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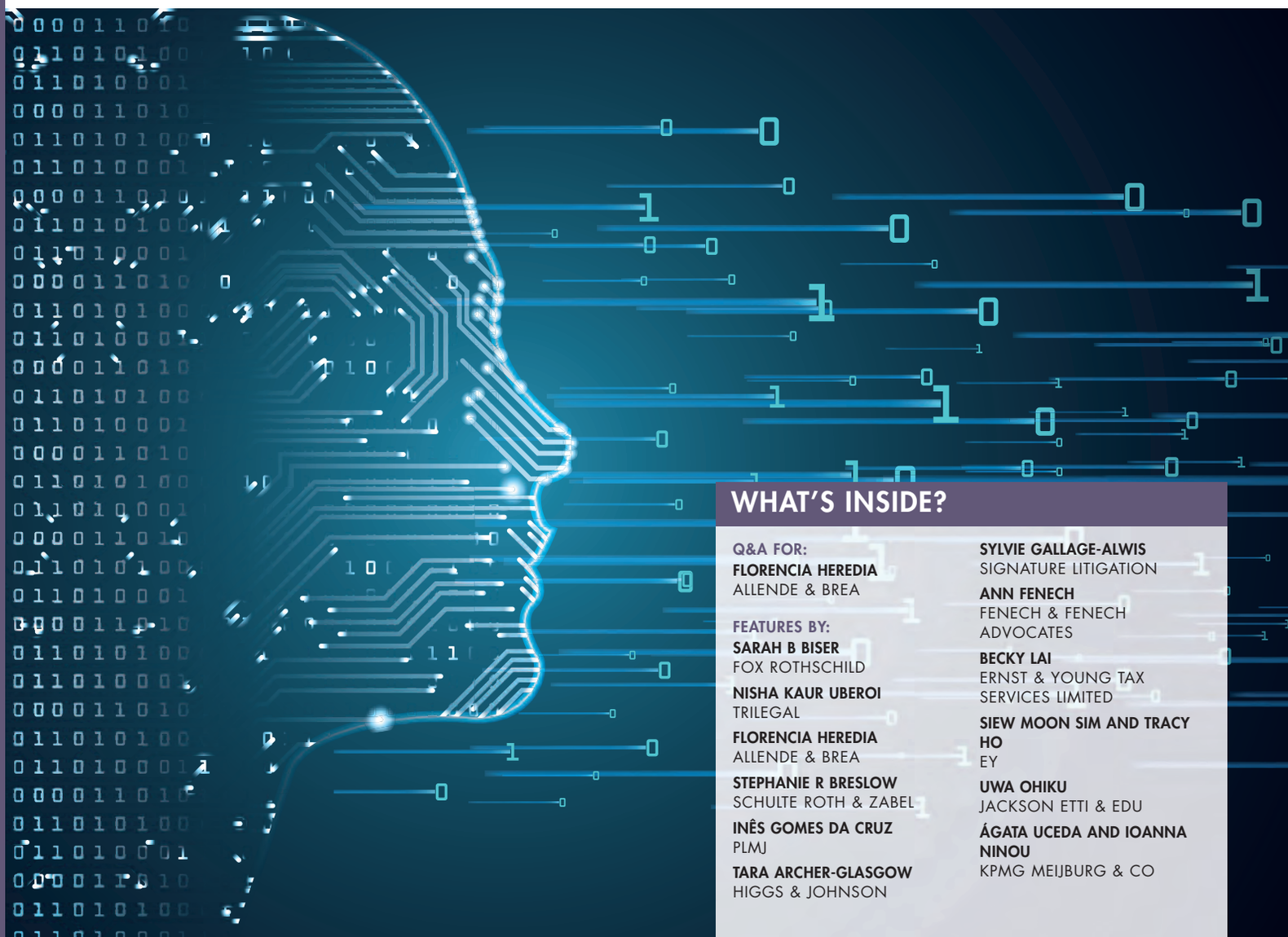
WOMEN IN BUSINESS LAW



WHAT'S INSIDE?

Explore the benefits of being a member of the Network:

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WOMEN IN BUSINESS LAW

Methodology

Welcome to the 2020 *Guide to the World's Leading Women in Business Law,* the international legal market's leading guide to the top female legal practitioners advising on business law.

The inaugural edition in 2010 was met with an overwhelmingly positive response from the female business community endorsing the idea of a guide devoted exclusively to the best female practitioners globally. The *Women in Business Law*, is one of the prolific Expert Guides publications and clearly the benchmark in the industry.

The idea to promote and celebrate successful women in the legal industry was our initiative and the Expert Guides brand is unique among it's competitiors due to a solid reputation over 25 years.

