malls shall become more appealing.

Last but not least, one must take into consideration that the legislative framework of law 392/1978 has been recently "revised" by law n. 164/2014, which has introduced—upon the condition that the annual rent provided in the lease agreement exceeds Euro 250,000—the "freedom of contract" clause in the commercial property lease agreement. Consequently, these contracts (commercial property lease agreements with annual rent exceeding Euro 250,000) shall be considered similar to business lease agreements and, therefore, may include preventive waiver to goodwill indemnification.

As a final comment, our wish is that the overflow of shops in malls shall not "water down" a brand's value by confusing the unique selling proposition of each brand in the mind of the consumer. P

1 Source: Cushman & Wakefield "European Shopping Centre Development Report".

2 Also, the lessee has the right to receive a further indemnification equal to 18 months of the last rent paid, if in the new store the same/similar activity as that of the former lessee is being carried out and such new activity is started within one year from the termination of the former lease agreement.

3 The rule is also not applicable (i) in case the termination of the contract is attributable to the lessee; (ii) in case the commercial activity is not open to the public and (iii) for professional activities and temporary activities.

4 A business unit lease agreement ("*affitto d'azienda*") differs from a commercial property lease agreement in that it includes a group of goods and resources organized to run the business and not only a property (and not only the agreement regulating the use of the estate).

5 The above to the extent the subject matter of the lease is indeed a "real" business unit and not mere business premises, without such features it might bring to a risk of a requalification of the contract with application of the rules of Law 392/78 (protecting the lessee).

M&A Transactions in Germany

Germany is one of the world's major economies. As a result, many foreign enterprises consider acquisitions of companies in Germany to get (better) access to the German market.

There are two major types of mergers and acquisitions (M&A) transactions in Germany: the acquisition of shares of the target company (Share Deal) and the acquisition of the assets of the target company or of specific business segments of the target company (Asset Deal). When the buyer is supposed to acquire only individual, but not all business segments from the seller, or when the buyer does not want to assume all liabilities or liability risks, an Asset Deal is often the better choice.

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Typical Targets: GmbH and GmbH & Co. KG

A GmbH (*Gesellschaft mit beschränkter Haftung*) is the most common form of corporation in Germany and is a limited liability company. It does not have any share certificates. The shares are transferred by way of an agreement, which needs to be notarized.

A GmbH has a management board consisting of at least one managing director (*Geschäftsführer*). It can have a separate supervisory board (*Aufsichtsrat*), but usually does not have one unless it is required by law for purposes of co-determination of employees.

It is registered with the local commercial register. Lawyers and other registered users can get the key information, such as names of the managing directors and their power of representation, as well as copies of the Articles of Association, the list of shareholders and the annual financial statements, on the Internet from the commercial register.

A GmbH & Co. KG is a limited partnership with at least one limited partner and a GmbH as general partner. The GmbH & Co. KG is managed by the general partner GmbH, which in turn is managed by its managing directors. Usually, the limited partners are also shareholders of the general partner GmbH. The individual liability is limited to the respective limited partner's capital contribution.

The GmbH & Co. KG is registered with the commercial register where its key information is available. However, the partnership agreement is not filed with the commercial register and therefore not publicly available. The partnership's interests are transferred by way of an agreement, which needs to be notarized if they are transferred together with the shares of the general partner GmbH.

Notarization of Agreements

Any agreement on the sale or transfer of shares in a GmbH needs to be notarized at a German notary public. This is often a cumbersome procedure, since the entire agreement, including all exhibits, needs to be read aloud to the representatives of the parties by the notary public. However, German M&A lawyers are experienced in this area and can ensure a smooth notarization procedure. The notary's fees can be material, depending on the value of the notarized transactions. To give an example: In the case of a purchase price of about EUR 10 Mio. for GmbH shares, the cost of notarization of the share purchase and transfer agreement can be about EUR 35,000 plus VAT.

Involvement of Employee Representatives

Works Councils

A company may have one or more works councils (*Bebriebsrat*) consisting of employees. It can be established by the employees of each establishment with five or more employees. The works council needs to be involved in particular cases, such as the dismissal of employees. It needs to be informed beforehand. Otherwise, the dismissal may be void.

In companies with more than 20 employees, the employer must inform the works council in advance about any planned alterations of an establishment, which may cause substantial disadvantages to a substantial part of the staff. The employer must try to reach an agreement with the works

council on reconciliation of interests (*Interessensausgleich*) and a social plan (*Sozialplan*) before starting the alteration. A social plan provides for a compensation of the disadvantages suffered by the employees. If both parties cannot agree on the reconciliation of interests or the social plan, either party can submit the matter to a Conciliation Board (*Einigungsstelle*), which shall attempt to reconcile the parties and is authorized to draw up the social plan.

The works council cannot prevent the alteration and cannot force the employer to agree to a specific reconciliation of interests or a specific social plan, but it can delay the process. Not every M&A transaction requires the mentioned procedure. However, if there are major restructurings of the business in connection with an M&A transaction, this could be the case.

Economic Committee

If a company has more than 100 employees and a works council, it is obliged to have an economic committee (*Wirtschaftsausschuss*), which consists of employees as well. The employer needs to inform the economic committee about various economic matters in advance, e.g., in case of the purchase of a majority interest by a buyer.

Co-determined Supervisory Board

A GmbH, as well as a GmbH & Co. KG, can be required to establish a so-called co-determined Supervisory Board if the company has more than 500 employees. Thus, the company needs to have a Supervisory Board where one-third (in companies with more than 500 to 2,000 employees) or half (in companies with more than 2,000 employees) of the members are employee representatives. The Supervisory Board supervises the company's management board.

Depending on the circumstances of an M&A transaction, an approval by a (possibly co-determined) Supervisory Board could be required on the seller's/buyer's side or in the target company.

Transfer of Employees by Operation of Law

In case of the acquisition and transfer of an undertaking or parts of it by way of an Asset Deal, employees belonging to the concerned undertaking or parts of it are transferred to the buyer by operation of law. The concerned employees have to be informed prior to the transfer and have a right to object to the transfer of their employment relationship within one month of receipt of a due notification. If an employee objects, he or she remains an employee of the seller.

Prohibition of Acquisitions in Case of a Foreign Buyer

In case of acquisitions by a foreign buyer from outside the European Union (EU) and the European Free Trade Association (EFTA; i.e., Iceland, Liechtenstein, Norway and Switzerland), the German Ministry of Economic Affairs may prohibit the acquisition if the investment endangers public policy or the security of the Federal Republic of Germany. The government recently implemented an obligation to notify the ministry in case of acquisitions concerning critical infrastructure. In other cases, it is possible to proactively file an application to the ministry in order to get a confirmation that the acquisition does not endanger the public policy or the security of Germany.

