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SPRING 2019

President's Podium: Primerus Community

Relationships Form the Bedrock of the Primerus Community

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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 primerus.com.

About Our Cover

Around the world, relationships among the Primerus community spark energy and collaboration that benefit members and clients alike.

Scan this with your smartphone to learn more about Primerus.

Primerus
The World's Finest Law Firms

Publisher & Editor in Chief: **John C. Buchanan**
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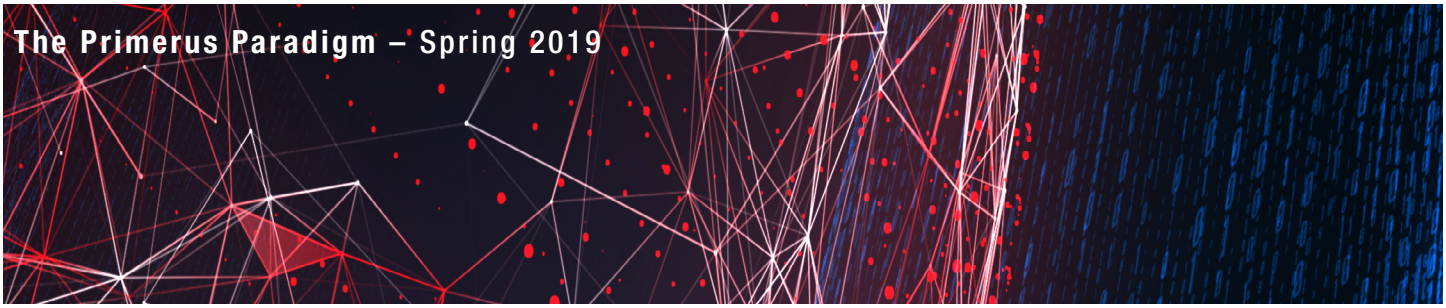


President's Podium

John C. Buchanan

Primerus Community

One of the most rewarding aspects of my role as the founder and president of Primerus is being part of the Primerus community and witnessing how it brings together lawyers and clients from around the world.

When Primerus members gathered last October in Boston, Massachusetts, for the Primerus Global Conference, I had the pleasure of working alongside a member from Hong Kong as we sorted food donations at the Greater Boston Food Bank. In a few hours' time, about 50 Primerus members packaged 8,962 pounds of food, which is enough to feed an American family of four for two years.

The event was part of our global community service effort called Primerus Fights Hunger, launched in 2017 to raise donations for the World Food Programme and other local hunger initiatives in the cities where we have firms around the world.

It was a tremendously rewarding experience to work with Primerus members as we all embraced the value of community service. The spirit of Primerus was alive and well that day.

When I founded Primerus more than 25 years ago, I wanted to create a society filled with high-quality lawyers who hold themselves to the highest standards of professionalism and integrity. Over the years we have proven to clients and the world that Primerus is exactly that. We have evolved into an organization of truly good people, who happen to be lawyers, who are partners and friends with one another.

While we benefit from those connections, the ones who really benefit are our firms' clients. Our members' work for clients goes beyond providing an excellent work product for reasonable fees. Because of the relationships and connections that members have developed around the world, we are able to care for clients like we would our own family. When a Primerus member recommends a fellow Primerus member, they know a client will be treated with the very best care.

Some organizations keep clients at arm's length, passing business cards and focusing on the bottom line. Not Primerus. We invite clients in, not just to attend our events, but to be part of us through initiatives like the Primerus Client Resource Institute.

When members and clients come to a Primerus event, we want everyone to feel like they are coming to a family reunion. We truly care about clients, and their well-being is our number one priority.

We have developed an organizational structure to support this philosophy. Our Accreditation Board ensures that we are seeking out, accepting and retaining only the best firms for membership. Our Quality Assurance Board works to define the high standards embodied within our core values – the Six Pillars – and help our member firms live by those standards in everyday practice. They're the guardians that protect Primerus' high standards and excellent reputation so that clients can rely upon our members with confidence. With 3,000 lawyers in 170 law firms around the world, Primerus is like a large, virtual law firm with countless opportunities for collaboration among members and with clients. The result is a tight-knit community that gives back both globally and locally, raises the standards of the legal profession and serves clients like family.

I am so glad that each one of you are part of the Primerus community and hope you find it as rewarding as I do.

Some organizations keep clients at arm's length, passing business cards and focusing on the bottom line. Not Primerus. We invite clients in, not just to attend our events, but to be part of us through initiatives like the Primerus Client Resource Institute.

Relationships Form the Bedrock of the Primerus Community

Like most general counsel, Lisa Stephenson gets invited to many events with outside attorneys.

She's picky about which ones she attends. And when she does go, sometimes the meetings feel a bit like "speed dating," with attorneys working hard to impress clients.

So when she attended the 2018 Primerus Defense Institute (PDI) Convocation in Scottsdale, Arizona, she was pleasantly surprised.

"I just felt a sincere camaraderie and strong relationships and connections among the members," Stephenson said. "It was a different vibe … I felt like the group truly likes each other and was excited to see each other."

Stephenson, who is general counsel for CRST International, Inc. in Cedar Rapids, Iowa, attended the Convocation as the guest of Duncan Manley, partner with Primerus member firm Christian & Small in Birmingham, Alabama. She has worked with the firm for years and has come to trust them.

That kind of relationship is what she's looking for with outside counsel. "I'm just a relationships person," Stephenson said. "Some corporations look at outside counsel as commodities … The only metric they use to measure success is 'whether you can decrease my legal spend.' For me, it's about having people who know me, know my company, and know that as long as they get great results, I want to be a partner with them."

Perhaps that's why she felt so at home with Primerus, according to Primerus President and Founder John C. "Jack" Buchanan.

"Trusted relationships form the bedrock of the Primerus community," Buchanan said. "They're the reason Primerus member firms are able to serve their clients with resources even the world's largest law firms may not offer: personal connections with high quality lawyers who charge reasonable fees around the world."

Primerus works hard to create the strong community that Stephenson experienced firsthand. The society offers many opportunities for members and

clients to attend social events, learn about the latest legal trends and develop meaningful relationships. Started in 2005, the PDI Convocation is one such opportunity. Primerus has other events with the same emphasis, including the new Primerus International Convocation, which kicked off in May 2018 in Miami, Florida.

Stephenson appreciated the opportunity to have fun together, as well as attend quality legal education sessions at the Convocation.

"I was just blown away," she said of the legal education options. "I thought it was amazing content – deep, useful, meaningful content."

She was so impressed with Primerus that she has hired two Primerus firms for matters since the Convocation and plans to turn to Primerus in the future when she needs legal representation around the country.

"It's just a class-act organization," she said. "I really genuinely feel it's a worthwhile organization, and it's been a big benefit to me already."

Member Connections

Fostering a strong community with deep relationships among Primerus members is a priority for Frank Szilagyi of Primerus member firm Szilagyi & Daly in Hartford, Connecticut.

"For me, Primerus became an opportunity to create and develop relationships that have lasted since the time I became involved," Szilagyi said.

So Szilagyi is committed to making sure every Primerus member, and their clients, get connected to the Primerus community from the get-go. He's the chairman of the Primerus Ambassadors Board, which reaches out to new and less active members to help them get involved.

"If we can make sure lawyers in the organization succeed, it's going to benefit all of us," he said. "One of the things we have found is that if you don't participate, it doesn't work."

Fellow Primerus member Robert Brown from Donato, Minx, Brown & Pool in Houston, Texas, helped Szilagyi when he joined Primerus in 2009.

"He told me about his experience and how Primerus had evolved into his firm's best marketing opportunity," Szilagyi said.

After joining, Szilagyi said he immediately started attending events. Now, he attends the PDI Convocation, regional events and practice area-specific events.

Connections through Primerus, he said, now represent a significant portion of his firm's existing work and an even greater percentage of new work coming in.

"We have doubled the size of the firm, from three to six lawyers," he said. "We have been able to grow the firm, and I think we're going to continue to grow the firm."

Ultimately, Primerus has benefited his clients. He shared the story of one client who, when they had legal needs in new jurisdictions around the country, he was able to introduce to other Primerus firms who could represent them in those areas.

"They felt comfortable in knowing the referral came from me, that the firms have been vetted by Primerus, and that I had a relationship with the lawyers," Szilagyi said. "The firms treated any referral they got from Primerus like it was the only client they had."

Return on Investment

Szilagyi's story is not unique. Primerus members around the world have had similar experiences, including Kevin Norchi of Norchi Forbes in Cleveland, Ohio.

Norchi's firm joined Primerus in 2005, and he started attending events right away, including the PDI Convocation.

"I have met a number of lawyers, and we still know each other. We're friends. We're comfortable picking up the phone and reaching out. Some I have known for 15 years, and some for two to three years," Norchi said.

Norchi also agreed that members must invest time into Primerus.

"The return on that investment of time is paid back in a number of ways," he said.

In addition to developing relationships with lawyers, he said Primerus also has enhanced his knowledge of legal trends that might be outside of his specific area of practice.

"I pick up other ideas that are transferrable from different areas of litigation to my own," he said. "That is information that directly benefits clients."

Norchi also has made connections with other Primerus lawyers in his area, including James Vail of Schneider Smeltz Spieth Bell, also in Cleveland, Ohio.

"I'm always available for him, and likewise for me with him," Norchi said. "Sometimes we just meet for lunch to visit and talk about what's going on."

His clients benefit from these connections. While most of his work is in Ohio, he has an occasional case in another state. In one such case, his client, a medical doctor, was being sued in Illinois. For the case he partnered with Primerus member Bradley Nahrstadt of Lipe Lyons Murphy Nahrstadt & Pontikis in Chicago, Illinois.

"Brad knew the local custom and practice of that court, which cannot be underestimated. It's very important to have a local lawyer who understands local custom. In this case, he also knew opposing counsel, his predilections and tendencies, so we could plan for that and rather than being reactive, we could be proactive," Norchi said. "We had an excellent result."

The client was thrilled, he said.

"Our clients respect our judgment to work with Primerus lawyers in other jurisdictions as it promotes continuity and consistency," he said.

Welcoming Clients

Unlike many legal organizations, Primerus seeks to get clients involved within the community, not just by attending events, but by being one of the "family," Buchanan said. That was the philosophy behind the Primerus Client Resource Institute. It was created in 2016 for clients to join the conversations about how Primerus can improve the quality of legal services available, provide easier access to the world's finest law firms, and ensure clients are charged reasonable fees.

The institute has grown to 60 client members, Buchanan said. Benefits for members include:

- A free 30-minute legal consultation phone call with any Primerus member, anywhere in the world.
- Primerus assistance in finding the right Primerus lawyer(s) to meet clients' legal needs.
- Access to free Primerus educational webinars.
- Access to all Primerus listservs, available in various legal specialties.
- Opportunity to participate in membership meetings in various areas of practice.
- Opportunity to arrange onsite educational programs customized to clients' business and industry.

Evan Slavitt, senior vice president, general counsel and corporate secretary for AVX Corporation in Myrtle Beach, South Carolina, joined the institute after attending the 2018 Primerus International Convocation. Now, he turns to Primerus when he needs new attorneys. He likes working with small to mid-sized firms like Primerus firms.

"They tend to be more responsive than the bigger firms," he said.

He also looks for lawyers who anticipate what he needs to know. "I need a lawyer to say, 'I know you asked x, but I am not sure you know about y, so we want to make sure you know about this so you can understand why that is a concern of ours."

To Ako Williams, vice president, general counsel and corporate secretary for Ushio America, Inc., in Cypress, California, size is also one of the attractive things about Primerus firms.

After attending the same Convocation, she came away with a new resource for finding firms in new jurisdictions.

"One of the great things about Primerus is, of course, all the firms are screened," Williams said. "And all of them are small to mid-sized firms, so their rates are much more reasonable and they provide excellent services."

She's planning to return to the 2019 Primerus International Convocation in Miami this May to develop more relationships with Primerus attorneys.

Not Just a Referral Group

It's the Primerus community that makes Primerus stand out from other legal organizations, according to Buchanan, and it's the reason he eschews the term "network" to describe Primerus, preferring instead the term society.

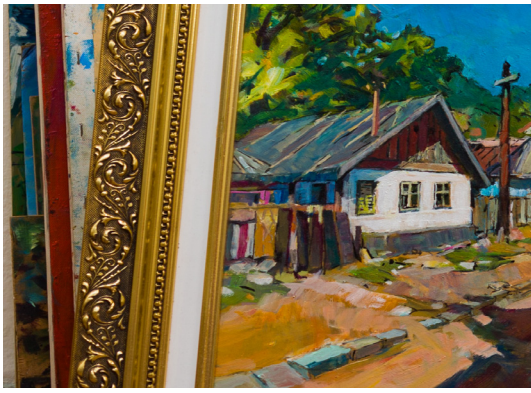
Norchi agrees. "It's not a referral group," he said. "We are much different from that."

Referrals happen, but they happen for substantive reasons, he said.

"It's sort of like being in a large law firm without the overhead and the political wrangling," Norchi said. "What we're really doing is we're enhancing our relationship with our client by being able to provide them with resources that most law firms don't have, even large law firms." P

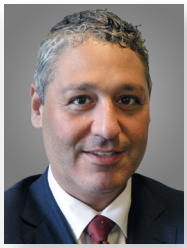
Primerus members, please send updates and photos from your community service projects so we can share them with the Primerus community. Contact Chris Dawe at cdawe@primerus.com with your details.

Primerus members are uniting to fight hunger locally and globally. We invite members to organize a local food drive or donate to the United Nations World Food Programme (WFP). According to the WFP, it provides food assistance to an average of 91.4 million people in 83 countries each year.



A Loan by Any Other Name…

Mathew Hoffman



Jason Cohen

Michael Ward

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Like many mergers, the merger of sale-leasebacks and art financing looks irresistible from a distance. However, a recent New York appellate decision (*Shagalov v. Edelman*, 161 A.D.3d 455 (N.Y. App. Div. 2018) obtained by our firm not only highlights the danger of the merger, but also establishes a precedent that should caution financiers when using sale-leasebacks.

Sale-leasebacks are a well-accepted method of corporate financing, particularly for real estate and machinery. In sale-leaseback financing, the asset owner sells it to a financing source, which in turn leases the asset back to the original owner. The original owner becomes the lessee while the financier becomes the lessor. While corporate debt involves loans that impact the balance sheet or the sale of equity, which lessens ownership, a sale-leaseback avoids both drawbacks. It has been noted: "This is much like the corporate version of a pawnshop transaction."[1] However, there is a critical difference between a standard sale-leaseback and a pawnshop loan. If one pawns an item, the pawnshop keeps the item as collateral. In the standard sale-leaseback, the original owner traditionally maintains possession of the asset that he sells.

Since the sale-leaseback is a financing device, the lessor bears a risk. Should the lessee file for bankruptcy, the transaction could be recharacterized as a secured loan and the lessor's title to the property would be challenged. See *In re Ajax Integrated, LLC*, 554 B.R. 568, 577 (Bankr. N.D.N.Y. 2016). However, we are unaware of any case where the debtor himself ever challenged a transaction (until we did).

Like corporations that own real estate or machinery, many major art purchases require financing. Potential buyers who seek to acquire pieces beyond their present means may use financing to purchase pieces for their collections or hoping to flip the piece after an increase in value. Art dealers use loans to finance their inventories. Other owners use art as collateral to establish a line of credit. Indeed, various businesses and wealthy individuals have begun using art financing as a means of funding investments in more traditional businesses. With private lenders (like our client Art Finance Partners), banks and the auction houses all taking active roles, art financing has become an incredibly important component in the art market.

Like sale-leasebacks, art financing has been described as pawnshop transactions. In fact, the *New York Times* article about art financing was entitled "That Old Master? It's at the Pawnshop."[2] In art financing, art is collateral for a loan. The lenders seek to control the collateral. Art lenders are often lenders of last resort and defaults are not uncommon. If the lender can take possession of the art, it is available to be sold in the case of default. Further, if the lender takes possession of the art during the life of the loan, the risk that the art will be double pledged after the loan is made is minimized.[3]

There seemed to be a natural fit. Why not use the sale-leaseback structure to finance art purchases? The benefits for the entity providing financing are apparent. Where a sale-leaseback structure is used, the financier does not have to abide by the requirements of Article 9 of the Uniform Commercial Code which are applicable

to secured loans. According to Artemus, LLC, an art financier, the advantages to the art owner include lower interest rates than would ordinarily be charged on art loans, a higher loan-to-value ratio than was available on standard art loans and critically, that under a sale-leaseback (unlike an art loan), the original owner maintained possession of the art.

Anatole Shagalov was a well-known art dealer and collector. Shagalov and his entity Nature Morte (together "Shagalov") and Artemus, LLC, entered into a series of transactions resulting in the financing of artworks that had been purchased by Shagalov worth millions of dollars. As is typical in sale-leasebacks, there were two agreements: a Purchase and Sale Agreement ("PSA") and a lease. The PSA referred to Shagalov as the "Seller" and Artemus as the "Buyer." Those terms, and not Borrower and Lender, were used over 100 times. Shagalov transferred all of his rights in the art to Artemus for a purchase price of several million dollars. Under the Lease and Possession Agreement, Shagalov agreed to pay Artemus monthly and had the right to repurchase the art. Superficially at least, the transaction looked as if it were a standard sale-leaseback – with at least one critical distinction. Until Shagalov repurchased the art, the art adorned the walls of Artemus' principal's home office.