When first published in 1994, the Expert Guides were the first-ever guides dedicated to leading individuals in the legal industry. Since then we have continued to focus on individuals considered by clients and peers to be the best in their field.

The guides for each practice area are updated regularly. Our research process involves sending questionnaires to senior practitioners or in-house counsel involved in each practice area in over 90 jurisdictions, asking them to nominate leading practitioners based on their work and reputation. The results are analysed and screened for firm, network and alliance bias. The list of experts is then discussed and refined with advisers in legal centres worldwide.

Our researchers have compiled a list of specialists in 82 jurisdictions and 30 practice areas for this guide. These specialists have been independently offered the opportunity to enhance their listing with a professional biography. The biographies give readers valuable, detailed information regarding each lawyer/adviser's practice and, if appropriate, their work and clients.

We owe the success of this guide to all the in-house counsel and firms that completed questionnaires and met our researchers. Thank you. We hope you find the guide to be a useful tool. All information was believed to be correct at the time of going to press.

The Research Team

EXPERT GUIDES RESEARCH

Expert Guides has been researching the world's legal markets for over 25 years, and has become one of the most trusted resources for international buyers of legal services.

Our guides cover a broad – and growing – range of legal practice areas, including:

Aviation
Banking, finance and transactional
Commercial arbitration
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Construction and real estate
Energy and environment
Insurance and reinsurance
International trade and shipping
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Life sciences
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Patents
Privacy and data protection
Rising stars
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Technology, media and telecommunications
Trade mark
Transfer pricing
Trusts and estates
White collar crime
Women in business law

Our guides are distributed to and regularly used by the world's most prominent decision-makers and frequent buyers of legal services. Each guide has an extensive distribution list plus additional tailoring to its area of focus.

Each guide is also reprinted in full at www.expertguides.com

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Laura Pierallini is the founder and name partner of the Italian aviation law firm Studio Pierallini.

She spent several years in the legal and tax department of Arthur Andersen and then she was the managing partner of the international law firm Coudert Brothers in Rome from 2001 to 2005.

She is a professor of Commercial Law and Director of the Executive Master in Air Transport Law at the LUISS School of Law of Rome.

Ms Pierallini has practised aviation law since 1988, providing expert advice to clients across the whole of the international aviation sector, including aircraft finance and leasing, M&A, anti-trust and regulatory, litigation and dispute resolution, insolvency and restructuring, employment and corporate matters. Her clientele includes, among the others, Italian and foreign airlines, private operators, manufacturers, lessors, financiers, airports, handlers and travel agents.

Ms Pierallini was recognised *Global Elite Thought Leader* 2018-2020 (aviation regulatory) and *Recommended Global Lawyer* 2018-2020 (aviation regulatory, aviation contentious, aviation finance) by *Who's Who Legal*, as well as *Best Aviation Lawyer* for Italy by *Client Choice Awards* 2020. She was also repeatedly shortlisted as *Best Aviation Lawyer* for the *Europe Women in Business Law Awards* (2015 to 2019).

Ms Pierallini regularly attends and organises conferences on air transport, delivering speeches and moderating panels at various Italian and international symposia, in particular organised by IATA, EALA, EAC, IBA, EBAA and LUISS.

She is a committee member of the European Air Law Association and a member of the International Aviation Womens Association and the European Aviation Club.

She is also author of many national and international publications on aviation, tourism and commercial law.

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Diane Westwood Wilson is Co-Chair of the Aviation practice group at Fox Rothschild LLP and a recognized authority on the globally complex legal issues facing the industry. One of the most accomplished aviation lawyers of her generation, Diane has earned a reputation over more than three decades as a litigator whose mastery of the facts and deep understanding of the technology makes her a formidable opponent in any case. Her November 1998 argument before the US Supreme Court in *EL AL Israel Airlines Ltd. v. Tseng* led to a seminal decision that established the Montreal Convention as the exclusive cause of action in international air transportation. Diane has been representing the interests of EL AL for nearly 30 years.

Drawn to aviation law while still a student at Seton Hall School of Law, Diane joined a boutique aviation firm (1983) where she honed her skills as a defense lawyer representing airlines in major litigation over plane crashes throughout the world. Diane's practice expanded to include complex product liability, airport operator and environmental claims, and defending a broad range of manufacturers—including component parts for planes and helicopters—and JFK International Air Terminal from the time that IAT was torn down and constructed to become Terminal 4 of today.