In case of acquisitions by any foreign buyer regarding companies which are operating in particularly security sensitive areas (manufacturers and developers of military weapons and certain components for tanks, as well as producers of certain products with IT security functions), the German Ministry of Economic Affairs must be notified in advance. The ministry can prohibit the acquisition if material security interests of Germany are endangered.

In both cases, the criteria of an acquisition is fulfilled if the buyer acquires directly or indirectly more than 25 percent of the voting rights. Thus, even the acquisition of a foreign company with a German subsidiary can be subject to the aforementioned examination procedures and a prohibition by German authorities. Recently, the German Ministry of Economic Affairs has reviewed some potential acquisitions of German companies by Chinese investors, for example.

Significant Advantage with the Early Involvement of a Local Counsel

German law provides a legal framework with complex issues in connection with investments in Germany that might appear as problems from a foreign perspective. However, if experienced German M&A lawyers are involved at an early stage, they can plan your transaction in a secure way and will, in most cases, be able to avoid damaging impacts.

The Applicable Law to International Commercial Contracts

A matter of key importance when signing an international commercial contract is determining what the applicable law should be. It is necessary for the parties to be aware of the set of rules governing the contract during its execution, as well as in any possible disputes related to the specific legal relation which may occur.

According to the United Nations Convention on Contracts for the International Sale of Goods (CISG) (Vienna, 1980) contracts are classified as "international" when the parties concluding the agreement come from two or more different countries (Article 1(1)(a)). For a contract to be identified as "commercial," each party must be acting in the exercise of its trade or profession.

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There are three basic ways for the parties involved to determine the applicable law to such contracts. First of all, they could expressly choose a governing law by making a reference to it either in the main contract or in a separate agreement on choice of law. Either a specific national legal order (for example, French law) or a supranational legal order (for example, UNIDROIT principles of international commercial contracts) could be chosen. The power of the contracting parties to select the applicable rules is referred to as "party autonomy." The advantages of that concept are significant since it provides parties with a considerable degree of certainty and the ability to foresee, to a large extent, how any future disputes under the contract would likely be determined. (Herbert Smith Freehills LLP, 2010). Moreover, the choice of law agreement would be used by the national courts, arbitral tribunals or any other forums deciding a possible future dispute to interpret the contract and determine the rights and legal obligations of the parties flowing from it. Thus, it is advisable for the parties to seek specific legal counsel in order to be aware of the set of rules best suitable to govern the transaction. It is important to note that "party autonomy" has some limitations. It does not exclude the application of imperative rules relevant to the specific legal relation which are a part of a legal order different from the chosen one, i.e., where the parties' express choice of law and imperative rules are in conflict the latter shall prevail.

In the absence of a specific choice of law, unified international rules in the field of commercial contracts would be applicable. The main source of such rules is the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) which regulates matters in the field of international private law. As of May 2017, it has been ratified by 85 states that account for a major proportion of world trade, thus making it one of the most successful international uniform laws. The CISG applies to contracts of the sale of goods between parties whose places of business are in different countries when the countries are Contracting Countries (Article 1(1)(a)). Furthermore, its rules are directly applicable and exclude the application of other national or transnational rules (apart from the mandatory ones). The contracting parties may exclude the application of the Convention only expressly or by indicating clearly that the law of a third non-contracting country would be applicable. It is important to be noted that the Convention itself establishes its own primacy over the applicable law, indicated by the conflict-of-law rules, i.e., it is sufficient to establish that the Convention is applicable to a specific contract in order to avoid the application of conflict-of-law rules.

The last possible approach in determining the applicable law to an international commercial contract in cases where the parties have not expressly chosen a governing law is applying the "conflict of laws" rules. The general principle is the applicable law would be

that of the country the contract is most closely connected with. Whether or not such connection exists is always a matter of the specific circumstances which would be taken into consideration by the courts or arbitral tribunals when deciding a dispute. However, there are a couple of rebuttable presumptions regarding that concept. For instance, in a real estate sales contract, the latter is presumed to be most closely connected with the country where the real estate is.

The predominantly dispositional character of the "conflict of law" rules, as well as the wide scope of assessment of the specific circumstances in any legal relation, make this type of approach in determining the applicable law unattractive to the merchants. In order to avoid these inconveniences, it is in the parties' best interest to choose the governing law expressly.

Litigation in Honduras: Towards a New International Law

Honduras is a country located in the heart of Central America, with a thriving industrial economy which has undergone drastic changes in the last 30 years, moving from agribusiness to technical industry—mainly textiles—as its main focus of wealth production.

The attractive and strategic logistics corridor in the north of the country (Metropolitan Sula Valley Area, including San Pedro Sula, Villanueva, Choloma and Puerto Cortés), which contains a certified port by Customs of the United States, has attracted an increasing amount of foreign capital and investors. This has boosted economic changes and provided solutions and job opportunities. In addition, Honduras promotes foreign investment through special tax laws and laws that favor exports, such as the Free Zone Act, the Temporary Import Regime Law and the Special Development Zones Law, among others. Another economic advantage offered by Honduras since 2005 is the Free Trade Agreement signed with the United States, allowing tax free exports to the United States.

However, the legislative and economic efforts, and the existing mechanisms applied by current governments, have proved insufficient to attract all of the foreign investment projected by the government. This is especially true from those whose countries of origin strictly regulate issues such as tax, transparency, ethical and corporate governance and financial information exchange (i.e., FCPA, FATCA, etc.), due to some corruption allegations against Honduras in the past. To address this, in addition to the economic and tax laws, Honduras has:

- passed laws on transparency and access to public information
- has begun a modernization process of the civil procedural system (Civil Procedure Code)
- has reformed the mechanisms used to select judges and members of the judiciary
- has created specialized courts and prosecutor's offices to deal with acts of corruption
- has passed laws on conciliation and arbitration as means to grant parties an additional method of solving conflicts.

These legislative and administrative efforts have had an impact on the local and international economic community, shifting the investor's perspective towards Honduras and favoring the integration of markets. Even so, the results obtained have been insufficient to reach the projection on investment established by the government.