In 2017, Artemus alleged that Shagalov defaulted and they began selling the art. Artemus did not give Shagalov notices of disposition and right to redeem the collateral under UCC Section 9-611, 9-613 and 9-623 that were required only if the transaction was a loan. These Sections were designed to do exactly what Shagalov wanted – give him the right to buy back his art and/or monitor any sales to third parties to ensure they were reasonable.

Shagalov sought a temporary restraining order (TRO) to stop Artemus from selling any more art. The TRO was denied, at which point our firm was retained. We were successful in obtaining a preliminary injunction to halt further art sales. The trial court found that, notwithstanding the fact that the parties referred to the transaction as a sale and leaseback, "It sounds like very much, much more so than it's a collateralized loan because who is enjoying the art? Certainly not the plaintiff but rather it is the defendant." NYSCEF No. 48 at 15.

Artemus appealed to the Appellate Division, which affirmed the injunction holding: "Plaintiffs demonstrated that the parties' arrangement may constitute a collateralized loan and that, therefore, they were entitled to notice concerning the disposition of the collateral under UCC article 9."

The Court did not explain the basis for its view that we had established the transaction was a loan. There are two possible grounds for the Court's holding. First, we argued the transaction was a loan under the "Bright Line Test" contained in UCC 1-203(b) "which requires the Court to determine whether the contractual terms of the Agreement … bear certain characteristics the statute defines as conclusive evidence that a security interest was created." *In re World Com, Inc.*, 339 B.R. 56, 64-65 (Bankr. S.D.N.Y. 2006). Alternatively, "[o]nce the court finds that the leases are not security interests per se, it is necessary to examine all the facts to determine whether the economic realities of a particular transaction nevertheless create a security interest." *In re Grubbs Constr. Co.*, 319 B.R. 698, 714 (Bankr. M.D. Fla. (2005); N.Y. U.C.C. § 1-203; *In re WorldCom, supra*). We simply do not know whether the Court agreed with us on one or both standards.

Where then does that leave the parties to a sale-leaseback? The financier needs to understand that the transaction needs to be a true lease. The language and intent of the parties are irrelevant. *In re ECCO Drilling Ltd.*, 390 B.R. 221, 226 (Bankr. E.D. Texas 2008); *In re Triplex Marine*, 258 B.R. 659, 666 (Bankr. E.D. Texas 2000).

If the "lessor" holds the "leased" property, if the value paid for the "purchased" property is much lower than the actual value of the property, if the option price to buy the property back is much lower than the value of the property, or if, at the end of the "lease," the only economically sensible thing for the lessee to do is buy the property, the lessor risks the transaction being successfully challenged as a loan and Article 9 of the UCC will apply.

There is a simple solution to all this, however. Temper aggressiveness and provide the notices required under Article 9 of the UCC and act in accordance with Article 9 standards, whether or not they apply. Even if this is beyond your obligations, the requirements are by no means draconian and simply encourage fairness. P

1 *Leasebacks* available at investopedia.com/terms/l/leaseback.asp retrieved on January 11, 2019.

2 Available at nytimes.com/2009/02/24/arts/design/24artloans.html.

3 Double pledging of art or pledging art the borrower does not actually own sadly are all too common. One of our client's borrowers was prosecuted for pledging works that he did not own, and another two borrowers asserted the protection of the Fifth Amendment when asked about collateral.

Driverless Technology and the Trucking Industry: The Road to Regulations

Advancements in driverless technology are prompting continued legislative and regulatory response. Most of our attention is focused on the transformation of passenger cars from the human to the machine, but advancements in commercial trucking are just as important. Autonomous trucks work just like their smaller autonomous car counterparts by using cameras, as well as sensory and radar systems to navigate and share similar benefits – namely, improved safety and better fuel efficiency. The financial benefits of self-driving trucks far outweigh those of passenger cars and place them at a clear advantage in the race to the roadways.

Rebecca K. Devlin

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The trucking industry is enormous and a vital part of the economy and supply chain. According to the American Trucking Association (ATA), trucks carry more than 70 percent of goods shipped around the United States. Among the findings in the annual compendium of data about the trucking industry, the *ATA American Trucking Trends 2018*, was that the trucking industry generated $700.1 billion in annual revenue in 2017. Consequently, researchers and financiers suggest that trucks equipped with autonomous technology slated to make them safer, more reliable and more efficient, also have tremendous potential to influence and improve the economy and workforce. Because of this, several concepts for the deployment of autonomous trucks have been proposed, including "Driver Assist Evolution," "Transfer-Hub Model," "Teleoperation," "Platooning" and "Private Site."

The first concept is the "Driver Assist Evolution," and many trucking fleets are already equipped with some of this technology. Rather than taking the driver out of the truck, the "Driver Assist Evolution" approach merely expands upon active safety technology with the goal of assisting the driver in transporting freight more safely and efficiently. The new technology augments safety functions, such as lane-departure warnings and adaptive cruise control, to include more advanced safety system technologies, including automated steering functions and emergency braking systems.

The "Transfer-Hub Model" is arguably one of the leading concepts in this area because it limits autonomous trucks to major freeways where truck driving is easier to automate.

Like the "Driver Assist Evolution," the "Transfer-Hub Model" does not remove the role of the truck driver altogether. Instead, autonomous trucks haul freight across long distances to and from transfer hubs located at exits on freeways, while allowing truck drivers to continue to handle driving duties associated with the more desirable local and regional deliveries.

Another concept involves deploying trucks that drive autonomously while being monitored and overseen by remote drivers. This concept, known as "Teleoperation," takes the driver out of the truck and places him/her in an office where he/she can "drive" the truck remotely. For instance, if it becomes necessary for the truck to change lanes, or avoid an obstacle on the roadway, due to an unforeseen event, and the machine fails to do so, the driver working remotely, using on-board cameras to ensure that it is safe to do so, can make the lane change or direct that the truck make the lane change.

Through the next concept called "Platooning," multiple trucks drive in unison in a tight, aerodynamic convoy allowing each truck to draft off the one in front of it to dramatically reduce fuel usage. As this technology evolves, a single driver could "drive" multiple trucks at once by digitally tethering to the trucks in its platoon. Back up or safety drivers may also be part of the equation while the platoon is active, depending upon the fleet's automated steering, accelerating and braking capabilities.

The final concept, "Private Site," which involves the deployment of automated trucks on private or restricted sites without cross traffic, pedestrians or cyclists,

undoubtedly presents the least challenging environment. Currently, autonomous trucks are operating in mines and farms on private sites, and the United States military uses autonomous trucks in its tactical vehicles on private sites.

Since the trucking industry in this country is massive and the United States economy is tremendously dependent upon it, we are seeing steady advances in the adoption of autonomous truck technology, and it is clear that, although the roles of truck drivers may shift, human involvement remains an essential component to success. Unfortunately, inconsistent regulatory and legislative response presents a roadblock.

Presently, state and local governments have defined roles in safeguarding the safety and promoting the mobility of vehicle operators in their jurisdictions. Those roles include enacting and enforcing traffic laws, vehicle registration and inspection laws, insurance and liability laws, and, more generally, the planning, building and management of roadway infrastructure. Each year, the number of states considering legislation related to autonomous vehicles has gradually increased. Presently, autonomous vehicles are legally regulated at the state level only. As of October 2018, according to the National Conference of State Legislatures, 29 states and Washington D.C. have passed laws pertaining to autonomous vehicles more broadly. These states are taking divergent legislative approaches when it comes to enacting laws related to the testing and operation of autonomous vehicles. In enacting these laws, it is incumbent upon state and local governments to consider amendments to existing traffic laws and regulations that may be barriers to the use of automated vehicles within their jurisdiction. For instance, several states have following distance laws and those laws will prevent trucks from participating in the automated truck platooning concept discussed above.

At the federal level, the National Highway Traffic Safety Administration provides recommendations, not regulations. The most notable breakthrough in autonomous vehicle legislation is the Self Drive Act, which passed in September 2017. The Act provides a federal safety framework to support self-driving innovation and technology; however, the Act excludes commercial trucks. Thereafter, the Senate introduced the AV Start Act, a similar bill, but that bill was stalled due to concerns raised by organized labor unions about workplace safety and job losses. Thus, despite what many investors and analysts view as potentially lifesaving and profitable technology, the trucking industry is left with a patchwork of inconsistent regulations and recommendations that renders it impossible to operate a truck with this technology on interstate freeways. P

Don't Let Your Marketing Strategy Unnecessarily Expose You to Personal Liability

You completed all the statutory steps to organize your business as a corporation (or LLC or other entity). Why? Because creating a separate entity for your business can insulate you, as its owner, from becoming personally liable for business debts. Nevertheless, while you've followed all the steps to create the corporation, you may have been convinced to not use your long, clunky "corporate name" for marketing purposes. Instead, your marketing guru may want you to use an abbreviated or truncated version of it or some different tradename for one or more reasons (works better with a selected logo, more mobile-friendly, easier to remember, etc.).

Daryl Manhart

Daryl Manhart is a senior shareholder at Burch & Cracchiolo, P.A. handling commercial and real estate transactions, commercial litigation and general business representation. He is also the firm's principal appellate attorney handling civil appeals, including special actions, in state and federal appellate courts in diverse practice areas, including cases before the U.S. Supreme Court.

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Marketing recommendations may be to use a short name or phrase, rather than your full entity name.

What could go wrong? Well, you could be exposing yourself to the personal liability that you probably incorporated to minimize or avoid.

First, statutes authorizing the creation of entities invariably state that the name of the business "shall" contain one or more of certain words or abbreviations identifying the type of entity. Corporate statutes require the name to contain something like "Corp." or "Inc."

Second, since entities can only act through individuals as their agent, here's some agency law. When an agent (i.e., you) makes a contract for its principal (i.e., your business), the party who is liable as between the principal and the agent is dependent on the level of disclosure. An agent who fails to disclose that the contract is being made for its principal, is personally liable on the contract as if the principal does not exist. An agent who discloses that he/she is acting for a principal without identifying that principal also is liable personally (unless the other party otherwise agrees). Only an agent who, in making a contract, discloses both that he/she is acting for a principal and identifies that principal is not personally liable on the contract.

When you hold yourself out for business with just your marketing name, you may be giving up entity protection.

So when your website (and other marketing material) is all about identifying your business with that catchy tradename, but doesn't include your full, actual business name, you could be leaving yourself open to trouble. The burden of disclosure is on you and the disclosure must have occurred by the time of transacting business – that is, before or at the time of contracting.

People conducting business using business cards, purchase order or receipt forms, stationery and the like with only some shortened version of their entity's legal name (particularly if omitting statutorily required words like "Inc.") or just a fictitious (albeit catchy) tradename have had to defend against claims of personal liability of the business owner. You may defend based on past dealings or some other basis from which you can show that the other party should have known you were acting as agent for a disclosed entity, but that costs you extra time and money and may not be successful. You organized as an entity in the first place intending to avoid that risk.

Consider some examples of what could go wrong.

O'Brien had formed an entity named Eurowest, Inc., but also used the name "Eurowest Tours." O'Brien made arrangements with Aeroflot to provide

air travel to Ireland as part of a vacation package, with O'Brien authorized to issue tickets and collect the payment for reimbursement to Aeroflot. During their dealings, O'Brien had used business cards, stationery, a written agreement and invoices which all identified his business as Eurowest Tours. As a result of scores of tickets for which no payment was ever received, Aeroflot sued O'Brien personally for over $29,000. In Aeroflot Russian International Airlines v. O'Brien, 824 F. Supp. 3 (D.D.C. 1993), the court held that at the time of contracting with Aeroflot, O'Brien had failed to disclose the name of his corporation or that he was acting as its agent. He was held personally liable.

Bakker had hired a landscaper to work on his backyard. The name on the business card he received was "D&A Landscaping," along with reference to Andrew Thomas as the landscaper. Besides the card, Thomas had provided Bakker with proposals, an estimate, and a drawing, but none indicated that D&A Landscaping was an LLC or that Thomas was an agent for an LLC. When Bakker sued, the court in Bakker v. D&A Landscaping Co., 2012 ND 170, 820 N.W.2d 357 (2012), held Thomas personally liable because he had failed to disclose the identity of his LLC.

Derr had formed a corporation named JCDER, Inc., but he began doing business as "J.D. Construction," sometimes identifying it as "J.D. Construction Co., Inc." Treadwell got a quote by mail and thereafter signed a contract with J.D. Construction, which was also signed by Derr, without indicating his office or authority to sign for J.D. Construction Co., Inc. After Treadwell had paid $91,000 on a $111,000 contract, Derr abandoned the construction job, and Treadwell sued. As there was no J.D. Construction Co., Inc., Derr was deemed operating with an assumed tradename, not as the disclosed agent of JCDER, Inc., and he was held personally liable. Treadwell v. J.D. Construction Co., 2007 ME 150, 938 A.2d 794 (2007).

In Odyssey Travel Center, Inc. v. RO Cruises, Inc., 262 F. Supp. 2d 618 (D. Md. 2003), RO Cruises, Inc. sought to avoid liability on the basis that it was a disclosed agent for another corporation, ROC, Ltd. Odyssey had relied upon, among other things, a brochure from RO Cruises referring to itself as agent for "Royal Olympic Cruises," which the court held to be a trade name and not a disclosed entity principal. The only references to ROC, Ltd. were in fine print and identified it as a cruise operator, but never as the principal for which RO Cruises, Inc. was acting. The court held that the representation of RO Cruises, Inc. was agent for what was merely its trade name, without disclosure of ROC, Ltd. as the principal, was insufficient to shield it from liability on the contract with Odyssey.

Make sure you can point to pre-contractual disclosures of your full entity name.

Consider this, then. On your website, set it up however you want for your marketing – use the short version of your entity name or your desired tradename. But somewhere on that page, for example if you have a physical address at the bottom of the page, include your entire business name (particularly if you are doing sales via that website). If you have a form of purchase order, receipt or stationery, however much you want to emphasize that name you are using for marketing, make sure your entire business name is somewhere on there, too. Although less problematic, it's a good idea to have your business cards also reflect the full entity name.

Don't forget it's important how you sign documents, too.

Now, while we're on this subject, remember that when your business contracts with others, you want to show the full entity name on any promissory notes and contract documents, and you also want to show that the person signing is doing so as a disclosed agent of the entity, and not personally. So, don't just sign your name to that service contract your vendor put in front of you. If it does not already show your entity is the contracting party, write in the full name of your business, sign below that entity name, and after your signature indicate you signed as an officer or agent (i.e., "its president").

You intend to operate your business as an entity to minimize or avoid personal liability. That makes it your responsibility to make sure those with whom you do business know that they are transacting with that entity and not with you using a fictitious name for a sole proprietorship or general partnership. P

Mortgage or Materialman's Lien – Which Has Priority?

Imagine this scenario. A borrower buys property for development. The lender provides the loan for the construction and the builder provides the material and construction based on such funds. Alabama law provides a security right to the lender for the loan and to the builder for its material and construction so everyone wins, right?

Not so fast, as the Alabama Supreme Court recently reached a controversial decision on whose lien takes priority in a future advance mortgage setting – the lender's mortgage or a builder's materialman lien – when a builder is not paid for its work. In reaching its decision, the Alabama Supreme Court relied, in part, on case law from other jurisdictions so this decision will have ramifications not only on future lending in Alabama but potentially in other states as well.

Alabama law recognizes that the priority of liens are determined as follows:

Priority of Lien

(a) **Such lien as to the land and buildings or improvements** thereon, shall have priority over all other liens, **mortgages**, or encumbrances **created subsequent to the commencement of work on the building or improvement**. Except to the extent provided in subsection (b) below, **all liens, mortgages**, and encumbrances (in this section, "mortgages and other liens") **created prior to the commencement of such work shall have priority over all liens for such work**. Ala. Code § 35-11-211 (1975) (Emphasis Added).

So, under Alabama law, the issue becomes when is a lien "created"?

Alabama has long recognized that a mortgage under § 35-11-211 is "created" when it is executed (see *Kilgore Hardware & Bldg. Supply, Inc. v. Mullins*, 387 So. 2d 834, 836 (Ala. 1980) or in the alternative, when the mortgage is recorded (see *Metro Bank v. Henderson's Builders Supply Co.*, 613 So. 2d 339, 340 (Ala. 1993).

However, a recent decision from the Alabama Supreme Court addressing future advance mortgages has turned this understanding upside down and left the lending and title industries in Alabama scrambling.

In September 2018, the Alabama Supreme Court released its decision in *GHB Construction and Development Company, Inc. v. West Alabama Bank and Trust*, which held that neither the execution date nor the recording date controls when a future advance mortgage is created. Rather, the determining factor is the time when the mortgage secures some type of indebtedness.

In *GHB*, the lender closed on a loan with its borrower and the loan was secured by a future advance mortgage (the Mortgage). No loan proceeds were initially advanced at the closing. The Mortgage was recorded the very next day, on April 10, 2015. The first advance of loan proceeds did not take place until October 16, 2015, nearly six months following the date the Mortgage was recorded. All parties agreed that no materials were delivered to the borrower's property and no construction began until *after* the Mortgage was recorded on April 10, 2015 but *before* the lender made its first advance payment on October 16, 2015. The builder completed the construction of the house a full year after the Mortgage was recorded. When the builder's final invoice was not paid, the builder filed a materialman's lien (the "Builder's Lien") against the property on December 20, 2016, a full year and a half after the Mortgage was recorded, claiming its Builder's Lien had priority over the Mortgage.