Diane is the co-author of the US chapter of International Comparative Legal Guides' Aviation Law 2020, a treatise on aviation law and legal issues, including aircraft leasing and financing, litigation and dispute resolution across more than 30 jurisdictions worldwide. She also hosts an annual aviation symposium with fellow Co-Chair Mark Dombroff that is a mainstay of legal and regulatory education for the industry.

What distinguishes Diane as a lawyer is a rare combination of fearlessness, pragmatism and hard work that is grounded in an intimate understanding of and dedication to her clients' goals. She knows that clients do not expect or even want perfect results if achieving them would be too costly or time consuming. But she does not shy away from taking a bold position that could lead to an important win and set a precedent or build on a new trend in the law.

Ranked by Chambers USA as a leading lawyer in the nationwide category of aviation litigation, Diane is one of very few women in the top tier of aviation law. She was named among the World's Leading Aviation Lawyers by *Euromoney Publications* and is the only female lawyer recognized in aviation and aerospace for multiple years in *New York Super Lawyers*, Manhattan edition. She is also a member of the International Association of Women in Aviation, a nonprofit that provides scholarships to promising women undergraduates studying aviation and mentoring programs designed to help women in the industry advance their careers.

Diane graduated from Seton Hall University School of Law after studying Art History at University of Illinois, Urbana-Champaign.

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Josée Weydert is the managing partner of NautaDutilh, where she heads the Luxembourg Banking & Finance practice. Josée specialises in financing, securitisation, (debt and equity) capital markets and financial regulatory matters.

Josée is a trusted advisor of numerous financial institutions, financial professionals and corporate groups. Due to her extensive experience working in the capital markets and structured finance departments at a well-known Luxembourg bank, she has particularly strong expertise in the banking and capital markets fields.

With more than 25 years of legal experience, Josée enjoys high recognition among both market players and clients. In 2020, Josée was named a Leading Expert in Banking & Finance Law in Luxembourg by *Chambers Europe* and as a Women Leader by the *IFLR1000*. *Chambers* notes that she has "profound knowledge of the products and services marketed in Luxembourg's financial market and excellent working relationships with the government and regulators" and that clients value her "depth of expertise and long-standing experience in the banking industry".

Josée and her team contribute regularly to various publications, including The Luxembourg Banking & Finance Comparative Guide (*The Legal 500*, 2019) and an article entitled "PSD2 Implementation in the Grand Duchy – Six Months Later" (*ILO*, 2019).

Josée obtained her law degree from the Robert Schuman University in Strasbourg (1992) and subsequently completed the two-year programme for young banking executives at the Luxembourg Training Institute for Banking (1995). She regularly speaks at conferences on topics relating to the financial sector.

Josée was admitted to the Luxembourg Bar in 1993.

She is a Luxembourg native and is fluent in English, French, German and Luxembourgish.

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Anita Schläpfer is a partner in Schellenberg Wittmer's banking and finance, and investment funds groups in Zurich.

Anita specializes in advising Swiss and international financial institutions and corporate clients on domestic and cross-border acquisition finance and syndicated lending transactions, securitizations and other finance transactions. She assists clients on asset and investment management, onshore and offshore investment vehicles and other financial products; and provides regulatory and transactional advice for technology-driven solutions and providers in the financial services industry.

Examples of Anita's expertise include: advising creditors of Advanz Pharma Corp (formerly: Concordia International Corp) on its recapitalization which resulted in new senior secured debt of approximatelyUS$1.36 billion, followed by amendments due to borrower's acquisition of Correvio Pharma Corp; advising Deutsche Bank AG, New York Branch, on a financing of up to US$825 million to the Trinseo group of companies and advising Lennox International Inc. on its offering of US$600 million senior notes and obtaining revolving credit commitments of US$750 million and term loans of US$145 million.

Anita held various offices at the International Association of Young Lawyers and was president from September 2013 to August 2014. She is a regular speaker at seminars and conferences.

Anita holds a law degree from the University of St Gallen (1997) and an LLM focusing on banking and securities law from Columbia University (2002). After being admitted to the Swiss Bar in 2000, she worked for another large business law firm before joining Schellenberg Wittmer in 2007 as a senior associate. Anita has been a partner at Schellenberg Wittmer since 2009.

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Jennifer B Ezring is a member of the Executive Committee and of Cahill Gordon & Reindel LLP's corporate practice group.

Jenn's practice focuses primarily on advising commercial and investment banks in leveraged finance and asset-based lending transactions, including acquisition financings, leveraged buyouts, going-private transactions, recapitalizations, project financings, bridge lending and loan commitments, out-of-court debt restructurings, and other secured lending transactions.

Jenn has practiced in a variety of industries, including communications, gaming, retail, energy, manufacturing, media, publishing and internet technology. She has a broad range of financing experience in both US and international transactions.