Regulations have recently been adopted to incorporate a new legislative layer of attraction of foreign investment, designed to create a flexible corporate-business environment, with the right measures to guarantee the legal security of the entrepreneur, even by international standards. The law for the generation of employment, promotion of the business initiative, formalization of business and protection of investors' rights, and the law for the promotion and protection of investments, are all laws designed to incorporate the current international principles, rulings and criteria on investment/investors protection, transparency and arbitration. These laws adjust the commercial regulations and jurisdictional options according to Soft Law or Lex Mercatoria indicators, in order to respond to the requirements of unification and standardization of the law, facilitating free commercial traffic.

These legislative, administrative and judicial efforts to bring the Honduran legal system closer to international parameters, homologating the conduct and business behavior of the investor with those of standardized norms, which reflects the recommendations of such entities as UNIDROIT, United National Commission on International Trade Law, International

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Centre for Settlement of Investment Disputes (ICSID) and the International Code Coucil (ICC), have been strongly criticized by various sectors of Honduran society. Several litigating lawyers have even expressed their fervent rejection of these reforms, claiming that these laws contradict principles and precepts rooted in Honduran legal culture, beginning with national sovereignty and state control over commercial practices. Their opposition and allegations are a product of our country's influence by foreign legislation, especially by Spain's law. In carrying out the corresponding historical analysis of the aforementioned legislation, Spain, as a Continental-European country, has a legal perspective that does not quite agree with the more liberal view of the common law. This European influence has produced a nationalist approach in Honduras, which in many occasions has caused isolation. Combined with this, some bad experiences in the past with foreign investments have been the main reasons argued by those who see this legal reform as a detriment to the country.

We cannot ignore the fact that the global economy is everyday becoming more integrated, and that economic blocs are increasingly approaching cultures, laws and societies. Proof of this is the Resolution 3281 of the General Assembly of the United Nations which establishes a new international economic order. In addition to international rules, the arbitration precedents in international matters have established the denationalization doctrine, which countries and companies adopt like, e.g., *Rene-Jean Dupuy's Arbitral Award, in the Texaco - Cal Asiatic v. Libya, Letco v. Liberia, Amco v. Indonesia*, among others. Therefore, Honduras cannot be the exception nor can it afford to disregard international changes and requirements of homologation of the rules applicable to trade.

Thus, legislative reform in Honduras is due to the requirement of economic integration and the country's project to attract foreign investment, offering guarantees and security in accordance with international parameters. This has had, in our opinion, a positive effect on the development of judicial processes by:

- reducing the time and cost of a procedure from five years to 14 months,
- transforming the written procedural system into a system of simplified hearings,
- bringing the judge closer to the trial and forcing him to be present at the moment of evacuation of the evidence and allegations, and
- incorporating into the judicial and arbitration procedure several in-between possibilities of direct conciliation, and facilitating mechanisms of complaining against judges and/or public officials who have commited acts of corruption, among others.

This does not mean that the goal has been achieved, and we are far from being able to call the task completed. The country continues to move towards an international order, planning to reform judicial procedure into electronic trials, reduce judicial delay by 100 percent and authorize investors to arbitrate "without privity" as established in the AAPL v. Sri Lanka arbitration rule and by the Convention on the Settlement of Investment Disputes between States and Nationals of other States. This leaves us with an exciting road to travel, and an interesting approach on standardizing our legislation to international requirements, granting local and foreign investors all guarantees required to assure a transparent and fair trade, without fear of being forced into a corrupt act.

Strong Whistleblower Laws in the Asia Pacific Region?

Several jurisdictions have recently or are currently reviewing their laws relating to protection of whistleblowers both in the public and corporate sectors.

For a long time, Australia has been the subject of criticism for the weakness of its whistleblower protections, including that existing protections are "overly narrow" and make it "unnecessarily difficult" for whistleblowers to make protected disclosures.[1]

An independent review, conducted by Transparency International in 2014, found Australia's whistleblower protections for the private sector is lacking, despite having comprehensive protections for public sector whistleblowers.[2]

With the strengthening of anti-corruption laws and growing domestic and international pressure for reform, as well as Australia's reputation as a transparent and low-corruption business and regulatory environment, there is every chance that Australia will seek to lead the way in the region by spearheading a reform to strike a balance between protecting whistleblowers, disincentivizing corruption, and protecting legitimate corporate confidentiality.

Recent Consultation

In line with the global movement against anti-corruption and bribery, the Australian Federal Government has stated its focus to combat corporate misconduct through the introduction of stronger whistleblower protections and compensation schemes.

The Australian Federal Parliament has referred an inquiry in relation to protections for whistleblowers to the Joint Parliamentary Committee on Corporations and Financial Services. The Committee's report is expected by mid-August 2017.

Whistleblowing on Breaches of Corporate Legislation

In recent years notable scandals have been brought to light due to whistleblowers' making disclosures in Australia.

The most notorious scandals are the underpayment of 7-Eleven employees by franchisees, which has resulted in $110 million compensation, and an investigation into the questionable financial planning advice given by the Commonwealth Bank of Australia's financial planners, resulting in $29 million compensation being paid to victims. In both instances, existing legislative protections have been criticized for their failure to offer sufficient protection to the whistleblowers.

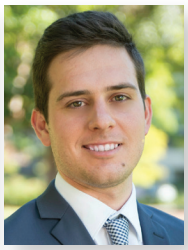
The weaknesses of Australia's current system has been highlighted by the media which has reported that Jeff Morrison, the key whistleblower who brought the Commonwealth Bank's financial advice scandal to light, lost his job and endured death threats. That narrative may have been different if Mr. Morrison was able to make an anonymous disclosure and there had been adequate legislation to compensate and protect him from reprisal.

What Disclosures Are Protected?

Under current Australian legislation, in order for a whistleblower to make a protected disclosure, the following requirements must be met:

1. the whistleblower must be a current officer, employee or contractor of a company;
2. the whistleblower must provide their name (anonymous disclosures are not protected);
3. the disclosure must be made to Australian Securities and Investment Commission (ASIC), the company's auditor or to specified officers of the company;
4. the disclosure must be made in "good faith;" and
5. the whistleblower must have reasonable grounds to suspect that officers or staff of an organization have breached a relevant provision of the legislation.

Murray Thornhill



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If a whistleblower satisfies the above criteria, they can be protected from civil or criminal litigation as a consequence of making a protected disclosure. However, the protections must be relied upon as a defense to prosecution or a claim by a whistleblower, meaning that a whistleblower is on the back foot and will have likely already suffered the fall-out for making the disclosure.