In deciding the issue, the Alabama Supreme Court first recognized that future advance mortgages are enforceable in Alabama, but the Court did not find any Alabama cases involving a future advance mortgage that did not initially secure

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some indebtedness. The Court did not address either the *Kilgore* or the *Metro Bank* cases in reaching its decisions. Instead, the Court focused its attention on *Morvay v. Drake*, 295 Ala. 174, 325 So. 2d 165 (1976), which did not involve a future advance mortgage, but recognized that in situations between a lender and its borrower, a mortgage that does not secure an actual debt may be declared void for failure of consideration. In looking to other jurisdictions for guidance, the Alabama Supreme Court noted that other states hold that future advance mortgages do not create a mortgage lien until some indebtedness is incurred. Based on the decision in *Morvay* and how other states address future advance mortgages, the Alabama Supreme Court ruled that a mortgage lien is not created until some indebtedness is incurred, i.e., some loan proceeds were advanced. Therefore, the Court ruled in favor of the builder holding its Builder's Lien had priority over the Mortgage.

The decision in *GHB* has already caused fallout with the lending industry in Alabama with the viability of future advance mortgages in the construction realm called into question. Counsel for the lender in *GHB* has filed a Motion for Rehearing on the decision. An Amicus Curiae brief has also been filed on behalf of the Alabama Bankers Association, the Alabama Land Title Association, the Mortgage Bankers Association of Alabama and the Credit Union Coalition of Alabama seeking to reverse this decision. Where this will end up, no one knows, but for now, the law in Alabama requires lenders to recognize that future advance mortgages are not "created" for priority purposes *until* some loan proceeds are paid out or some indebtedness arises.

Whether a mortgage provides security to a lender when the mortgage is recorded or only when it actually secures some type of indebtedness could very well become an issue with other states as well. In *GHB*, the Alabama Supreme Court looked to see how other states determine when a future advance mortgage is created. Decisions from other states were cited for the proposition that "a mortgage is a security for a debt, and without a debt, it has no effect as a lien" *Freutel v. Schmitz*, 299 Ill. 320, 132 N.E. 534, 535 (1921); *Guar. Title & Tr. Co. v. Thompson*, 93 Fla. 983, 113 So. 117, 120–121 (1927) and that for a mortgage to secure future advances that may or may not be made, the security does not arise until some advance is made. *Ladue v. Detroit & M.R. Co.*, 13 Mich. 380, 407 (1865). The Alabama Supreme Court even cited a treatise on mortgages, 59 C.J.S. Mortgages ' 256 (2009), for the following proposition:

> "A mortgage to secure a future loan or advance becomes a lien from the day the loan or advance is made, but not until then, and does not create a lien if no advance is ever actually disbursed."

If the Alabama Supreme Court is correct in saying that "… treatises and authority from other jurisdictions that address this issue uniformly indicate that a future advance mortgage does not create a mortgage lien until some indebtedness is incurred by the mortgagor," other states, along with Alabama, will need to evaluate how its lending industry is protected in the construction realm involving future advance mortgages. P

U.S. Department of Labor Modifies Stance on Obama Era 80/20 Rule for Tipped Employees

As labor groups and grassroots organizations across the country continue to fight for higher wages, the United States Department of Labor (DOL) has provided new guidance on what is commonly referred to as the "80/20 Rule"[1] for tipped employees. On November 8, 2018, the DOL issued Opinion Letter FLSA 2018-27 rolling back the Obama era's enforcement of the 80/20 Rule. The new rule eases restrictions on an employer's use of what is known as the "tip credit" and has vast implications for employers of the millions of tipped employees throughout the United States who are paid the minimum wage.

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The Fair Labor Standards Act mandates that non-exempt employees be paid at least the hourly minimum wage (the federal minimum wage is currently $7.25 per hour) for all hours worked. Some states also have minimum wage laws which provide greater employee protections than federal law. However, a majority of states have a special, lower minimum wage, which an employer can pay an employee who receives tips. A tipped employee is defined as an employee who works in an occupation in which he or she "customarily and regularly receives more than $30 a month in tips." 29 U.S.C. § 203(t). Many states allow an employer to pay a lower service rate to tipped employees, such as servers and bussers, and to take a "tip credit" equal to the difference between the service rate paid and the state's basic minimum wage.

For example, in Massachusetts, the basic minimum wage is currently $12 per hour, but tipped employees can be paid a service rate of $4.35 per hour, so long as the employee is informed of the law and the sum of the service rate and tips received by the employee equal or exceed the basic minimum wage.[2] In other words, the employer receives a "tip credit" of $7.65 per hour toward its minimum wage obligation for tipped employees. If the combined service rate and tips received by an employee do not equal at least the basic minimum wage for all hours worked, the employer must make up the difference. However, service employees generally receive tips well in excess of the basic minimum wage. In fact, in some states where the legislature has attempted to raise or eliminate the service rate, such as Maine, tipped employees have proactively lobbied against the change, concerned that customers would stop tipping, resulting in a net decrease in take home pay.[3] Forty-three states allow employers to take a tip credit of varying amounts (the federal tip credit is currently $5.12 per hour), while the remaining seven states require employers to pay tipped employees the full state basic minimum wage before tips.[4]

The 80/20 Rule, contained in section 30d00(f) of the DOL's internal Field Operations Handbook, acted as a limit on the use of the lower service rate. The 80/20 Rule stated that no tip credit could be taken on "related duties" where a tipped employee spent more than 20 percent of working time performing duties related to the tipped occupation, but not directly producing tips, such as cleaning and setting tables, rolling silverware, making coffee, etc.[5] It resulted in numerous lawsuits throughout the country, requiring employers defending wage claims to take on the nearly impossible task of attempting to recreate, minute by minute, the activities performed by tipped employees, separating them into "related" and "un-related" duties. This was further complicated because the DOL offered little guidance on what duties were "related" versus "un-related" to a tip-producing occupation, making it difficult for an employer to determine whether it complied with the law. For example, if a server performed cleaning duties after guests finished dining, such as sweeping and mopping floors, vacuuming the carpet or tidying up a server station, were those duties "related" to the server's tip

producing occupation of serving guests?

The DOL has now largely abandoned the 80/20 Rule. The Opinion Letter recognizes that the 80/20 Rule resulted in confusion and that it would be difficult, if not impossible, for employers to account for the exact amount of time each employee spends on every "related" task performed. The Opinion Letter states that, going forward, the DOL does "… [n]ot intend to place a limitation on the amount of duties related to a tip-producing occupation that may be performed, so long as they are performed contemporaneously with direct consumer-service duties..."

The Opinion Letter also provides guidance for an employer to determine which duties are "related" versus "un-related" to a tip-producing occupation. The DOL has taken the position that "[d]uties listed as core or supplemental for the appropriate tip-producing occupation in the Tasks section of the Details report in the Occupational Information Network … shall be considered directly related to the tip-producing duties of that occupation…" However, such duties must be performed contemporaneously with the duties involving direct service to customers or for a *reasonable* time immediately before or after direct service duties are performed. Clarifying the question asked above, sweeping and mopping floors, vacuuming the carpet and tidying up a server station are included in the related duties for waiters and waitresses.

As a result, as long as the duties are performed contemporaneously with duties involving direct service to customers or for a reasonable time immediately before or after such direct-service duties, it does not matter whether a service employee spends more than 20 percent of working time performing related, non-tipped work. On the other hand, employees cannot spend an unlimited amount of time performing such work while being paid the service rate. If an employee mops floors, vacuums and cleans for an unreasonable amount of time before and after serving guests, the employee will arguably no longer be performing a tipped occupation during that time and could be deemed to have dual jobs – cleaner and server – entitling the employee to payment at the higher basic minimum wage for the non-tipped cleaning work.

Notwithstanding the issuance of the Opinion Letter, attorneys should caution clients against changing their compensation structures for tipped employees. Instead, it is more sensible to wait to see how the change plays out in the courts and the legislature, both state and federal. At a minimum, related work performed before and after direct service duties should continue to be limited to 20 percent of working time. Many states provide a prevailing employee in a wage claim with a statutory entitlement to multiple damages and attorney's fees, so it is better to be overly cautious than risk a potential wage violation.

1 U.S. Department of Labor, Wage & Hour Division, Opinion letter FLSA 2018-27.

2 Massachusetts General Laws Chapter 151, §§ 1 & 7.

3 Dewey, Caitlin, *Maine tried to raise its minimum wage. Restaurant workers didn't want it*., The Washington Post, June 27, 2017.

4 U.S. Department of Labor, Wage and Hour Division, *Minimum Wages for Tipped Employees*, revised January 1, 2019.

5 DOL's Field Operations Handbook, published November 17, 2016, Section 30d00(f).

California's Consumer Privacy Act: Implications for Counsel and Clients

On June 28, 2018, California Governor Brown signed the California Consumer Privacy Act (CCPA), which will become effective on January 1, 2020. The CCPA (Civil Code § 1798.100 *et seq*.), is the most significant state privacy legislation passed in the United States for many years. The CCPA has been compared to the most important privacy legislation of recent years – the European Union's General Data Protection Regulation (GDPR), which came into effect on May 25, 2018.[1]

Having only recently undertaken substantial efforts to comply with the GDPR, including revising privacy and other policies, many companies in the United States may well be wary of having to undertake new work to comply with the privacy legislation passed by a single state. Whether such efforts are required will depend on the extent of California consumer data collected and shared by a business and whether the CCPA will be modified or preempted by federal legislation before it comes into effect.

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What is the CCPA?

The CCPA forestalled a substantially stricter privacy measure sponsored by Californians for Consumer Privacy, headed by San Francisco real estate developer Alastair Mactaggart, that had qualified as an initiative for the Fall 2018 ballot. Because the California legislature passed the CCPA in relatively short time, the technology industry, privacy professionals and advocacy organizations continue to lobby the California legislature to modify the CCPA. However, barring unforeseen changes and timely promulgation of regulations by the California Attorney General, enforcement of the CCPA will commence on July 1, 2020.

Four aspects of the law are particularly salient for businesses considering whether their operations fall under the CCPA:

- The CCPA imposes substantive new obligations on companies "doing business in California"[2] to protect the "personal information" of California "consumers." "Personal information" is broadly defined as "information that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household." A "consumer" is a "natural person who is a California resident," including employees, parents and children.
- The CCPA is applicable to a for-profit business (wherever located) if it (1) has annual gross revenues in excess of $25 million; (2) "annually buys, receives for the business' commercial purposes, sells or shares for commercial purposes, alone or in combination, the personal information of 50,000 or more consumers, households, or devices;" or (3) derives 50 percent or more of its annual revenues from selling consumers' personal information.[3]
- The CCPA gives California consumers substantive new rights, including: (1) the right to obtain information regarding the categories and specific pieces of personal information collected by the business about that person; (2) the right to make requests regarding the information held by the business about them; (3) the right to obtain (free of charge) copies of the personal information held by the business; (4) the right to request deletion of certain personal information; and (5) the right to direct a business that "sells" personal information to third parties not to sell such information ("opt out right").[4] For the purpose of the statute, "sell" is broadly defined as including "releasing, disclosing, disseminating, making available, transferring, or otherwise communicating … a consumer's personal information."[5]
- The CCPA gives the California Attorney General enforcement authority and the power to levy sanctions of $7,500 per intentional and $2,500 for unintentional

violations.[6] The statute also creates a private right of action with statutory damages for security breaches, which are defined as "unauthorized access and exfiltration, theft or disclosure as a result of the business' violation of the duty to implement and maintain reasonable security procedures and practices."[7]

Is the CCPA another GDPR?

Although the CCPA's definition of "personal information" is strikingly similar to the GDPR's definition of "personal data" and the CCPA provides increased consumer rights, similar to those of the GDPR, the CCPA is far from being a GDPR clone. Unlike the GDPR, the CCPA is not a comprehensive privacy regulation applying to all business sectors. The CCPA specifically exempts health and some financial information from its scope.

The CCPA, unlike the GDPR, also does not require a specific legal basis for collection and processing of data. Nor does the CCPA require companies to hire data protection officers or enter into data processing agreements. The CCPA also does not prohibit trans-border data transfers, nor will the California Attorney General be able to levy fines and penalties on the high level of EU data protection authorities.

Will there be federal privacy regulation?

Notwithstanding the CCPA's relatively limited scope, its passage has led to a renewed push for federal legislation that could preempt state laws like the CCPA. By early 2019, a half-dozen proposals have emerged with no clear frontrunner.

Citing the data collection and sharing practices of companies like Facebook and Google, as well as the data breaches involving Marriott and Equifax, several Democrats have called for a comprehensive and strict privacy law to hold companies responsible for their data practices. For example, Democrats have introduced a bill to enact a fiduciary-like standard of care on organizations collecting personal data and, separately, a Consumer Data Protection Act with "radical transparency for consumers" that would allow the FTC to fine companies and send corporate executives to jail.

In contrast, Republicans and large U.S. companies propose passage of a federal law to preempt what Intel calls "[a] non-harmonized patchwork of state legislation."[8] Similarly, Senator Marco Rubio's proposed pre-emptive federal act would promote transparency without harming "innovative capabilities."

Should businesses ignore the CCPA and wait for federal privacy legislation?

The future of federal legislation is uncertain, given the partisan divide in Washington. But pending passage before January 1, 2020, of a comprehensive law preempting state laws (which seems unlikely), companies doing business in California should consider whether they meet the criteria of the CCPA by having gross receipts of $25 million or annually collecting data of 50,000 or more Californians, i.e., 137 records a day.

If a business is subject to the CCPA, it will likely have to modify its privacy policy and establish a mechanism for complying with consumers' requests for information and limited rights of data transfer and erasure. Under the CCPA's broad definition of "sell," a business sharing information with third parties must not only describe its practices and give notice to California consumers of their rights, but also post a clear and conspicuous link on its website titled "Do Not Sell My Personal Information" to allow consumers to exercise their opt-out rights.

Businesses should also be aware that the California Attorney General's office is likely to take an active enforcement role under the CCPA through fines and penalties. Companies should also be alert that, for the first time, plaintiffs may bring lawsuits with statutory damages for certain data breaches.

Although it is unclear whether the CCPA is the harbinger of a new era in federal privacy legislation, the law is likely to have an outsized impact on other states, emanating as it does from the heart of the technology industry. If earlier legislation like California's pioneer data breach notification law is any indicator, other states may also be inspired to follow the example of the CCPA and strengthen their own privacy laws. In any event, companies should monitor the situation carefully and begin compliance efforts well ahead of the effective date of the CCPA. P

1 fpf.org/2018/11/28/fpf-and-dataguidance-comparison-guide-gdpr-vs-ccpa/

2 "Doing business in California" is defined by the California Franchise Tax Board as "actively engaging in any transaction for the purpose of financial or pecuniary gain or profit." *See* ftb.ca.gov/businesses/Doing-Business-in-California.shtml

3 Cal. Civil Code § 1798.140.

4 Cal. Civil Code §§ 1798.100-120

5 Cal. Civil Code § 1798.140

6 Cal. Civil Code § 1798.155

7 Cal. Civil Code § 1798.150

8 securityweek.com/intel-asks-comments-draft-federal-privacy-law

Bridging the Gap between Farmers and Attorneys

Farming is one of the world's oldest professions. But our modern food system is firmly planted in the 21st century. Agriculture utilizes the latest technology to operate machinery, get precise metrics on soil and plant health, and grow bioengineered crops.

While the farming industry has welcomed technology, it still shies away from the legal profession. But attorneys can actually provide many useful and valuable tools to run a sophisticated farming business. Sound legal advice is indispensable to a farming operation's continuity, profitability and financial security.

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Here are a few ways a farming operation can benefit from an attorney:

Entity Formation and Management

Many farmers still operate as sole proprietors. That is, they simply own and operate their business personally. While it might seem less complicated, sole proprietorships are left without the benefits and protections ensured by a formal entity. Entities are particularly important to insulate personal assets from liability, take advantage of tax laws and conduct business. Attorneys can assist by explaining the entity options, forming the entity and managing it.

Estate Planning

Farm families own and operate 98 percent of the agricultural operations in the United States. Many families want to keep the farm in the family for generations to come, so it's important for families to meet with an attorney and develop a comprehensive estate plan. Not only will an attorney make sure the transition goes smoothly, but he or she will also ensure that the farm's assets aren't gutted by estate taxes.

Real Estate Transactions

Realtors are often seen as indispensable to real estate transactions. They're certainly helpful in matching buyers and sellers. But attorneys are more than capable of handling the paperwork for property transfers, and they provide the legal expertise that most realtors lack. If the property's buyer and seller are ready to make a deal, call an attorney to do the paperwork instead of working with a realtor.

Insurance Coverages

Agricultural operations continue to diversify and become more complex. As they do, their insurance needs follow suit. Attorneys can identify potential risks and liabilities so farmers can make sure they have adequate coverage when something goes wrong. And what about coverage like worker's compensation? An attorney can determine whether operations need specialized coverage types so they don't get penalized for not having them.