Jenn was named to *Crain's* 2019 list of Notable Women in Law and was recognized as one of *The Secured Lender*'s 50 Women in Commercial Finance in 2017. She has been recommended as a leading finance lawyer by *Chambers USA*, *IFLR1000* and *The Legal 500*, including being named as one of *IFLR1000*'s Women Leaders in 2020. Jenn is a frequent speaker on leveraged finance and asset-based lending topics, including for SFNet, PLI, and ACG New York. She is a member of the State Bar of New York, the New York State Bar Association and the American Bar Association.

Jenn serves on Cahill's Women's Initiatives Committee. She is a member of the Board of Directors of LiveGirl, Inc. and the Board of Governors of Multiplying Good, and has served on the Leadership Advisory Committee of the National Womens Law Center.

Selected Matters:

- Advised the lead arrangers in connection with a $1.868 billion North American asset-based loan facility for Gap Inc.
- Advised the lead arrangers in connection with a $1,500,000,000 Term B credit facility and a $50,000,000 revolving credit facility for subsidiaries of Virtu Financial, Inc. in connection with its acquisition of Investment Technology Group, Inc.
- Advised the lead arrangers in connection with a $1,250,000,000 global asset-based revolving credit facility for Adient US LLC and certain of its domestic and international subsidiaries
- Advised the lead arrangers in a $400,000,000 cross-border asset-based credit facility in connection with the acquisition of Vertiv Group Corporation by Platinum Equity
- Advised the administrative agent and lead arrangers of $675,000,000 in first lien loans, second lien loans, and revolving commitments in connection with the purchase of Intralinks, Inc. by Siris Capital

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Eliza McDougall is a Partner in the Debt Finance practice of White & Case LLP. She serves as Executive Partner for the New York office of the Firm and as a member of the Firm's elected Partnership Committee.

Eliza represents leading investment and commercial banks, direct lenders, corporate borrowers and private equity sponsors on a wide range of financing matters, including leveraged and investment-grade acquisition financings, asset-based financings, project and structured financings, debtor-in-possession and exit financings, and general corporate lending transactions.

Eliza has a proven ability to manage complex, multijurisdictional transactions and work alongside teams of the Firm's lawyers from around the world. Clients "respect her viewpoint and she is very proactive in flagging issues for consideration and giving advice in complex transactions" and "rely on her market experience." (*Chambers* 2019 and 2020).

Eliza is an exceptionally skilled practitioner sought after by clients from various areas of leveraged finance, a trusted leader dedicated to diversity, and a true legal industry MVP.

Recent and representative matters include the representation of:

- Stone Point Capital, in connection with a US$1.55 billion first lien term loan facility, a US$200 million first lien revolving credit facility, and a US$450 million second lien term loan facility, the proceeds of which were used to fund the acquisition of Duff & Phelps (including the repayment of Duff & Phelps' outstanding debt). Eliza also represented Stone Point Capital LLC and Duff & Phelps in connection with a US$300 million first lien incremental term loan facility in connection with a potential acquisition.
- UBS, as arranger, in connection with a US$1.32 billion incremental term loan facility for ION Trading Technologies S.a r.l. and ION Trading Finance Limited for the purposes of funding the acquisition of Fidessa Group plc, a publicly traded UK company. The International Financing Review (IFR) named this complex cross-border transaction "North America Leverage Loan of the year" in January 2019.
- Booking Holdings Inc. in connection with its entry into an unsecured revolving credit facility in the aggregate principal amount of $2 billion with a maturity of five years.
- UBS, Banco Bradesco and HSBC, as joint lead arrangers with respect to a US$1.15 billion Bridge Term Loan facility to finance Natura Cosméticos' acquisition of The Body Shop from L'Oréal.
- Hess Midstream Partners LP, as borrower, on obtaining a five-year, US$1.4 billion pro rata credit facility. The financing, which includes a US$400 million A term loan and a US$1 billion revolver, was entered into for the purposes of refinancing existing debt.
- UBS Securities LLC, Jefferies Finance LLC, Barclays Bank PLC and Deutsche Bank Securities Inc. as joint lead arrangers and bookrunners in connection with a US$1.425 billion financing of the proposed acquisition of Dell Technologies (NYSE: DELL) RSA by a consortium led by Symphony Technology Group, Ontario Teachers' Pension Plan Board and Alpinvest Partners. The financing will consist of a US$1 billion first lien term loan facility, US$75 million first lien revolving credit facility and US$350 million second lien term loan facility.