Further, a whistleblower's disclosures in some cases can be referred to other parties, including the Federal Police or Australian Prudential Regulation Authority (APRA). Given that the disclosure cannot be made anonymously, a whistleblower's disclosure often leads to rapid escalation of events completely outside of the whistleblower's control.

Misconduct Relating to Unions and Employer Organizations

Recent amendments were enacted by the Australian Commonwealth Parliament to allow employees to make protected disclosures to government bodies in relation to breaches of union and employment laws. Although the scope of this reform is limited, these amendments are significant as they have done away with the need for a disclosure to be made in "good faith."

Whistleblowers – Tax Fraud

Disclosures by whistleblowers relating to tax fraud or misconduct to the Australian Tax Office (ATO) are not currently protected, given that only certain disclosures relating to employment law or corporate law misconduct can be protected under the current legislation.

Given the government's crackdown on tax evasion and fraud, it is expected that proposed amendments may include the ability for financial advisers to make protected disclosures to the ATO regarding their corporate clients' tax affairs. However, such reforms are likely to be hotly contested and vigorously opposed by industry and professional groups.

Protected Disclosures

It is also expected that the federal government will seek to implement provisions that will allow for former employees, officers and contractors to make protected disclosures, similar to recent amendments to employment related disclosures.

The current regime, by allowing only current employees, officers and contractors to make protected disclosures, fails to take into consideration that these parties will suffer reprisal and career damage if knowledge of their disclosure became public. Under existing Australian legislation, if a whistleblower who is no longer employed by a company took part in any breach of corporation legislation themselves, they are not currently protected from prosecution or civil action.

To bring Australia's corporate whistleblower scheme in line with best practice international laws and encourage disclosures, it is expected that it will be proposed for the "good faith" requirement to be dispensed with.

Currently, for a corporate whistleblower to be entitled to protection for making a disclosure relating to corporate misconduct, their motive for making the disclosure must not be malicious or for a collateral purpose. The "good faith" requirement is considered to deter potential whistleblowers, given that it creates uncertainty of whether they will be protected after they make the disclosure.

Bounty-Style Compensation

The Australian Federal Financial Services Minister Kelly O'Dwyer has suggested that the Australian Government would be seeking to introduce a "bounty-style" reward system similar to that of the U.S. Such a system would reward whistleblowers who disclose high-quality information that results in a conviction or monetary penalty. It is suggested that a rewards scheme would take into account the financial consequences that whistleblowers endure from disclosing information.

This "bounty-style" rewards scheme is based on U.S. law which rewards whistleblowers with 10 to 30 percent of money recovered, where sanctions exceed $1 million. However, by international standards, fines imposed on Australian companies are relatively low. For such a scheme to be successful in Australia, there will need to be a substantial increase in the fines.

Further issues under consideration include whether disclosures made to media should be protected, given that in recent years the media has been instrumental in revealing substantial corporate misconduct.

How Businesses and Companies Can Prepare

The impending reforms seem to have been broadly accepted by the Australian corporate sector. Many industry sectors are attempting to prepare themselves. Businesses are able to prepare by:

1. arranging for an independent and external review of their current whistleblower policies;
2. permitting anonymous disclosures internally, such as by hotline or email;
3. if appropriate, engaging an external investigator to investigate disclosures and conduct;
4. implementing specific procedures for investigating and dealing with disclosures;
5. educating officers and employees about internal policies and protections offered to whistleblowers and how to handle disclosures;
6. ensuring that suppliers are contractually bound to have minimum standards of whistleblower procedures; and
7. committing to compensation or relocation arrangements for staff who are targeted for reprisals after making a disclosure.

Lawyers and in-house counsel representing clients conducting business in, or in connection with, Australia and throughout the Asia Pacific region should flag the potential reform of whistleblower protections to ensure they are not caught off guard. While reform is never a certainty, the key to preparing for such reforms will be ensuring that employees are offered suitable options for whistleblowing and that suitable procedures and processes for dealing with complaints are well known throughout the company. Failure to adopt such an approach could result in significant financial and reputational damage to the company. P

1 Australia's first Open Government National Action Plan 2016-18

2 Whistleblower Protection Laws in G20 Countries Priorities for Action: Final Report 2014

Bill Project 231/17: Main Changes to the Corporate Fiduciary Duties in Colombia

The current Columbian fiduciary duties required of the officers and directors of a corporation were established 20 years ago in Act 222 of 1995, obliging them to act "in good faith, with loyalty and with the diligence of a good businessman"[1] and "their actions will be performed in the interest of the company, taking into account the interests of their associates."[2] Thus, the duties of good faith, care and loyalty are incorporated into the current regulation.

The good businessman standard demands the utmost level of diligence to the directors in any of their actions, making them "jointly and severally liable and without limitation for the damages caused by negligence or willful misconduct caused to the company, to the partners or to third parties,"[3] not allowing the shareholders and the managers to limit or eliminate by contract, the officers or directors liability for damages caused in their decision making process, considering any agreement with that intend to be void and null.

Likewise, all the qualifications required to determine the negligence categories mentioned above, such as "not a prudent person," "diligent and careful men" or "sensible man" are really difficult to frame and apply by the judges, since they lack the proper definition and consistence procedure, thus, the use of this article and its consequences has been discouraged and barely seen in practice.

On the other hand, talking about the duty of loyalty, the current applicable provision states that the managers shall not participate, directly (personal interests) or indirectly (third parties interests), in activities that involve competition with the company or in acts where there is a conflict of interest, unless expressly authorized by the shareholders. In addition, the cleaning process of any decision involving a conflict of interests between the company and its managers should be voted on by a majority of the shareholders, excluding the vote of any interested director that is also a shareholder of the company.

Hence, a majority shareholder who wants to approve a self-dealing transaction and not be covered by the vote exclusion provision mentioned above, just has to resign his position as manager and then force the summoning of a shareholders meeting to vote as a not excludable party.

Although it seems to be a strong regime, it is often not enforced due to its lack of clarity of what conduct is considered a conflict of interest. This lack of clarity has allowed administrators in the current legislation to bypass the before mentioned regime regarding the questionable transaction, the low number of sanctions imposed by the authorities, and the difficulty to approve any kind of claim by the shareholders in closely held corporations where the majority has the control of the corporation.

Consequently, all these flaws and gaps have produced a lack of uniformity in the current provisions, which is triggering the continuous abuse of the controlling shareholders. This happens, principally, in closely held corporations, who can approve a self-dealing transaction, or block a company suit against them at any time, thus, making the actual rules oppressive to the minority shareholders and hardly applicable in practice.