Farmland Lease Agreements

Farmers often expand their operations by leasing farmland, but many fail to memorialize the agreement in writing. In some jurisdictions this is a risky gamble: if the land changes hands without a lease in place, the crops go with the new owner. Lease agreements are an inexpensive and easy way to protect farmers and give landowners peace of mind. Attorneys can draft these agreements generally, or with the specific and unique circumstances of each landowner in mind.

Regulatory Compliance

Farms are subject to regulations from federal, state and local governments. Keeping up with all of it can be challenging. Some farmers may find that handing off the task to an attorney is an easier and more efficient option. An

attorney familiar with your operation can advise on regulatory compliance and offer solutions for avoiding hefty fines and penalties.

Government Programs

As much as farmers want the government to stay out of the way, sometimes participating in government programs, such as crop insurance or disaster relief, is beneficial. But what are the responsibilities and potential pitfalls from these programs? Are there any strings attached? Attorneys assist in identifying available programs, assessing the downsides and ensuring compliance.

Understanding Data Rights

Who owns the data recorded by your farm equipment? The answer is a developing legal question. Many tractors, GPS tracking devices and other agricultural software may share your data with the company that created it or others. If you're concerned about who can access your farm files, you should consult an attorney before signing any technology agreements.

Solving Disputes

What happens if the new planter you're leasing is a lemon? Or what if shoddy construction causes your new milking parlor to leak during thunderstorms? Attorneys are available to help mediate these types of conflicts. Many times, we can facilitate a reasonable agreement between both sides without getting into litigation. Bringing in an expert early can alleviate costly downtime. It also makes sure you're doing all the right things if you eventually have to file a lawsuit.

Contract Review

Farmers enter a lot of contracts, sometimes on a daily basis. And while not every contract needs reviewing by an attorney, some do. For contracts involving expensive purchases, multi-year deals or big commitments, it doesn't hurt to have a legal review. Attorneys can also help negotiate contracts, possibly getting you better terms.

Finding an attorney who regularly advises farm clients can be a valuable tool. Establishing a working relationship with an attorney familiar with you and your business allows them to efficiently and quickly advise you. In the modern age, a farm business must run as any other sophisticated business. Legal advice can save money and time – the most precious of all commodities.

Business Alert – Recently Enacted Changes to Prop. 65 Requirements

As of August 30, 2018, California businesses needed to be in compliance with the updated signage requirements of Proposition 65 or face fines up to $2,500 a day and potential litigation.

Proposition 65, officially known as the Safe Drinking Water and Toxic Enforcement Act of 1986, was intended to address the growing concern of chemicals in drinking water. The initiative requires California businesses with 10 or more employees to provide warnings when they knowingly and intentionally cause significant exposure to listed chemicals.[1] There are currently over 850 chemicals listed, and the list is continuing to grow.

These warnings have become fairly common in the daily life of California consumers. Since 1988, Proposition 65 has required the warnings to state information such as, "a product may contain a chemical" or "detectable amount of chemicals" known to the state of California to cause cancer and birth defects.[2] Unfortunately, the warnings that were in compliance with Proposition 65 for the past 30 years are now ineffective.

New regulations adopted in August 2016, which took full effect on August 30, 2018, mandate that all warnings need to comply with the updated requirements. For example, one of the new requirements is that a triangular yellow warning symbol, the name of at least one listed chemical, and the internet address for California's Office of Environmental Health Hazard Assessment (OEHHA) appear on each of the warnings. Failure to comply can result in fines up to $2,500 a day and legal settlements that can reach $60,000 to $80,000 for small businesses.[3]

If you own or operate a business in California with 10 or more employees, you must comply with these new regulations. Do not assume these regulations are reserved for just the consumer products industry. Proposition 65 also applies to areas and spaces, such as enclosed parking facilities, amusement parks, service stations and designated smoking areas, as a few examples. To demonstrate the magnitude of these regulations, in just the last year there have been suits brought against chocolate, baked chips, gingerbread cookies, sunscreen, trampolines, flip flops, shea butter and more.[4]

Whether you are a local California business or out-of-state business operating in California, Proposition 65 can become a costly imposition on your operations. If you are an out-of-state business selling products in California, you will need to conduct a cost benefit analysis to determine the practicality of compliance. Options for out-of-state businesses include: making California destined products compliant and not the remaining products produced, making all products produced compliant, or pulling sales in California.

All options prove to be costly decisions for a business that does not solely operate in California. Choosing to make all products compliant could theoretically alienate consumers in other states who are not accustomed to these requirements. Dividing your products by end consumer can also create frustration in production, as well as increase manufacturing costs. Pulling sales in California would evaporate a potential market of roughly 40 million participants.

Proposition 65 highlights a concern that all businesses should stay apprised of, and that is the risks of interstate commerce and the need to be aware of the rules and regulations of the states your business operates in.

For further information on the new regulations and compliance requirements please visit: p65warnings.ca.gov or oehha.ca.gov.

1 p65warnings.ca.gov/new-proposition-65-warnings
2 thebusinessjournal.com/blog-wheres-your-sign-prop-65-changes-are-coming
3 thebusinessjournal.com/blog-wheres-your-sign-prop-65-changes-are-coming
4 thebusinessjournal.com/blog-wheres-your-sign-prop-65-changes-are-coming


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DAPTs Under Attack? How Courts and Lawmakers Are Pushing Back Against Domestic Asset Protection Trusts

In 1997, Alaska became the first state to enact legislation authorizing the use of domestic asset protection trusts (DAPTs). In the years that followed, a steady flow of states enacted similar legislation and authorized the use of DAPTs, with 17 states authorizing their use today. However, 2018 brought significant pushback against this technique. To understand that pushback, it is helpful to first understand what exactly a DAPT is, and what makes it controversial.

DAPTs are unlike any other asset protection vehicle offered in the U.S. Under general common law principles, a settlor (trust creator) could not place his or her own assets into a trust and protect those assets from his or her own creditors. Instead, a settlor could only protect trust assets from creditors of other beneficiaries. Most commonly, this involves a parent establishing a trust for the benefit of his or her child. The parent's assets placed in the trust are, while in trust, generally protected from the child's creditors. But that does not satisfy the desire of at-risk professionals like doctors, real estate developers, athletes and others to protect their own assets from their own creditors. In response, at-risk individuals seeking to protect their own assets looked offshore and began establishing foreign asset protection trusts in jurisdictions like the Cook Islands, Cayman Islands and others. This type of planning worked, as these far away and small jurisdictions had their trust law carefully constructed to include extremely debtor-friendly provisions to attract foreign investment. Back in the U.S., many states watched on the sidelines as millions of dollars of U.S. wealth moved to these offshore jurisdictions. In 1997, Alaska enacted the first DAPT statute and forever changed asset protection in the U.S.

Alaska's 1997 DAPT statute offered at-risk professionals and others what they previously could only receive offshore: creditor protection of the settlor's assets once the assets were transferred into an Alaska DAPT. Of course, to benefit from this protection, the transfer into the DAPT in Alaska (and other subsequent jurisdictions) could not be fraudulent. Other states, seeing the potential to retain their residents' wealth, enacted DAPT statutes in the years after 1997. But 2018, however, bucked the DAPT-friendly trend.

The first element of pushback in 2018 came from the Supreme Court of Alaska. The case, *Toni 1 v. Wacker*, involved a lawsuit between two families in Montana. After a series of default judgments in the Montana trial court, the family subject to the judgments transferred their Montana real estate into an Alaska DAPT. Unsurprisingly, the transfer was alleged to be fraudulent in Montana court, but the family transferring the real estate argued Alaska's DAPT statute mandated all claims against an Alaska DAPT must be brought in Alaska. The case then found its way to the Alaska Supreme Court which agreed with that reading: the statute did require all actions against an Alaska DAPT be brought in Alaska. However, the Alaska Supreme Court found that provision of the statute unconstitutional, holding that Alaska's legislature cannot limit the scope of another state's jurisdiction. The Montana Court was now free to unwind the transfer to the Alaska DAPT.

But more significant than the result for these parties, *Toni 1* is a direct rebuke of a strategy many offshore jurisdictions use. The strategy is to force a creditor to bring suit in the locality where the trust is located. For example, the Cook Islands require a creditor to bring suit against a Cook Islands trust in the Cook Islands (conveniently located over 4,000 miles from Los Angeles) under local law where trustees are explicitly permitted to wholly disregard U.S. Court orders. Alaska sought to borrow this tactic by forcing actions against Alaska DAPTs to take place in Alaska courts. However, the Alaska Supreme Court rejected that

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type of law as unconstitutional, and in doing so severely limited the options for residents of non-DAPT states to go to a DAPT-friendly state and establish a trust. Indeed, if a resident of a state that does not permit DAPTs transfers assets located in that state into an out-of-state DAPT, *Toni 1* tells us the transfer of assets to the out-of-state DAPT could be unwound by a judge of the non-DAPT state. It is easy to imagine a judge from Pennsylvania, a non-DAPT state, being less than pleased with a Pennsylvania resident putting Pennsylvania assets into an Alaska DAPT and arguing that those assets are unreachable by the Pennsylvania judge.

The pushback in 2018 came not only from the Courts. The Georgia legislature sought to become the 18th state to authorize DAPTs and presented HB 441 for former Governor Nathan Deal's signature in April 2018. A number of commentators argued against the enactment of the bill. For example, Jay Adkisson wrote a piece in *Forbes* entitled "Georgia Legislature Snookered Into Passing Legislation To Cause Investment Flight From Georgia." A month later in May, Governor Deal vetoed the legislation. His press release argued that HB 441 could have potential unintended consequences, and that the State of Georgia should ensure the creditor-debtor relationship is equitable and facilitates economic prosperity and mobility. The release concluded that HB 441 did not have sufficient safeguards to protect against negatively impacting the creditor-debtor balance.

Governor Deal's statement is worth examining. The statement does not reject the use of DAPTs based on preserving longstanding common law principles. Instead, the statement argues as a matter of policy that DAPTs are bad for business and that Georgia is better suited to protect creditors' rights. This is a much more pragmatic rejection of DAPTs than simply arguing the use of DAPTs upsets a longstanding legal principle. Georgia was already considered one of the most creditor-friendly states in the nation, and by rejecting HB 441 Governor Deal ensured Georgia would retain that status.

The 2018 legal and policy DAPT pushback then fits within the larger wave of DAPT criticism and rejection via the Uniform Voidable Transfer Act (UVTA). The UVTA has been adopted by 18 states, and is perhaps best known for its harsh treatment of transfers to DAPTs. Typically, fraudulent transfer laws are used to unwind transfers made to defraud a creditor. But the UVTA goes further. Comment 8 to Section 4 of the UVTA says that a transfer of assets from a resident in a non-DAPT state to a DAPT in another state is voidable. Or, in other words, the UVTA does not seek to just unwind fraudulent transfers. Instead, the UVTA indicates a legitimate, non-fraudulent transfer to a DAPT is in itself fraudulent if the resident resides in a UVTA state that does not authorize DAPTs.

What, then, does this mean for DAPT planning as we enter 2019? The use of DAPTs in DAPT states continues to offer perhaps the most effective blend of asset protection and cost effectiveness available to individuals seeking creditor protection. Such individuals can protect their own assets and still retain significant elements of control, depending on which DAPT statute is being used. However, the *Toni 1* case, coupled with relevant provisions of the UVTA, casts serious doubt over the utility of DAPT planning for a resident of a non-DAPT state. And the growth of DAPT states may be stalling, as seen in Georgia. Thus, attorneys and concerned clients alike should tread carefully when thinking about asset protection strategies for non-DAPT state residents while continuing to closely monitor the DAPT and UVTA state landscape. P

Reverse Bad Faith: What Remains and What Can Be Done?

The risk of bad faith liability makes life stressful for insurance claims technicians, and expensive for the companies that employ them. The stark contrast between the severe legal consequences that attend claim errors and the seeming impunity of insured's counsel who engage in set-up tactics is not lost on most in the industry.

What About "Reverse Bad Faith"?

To begin, people in the industry should stop using the term, which has fallen into judicial disrepute. Inspiring though it may be to the besieged claims manager, it leaves judges cold, for reasons that derive from the fundamentals of bad faith. The concept of "bad faith" is predicated on the breach of the covenant of good faith and fair dealing implied into contracts, including insurance policies. The implied covenant applies to both insurers and insureds. Insurers can't vindicate their rights against uncooperative (or worse) insureds with reverse bad faith actions because of the differing expectations of insurer and insured. Simplistically, the insured has an expectation of peace of mind, and the insurer has an expectation of a premium. Because of this distinction, most jurisdictions have rejected "reverse bad faith." California, for example, does not recognize reverse bad faith as a discrete affirmative tort defense, or as the basis for a cross-claim in tort.

Some insurers are misled by a rhetorical bone tossed to them by the judiciary. Bad faith claims are by nature a hybrid of tort and contract. The authority holds that an insurer cannot bring a tort cause of action against an insured for breach of the implied covenant. Untouched, in theory, is the insurer's right to recover on a contractual theory. But the scope of damages recoverable on a contract claim is narrower than in tort. Tort recovery generally embraces all harm in which the defendant's conduct was a substantial factor, even if not anticipated; for example, the "eggshell plaintiff." Contract damages, on the other hand, extend only to loss likely to occur in the ordinary course of events. A contractual claim for bad faith that simply seeks the same damages recoverable for breach of contract is prone to dismissal on a pleading motion as superfluous.

Fitting the contractual measure of damages to the detriment an insurer incurs when an insured is in bad faith is challenging. In the liability insurance context, an uncooperative insured forces the insurer to expend exceptional adjustment and legal expenses, or to offer more in settlement than warranted. But courts begin their analysis with the premise that the burden of uncertainty of litigation is precisely what the insurer assumed. This places on the insurer the burden of proving how much more it spent, as a legal result of the insured's misconduct. In one first party case, where the insurer sued an insured for the expense of investigating a fraudulent theft claim, the court declined recovery. It noted that the insurer had a duty to investigate, with the attendant expense. It was incumbent on the insurer to prove the extent to which its expense was caused by fraud. In the context of a "reverse" contractual bad faith claim, the insurer would need to prove the amount of expense attributable to the insured misconduct, as distinguished from the expense inherent in adjusting a legitimate claim.

In the context of liability insurance, proof of how much more an insurer spent on defense because of an insured's uncooperative conduct is especially problematic. A principal witness in that dispute will be the panel counsel. The ethical conflict presented, when the insurance client enlists their aid to prove damages against the insured client, is obvious.

It is virtually certain that a liability insurer would be precluded from bringing a contractual bad faith claim while the liability case is pending. The insured will file a motion to stay the insurer's suit, on the grounds that its issues overlap with the liability case issues, confront the insured with a "two-front war" and risk disclosure

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of defense strategy to the liability plaintiff. Consequently, a contractual reverse bad faith case will only be available after a judgment or settlement. At that point, apportioning a settlement or a jury verdict will be problematic. While some states recognize the right of an insurer to apportion between covered and non-covered elements, the courts afford little practical guidance. Neither plaintiff's counsel nor defense panel counsel are likely to agree to submit a special verdict form to the jury.

Proving what loss the insured "knew or reasonably expected" also poses a problem. In a first party claim, the insured presumably knew or reasonably expected their fraud to cause loss in the measure of the overstated value. But insureds generally have no knowledge or expectation of the expense that attends a claim investigation or defense. These expenses are hard to recover.

A Better Option – The Cooperation Clause

The broad scope of the standard cooperation clause is routinely overlooked. Insurers tend to segregate their claim personnel by type of claim; the cooperation clause is most frequently invoked by the Special Investigation Unit. But it has underutilized value in the management of claims that fail to raise what would traditionally be seen as "red flags."

The commercial general liability form reflected in ISO CG 00 01 04 13, requires that the insured:

> "2. Authorize us to obtain records and other information;
>
> "3. Cooperate with us in the investigation or settlement of the claim or defense against the suit."

First party coverage incorporates similar recitations of the insured's duty which typically include an express obligation to submit to an examination under oath.

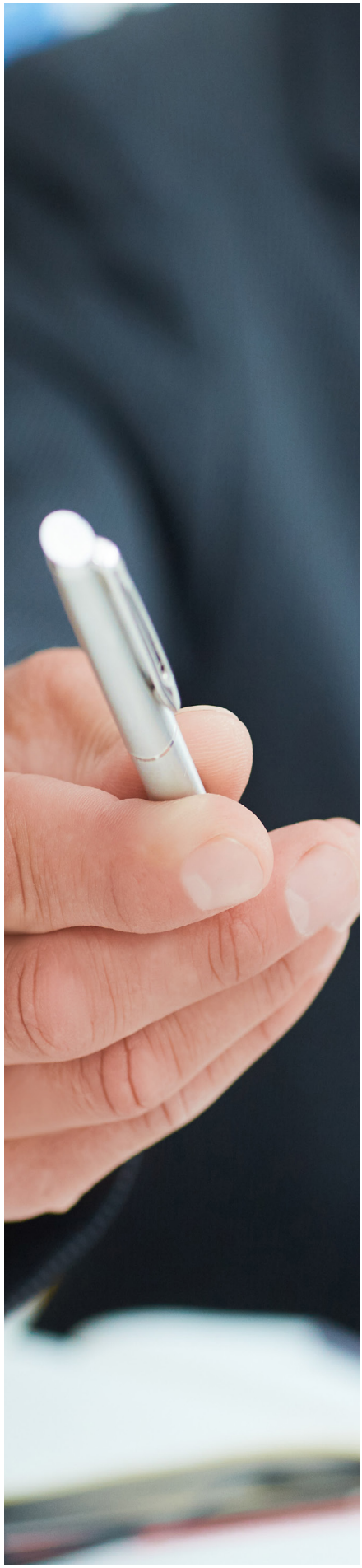
The provisions afford exceptional investigatory rights. For example, demands for tax information in other contexts will be rebuffed because, under both federal and state law, tax information is privileged. However, in the context of an insurer's investigation, courts recognize production of this information as a precondition to coverage. A United States Supreme Court opinion *Claflin v. Commonwealth Ins. Co.* (1884) 110 U.S. 81, 3 S.Ct. 507, 28 L.Ed.76 recognizes the breadth of an insurer's rights to require cooperation and examinations of its insureds.