Bill Project No. 231 of 2017: New Definition of the Duty of Care and Incorporation of the Business Judgment Rule into Colombian Corporate Regime

This reform proposes a new definition of the duty of care as a way to improve its applicability. The bill defines the duty of care in Article 6, as follows: "the director shall fulfill his duties with the diligence that a prudent person will be judged reasonable in light of the specific circumstances surrounding each decision."[4]

The idea behind the proposed definition is the simplification of the standard (prudent person), in order to:

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(i) frame it to the singular events, conditions and situations that could influence the decision-making process; (ii) adjust it to the new business judgment rule standard regulated in Article 9 to enable a coherent application of the new standard by the courts; and, (iii) eliminate the current liability regime for directors, namely, the use of Article 63 of the Colombian Civil Code.[5]

Together with the new definition to the duty of care, the creation of the business judgment rule with deferential scrutiny, as the new standard of review to be used by the judges, is meant to shield the decisions of the corporate directors as risk takers and narrow the situations where they could be found liable.[6]

Additionally, the business judgment rule, just as in the U.S. system, creates a rebuttable legal presumption, protecting the directors' decisions as long as they are made with reasonable judgment sufficiently informed. According to the new standard, in order to challenge the presumption and make the directors liable, the plaintiff will have the burden to prove that the directors acted in bad faith, violated the law, or the duty of loyalty.

On the other hand, the reform proposes the strengthening and reinforcement of the current duty of loyalty, stating that the actions of the directors shall always be performed pursuing the best interests of the company.[7]

Likewise, in explaining the scope of this duty, the bill enlisted five duties that need to be obeyed by the directors to be in "compliance" with it; these are:

1 guard and protect the commercial and industrial reserve of the corporation;

2 refrain from misuse of confidential information;

3 provide fair and equal treatment to all shareholders;

4 abstain from being part of acts or transactions on which there is a conflict of interest, unless due authorization is provided according to the procedure established in Article 13 of this law; and,

5 abstain from being part of acts or transactions implying competition with the corporation and taking for oneself business opportunities that belong to the company, unless due authorization is provided according to the procedure established in Article 17 of this law.

In summary, this dual system (ex ante and ex post) is implemented to allow the directors to foresee some circumstances and events where conflicts of interests are completely and undoubtedly clear, and some others that, if considered uncertain, can later be reviewed by the courts in order to protect the best interests of the corporations and its shareholders. P

1 ARTICLE 23, ACT 222 OF 1995.

2 Id.

3 ACT 222 OF 1995. ARTICLE 24. RESPONSIBILITY OF THE MANAGERS. "The managers will be joint and severally liable and without limitation for the damages caused by negligence or willful misconduct caused to the company, to the partners or to third parties.

4 Authors' free translation.

5 BILL PROJECT NO. 231 OF 2017. ARTICLE 8. MANAGERS' LIABILITY. (…) In order to judge the managers' liability, the rules on the levels of negligence provided in article 63 of the Civil Code shall not be taken into account.

6 BILL PROJECT NO. 231 OF 2017. Authors' free translation. "ARTICLE 9. DEFERENCE TO THE BUSINESS JUDGMENT OF THE CORPORATE DIRECTORS. The judges shall respect the business judgment adopted by the directors in the decision making process related to the exercise of their functions, provided that such determinations correspond to a reasonable judgment sufficiently informed. Therefore, unless bad faith, violations of the law or the duty of loyalty, the directors shall not be liable for damages originated as consequence of their business decisions."

7 BILL PROJECT NO. 231 OF 2017. ARTICLE 7. DUTY OF LOYALTY. The actions of the managers shall be fulfilled at all times in function of the best interests of the company.

Material Changes in Hungarian Competition Law in the Light of EU Antitrust Damages Directive

In order to implement the European Union (EU) Antitrust Damages Directive (2014/104/EU) into Hungarian law in due course, the Hungarian Parliament adopted a major amendment to the Competition and Antitrust Act No. LVII of 1996 by Act No. CLXI of 2016 (the "Amendment Act"). The change came into effect on January 15, 2017. This implementation is likely to result in an easier way to succeed in private antitrust litigations. However, the existing failures of the Hungarian civil law litigation will not be remedied. On the other hand, business associations are not really encouraged to introduce legal actions in antitrust matters. In addition, the new private enforcement rules will probably contribute to a legal environment that may, step by step, enhance private enforcement of competition law in Hungary.

Historic Background

Previously, claiming damages for a competition law infringement was feasible under the general civil law rules on indemnification and a few special supplementary provisions. However, the Amendment Act introduced detailed rules for damage claims arising out of competition law infringement and the enforcement thereof. These new rules are incorporated into a new chapter of the Competition Act and several other new solutions are admitted to Hungarian law aiming at the private enforcement of competition law.

Liability and Compensation

Compensation may be claimed for:

- cartels and other horizontal or vertical restraints (Chapter IV of the Competition Act and Article 101 of the Treaty on the Functioning of the European Union); and
- abuse of a dominant position (Chapter V of the act and Article 102 of the treaty).

In such cases, the Civil Code and the Code of Civil Proceedings apply, with the exception of cases in which the special rules included in the new chapter of the Competition Act apply.

Joint and Several Liability

Multiple infringers are jointly and severally liable for the damages caused. The principle of joint and several liability was already a well-known principle of Hungarian civil law even before, but now the Competition Act also accepts this general principle in the context of competition law, which results in exceptions from joint and several liability for small and medium sized enterprises and leniency applicants to whom immunity is granted. These business players' joint and several liability exists only for the losses of their direct or indirect buyers and suppliers and are liable for the losses of further parties only if the losses cannot be enforced against the other infringers.

Full Compensation

Aggrieved parties are entitled to full compensation for their losses. Full compensation is the general principle of both the EU Antitrust Damages Directive and Hungarian civil law and, as such, the directive made no significant changes in this respect. The major difference between the directive and Hungarian civil law is that the Hungarian Civil Code accepts the concept authorizing the courts, in exceptional circumstances, to award compensation for damages in an amount less than the loss actually suffered. This rule is not undertaken by the Competition Act and will therefore not apply in cases of liability based on competition law infringements. Moreover, liability for such damages cannot be excluded or limited by a contractual provision.

Amount of Loss

As a general rule, the burden of proof on the damage caused by the infringement

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lies with the plaintiff. However, the Competition Act now contains two important rebuttable presumptions in this regard:

- if a cartel's existence is proven, it is assumed that it caused damage (this has been implemented by the new amendments); and
- it is assumed that cartels increase the prices applied by infringers by 10 percent.

Of these two presumptions, the latter one existed in the Competition Act even before but still practically no claimants tried to start legal proceedings against cartelists.

Limitation Period

The usual five-year limitation period provided for under civil law is applicable in competition law infringement claims, too. However, the commencement of the limitation period is different for competition law claims. It starts from the date when the infringement ceases and the aggrieved party learns, or should have learned, of the infringement, the harm and the party that caused it.

If a competition authority in the EU starts to investigate the infringement, the limitation period is suspended from the beginning of the investigation until one year after the authority's final resolution. If the parties enter into alternative dispute resolution, the limitation period is suspended during that procedure.

Passing-on Defense

The Competition Act now clearly provides that infringers may rely on the passing-on defense. The burden of proof lies with the party that relies on this defense. In the past this issue was not clarified in Hungarian jurisprudence, even though the Hungarian courts seemed to accept the passing-on defense applying that provision of the Civil Code which set forth that plaintiffs are not eligible to compensation for costs which have been recovered from elsewhere.

Disclosure of Evidence

The Competition Act now contains detailed rules on discovery with regard to how the courts may order participants or other third parties, including national competition authorities and the European Commission, to disclose evidence. Disclosure may be ordered only at the request of a party and not by a court *ex officio*. There are a couple of requirements and limitations under which the courts should order the disclosure of evidence. The crucial ones are the following:

- If the disclosure was requested by the plaintiff, it can be ordered only if it seems likely that the plaintiff's claim is justified. Certain documents, including leniency applications and other confidential documents, are in all cases exempt from disclosure.
- The evidence requested should be capable of supporting the requesting party's claim.
- The scope of the disclosure is limited to evidence which is absolutely necessary and in terms of various factors, such as the costs and workload, the disadvantages expected from the disclosure cannot exceed the related advantages. Failure to comply with an order to disclose evidence may result in a fine of up to HUF 50,000,000 (approximately EUR 160,000). This fine can be imposed repeatedly.

While it must be ensured that requests for disclosure are used as a tool for fishing for information, the Hungarian disclosure requirements might be considered too stringent. It will be up to the courts to so apply these rules so they do not trigger unreasonable obligations to the party asking for the disclosure. As a matter of fact, the defending parties will have lots of methods to argue against disclosing evidence.

Participation of the Competition Authority

The Hungarian courts are bound by the decisions of the Hungarian Competition Authority or the European Commission if the latter ones have already rendered such in the same case, concerning the fact of the infringement. Decisions of other EU member state competition authorities are also accepted by the Hungarian courts concerning the fact of the infringement, but they can be challenged. Other elements of the decision, e.g., the effects of the infringement, are not binding on the courts.

The court may also request a non-binding opinion on the case from the Hungarian Competition Authority, however, it is entitled to reject this request.

Termination of Employment Procedure in Kenya

Sometimes employers find themselves in trouble with the law. They are condemned by the Employment Court to pay hefty awards for unlawfully terminating the services of their employees—even where whether there was justification for termination. Many employers are therefore learning the hard way that there is a lot to consider before uttering the dreaded words, "You are fired!" For an employer to safely exercise their right to terminate an employment engagement with their employees, they must ensure compliance with the procedural requirements for fair termination established under the Employment Act, 2007, and respect the rights of the employees as enshrined in the Constitution of Kenya, 2010.

As the Employment Court observed in *Mary Chemweno Kiptui vs. Kenya Pipeline Company Limited, Case No. 435 of 2013*, "the industrial Court has now built firm jurisprudence on circumstances within which the employer and employee relationship can be terminated or how the process of summary dismissal can be conducted so as to meet the strict provisions of the law and to avoid making the same invalid." The judge in this case agreed with the decision in *Kenya Union of Commercial Food and Allied Workers vs. Meru North Farmers Sacco Limited Case No. 74 of 2013* where it was held that "whatever reason or reasons that arise to cause an employer to terminate an employee, that employee must be taken through the mandatory process as outlined under Section 41 of the Employment Act. This applies in cases for termination as well as in a case that warrants summary dismissal."

Section 41 of the Employment Act, 2007 provides that "Subject to Section 42 (1), an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity, explain to the employee in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation."

Various decisions by the Employment and Labor Relations Court have now established that Section 41 of the Employment Act is a mandatory provision. Therefore, if the employee has not been given notice of intended termination and an opportunity to be heard before the decision for termination is made, whatever the grounds the employer may use to justify the termination, such termination will be held to be unfair and unlawful.

There are three basic requirements for an employer to put in place to meet this threshold. First, the employer should have valid reasons for termination. This may be based on misconduct, poor performance or physical incapacity on the part of the employee. It is upon the employer to prove the grounds.

The second requirement is that the employer must notify the employee that they are considering terminating their employment. The Court in *NAIROBI ELR Case No. 562 of 2012, Shankar Saklani vs. DHL Global*, held that "except for contracts of service to pay a daily wage, the employer must serve a notice and accord the employee a hearing as contemplated in Section 41 of the Act. The only leeway the employer is entitled to under Section 44 (1) is to serve a shorter notice, on account of gross misconduct, than that to which the employee was entitled to under statute or contract."

The third requirement is for the employee to be given an opportunity to be heard before the decision to terminate

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their employment is made. The employee must be informed through a notice as to the charges and given a chance to submit a defense, followed by a hearing in due cognizance of the fair hearing principles, as well as natural justice tenets. The best practice is to also allow for an appeal to the employee within the internal disputes resolution mechanism if dissatisfied by the decision of the disciplinary committee. Where this procedure is followed, an employer would have addressed the procedural requirements outlined under section 41 and any challenge that an employee may have would be with regard to substantive issues only.

So then, what happens in the meantime as the employee is going through the notification and hearing process? The employer is entitled to place the employee on suspension when there are reasonable grounds to suspect the employee has been involved in misconduct, poor performance or physical incapacity. Suspension allows the employer the opportunity to undertake further investigation. The employee can be summoned back to work any time for disciplinary proceedings or under other terms of the employer.

Even in cases of serious breach of contract or an employee being absent from work; being intoxicated, being negligent or abusive; failing to obey lawful orders; criminal arrest; or being a suspect in a criminal case, under Section 41, an employee is entitled to a hearing. P

Risks to the Community vs. Confidential Medical Care: A Challenge Not Yet Solved

Although decided more than 30 years ago, many lawyers will remember the Tarasoff case,[1] which saw the Supreme Court of California called upon to consider the limits of a patient's expectation of confidentiality when seeking advice from a health professional. As recent developments in Australia show, the balancing exercise between confidentiality and the patient's potential risk to the community has become no easier, and its significance may now be heightened by the scope for the risk to the community to be a risk of terrorist activity affecting many, rather than a risk to an individual.