This area of the law is more developed in the context of first party "property" claims than in the context of liability claims. An insurer's counsel may point out that in most policies, an express right to conduct an examination under oath is found only in the first party section. But it can be maintained that whether specified or not, an examination under oath falls within the broad scope of the duty of cooperation. This is consistent with the broad scope of investigation recognized by the courts, notwithstanding lack of specific reference in the policy.

One concern in examining the liability of the insured is the risk of creating a record of the insured's testimony that may be prejudicial in the liability suit. But the fact that the examination under oath occurred, and its content, should not be discoverable. Some jurisdictions limit the extent to which a liability plaintiff can access insurance coverage information. California, for example, confines liability discovery to the identity of the carrier, nature and limits of coverage, and whether (but not why) coverage is contested. Generally speaking, courts won't allow a plaintiff access to the contents of a liability claim investigation, given work product and attorney-client privilege considerations.

The foremost benefit of the insurer's exercise of its rights to cooperation is that, unlike contractual reverse bad faith, they aren't illusory. Nor does enforcement require a lawsuit.

Reverse bad faith, notwithstanding its theoretical survival as a contractual remedy, is not a particularly meaningful recourse for insurers confronted by uncooperative or collusive insureds. But cooperation clauses can do much to curb misconduct. P



Amendments to the Company Act

To improve corporate flexibility and better align with the emerging global economy, Taiwan promulgated the 2018 amendments to the Company Act, which became effective on November 1, 2018. The major amendments are summarized as follows:

Increase flexibility for management

1. Eliminated the restriction that a private company shall not reinvest any amount more than 40 percent of its paid-in capital.
2. Shareholders' meetings may be convened via video-conferencing if so provided in the articles of incorporation.
3. Lower the threshold required for a resolution in limited companies: with respect to resolutions regarding amendment of articles of incorporation, merger, dissolution and liquidation of limited companies, the threshold is lowered to two-thirds of the consenting votes of its shareholders instead of the original unanimous consent.
4. A company limited by shares may be exempt from placing a board of directors, but rather put in place one or two directors, if so provided in the articles of incorporation.
5. A company limited by shares with only one government/corporate shareholder, may be exempt from placing any supervisor, if so provided in its articles of incorporation.
6. It is not mandatory for a private company of whatever amount of paid-in capital to issue shares. Further, if a private company chooses to issue shares, it may elect to do so paperlessly.
7. The notice period to convene a board meeting is shortened to three days.
8. The articles of incorporation may stipulate that, by unanimous consent, the directors may pass written resolutions on the proposals for the board meeting.
9. It is allowable for the articles of incorporation to provide that the employee incentive mechanism of a company may apply to the employees of its holding company or subordinate companies. A company limited by shares may stipulate in its articles of incorporation that, as part of the employee incentive mechanism, the provisions relating to employee treasury shares, certificates of employee stock options, employee compensation, employee's subscription of new share, and issuing restricted stocks for employees, etc., may be applied to the employees of its holding company or subordinate companies as well.
10. A private company may issue restricted stocks for employees upon the special resolution of the shareholders' meeting.

Friendly environment for entrepreneurship and capital market

1. A company may set off losses or distribute dividends upon the closing of every quarter or every half fiscal year, if so provided in its articles of incorporation.
2. Repealed the restriction that the founding shareholder shall not transfer his/her shareholding within one year from the registration of the incorporation of company.
3. A company may issue no par value share in its option.
4. New types of preferred shares: the company may, by providing so in its articles of incorporation, issue the preferred shares with multiple voting rights, the preferred shares with veto rights on certain matters, preferred shares of which the holder is restricted or prohibited from being elected as a director or a shareholder, or the preferred shares whereby the holder thereof is ensured to a certain number of seats of directors or supervisor.

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5. The shareholders of a company limited by shares may enter into a written voting agreement or form a voting trust.

Improve the corporate governance

1. Provisions regarding de facto directors apply to all types of companies having directors, rather than being limited to public companies.
2. Expand the scope of personal interest of a director: if the spouse or blood relations within the second degree of the director, or a company having holding or subordinate relationship with the director, have personal interest in the matter under discussion, it is deemed that such director has a personal interest in the matter under discussion.
3. It is amended that the shareholder of limited companies shall be responsible for the corporate debt. If a shareholder of a limited company abuses the status of a juridical person of such company, resulting in making the company liable for a certain debt and having significant difficulty in paying off such debt, where necessary, such shareholder shall be liable for such debt.
4. A majority of the directors may make a written request to the chairman to convene the board meeting. If the chairman fails to convene the board meeting within 15 days of the written request, a majority of the directors may convene the board meeting on their own.
5. Expand the categories of matters for inspection: lower the threshold for the shareholders' application for an inspector and expand the categories of matters for inspection to the documents and records for specific matters and specific transactions.
6. Directors, supervisors and major shareholders have the responsibility to make a report: companies shall report electronically on a regular basis, every year or at the time of any change of the name, nationality, birthdate or date of incorporation, identification number, number of shares held or amount of capital contribution, and other matters required by the competent authority of the directors, supervisors, managers, and shareholders of 10 percent or above shareholding (contributions).
7. Repeal bearer shares.

Safeguard shareholders' rights

1. Add the restriction on matters that cannot be proposed through an extempore motion: the subject matters, such as reduction of capital, application to withdraw the public offering, release and discharge directors from non-compete obligations, capitalization of earning, and capitalization of legal reserve, shall be explained in the cause of convention in the meeting notice and shall not be proposed through an extempore motion.
2. Implement shareholder's right to make proposal: the amendment provides four causes for which the board of directors may not include a shareholder's proposal in discussion. Except for such four causes, the board of directors shall include a shareholder's proposal in discussion.
3. The shareholders holding the majority of the outstanding shares for over three months may convene an extraordinary shareholders' meeting on their own.
4. The convener of a shareholders' meeting may request that the company or its agent provide the roster of shareholders.
5. The threshold for minority shareholders' request for the supervisor to file an action against the director on behalf of the company is lowered to a continuous holding of at least one percent of the total outstanding shares for six months.

Build an international environment and improve the regulations on branches of foreign companies

1. Eliminate the recognition system for foreign companies.
2. A company may register its foreign language name as identified in its articles of incorporation. P

Is Australia Pro-Arbitration?

Arbitration is a means of alternative dispute resolution where disputes are heard and determined outside a court process by either a single arbitrator or a number of arbitrators. Those in favor of the use of arbitration for commercial disputes argue that the process is less formal and the parties have more control, including their ability to decide on arbitrators.[1]

Some of the contended benefits of arbitration, such as the reduced time taken to finalize disputes and the lower cost compared to Court proceedings, are arguable, due to the significant cost of experienced and specialized arbitrators.[2]

Arbitration has particular value in cross-border deals, as it does not use the court system of either party. A total of 810 new cases were filed in the largest arbitral institute worldwide in 2017.[3]

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Background

This article will focus on the approach of Australian Courts to International Commercial Arbitration (ICA) at two main stages. Firstly, the recognition of arbitration clauses in commercial contracts by Australian Courts, and secondly, the enforcement of arbitral awards by Australian Courts. Arbitration in Australia is predominantly governed by the *International Arbitration Act 1974 (Cth) (IAA)*,[4] which implements domestically the *UNCITRAL Model Law on International Commercial Arbitration and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)*.[5]

Recognition of Arbitration Agreements

Courts in a particular jurisdiction may have a dispute referred to them which is covered by an arbitration clause, but which has not yet been referred to arbitration. Where the arbitration agreement is governed by the law of a state that is a party to the *New York Convention* or one of the parties to the agreement is domiciled or an ordinary resident in a country that is a party to the *New York Convention*, the recognition of an arbitration agreement is governed by the Convention.[6]

In such cases, courts in jurisdictions that are a party to the *New York Convention* are required to refer parties to arbitration at the request of one of the parties, unless it is found that the arbitration agreement in question is null and void, inoperative or incapable of being performed.[7]

Enforcement of Arbitral Awards

Courts may also be approached once a dispute has already been determined through arbitration in order to enforce the binding arbitral award that was rendered by the arbitrator or arbitrators. In that instance, international arbitral awards rendered in a *New York Convention* jurisdiction are generally enforceable in other Convention jurisdictions.[8]

Commercial Arbitration in Australia

It was noted in 2009 that the Australian legal system has been somewhat slow in embracing ICA.[9] In particular, this delay was said to be caused by factors such as Australia's then political isolationism and the previous apprehensiveness of Australian legal practitioners to consider comparative and international law.[10]

More recent assessments have suggested that Australia's adoption of both "top-down" and "bottom-up" reform has successfully transformed Australia's approach to the "top-down" level. This has included the 2010 and 2018 amendments to the *IAA*.[11]

Recognition of Arbitration Agreements

In Australia, the relevant provision incorporating Article 2 of the *New York Convention* is Section 7(2) of the *IAA*,[12] which requires an Australian Court to stay proceedings either in whole or in part at the request of one of the parties when presented with an unresolved matter

covered by an arbitration agreement.

In practice, this provision has recently been applied in the New South Wales (NSW) jurisdiction in Australia by the NSW Court of Appeal.[13] The Court, when faced with a dispute relating to the production and direction of the film *Mad Max: Fury Road*,[14] held that the proceedings before the court were to be stayed in their entirety under Section 7(2) of the *IAA* in order to allow arbitration to take place in California.[15] This decision was reached notwithstanding the ambiguous nature of the arbitration clause in question.[16]

A similar conclusion was reached in the Western Australian (WA) jurisdiction in the matter of *Siam Steel International PLC v Compass Group (Australia) Pty Ltd*.[17] In that matter, the WA Supreme Court held that the arbitration agreement before the Court was not "inoperative" within the meaning of Section 7(5) of the *IAA* and hence Section 7(2) of the Act applied and the proceedings were stayed for arbitration to occur.[18] At the national level, proceedings before the Federal Court were stayed pending arbitration under Section 7(2) in the matter of *Casaceli v Natuzzi S.p.A*,[19] with the Court's decision turning on an affirmative conclusion as to whether the matter was capable of settlement by arbitration.[20]

Takeaway for Commercial Parties

In order for an arbitration agreement to be recognized in Australia, as in any other *New York Convention* jurisdiction,[21] parties must ensure that the disputes covered by the arbitration clause are capable of resolution by arbitration. This may exclude disputes "required to be determined exclusively by the exercise of judicial power."[22] The arbitration clause must then be carefully drafted to ensure that it is not considered by an Australian Court to be null and void, inoperative or incapable of being performed. Where these conditions are met, commercial parties applying to the Australian Courts to have a matter before the courts stayed pending arbitration are likely to be successful.

Enforcement of Arbitral Awards

Arguably the most significant decision relating to the enforcement of foreign arbitral awards in Australia was *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia*.[23] In the case, the High Court of Australia concluded that the inability to challenge arbitral awards on the basis of an error of law is consistent with the consensual and private nature of arbitration, and thus constitutional invalidity cannot be raised as a bar to enforcement.[24] The decision built on pro-arbitration jurisprudence in the Federal Court prior to the *TCL* decision,[25] including the enforcement of an arbitral award notwithstanding that the arbitral proceedings were conducted without the respondent in attendance.[26] It has also undoubtedly laid the foundations for later decisions, including the granting of leave by the Federal Court to a creditor to commence proceedings for enforcement of a $200 million USD Singaporean award in Australia under the *IAA*.[27]

Similarly, parties seeking to unreasonably challenge arbitral awards in order to prevent their enforcement have faced strong opposition. In *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd (No 2)*,[28] the Federal Court ordered the unsuccessful applicant was to pay two-thirds of the respondent's costs on an indemnity basis due to the lack of merit and lack of reasonable prospects of success of the applicant's claims.

Takeaway for Commercial Parties

Parties seeking to challenge the validity of arbitral awards must also ensure that challenges to arbitral awards are not founded on substantive grounds of appeal as, in the absence of reasonable prospects of success, unmeritorious claims of invalidity may be the subject of harsh costs orders against applicants.

Conclusion

Australian jurisprudence in recent years has been increasingly welcoming in relation to the recognition of international arbitration agreements and international enforcement of arbitral awards.

International commercial parties still should ensure that they act prudently in preparing competently drafted arbitration agreements and in selecting experienced arbitrators so as to ensure they receive the best possible outcome in arbitrated disputes involving Australia. P

1 Warren Pengilley, 'Alternative Dispute Resolution: The Philosophy and the Need' (1990) 1 *Australian Dispute Resolution Journal* 81, 88.
2 Ibid 90.
3 International Chamber of Commerce, '2017 ICC Dispute Resolution Statistics' (2018) 2 ICC *Dispute Resolution Bulletin* 51, 52.
4 *International Arbitration Act 1974* (Cth).
5 *United Nations Commission on International Trade Law: Model Law on International Commercial Arbitration*, 40 UN GAOR Supp No 17, UN Doc A/40/17 (1985), annex I, 81, 24 ILM 1302 (1985); *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature on 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) ('*New York Convention*').
6 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature on 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) ('New York Convention').
7 Ibid, art 2.
8 Ibid.
9 Hon Michael Kirby, 'International Commercial Arbitration and Domestic Legal Culture' (Paper Presented at Australian Centre for International Commercial Arbitration Conference, Melbourne, 4 December 2009) 2.
10 Ibid 9, 24.
11 Ibid.
12 *International Arbitration Act 1974* (Cth) s 7(2).
13 *Warner Bros Feature Productions Pty Ltd v Kennedy Miller Mitchell Films Pty Ltd* [2018] NSWCA 81 (24 April 2018).
14 Ibid [2].
15 Ibid [88]; *International Arbitration Act 1974* (Cth).
16 *Warner Bros Feature Productions Pty Ltd v Kennedy Miller Mitchell Films Pty Ltd* [2018] NSWCA 81 (24 April 2018) [62]-[92].
17 [2014] WASC 415 (7 November 2014).
18 Ibid [43]-[47]; *International Arbitration Act 1974* (Cth) s 7(2).
19 [2012] FCA 691 (29 June 2012).
20 Ibid [34].
21 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature on 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) ('*New York Convention*').
22 Research Laboratories Inc v O'Brien (1990) 169 CLR 332, 351.
23 (2013) 251 CLR 533.
24 *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 ('TCL').
25 Ibid.
26 *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* [2011] FCA 131 (22 February 2011).
27 *Sanum Investments Limited v ST Group Co Ltd* [2017] FCA 75 (8 February 2017).
28 [2016] FCA 1169 (29 September 2016).

Consumer Protection in the Digital Age

In the past few years, the Hungarian Competition Authority (HCA) has become a dynamic authority, which is committed to effectively enhancing competition, particularly in new cases. It has also concentrated on consumer protection, most recently in digital markets. As a result, it has devoted significant resources to protecting consumer interests, which has somewhat slowed down enforcement in other areas. However, the HCA's newly discovered focus has also led it to issue groundbreaking decisions.

Strategy Paper

The HCA recently published a strategy paper summarizing its views on consumer protection in the digital age. The paper indicates that the HCA will continue to follow the European Commission's guidance in this respect. It highlights the measures, which the HCA deems necessary to protect consumers and keep up with the developments central to this process.

As a basic principle, the HCA states that consumers are highly vulnerable to certain tech giants and other online service providers. This is due to the fact that the overwhelming data flow inherent to the emerging digital age has rendered the traditional consumer protection approach meaningless.

The HCA recognized that algorithms and artificial intelligence are likely to become highly relevant in the foreseeable future and urged competition authorities to prepare to respond accordingly. The HCA is of the opinion that consumers with a limited understanding or interest in technology must both remain protected and benefit from new inventions. This goal should stay at the forefront of future activities of competition authorities globally.

According to the HCA, to cope with the new dynamics of the market, authorities and consumers need a new approach to consumer protection issues and transactional decisions.

Strategy

The HCA has defined its most important objectives as follows:

Market analysis: The HCA may use tools to map a market before deciding whether an investigation into a certain conduct is necessary. One such tool is market analysis, which the HCA intends to employ to better understand the functioning of comparison tools.

Fostering compliance: The HCA thinks that the problems posed by the digital markets may be best solved by proceedings, which aim to foster compliance rather than impose penalties. These proceedings mainly try to provide a solution for prevalent topics. In addition to traditional purposes, their goal is to function as an exemplary case or guidance. While these cases may also involve penalties, these are not of utmost importance. The HCA has already initiated proceedings using this approach. These cases involved Instagram celebrities with paid content and online accommodation booking sites, among others.