In *Tarasoff*, the patient Mr. Poddar was a graduate student who had formed a relationship with Ms. Tarasoff. Her views regarding the relationship were not the same as those of Mr. Poddar. He apparently began to stalk her and he became increasingly depressed. He came under the care of a psychologist to whom he confided his plan to kill Ms. Tarasoff. In due course he was detained for mental health reasons, before being released. The psychologist did not warn Ms.Tarasoff of the risk to her, and she was ultimately killed by Mr. Poddar.

The litigation was brought by the parents of the late Ms. Tarasoff, alleging negligence on the part of the psychologist and others who had treated Mr. Poddar. It was ultimately successful, with the majority of the Court holding that the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins.

The *Tarasoff* decision is well known through much of the legal world. It has a page on Wikipedia.[2] Some 30 years later, the challenge posed by *Tarasoff* has not disappeared.

In April 2017, a Coroner in the State of Victoria, Australia, published findings in an inquest into the death of Ms. Adriana Donato in 2012.[3] Ms. Donato had formed a relationship with a former school friend, James, which she ultimately ended. James did not cope well and came under the care of a psychologist. In a sad parallel to the Tarasoff matter, he ultimately stabbed and killed Ms. Donato.

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The coroner's inquest focused on James' disclosures to his psychologist, and examined the existing obligations of confidentiality in the psychologist/patient relationship. Probably having some regard to *Tarasoff*, the legislative threshold for breaching patient confidentiality in the State of Victoria required a "serious and imminent threat."[4] The psychologist gave evidence that she had not reached the view that James constituted a serious or imminent threat. However, the coroner found that it would have been appropriate for the psychologist to question James on his threats. Such questioning should have made reference to Ms. Donato and should have intended to verify whether he had developed a plan as to how harm would be inflicted. The response to these questions could have clarified whether she notify her employer and the police of the threats.

The coroner recommended that the State of Victoria amend its legislation to remove the requirement that a "serious risk of harm" be also one which is "imminent." It also recommended that existing Code of Ethics and Guidelines of the Psychology Board of Australia should provide greater clarity of reporting obligations.

After Ms. Donato's death in 2012, but before the publication of the coroner's findings in 2017, a far more prominent event occurred in Sydney, Australia. On December 15, 2014, Mr. Monis took a number of people hostage in a café in central Sydney, purporting to do so on behalf of the ISIS organization. He ultimately killed Mr. Johnson, who worked at the café. Ms. Dawson, a lawyer who had been in the café as a customer, was accidentally killed as police entered the building in response to the shooting of Mr. Johnson.

Mr. Monis, at an earlier stage, had also been under the care of health professionals for mental health issues. The difference between his history and the two examples above was that Monis' mental health issues were more diverse and not focused on any of the individual hostages.

Again a coronial inquest was held, addressing a wide range of issues. The coroner touched on the *Australian Psychological Society Code of Ethics*, making recommendations for consideration of expanded circumstances for disclosure of risks of harm to others. The coroner also addressed changes to privacy legislation, with recommendations for consideration of disclosure of health records to security agencies.[5]

The three examples above all related to risks of deliberate harm through physical actions on the part of a person who had been under care for mental health issues.

This brief article can only point to the challenge of balancing risks to the community against the benefits of confidential medical care. Doctors and other health professionals, at least in Australia, will no doubt wish to refine their codes of conduct. Governments may well revisit relevant laws, to tip the balance further in favour of the community protections.

Perhaps the same contemplation of similar issues may be warranted by the legal profession, given that lawyers sometimes learn from their clients of risks to the community of a serious and sometimes imminent nature.

Are these challenges limited to the health and legal professions? The responsibilities of other organizations, such as internet service providers, have already been the subject of debate. Despite the challenges of a general "duty to rescue" concept, perhaps one day soon the courts will be called upon to consider the responsibility of a family member or an unrelated person, with knowledge that may have prevented the death of or injury to another. P

1 Tarasoff v. Regents of the University of California, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14
2 en.wikipedia.org/wiki/Tarasoff_v._Regents_of_the_University_of_California
3 coronerscourt.vic.gov.au/resources/6a8714f7-7732-4ec5-9fa6-5208783b810d/adrianadonato_346512_redacted.pdf
4 Health Records Act 2001 (Vic)
5 lindtinquest.justice.nsw.gov.au/Documents/findings-and-recommendations.pdf

Things to Learn from the European Crowdfunding Market

According to the Cambridge Centre for Alternative Finance at the University of Cambridge Judge Business School, 5.4 billion Euro were raised through national and international crowdfunding platforms in 2015 inside the European Union (EU). Crowdfunding is growing in the EU and is now considered the new trending financial tool. But its quick evolution and growth raises questions and doubts both for project inventors and investors.

How is the Actual European Crowdfunding Market?

The European Commission generally defines crowdfunding as "an online marketplace to match investors and investees or lenders and borrowers." Crowdfunding was mentioned by the European Parliament in its resolution of July 9, 2015, on Building a Capital Markets Union, stating that the "Capital Markets Union should create an appropriate regulatory environment for the companies looking for … non-bank financing models, including crowdfunding…". It allows the discoverer to create a direct relationship with the funder.

In the EU, figures show that even if crowdfunding is constantly growing, it still represents a small part of the financial

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market with operations confined to the national level. Although the cross-border activity and globalization of crowdfunding are still limited, crowdfunding is expanding all over Europe, and especially in France, the United Kingdom (UK), Germany and The Netherlands. As of today, the UK is the leader in terms of volume inside the EU. In France, equity crowdfunding and reward-based crowdfunding are dominant. Belgium is first for invoice-trading and Germany is the leader for real-estate crowdfunding and donations-based crowdfunding. It is important to notice that there are still huge disparities between the European member states; for instance, if you divide the volume of the transaction of each European country by its population, then the UK is still the leader, but France and Germany leave the podium and Estonia enters in second place.

What are the Potential Risks of Crowdfunding?

Those who would like to start investing in projects via crowdfunding must be aware that potential risks include investors not getting the returns they expected, a loss of capital, illicit activities performed by the platforms, or even misinformation.

In response to those different risks, the European Commission created the European Crowdfunding Stakeholder Forum (ECSF) which has the objective to "contribute to raising awareness, providing information and training modules for project owners, promoting transparency and exchange of best practices, and identifying issues that may need to be addressed in order for crowdfunding to flourish, while taking into account the interest of contributors" (explanation given by the Commission). At the same time, some member states are implementing "bespoke regimes" for crowdfunding, taking into account different European law obligations, such as the European Consumer Law, Know Your Customers obligations, due diligence requirements, the Directive of Unfair Commercial Practices (Directive 2005/29/EC) or even the Anti-Money Laundering Directive (Directive 2015/849). What's more, some platforms must be authorized under the Directive on the Markets in Financial Instruments to obtain a "passport" allowing them to perform financial services and financial activities through the European market. So by developing their bespoke regimes, European Member States try to secure any financial transactions occurring by crowdfunding and protect both parties. European law, Opinions from the European Parliament, and Opinions from the European Commission are the best way for member states to regulate crowdfunding activities inside the EU and to allow platforms to thrive in the near future.

The next objective for the European institutions and the member states should be to harmonize the different crowdfunding European bespoke regimes in order to contribute to the sustainability of crowdfunding and its internationalization with cross-border activities.

Sources:

- European Commission working document on the Crowdfunding in the EU Capital Markets Union (ec.europa.eu/info/system/files/crowdfunding-report-03052016_en.pdf)
- Ethan Mollick's article for the Harvard Business Review "The Unique Value of Crowdfunding Is Not Money — It's Community" (hbr.org/2016/04/the-unique-value-of-crowdfunding-is-not-money-its-community)
- Alex Lui at Cambridge Insight Talk The EU CrowdFunding market in a global context @Crowd Dialog EU 16 (youtube.com/watch?v=kXS0jY2Uk1k)

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Alphabetical by State/Country

Alabama PBLI PDI

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Alaska PBLI PDI

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Arizona PBLI PDI

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Arkansas PBLI PDI

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California PPII

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California PBLI PDI

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Primerus Business Law Institute (PBLI) Primerus Defense Institute (PDI) Primerus Personal Injury Institute (PPII)

Primerus Law Firm Directory – North America

Alphabetical by State/Country

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Primerus Business Law Institute (PBLI) Primerus Defense Institute (PDI) Primerus Personal Injury Institute (PPII)

Primerus Law Firm Directory – North America

Alphabetical by State/Country

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Primerus Business Law Institute (PBLI) Primerus Defense Institute (PDI) Primerus Personal Injury Institute (PPII)

Primerus Law Firm Directory – North America

Alphabetical by State/Country

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Primerus Business Law Institute (PBLI) Primerus Defense Institute (PDI) Primerus Personal Injury Institute (PPII)

Primerus Law Firm Directory – North America

Alphabetical by State/Country

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Primerus Business Law Institute (PBLI) Primerus Defense Institute (PDI) Primerus Personal Injury Institute (PPII)

Primerus Law Firm Directory – North America

Alphabetical by State/Country

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Primerus Business Law Institute (PBLI) Primerus Defense Institute (PDI) Primerus Personal Injury Institute (PPII)

Primerus Law Firm Directory – North America

Alphabetical by State/Country

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Alphabetical by Country

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Blue Mountains National Park, New South Wales, Australia

Primerus Business Law Institute (PBLI)

Roe Cassidy 'Feeds Thy Neighbor'

Every Saturday morning at 7:30 a.m., between 40 and 80 hungry people file through the doors of St. Andrews Episcopal Church in Greenville, South Carolina, and load their plates with eggs, ham, biscuits and grits.

Clark Price of Roe Cassidy Coates & Price prepares breakfast.

Though they are not affiliated with the church, volunteers from Primerus member firm Roe Cassidy Coates & Price in Greenville are often among those serving the guests. Firm attorneys Josh Smith, James Cassidy and Clark Price are part of the volunteer team every first Saturday of the month. During months with a fifth Saturday, Roe Cassidy attorneys and employees make and serve the meal.

The guests for the traditional Southern breakfast include homeless, working poor and others who don't have enough to eat.

Smith said he comes away from the experience with renewed gratitude and perspective on the struggles of life.

"We have stressful jobs, but at the end of the day we go home, and we don't ever worry about where the next meal is coming from," Smith said. "It will keep all the stress you have in perspective. That's the universal thing I hear from everyone [who volunteers]."

The program, called Feed Thy Neighbor, was founded in 2010 and has grown to become a cooperative effort of the Episcopal churches in Greenville – and the community at large. Volunteers come from the churches, as well as community groups and businesses.

Roe Cassidy Coates & Price first became involved through Smith's father, who volunteered on the first Saturday of every month. Smith, Cassidy and Price joined him. They then learned that there was a gap in volunteers every fifth Saturday of the month.

"We thought we could do this together as a firm," Smith said.

Attorneys, paralegals and other staff members took on the project, which includes purchasing the food, preparing the meal, serving the guests and cleaning up.

The effort fits with the firm's mission to improve the community around them.

"The need is always out there," Smith said.

2017 and 2018 Calendar of Events

Scan to learn more about Primerus.

October 4-7, 2017
Primerus Global Conference
Vancouver, Canada

October 15-18, 2017
Association of Corporate Counsel Annual Meeting
Washington, DC
Primerus will be a corporate sponsor.

November 9-10, 2017
Primerus Defense Institute Insurance Coverage and Bad Faith Seminar
New York, New York

January 24, 2018
Primerus Europe, Middle East & Africa/Association of Corporate Counsel Europe Seminar
London, United Kingdom

February 22-23, 2018
Primerus Defense Institute Transportation Seminar
Las Vegas, Nevada

February 21-24, 2018
Primerus Plaintiff Personal Injury Institute Winter Conference
Sedona, Arizona

March 7-9, 2018
Primerus Young Lawyers Section Conference
Charleston, South Carolina

March 21-22 , 2018
Primerus Latin America & Caribbean Institute/Association of Corporate Counsel Argentina Seminar
Buenos Aires, Argentina

April 26-29, 2018
Primerus Defense Institute Convocation
Scottsdale, Arizona

May 3-5, 2018
Primerus Business Law Institute International Convocation
Miami, Florida

May 20-22, 2018
Association of Corporate Counsel Europe Annual Meeting
Paris, France
Primerus will be a sponsor.

There are other events for 2017-18 still being planned which do not appear on this list. For updates please visit the Primerus events calendar at primerus.com/events.

For additional information, please contact Chad Sluss, Senior Vice President of Services, at 800.968.2211 or csluss@primerus.com.

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