Prioritizing novel cases: The HCA has prioritized the issues pertaining to consumer protection in the digital markets. In particular, the HCA intends to address cases, which raise novel questions and raise problems, which did not exist or were not addressed prior to the digital age. The HCA intends to pilot international actions if necessary and has indicated that it will not shy away from leading the way in this regard. The HCA has stressed that it intends to introduce at least one novel proceeding every year.

Proceedings against global players: According to the HCA, these cases may require an assessment of the overarching effects of the specific conduct, including those which occur outside Hungary. Therefore, the HCA considers it necessary to take into account the approach of other authorities, especially those of European

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Union member states. However, the HCA remains confident to take action on an international scale and expects international players to align their practices with its guidance, where relevant.

Super complaints: The HCA also put forward its idea of "super complaints" (i.e., such complaints that were sent directly to the HCA by or through authorities or consumer associations). Although the HCA does not make distinction between complaints, such pre-selected and comprehensive presentations by professional organizations may receive more intensive and swifter intervention by the HCA.

Fostering international cooperation: The HCA concluded its strategy paper by emphasizing its intention to accelerate and strengthen international cooperation around consumer protection, especially within the framework of the Consumer Protection Cooperation Network and under the support of the European Commission's New Deal for Consumers.

Evaluation

The HCA's strategy paper gives market players insight into how the group perceives market activities. The ambitious undertaking to solve at least one novel issue every year may represent an overly eager approach to enforce competition on the digital markets and among major international companies. On the other hand, it is arguable whether such a strong approach from the HCA is indeed necessary.

The HCA is definitely planning to initiate an analysis of the online comparison services market. Therefore, undertakings, which perform such activities, may expect data requests in the near future. This inquiry is not restricted to price comparison websites, but extends to any online service, which allows for product comparisons. Furthermore, players, who also market their own products through such services, may expect a high level of scrutiny. The HCA is likely to thoroughly control whether consumers are provided with all information regarding the basis of a comparison and the proof regarding the lack of bias in the algorithms.

All other undertakings, which are active on the digital markets, may well expect to be the target of HCA's scrutiny. If the authority remains consistent with its own goals and keeps providing guidance regarding novel issues and compliance, the number of tech companies approached by the HCA may increase significantly in future.

New Optional VAT Regime Makes Building Cheaper in Belgium

The rental of real estate and property in Belgium has been exempt from the application of VAT (value-added tax) in Belgian regulation. This was the case since the VAT regulation was accepted in Belgium. As a result of this, the owner of the rented property cannot deduct the VAT they have paid on the construction or renovation of the building. In order to be able to deduct the VAT on costs that a business has incurred, these costs have to be made in order to enable an economic activity, which is subject to the VAT regulation, which is clearly not the case for rental activities.

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Therefore, for a long time, the owners of Belgian real estate had the competitive disadvantage of not being able to recover the VAT on the expenses they made on the buildings they rented out. In all neighboring countries, the deduction of the VAT on these expenses has been accepted for a long time.

Evidently this led owners to search for ways in which they could put their property at the disposal of people without it being considered as "rental activity." Ever since the "Temco-judgment" by the European Court of Justice,[1] the letting of immovable property is *usually a relatively passive activity linked simply to the passage of time and not generating any significant added value*. Based on this, letting has an essentially passive characteristic.

The fact that additional services are being provided along with the rental agreement does not exclude the fact that this is a "rental activity." The services provided are either independent from the "rental activity" and thus subject to VAT or considered to be a part of the "rental activity," in which case they are excluded from the VAT regulation.

When letting, or renting, of real estate becomes part of an entire package of services that is mandatory to the occupier, it becomes more than a passive activity. Then the availability of the property is no longer the main characteristic of the contract between parties. The package of services on the other hand is considered the essential element of the agreement. Because the services that are being provided are a main part of the contract, this is no longer considered to be a "rental activity" since it is no longer a passive activity. The other services that are being provided lead this contract to be more "active."

A classic example of this exception to the exemption of VAT concerning "rental activities" is the letting of a business center. Because of the additional services that are being added once the business center is being rented, it is considered to be a whole package of services and not solely the supply of offices. The conditions for this exception have been clearly laid out by the Administration in a *Circulaire*.[2] For example, the owner needs to provide a basic package of (essential) services to the occupiers. These services cannot be excluded for a lower cost of the package. If these conditions are met, the letting of a business center can be considered as a service subject to the VAT regime since it's no longer considered to be a "rental activity."

Optional VAT in B2B Rental Agreements

The Belgian legislature has decided – at least partially – to mitigate this competitive disadvantage and has worked out the optional application of VAT on "rental activities."[3] This new regulation has two basic conditions. First, the rent must apply to (a part of) a building. Letting of terrain or grounds will still be VAT exempt except if this terrain is rented together and as an integral part of the rental of the building.

Second, the tenant needs to use the rented property in order to perform an economic activity, which is subject to VAT (even if this activity is exempted from VAT, for example "rental activities"). Therefore, the optional VAT system

can only be used in a B2B (business-to-business) context, and not with an individual (outside of a professional context) or other non-VAT taxpayers.

The explanatory memorandum of the regulation clarifies the possibility of using the optional VAT system on a part of a building. This is only possible if this part can be operated "economically independent," for example, a commercial space on the ground floor of an apartment building.

Since the new system is optional, both parties to the rental agreement need to accept the application of VAT together and explicitly. The rental agreement will therefore need to provide a clause confirming the intention of both parties to bring the rent under VAT.

The application of VAT will be final and irrevocable for the full length of the rental agreement. If, later on, a new rental agreement is agreed upon, or if an ongoing agreement is extended (after the original duration of the rent), parties need to decide whether to apply VAT again. This means a clause confirming the choice for VAT will need to be added or at least referred to in case of a new agreement or an extension.

Only New Buildings

Because of this new optional VAT system, the owner will be able to deduct the VAT spent on the construction of the building, even before it is actually in use. Because of the budgetary consequences thereof, the new system will only be possible for "new" buildings. Only buildings for which the VAT for the construction of the building was first payable on or after October 1, 2018 (i.e., the first invoice was sent) can be subject to the new optional VAT regime.

Also, renting out a building after a thorough renovation, based on which the building can be considered as "new" under the VAT regulation, can be subjected to the application of VAT.

Whether or not a building is "new" is only relevant in order to know whether or not the building is eligible for the new system. Once it is established that a building can be considered "new," every rental agreement that fulfils the conditions explained above can be subjected to VAT.

During a period of 15 years after the VAT, paid for the construction of a building, has been deducted, the administration can make the decision to revise the situation and demand the payment of (a part of) the recovered VAT in case the designation of the building has changed and the new designation cannot lead to the deduction of the paid VAT.

For example, if the first rental agreement for the letting of offices was subject to the optional VAT-regime, it opens up the possibility to deduct the paid VAT. However, in case a second agreement is made five years later, without the application of the optional VAT, the administration will have the possibility to demand payment of the part of VAT that was unjustly recovered. The same applies if the designation of the building went, for example, from the letting of offices to the letting of residential real estate.

Lastly, the newly adopted regulation also installs the mandatory applicability of VAT on any rental agreements for a duration of six months or less. This is, however, not the case if the real estate is rented to individuals, who use it for private purposes, if the real estate is used for residential purposes, or if it is rented to a nonprofit organization.

The fact that an optional VAT regime for rental activities has been accepted will soften the competitive disadvantage of owners of Belgian real estate. Although this is a big step in the right direction, since the new system is restricted to the B2B context and only applicable towards newly constructed or renovated real estate, it will take some time before the effect will be noticeable on the Belgian real estate market. P

1 European Court of Justice, 18 November 2004, case nr. C-283/03, *Temco Europe SA*.

2 Circular nr. AOIF 39/2005 (E.T. 108.816), 27 September 2005.

3 Draft law to amend the Code Value Added Tax concerning the optional taxation of the rental of real estate, Belgisch Staatsblad/Moniteur Belge, October 25, 2018.

The German Federal High Court's Facebook Decision and Its Lesser Known Cross-Border Lessons

On July 12, 2018, the German Federal High Court (BGH) handed down its closely followed judgment against Facebook.[1]

The Case

The parents of an underage teenager who had been tragically killed in 2012 in Berlin under undetermined circumstances by a subway train sued Facebook for access to their daughter's account, wanting to know more about her frame of mind before her death. Was this a case of suicide or not? Facebook tenaciously denied the parents access, citing everything from the German constitution to its own terms of service.

The facts of the case are eerily similar to those of a case decided in 2012 by the courts of the Northern District of California,[2] in which surviving family members of a young fashion model who had died in 2008 after falling from the 12th floor of an apartment in Manchester, England, sought access to her Facebook account. The applicants in the case before the California court did not believe that the deceased had committed suicide and sought access to her Facebook account in search of evidence of her state of mind in the days before her death.

The facts may have been very close, but the outcomes couldn't have been more different. While the family lost before the California court, the parents won in Germany.

Jurisdiction

Considering that Facebook is a global phenomenon, halting at virtually no borders, it is not surprising that the tragic cases against Facebook occurred in different parts of the world. And considering that Facebook is headquartered in Menlo Park, California, it's equally unsurprising that the courts of the Northern District of California came to decide the Manchester case. But how did the Berlin case manage to stay in the grasp of the German courts, especially since Facebook's "Statement of Rights and Responsibilities" in most of the world at the time provided that the choice of forum for "all disputes is exclusively in a state or federal court located in Santa Clara County," California? Given the home court advantage, one can imagine that the defendant did not relinquish the case to the German courts willingly.

Under the European Union (EU) harmonized civil procedure conflict of laws rules (which override German national conflicts rules in certain cross-border cases) in effect when the Berlin case was brought,[3] the competence of the German courts was based on whether the defendant had a legal presence in an EU Member State. Since Facebook operated an affiliate in Ireland (and still does), the BGH held that the lower courts had correctly asserted jurisdiction; and the defendant was ultimately forced to relent and submit to the German courts.

Since then, the underlying EU regulation has been recast.[4] In cross-border matters German courts now look to EU civil procedure conflicts rules, which lean even further in favor of consumers.[5] Even the mighty social media giant has been forced to accept that the courts of the targeted user's domicile will have jurisdiction when it comes to Germany (and the EU).[6]

Lesson learned: all providers who, by whatever means, are commercially targeting consumers domiciled in Germany know that the German courts will have jurisdiction regardless of what their terms of service may provide.

Classification of the Question

The next step in a cross-border dispute is that of classification. What is the legal category into which the question falls? For the German courts, the Facebook case was a matter of contract and not of the German constitution or the German Telecommunications Law as argued by

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the defendant. It was found that neither of these "domestic overriding mandatory norms"[7] (referred to as public policy doctrine under U.S. conflicts principles) applied to the case. The BGH dismissed the idea that the deceased's post-mortem constitutional right to preservation of her personal dignity prevented Facebook from disclosing the contents of her account to her parents, much as diaries and letters, unless stipulated otherwise by the deceased, are not prevented by the German constitution from becoming a part of the estate. And it held that the German Telecommunications Law,[8] pursuant to which a communications provider is prohibited from disclosing content to "third parties," did not prevent access from being given to the parents of the deceased (as the court of appeal had held). As heirs, they were not "third parties" within the statutory definition.

Connecting Factor

German conflicts rules (as well as EU principles[9]) generally acknowledge the principle of freedom of contract, meaning that the parties can choose the applicable law. This explains why the California court not only heard the Manchester case, but applied California law.

The German market, however, had already become an exception in the Facebook world. Its "terms of use," as they were called in the German language version, made an exception to the choice of California law by explicitly replacing it with the provision: "This Statement is subject to German law." In other words, Facebook had "unilaterally" submitted to German law, and the courts readily accepted this. The BGH noted obiter dicta that German law would have applied regardless, pursuant to the EU conflicts rule,[10] which provides that in "a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional … by any means, directs such activities to that country … and the contract falls within the scope of such activities."

A second lesson learned: all providers who, by whatever means, are commercially targeting consumers habitually residing in Germany know that German law will apply regardless of what their terms of service may provide.

German Contract Law

The final question put to the BGH was whether the account had become a part of the estate. Although the general heritability of contracts can be restricted or excluded by the parties under German law, the court held that this had not been the case. Facebook's provisions on the "memorialization" of an account were not found in the body of the "Statement," but rather obscured in the "Help" section. But even so, any of a provider's general terms and conditions, which materially restrict its services are subject to the scrutiny of the German courts.[11] Closing the door to the heirs to a deceased's account was found to be such a material, and, thus, invalid post-contractual restriction of Facebook's services. Although the BGH went to great lengths to deny all defenses brought forth by the defendant, at the core of its reasoning lies the fierce determination of the German courts to defend the German consumer.

A third lesson learned: all providers targeting consumers in the German market know that their general terms and conditions will be subject to intense scrutiny by the German courts.

Adjudicating this case as a matter of contracts law (and not as one of heritability of digital assets) provided the BGH with the tools it needed to get the result it wanted, which was to override the memorialization of Facebook accounts. P

1 BGH, Urt. v. 12.7.2018 – III ZR 183/7.

2 *In re Request for Order Requiring Facebook, Inc. to Produce Documents and Things*, Case No C 12-80171 LHK (PSG) (N.D. California, 20 September 2012).

3 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

4 That is, for causes of action occurring after January 10, 2015. Too late to apply therefore to the Berlin case. The results of the case, however, would have remained the same, even under this EU regulation.

5 Articles 17 and 18 of the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

6 Query, how the clause will read for U.K. users post-Brexit.

7 Article 9 subsection 2 of the Regulation (EC) No 593 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I Convention).

8 § 88 subsection 3 *Telekommunikationsgesetz*.

9 Articles 3 subsection 1 and 6 subsection 2 of the Rome I Convention.

10 Article 6 subsection 1 of the Rome I Convention.

11 Pursuant to Section 307 of the German Civil Code.

Airbnb Regulation in Italian Regions

Before deciding whether you want to become an Airbnb host in Italy, it is important to understand the local laws that govern the matter.

In Italy, the so-called "Code of Tourism" (established by Legislative Decree no. 79 of 2011) is in effect, but some cities and regions have specific laws that limit or differently regulate the possibility of accommodating people for short periods of time upon remuneration.

In many Italian cities, it is necessary to apply for enrollment in specific local government bodies in order to obtain a permit or a license before posting an advertisement or receiving guests with payment. Some real estate short-term rentals may even be forbidden, and local authorities may also apply very high penalties, which, depending on the case, may reach tens of thousands of euros.

In general, we must never forget that all hosts are obliged to register their guests' personal data and communicate it to the local police headquarters (Questura) for security reasons. This must be done through the website "Portale Alloggiati" at the time of check-in.

You must request a username and password to access the website (Portale Alloggiati) in advance, either online or at the offices of the local police headquarters.

Real estate short-term rental contracts, which can never last more than 30 days, must be drawn up in writing, even in a very simple way. On the web, you can easily find formats to use. These contracts are *not* subject to mandatory tax by the Italian Revenue Office (Agenzia delle Entrate).

It is possible to become an Airbnb host even if you are not the owner of the property, as it is sufficient for you to be the tenant. In this case, subletting (even for short periods as an Airbnb host) must be expressly provided for in the lease agreement.

Regarding the taxation of real estate short-term rental contracts, remember that all incomes produced in Italy must be subject to taxation by the Italian Revenue Office, with the application of tax rates that can reach up to 43 percent.

It is possible to apply for tax deductions (for example: the costs of restructuring and adapting the property to the laws applicable from time to time or Airbnb commissions).

It is also possible to opt for the application of a fixed tax rate of 21 percent (the so-called "Cedolare secca"), but in this case, it will not be possible to deduct any cost, including Airbnb commissions.

In addition, there are additional local tourist taxes ("Tasse di Soggiorno") that may vary from city to city.

Also, remember that in Italy, even in the case of real estate short-term leases (such as for Airbnb), it is mandatory to comply with specific regulations about the safety of systems (power, gas, etc.) servicing the property and fire prevention.

It is also necessary to have specific and adequate insurance coverage for possible damages to guests that is not generally included in the insurance that may be offered or provided by Airbnb.

Very often, depending on the local law requirements, you need to have an Italian VAT (value added tax) number.

This is what we can say in brief and in general. Specific rules, as we said before, apply in the different Italian regions and even in the different municipalities.

Lombardy

In Lombardy, for example, there are many local laws, but in general, we can say that you must first submit an administrative statement to the technical department (Ufficio Tecnico) of the concerned municipality. This statement is called SCIA (Segnalazione Certificata Inizio Attività). It must be filed to the Public Administration Authority when you are about to start a specific activity for economic purposes regarding the so-called CAV (Case e Appartamenti per Vacanza, which means holiday building and apartments).

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It is also necessary to acquire a digitalized code that identifies the individual host and simplifies controls on the activities and the territory by the Public Administration and the Public Security Authorities.

In order to obtain the above digitalized code and carry out the SCIA statement, from an operational point of view, it will be mandatory to have a certified email box and a digital signature kit that, for example, you can buy on aruba.it and/or on register.it.

With the same procedure, you can also obtain a username and password to access the website "Portale Alloggiati" of the local police headquarters (Questura) to which, as said earlier, hosts must communicate the personal information of their guests and pay the local tourist taxes.

There are also specific requirements concerning (i) total compliance with the rules governing the consumption of electricity, water and heating, (ii) the number of beds per square meter (one bed for eight square meters for properties up to 48 square meters and so on), (iii) specific rules about the type of household appliances that must equip the apartments, and, of course, (iv) the compliance of the buildings to the urban planning and building rules.

Veneto

In Veneto, the Regional Law n. 1992 of 2018 applies, which, in addition to the filing of the SCIA for CAV (see previous section), also has a mandatory requirement for an identification code of the single apartment and of the individual host, similar to the one for Lombardy's municipalities, but, in this case, such code will be valid on a regional basis.

In this way, an "enlarged" database has been created to facilitate and make more effective the control activities, also for public security.

The laws of the Veneto region also provide for specific requirements about: (i) town and building planning, (ii) hygienic-sanitary matters, and (iii) safety of plants (for electricity and gas in particular) servicing the properties.

Failure to comply with these provisions will be punished with fines of up to €19,000.

Tuscany

Finally, just some brief information about Tuscany, where Regional Law no. 42 of 2000 and Regional Regulation no. 18/R of 2001 apply, as well as some specific subsequent local rules, which require the host to have a VAT number if they manage real estate short-leases for more than 90 days a year, with the individual rental periods not lasting more than seven days in any case.

This is just a general and brief picture... happy Airbnb, everybody! P

Legal Aspects of Ecosystems

Ecosystems seem to be the "big thing" in the next decade. Switzerland, which is home to a vibrant blockchain community, is in the center of this trend. Therefore, we will take a closer look at ecosystems and evaluate possible legal forms according to Swiss law.

What are Ecosystems?

In a business world dominated by competitors, for decades, competition was the only strategic goal. In 1996, Nalebuff and Brandenburger published their bestseller "Co-opetition" (cooperation and competition).[1] However, the business world was not yet ready for this mind shift. Nowadays, we are moving gradually in this direction, driven by changing customer expectations and technological developments, such as blockchain, artificial intelligence and the internet of things. Interdisciplinarity is the new challenge and companies are realizing that they have to rely on skills outside of their own core competence in order to comply with increasingly complex value propositions. The ability to cooperate in a goal-oriented manner will be a decisive factor of success in the future.

For a long time, however, it was not known how such forms of cooperation could be shaped in order to promote innovation. Ecosystems provide a methodical approach to solving this problem.[2] In ecosystems, one's own company is regarded as part of a community that jointly develops products or services that a company alone could not offer. For an ecosystem to provide a product or service, those involved must contribute their data, skills and networks and align them with each other. In this respect, ecosystems differ from other forms of economic relationships, such as supply chains.

In ecosystems, the focal value proposition and the incentive system that motivates the actors to get involved are decisive. This always requires at least one focal firm. The focal firm has the task of aligning the actors involved towards the focal value proposition, so that the synergies and benefits of the ecosystem, such as access to information, more efficient business processes and reduced transaction costs, can be exploited. From a legal point of view, it is of particular interest which legal entities are most suitable to organize an ecosystem in an effective and efficient way.

Types of Ecosystems

The following figures show a graphic illustration of three possible basic ecosystem concepts. The figures serve to clarify and visually orient how ecosystem concepts differ in their structures and interactions:

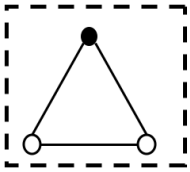

Figure 1

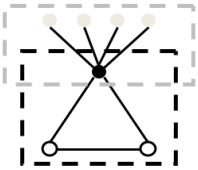

Figure 2

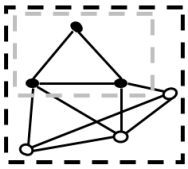

Figure 3

Legend:

- Focal firm
- Complementor/Actor
- Proprietor
- Ecosystem

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Figure 1 describes the basic concept of an ecosystem. It consists of a focal firm and the actors involved. The focal firm coordinates the actors and thereby determines their activities and contributions, as well as their sequence.

Figure 2 differs from Figure 1 because there are several companies behind the focal firm (grey border Figure 2), whereby the focal firm in principle acts in an autonomous manner. The cooperating companies are typically competitors seeking to improve their market positions through "co-petition." Such an approach is particularly suitable for forming broad-based ecosystems.

Figure 3 is characterized by multi-orchestration. In comparison to Figure 1 (or Figure 2), several companies jointly determine the structure and the further course of the ecosystem, i.e., several members of the ecosystem have direct rights (grey border Figure 3). In order for the focal value proposition to be realized, it still requires the knowledge and contributions of other actors, i.e., of the entire ecosystem (black border Figure 3).

Legal Forms for Ecosystems

Ecosystems do not just work by themselves. They need a legal framework for companies to get involved. Therefore, the question of which legal form is best suited for which ecosystem concept is of particular interest. In the following, we will address a selection of legal forms, which are most suitable under Swiss law.

Contract

For the focal firm in Figure 1, working with contracts is suitable for binding and coordinating the actors involved. The focal firm thus secures leadership over the strategic alignment of the ecosystem. Furthermore, liability risks can be allocated via cooperation agreements. However, if the orchestrator binds the actors involved via contractual regulations too strongly to itself, the cooperation may develop in the direction of a supply chain and the incentives to get involved in the ecosystem disappear. It is therefore important to find the balance between binding, enforceable contract terms and taking advantage of existing interdependencies.

Joint Venture Company

For the cooperation of competitors through a focal firm according to Figure 2, a joint venture is a good option. Often the form of the equity or corporate joint venture is chosen. To this end, the companies are founding an independent legal identity. In order to limit the liability risk to the assets of an independent legal entity, a limited liability company according to Articles 772 ss. of the Swiss Code of Obligations (SCO) or a corporation according to Articles 620 ss. SCO are usually chosen. A joint venture enables the participants to exploit synergies; in particular, it allows them access to mutual knowledge, innovation and resources. The result is a strong competitive unit, which then may take leadership of the ecosystem in the same way as the focal firm in Figure 1.

Cooperative/Association

A cooperative according to Articles 828 ss. SCO offers itself wherever it is about defining a value proposition in mutual self-help. The personal involvement of each cooperative member is central. The legal form of a cooperative therefore is ideal for the organization of a multi-orchestrator according to Figure 3. The right to say can be exercised through the general assembly and the board of directors, whereby the mandatory "one man, one vote" principle applies, i.e., every cooperative member has one vote. For a cooperative organization, it is also possible to delegate the management to outsiders. This is particularly of use if the members of a multi-orchestrator have no experience in the management of an ecosystem. Furthermore, the cooperative's assets are exclusively liable for the cooperative's liabilities.

In Switzerland, the legal form of the association according to Articles 60 ss. of the Swiss Civil Code is a viable alternative to the cooperative since associations are also open to support the economic interests of their members as long as the pursuit of an economic purpose is not in the foreground. The rights to say can be exercised through the general assembly and the committee, whereby the "one man, one vote" principle is not mandatory, which enables a graduation of the voting rights. Since Swiss law on associations contains only few mandatory provisions and the "one man, one vote" principle is not mandatory, the association can be well adapted to the specific circumstances and needs. The liability risk is limited to the assets of the association.

Conclusion

It turns out that, depending on the starting position, purpose, objective and composition of the parties involved, different forms of ecosystems, as well as legal forms, are possible. Additionally, other legal forms than the ones discussed, such as the simple partnership, the foundation or a Code of Conduct, could be conceivable. A treatise of this, however, would go beyond the scope of this article. The use of new technologies and ecosystems requires a willingness to take risks, but also a well thought-out choice of a suitable legal form to govern the ecosystem. P

1 ADAM M. BRANDENBURGER/BARRY J. NALEBUFF: Co-petition, 1st ed., New York (1996).

2 For further information about Ecosystems: RON ADNER: Ecosystem as structure: An actionable construct for strategy: Journal of Management (2017), 43(1), 39-58

People, Planet and Profits: The Dynamics of Corporate Sustainability

Corporate sustainability has been defined as an approach that creates long-term stakeholder value by implementing a business strategy that considers every dimension of how a business operates in the ethical, social, environmental, cultural and economic spheres. Notwithstanding the size of a business venture, corporate sustainability is now recognized as a key priority for any business that is intent on growing and remaining relevant to its consumers. This is particularly driven by consumer awareness, which demands that companies not only return profits to their shareholders, but more importantly, that they demonstrate compliance with ethical standards and commitment to deliver their goods and services in a sustainable manner.

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Understanding the Concept of Sustainability

While there is no homogenous universal definition of the term sustainability, it is commonly understood to mean the ability to meet the needs of the present without compromising the ability of future generations to meet their own needs. This definition emanated from the 1987 report by the World Commission on Environment and Development (Brundtland Commission Report) which introduced the concept of sustainable development. Today, the term sustainability has evolved and become part of corporate culture, with a focus on the need for companies to pursue growth and profitability strategies that take into consideration the relationship between the company and its stakeholders (including not only the shareholders, but also their consumers and the community affected by their business). This requires that companies incorporate sustainable development, environmental protection, social equity and justice in their economic development agenda.

The Pillars of Corporate Sustainability: People, Planet and Profits

Sustainability includes three key pillars: environmental, social and economic, commonly referred to as people, planet and profits. It is from this agenda that the United Nations in 2016 adopted the 17 Sustainable Development Goals (SDGs) as a global blueprint to achieve a better and more sustainable future for all by the year 2030. The SGDs seek to address global challenges, including ending extreme poverty and hunger, access to good health and quality education, promoting gender equality, access to clean water and sanitation, affordable clean energy, decent work and economic growth, among others. These are also in line with Kenya's Vision 2030 and the Big Four Agenda setting out Kenya's development agenda and priorities.

The pillars of corporate sustainability can be summarized as follows:

1) **Environmental pillar**: Sustainable businesses are expected to adopt environmentally friendly practices and avoid waste, pollution and environmental degradation.

2) **Social pillar**: Sustainable companies are expected to treat their employees fairly and adopt principles of good neighborliness as corporate members of communities in the localities where the business operates, as well as globally. This also means that sustainable businesses should ensure that businesses in their supply chain adopt and implement sustainable corporate culture, which include non-discrimination, fair labor practices, respect for human rights and entrenching ethical practices to prevent bribery and corruption in their dealings.

3) **Economic pillar**: Sustainable companies are expected to return profit to their shareholders, but this should not be at the expense of the other two pillars. Nevertheless, without return on investment, the business would not be sustainable.

While many companies focus on financial reporting for the third pillar, sustainable companies are expected to also prepare nonfinancial reports on all aspects of their business. This is referred to as sustainability reporting, which provides data on non-financial aspects of a company's performance, including environmental, social, employee and ethical matters, and defining measurements, indicators and sustainability goals based on the company's strategy. As observed by Professor Rosabeth Moss Kanter of Harvard Business School, "Companies that are breaking the mold are moving beyond corporate social responsibility to social innovation. These companies are the vanguard of the new paradigm. They view community needs as opportunities to develop ideas and demonstrate business technologies, to find and serve new markets, and to solve longstanding business problems."

Why is this Relevant to Businesses in Kenya?

The three pillars of corporate sustainability are reflected in the directors' duties under Section 143 (d) of the Companies Act, 2015, which require directors of a company to always act in ways in which the director considers, in good faith, would promote the success of the company for the benefit of its members as a whole. In so doing, the director shall have regard to the impact of the operations of the company on the community and the environment. Section 143 (3) further obligates the directors in exercise of their mandate to consider the desirability of the company to maintain a reputation for high standards of business conduct.

In addition to the statutory duties of directors, corporate sustainability also ensures that a company attracts and retains a high cadre of employees, business partners, financiers and customers. As observed by the former CEO of Royal Dutch Shell, Jeroen van der Veer, "The successful companies of the future will be those that integrate business and employees' personal values. The best people want to do work that contributes to society with a company whose values they share, where their actions count and their views matter."

What is Expected of Businesses to Ensure Compliance?

Kenyan laws prescribe various policies that are expected to be maintained and implemented by businesses operating in Kenya. These include, among others:

1) Sexual Harassment Policy (Section 6 of the Employment Act, 2007);
2) Prevention of Bribery and Corruption Policy/Procedure (Section 9 of the Bribery Act, 2016);
3) Human Rights Policy (Employees' Rights Policy) – (Section 15 of the Employment Act, 2007); and
4) Privacy and Data Protection Policy (Article 31 of the Constitution of Kenya, 2010).

There are also various global guidelines that a company should consider in its efforts to establish a culture of corporate sustainability. These include:

1) Organisation for Economic Co-operation and Development Guidelines on Multinational Enterprises;
2) International Finance Corporation Performance Standards;
3) United Nations Global Compact;
4) Equator Principles for Project Finance; and
5) United Nations Guiding Principles on Business and Human Rights.

These guidelines are particularly important in ensuring that a business mitigates its legal risks against potential criminal and civil liability, avoids reputational risks and is compliant with ever-growing stringent requirements to become part of supply chain of multinational or leading local corporations. These corporations are particularly cautious of engaging with entities that may pose potential noncompliance with modern slavery, bribery and corruption, human rights abuse and breach of privacy concerns, which pose astronomical financial and reputational risks both for the local corporate entities and overseas parent companies.

Conclusion

Every company or business can, according to its size and resources, decide what commensurate actions to take towards developing a culture of corporate sustainability and promoting sustainable development in its sphere of operation. This will not only add value towards holistic growth into a profitable and friendly work environment, but also mitigate risks and losses associated with unsustainable corporate practices. To start or enhance this journey, a business should consult dynamic and knowledgeable corporate lawyers who will undertake the relevant due diligence and provide guidance. I believe these are the sentiments that were echoed by business mogul Richard Branson who observed that, "We need government and business to work together for the benefit of everyone. It should no longer be just about typical 'corporate social responsibility' where the 'responsibility' bit is usually the realm of a small team buried in a basement office. Now it should be about every single person in a business taking responsibility to make a difference in everything they do, at work and in their personal lives." P

Panama's Multinational Headquarters Regime Law: Recent Amendments

The Panamanian Government has made recent changes in order to enhance the advantages offered to multinational headquarters for establishing and operating offices in Panama. The government, by the publication of Official Gazette No. 28641 on the 25th of October 2018, has enacted Law 57 of 2018 to amend Law 41 of 2007, which created a special regime for the establishment and operations of offices of multinational headquarters and created the Commission of Offices of Multinational Headquarters. These amendments consist of adding several provisions enhancing the scope of their activities and making their operations more competitive and attractive, and went into effect in January 2019.

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The most important new provisions are as follows:

- The services authorized under Item 4 of Article 4 of Law 41 of 2007 are extended to the provision of technical and financial assistance and other kinds of support to legal entities of the same enterprise group, including, without limitation, financial management services, risk analysis, due diligence compliance, custody and filing documentation, document and data processing center, treasury services and loans between entities of the same group.
- It stipulates that the main purpose of a multinational legal headquarters establishing an office in Panamanian territory is to provide services to the enterprise group to which it belongs.
- According to amendment of Article 12 of Law 41 of 2007, the following are the parameters required to be considered by the Commission for Offices of Multinational Headquarters in order to grant the License of Office of Multinational Legal Headquarters:
  a) The assets of the multinational entity;
  b) The places where the multinational entity has offices operating;
  c) The activities or commercial operations the multinational entity is engaging in;
  d) The listing of its shares in a local or foreign stock exchange;
  e) The minimum number of full-time employees and the annual operation expenses of the Office of the Multinational Headquarters in the Republic of Panama, both to be in accordance with the nature of the business it is to engage in; and
  f) An entity holding a License of Office of Multinational Headquarters may only engage in activities that render income subject to the fiscal provisions of Law 41 of 2007.
- As for the applicable Fiscal Regime, the following modifications are stipulated:
  a) Income tax on taxable income arising from services provided by the Office of Multinational Headquarters shall be five percent.
  b) The income tax shall be declared upon an affidavit of the annual income deducting expenses incurred in salaries and remunerations of all of its employees, including those employees who are exempt from income tax.
  c) The amount paid abroad as income tax or similar disbursement on taxable income earned in the Republic of Panama for services provided to non-residents, as well as taxes retained by taxpayers of the Republic of Panama since that income tax may be credited to its income tax.
  d) When a fiscal credit is applicable, the Office of Multinational Headquarters shall have to pay at least 2 percent of the income tax, but the credits may not be applicable to other subsequent fiscal periods and are not to be reimbursed.
  e) Any Office of Multinational Headquarters engaging in activities that increase the profitability of the commercial operations of the

legal entities in its group shall submit in its statement of income tax applicable to said increase of the arm's length amount of assets used and the risks involved. The respective costs and deductions shall then be arm's length applicable to the income involved, and the net result shall be subject to a five percent tax rate.

- Starting January 1, 2019, the individuals or legal entities engaging in operations with related parties having a License of Office Multinational Headquarters shall be subject to the transfer price regime according to the provisions of Article 762-D of the Fiscal Code.
- The price of the transfer shall also be applied to any operation conducted by an Office of Multinational Headquarters with related parties established in the Republic of Panama or with related parties that have a fiscal domicile in other jurisdictions or established in the Colón Free Zone, the Panama-Pacific Special Economic Area, Offices of Multinational Headquarters, Ciudad del Saber or any other free zone or special economic area.
- According to the amendments, the Offices of Multinational Headquarters are exempt of income tax on dividends, complementary tax and tax on branches, regardless of their being local or foreign source or exempt.
- Even though an Office of Multinational Headquarters is not bound to have a fiscal team in its personnel, it must document its activities in invoices or equivalent documents, which may enable the Income Tax Authority (*Dirección General de Ingresos*) to control, register, subject to accounting and oversee the transactions it has carried out.
- It is emphasized that they are not bound to pay the tax stipulated in Article 1004 of the Fiscal Code because they are not required to have a Notice of Operation.
- Capital gains in the transfer of shares and securities issued by an Office of Multinational Headquarters are subject to the provisions of the Fiscal Code and Decree 170 of 1993. If income tax is applicable to the profits obtained, it shall be at a fixed rate of two percent, and the buyer must retain one percent of the total value of the sale by way of an advance settlement of the income tax on capital gains.
- Article 23 of Law 41 of 2007, as amended, shall stipulate the following in respect of the income of the Office of Multinational Headquarters:

  a) The individual or the legal entity deriving a benefit from a documented or not documented service or action provided by an Office of Multinational Headquarters must retain a rate of five percent of the amount to be remitted to the legal entity holding the License of Office of Multinational Headquarters, provided always that said services be related to producing income of a Panamanian source or preserving it, and that its value has been considered by the person receiving it as a deductible expense. Similarly, individuals or legal entities living outside of the Republic of Panama shall be subject to pay such income tax to the extent that the services provided are related to producing the income of a Panamanian source.

  b) Individuals or legal entities having a domicile outside of the Republic of Panama shall be subject to income tax on the interests, commissions and other charges due to loans or financing used in the Republic of Panama.

  c) The legal entity that benefits from the service, loan, financing or action involved must retain a rate of five percent of the 50 percent of the amount to be remitted to said person living outside of the Republic of Panama, unless the individual or legal entity domiciled outside of the Republic of Panama has registered as taxpayer with the Tax Authority (*Dirección General de Ingresos*).

- The employees of the Office of Multinational Headquarters are exempt from income tax, social security contributions and education insurance on the salary and other labor remunerations, including salary in kind, when said salaries and labor remunerations are paid, assumed and recognized as personnel expenses in the accounting of the entity holding a License of Office of Multinational Headquarters.
- When five years have elapsed after obtaining a visa as permanent personnel of the Office of Multinational Headquarters in the Republic of Panama, the foreigner who may so desire may choose to obtain a permanent resident visa, but after obtaining that visa, said foreigner shall be subject to income tax, social security contributions and education tax on the amounts of money received as salary and other remunerations, including salary in kind.
- The License of Office of Multinational Headquarters may be cancelled if it is proven that it engages in activities that are not authorized by its license, and thereupon, said Office of Multinational Headquarters shall also be liable to payment of outstanding taxes with the respective sanctions, surcharges, interests and penalties stipulated by the Fiscal Code.
- Legal entities holding a License of Office of Multinational Headquarters that have a fiscal agreement with the Ministry of Economy and Finance must cancel said agreement and must implement the changes stipulated by Article 12 of Law 41 of 2007 by June 30, 2021.
- In the Republic of Panama, any Office of Multinational Headquarters entitled to legal stability for investments under Law 54 of 1998 shall be automatically exempt from income tax on income derived from services provided, including services provided to a taxpayer in the Republic of Panama, until the expiration date of its legal stability. P

Foreign Capital in Brazilian Fintechs

"Fin" originates from the word "financial," and the term "tech" comes from the word "technology." Fintechs are small structured financial companies, mostly startups, which provide credit and other financial services, such as financing of final users' assets and crowd funding. Their services operate through electronic platforms, such as mobile apps or websites.

According to Pricewaterhouse Coopers (PWC) research published in 2018,[1] 51 percent of Brazilian fintechs are beginning their operations and only 12 percent have reached more than R $10 million gross revenue in 2017 (approx. USD $2.7 million). In the research, the fintechs' managers have reported difficulty capturing investments for the institutions.

According to a report from KPMG, Brazil leads the fintechs' investments in Latin America, increasing from $134 million invested during 2017 to $257 million invested through the third quarter of 2018. Ian Pollari, global co-leader of fintech from KPMG International, says, "Geographically, we are seeing more activity and bigger deals in less traditional markets like Brazil, Japan and South Korea."[2]

National Monetary Council Resolution (CMN) No. 4.656, dated April 26, 2018, has regulated fintechs' activities, segregating these companies in (i) SCDs, which provide credit to customers directly through the fintech's electronic platform; and (ii) SEPs, peer-to-peer intermediary companies, whose electronic platform facilitates credit transactions between lenders and borrowers.

In addition, Brazilian fintechs provide other financial services, such as payment cards. Also, according to Ernst & Young, "Brazil is notable for evolution of its online budgeting and financial planning services … ."[3]

Central Bank of Brazil (BACEN) further regulated the issue through Circular No. 3.898, dated May 17, 2018.

Fintechs' activities are not exclusive to financial institutions. Any entity or individual can form such corporations, provided they comply with regulations issued by BACEN. In addition, fintechs' activities cannot be confused with a bank's, since the fintechs do not collect funds from the general public.

Due to the expressive development in Brazil of fintechs and payment arrangements, Brazilian government has recently allowed the foreign investors to hold 100 percent equity in local fintechs without the need to apply for the presidential authorization decree, applicable to traditional financial institutions.

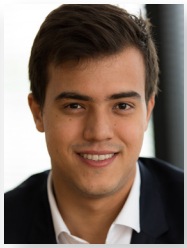
According to article 52 of the Brazilian Transitory Constitutional Disposals (ADCT) and article 192 of the Federal Constitution (CF), foreign investments in financial institutions are allowed if national interest matter is concerned and any such foreign investment needs a presidential authorization decree.

Decree No. 9.544, dated October 29, 2018 (Decree), allowed 100 percent foreign investments in fintechs on the grounds that such investments are in the best interests of the government. According to the Decree, BACEN is responsible to issue rules and other specific conditions to define how the investments shall be made in Brazilian fintechs.

Foreign investments are necessary to most Brazilian companies, especially to fintechs whose core business is directly associated with technology. The Decree will enable state-of-the-art systems to be aggregated to Brazilian fintechs more efficiently.

Brazilian fintechs will technologically be on the same level as their foreign

Giancarllo Melito



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competitors due to the foreign investments that will be injected. Fintechs' presence in the market will reduce credit costs and enhance efficiency in the local banking market, which is highly concentrated and certainly will be another option to small businesses that pay extremely high rates in their traditional credit transactions.

What to Expect

The Decree and BACEN's regulation will cause the development of an attractive environment for foreign investments in the financial market and will increase competition in this highly concentrated market. Such a set of rules offers a secure legal benchmark to the foreign investors and also matches the fintechs to other kinds of national, small-structured companies (startups). In addition, it will facilitate the growth of Brazilian fintechs' investments and also the entrance of foreign companies in the Brazilian financial sector.

As BACEN has noted, the Decree's main intention is "boosting new companies' entrance, enhancing competition and developing an innovation process." After the decree was issued, it declared "the authorization process is efficient, compatible with the pace fintechs operate."[4]

Brazil is studying the possibility of simplifying foreign investments in banks and other financial institutions, but so far, there is no new regulation in place. The Decree is the first step of the Brazilian government's strategy to continue to open the financial market and enhance foreign investments in local financial markets. P

1 PwC, *Fintech Deep Dive 2018*, p. 13, 2018. pwc.com.br/pt/setores-de-atividade/financeiro/2018/pub-fdd-18.pdf

2 KPMG, *The Pulse of Fintech 2018 – Biannual global analysis of investment in fintech*, p. 7 and 17, July 31st, 2018. assets.kpmg/content/dam/kpmg/xx/pdf/2018/07/h1-2018-pulse-of-fintech.pdf

3 Ernst & Young, *EY FinTech Adoption Index 2017*, p. 14, 2017. ey.com/Publication/vwLUAssets/ey-fintech-adoption-index-2017/$FILE/ey-fintech-adoption-index-2017.pdf

4 Central Bank of Brazil, 2018. bcb.gov.br/detalhenoticia/16592/nota

Reverse Mortgage as a New Financial Product in Peru

Peru is one of the few countries in Latin America that has recently legislated the reverse mortgage (RM) as a new financial product, making available a new funding source for consumers. Nonetheless, there are many remaining questions about topics including the delimitation of the segment target, characteristics of the borrower's assigned beneficiaries, the determination of the required factors and processes to calculate interest rates, and the clarification of the possibility to compromise the property with another RM or traditional mortgage and its consequences. The establishment of an appropriate mechanism to provide information and counsel to consumers, if well-defined, would enhance the use of RM in the market.

In Peru, the term "reverse mortgage," at a first thought, could be misinterpreted and considered as a new property right outside of the traditional mortgage. Let's first establish the difference between the traditional mortgage and the mortgage loan. The traditional mortgage is a legal instrument used in order to guarantee the performance of specific or determinable obligations. Meanwhile, the mortgage loan is a financial product, a loan granted to a natural person in order to acquire, build, repair, remodel, expand or execute building improvements and subdivide real property using such property to guarantee the loan for as long as the debtor fully pays the loan according to an agreed payment schedule. Thus, regarding the financial aspect, in order to grant a mortgage loan, the financial entity first evaluates (i) the appraised property value, (ii) the borrower's down payment, and (iii) the borrower's cash flow and assets.

RM is defined as a credit granted to a real estate property owner (the borrower) by an authorized entity against the property. In exchange, the authorized entity is obligated to execute monthly payments or a single payment to the borrower or the assigned beneficiaries, as the case may be. The differentiating characteristic of this credit is the deferred payment if the borrower passes away.

Therefore, regarding the financial aspect, in order to grant this RM, the authorized entity evaluates (i) the appraised property value, (ii) the borrower's life expectancy, and (iii) interest rates, among others. In the following paragraphs, we point out some advantages of RM:

- The borrower is allowed to remain living in the property.
- The borrower is allowed to assign beneficiaries.
- The borrower is allowed to buy life insurance (free of income taxes). Thus, if the borrower passes away, beneficiaries shall receive the monthly payment for life in case the borrower has purchased life insurance and remains living in the property.
- The borrower is allowed to sell, lease or grant any encumbrance on the property as long as the authorized entity consents to it previously.
- The borrower is allowed to prepay the debt without having to pay any arising penalty.
- In case the borrower passes away, the borrower's heirs may choose to pay the debt and keep the property. In case the heirs choose not to pay the debt, the authorized entity is allowed to: (i) execute the RM within a judicial process, (ii) execute the RM within a non-judicial process, or (iii) mutually agree with the heirs the payment in lieu. In any case, if there is a remaining price, the authorized entity shall pay it to the heirs.

In spite of the advantages aforementioned, there are some borrower's obligations to consider before entering into a RM contract. The borrower must:

- Remain living in the property;
- Pay property taxes;
- Buy property insurance;

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- Keep the property in good repair and well-maintained; and
- Pay the costs related to the constitution and termination of RM, including the required appraisals.

Regarding the authorized entities, this law and its ruling establishes that multi-business and insurance companies, as well as mortgage management companies, are allowed to grant RM, according to their applicable law. This also reinforces the required borrower's right to be duly informed and advised provided that these companies are subject to SBS Resolution 3274-2017. However, it is still required to define the mechanism to provide counsel to consumers and determine the responsible organization in charge of this work.

According to comparative law, and setting aside the particularities of laws from countries of common law or civil law, RM pursues a social assistance aim, considering that this type of loan is granted to elderly real estate property owners to complement their retirement incomes. RM has been criticized, considering that the development of its use mainly depends on economic aspects, therefore, a well-defined legal framework shall promote the use of RM. For instance, in Spain it is required that the borrower is at least 65 years old or disabled of 33 percent of the borrower's capability. Another example is the Mexico regulation, which establishes the minimum property value to be considered as a base for the granting of the credit, with the possibility for heirs to mutually agree with the financial entity a refinancing of the debt.

Let's consider the context in Peru: (i) Peruvians may choose between ONP (the state pension system) or AFP (the private pension system) as a retirement source of incomes; however, nowadays, pensions from ONP don't allow Peruvians to cover their real living expenses and AFP allows it proportionally to the amount effectively contributed by the retired; (ii) Peru has a growing real estate secondary market. Taking that into consideration, RM is a good, new financial product for elderly people.

In conclusion, the legislation of the RM as a new financial product in Peru is a very positive initiative to benefit and protect elderly people or disabled people by providing them with a new funding source to complement their incomes in order to satisfy their financial and living needs without having to sell their real estate property. However, the promotion of this financial product would be enhanced insofar as the legal framework improves. P

Coming Together to Serve

At the Primerus Global Conference in October, 50 Primerus members packed 8,962 pounds of food at the Greater Boston Food Bank – enough food to feed a family of four for two years.

Members from around the world, including Giuseppe Cattani of FDL Studio legale e tributario in Milan, Italy, relished the opportunity.

"I chose to participate with enthusiasm as I feel we all really should do something to help people who are less fortunate than us," he said. "It was also fun and very good for socializing among Primerus members. We all felt united in this special initiative and proud to be part of the same community."

The event was part of Primerus Fights Hunger, an ongoing initiative organized in 2017 to allow Primerus firms to unite in their community service efforts by combatting hunger locally and globally. To join in the effort, Primerus invites firms to:

- **Organize a local food drive**. Firms in many cities have already done this, donating many pounds of food to local non-profit organizations. More are invited to do the same, and then share with Primerus news of the project.
- **Financially support global hunger assistance**. Make a contribution to the United Nation's World Food Programme equivalent to the cost of at least one billable hour.

The food bank event was the first time Primerus offered a community service option at the annual Global Conference – and it won't be the last, according to Primerus Vice President of Services Chris Dawe.

Because of the positive feedback, plans are already underway to do the same at the next Global Conference, as well as at other events.

"I've never participated in a community service event through Primerus, so it was really nice to have that option at Global," said Muliha Khan, an attorney with Primerus firm Zupkus & Angell in Denver, Colorado. "I wanted to participate because food banks are a cause close to my heart. I also thought it would be a great way to immerse myself in the city of Boston."

At the 2018 Primerus Young Lawyers Section Conference in Charleston, South Carolina, attorneys visited a local Title I school to read with students, play on the playground with them, and to attend an after-school program, according to Emily Campbell of Dunlap Codding in Oklahoma City, Oklahoma. Campbell is a member of the Primerus Community Service Board and the Primerus Young Lawyers Section.

"Stepping outside of that conference atmosphere and into this whole new world gave me a new perspective," Campbell said. She was struck by the lack of resources in the school they visited. The Young Lawyers Section learned that most of the children could not afford bikes, and for some, this was their primary mode of transportation to and from school.

"In a place with so many challenges, the teachers and staff were incredible. They inspired us all," Campbell said. "The kids were so resilient and sweet, and they ate up all the attention we gave them."

Following the visit, the Young Lawyers Group donated 30 bikes to Going Places, the organization that helped organize the school visit. At the group's March conference in Denver, Dawe said they will undertake a similar project through Wish for Wheels. The Young Lawyers group will donate $3,500 to purchase bikes and helmets for 35 second grade students. The attorneys will then go to a local elementary school to help the students build the bikes.

"What a great way to interact with your peers in that environment and get to know one another and give back to the community," Campbell said. "It's a win-win all the way around."

Campbell is pleased that the Community Service board is helping to emphasize community service throughout the organization. She encouraged Primerus members to share their own firm's community service efforts with the board, as well as to share feedback about how Primerus can further embrace outreach.

"I think giving back is certainly part of the well-rounded attorney that Primerus encourages and supports its attorneys to be," she said. "At every Young Lawyers Section conference that I go to, or any Primerus conference, we're always looking to be inspired and take a step outside of the office and be enriched in some way. So the legal curriculum is always great, but it's icing on the cake when you get these personally enriching experiences like community service events. That certainly inspired me when I went back home. It fuels you to do better, to be better, and give better." P

To learn more, visit primerus.com and click on Fight Hunger.

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Primerus Business Law Institute (PBLI)

Hong Kong, Hong Kong

2019 Law Firm Locations – International Society of Primerus Law Firms

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Maine
Maryland
Massachusetts
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Missouri
Montana
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New Mexico
New York
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Oregon
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South Carolina
Tennessee
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2019 Calendar of Events

Scan to learn more about Primerus.

April 4-7, 2019
Primerus Defense Institute Convocation
Boca Raton, Florida

May 2-4, 2019
Primerus International Convocation
Miami, Florida

May 12-14, 2019
Association of Corporate Counsel Europe Annual Meeting
Edinburgh, Scotland
Primerus will be a sponsor and exhibitor.

June 11, 2019
Primerus Northeast U.S. Regional Meeting
New York, New York

June 20, 2019
Primerus Western U.S. Regional Meeting
Boise, Idaho

June 27, 2019
Primerus Midwest U.S. Regional Meeting
Louisville, Kentucky

September 19, 2019
Primerus Europe, Middle East & Africa and Association of Corporate Counsel Europe Local Seminar
Amsterdam, Netherlands

September 20, 2019
Primerus Europe, Middle East & Africa Member Meeting
Amsterdam, Netherlands

October 10-12, 2019
Primerus Global Conference
San Diego, California

October 27-30, 2019
Association of Corporate Counsel Annual Meeting
Phoenix, Arizona
Primerus will be a corporate sponsor and exhibitor.

November 7-8, 2019
Primerus Defense Institute Fall Seminar
New York, New York

For more information, please visit 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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