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Sabrena has over 20 years' experience in completing US domestic and cross-border financing transactions. She advises financial institutions and companies on complex financing transactions, including structured finance deals, acquisition financings, syndicated and bilateral loans, bridge loans, margin loans, investment grade loans, private equity and hedge fund financings, private banking transactions, debt restructurings, sovereign loans, trade financings, supplier financings, receivables purchases and non-performing loan (NPL) transactions.

Sabrena's broad international experience spans Europe, Asia and Latin America. She has a particular focus in Latin America, and has completed transactions in Argentina, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, Mexico, and Peru, as well as other Latin American jurisdictions.

Named by *Latinvex* in 2020 as one of Latin America's top 100 lawyers, and by *Chambers Global* in 2020 as a Foreign Expert in Banking & Finance, Sabrena has led on many high-profile finance deals.

Recent matters include the representation of:

- Bayport Colombia S.A., a subsidiary of leading specialist credit provider Bayport Management Limited, on its entry into a COP-denominated secured loan agreement of up to US$150 million through a Colombian trust established by Bayport Colombia S.A., as borrower, and a syndicate of leading international lenders.
- Bayport Mexico (Financiera Fortaleza S.A. de C.V.), a subsidiary of leading specialist credit provider Bayport Management Limited, on its entry into a MXN 1.5 billion secured loan agreement with a syndicate of leading international lenders.
- OPIC and Citibank in connection on a US$150 million unsecured loan to Banco Regional S.A.E.C.A.. The purpose of the financing was to finance new lending to small and medium enterprises of Banco Regional, with a particular focus on supporting women-led small and medium enterprises.
- OPIC and Citibank on a US$101.6 million loan facility to finance new lending to small and medium enterprise customers of Sudameris Bank S.A.E.C.A.
- Deutsche Bank in a US$150 million finance transaction for Avianca S.A. backed by future credit card receivables.
- Joint Lead Arrangers and Bookrunners, and Scotiabank Peru S.A.A., as Administrative Agent in connection with Alicorp S.A.A.'s US$500 million senior unsecured bridge loan for the acquisition of Intradevco Industrial S.A.
- Sumitomo Mitsui Banking Corporation, ABN AMRO Bank N.V. and ING Bank N.V. as lenders and joint lead arrangers in a US$700 million revolving loan facility granted to Bunge Limited Finance Corp., an American agribusiness and food company, which upon the satisfaction of certain conditions following the sale of an interest in certain Brazilian subsidiaries, was converted to a pre-export loan facility made to such Brazilian subsidiaries.

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Taisa Markus is a partner in White & Case's Capital Markets practice. Her practice focuses on cross-border securities offerings, cross-border bank finance and M&A, restructurings and general securities law matters. Taisa has significant experience representing both financial institutions and issuers particularly in the Latin American and European capital markets. She also has in-depth knowledge of Tier 1 and Tier 2 capital securities across jurisdictions.

Industry press consistently recognizes Taisa as a leading lawyer for capital markets involving Latin American issuers. She is ranked for Banking & Finance and Capital Markets by *Chambers Latin America*, *Chambers Global* and as a Foreign Expert in *Chambers USA*. Taisa is also recognized in *Latinvex* as one of the top 100 lawyers specializing in Latin America. Taisa serves on the Committee of the Vance Center for International Justice and on the boards of the University of Illinois College of Law and the Women in Law Empowerment Forum.

Recent matters include representation of:

- Alpha Holding, S.A. de C.V., on its Rule 144A/Reg S offering of 9.000% senior notes due 2025 in an aggregate principal amount of US$400 million.
- Aerovías de México, S.A. de C.V., the largest Mexican airline, on its Rule 144A/Res S offering of US$400 million in aggregate principal amount of 7.000% Senior Notes due 2025.
- WOM S.A., on its inaugural US$450 million high yield bond issue and entry into a new US$200 million (equivalent) pari passu senior credit facility.
- The dealers in the issuance by BBVA Mexico of US$750 million of 5.875% fixed Reset Subordinated Preferred Tier 2 notes under its US$10 billion Rule 144A/Reg S medium term note program and related tender offer for a portion of two series of outstanding subordinated notes due 2020 and 2021.
- The dealers in the establishment of the US$10 billion Rule 144A/Reg S medium term note program by BBVA Mexico allowing for the issuance of senior unsecured and subordinated securities.
- Pesquera Exalmar, as borrower in connection with a US$110 million secured term credit facility with a syndicate of lenders and refinancings of the borrower's 144A/Reg S bonds and certain other debt.
- Telefónica Celular del Paraguay S.A. on the issuance of US$300 million of its 5.875% senior unsecured notes due 2027 in the Rule 144A/Reg S markets and the exchange offer for any and all of its 6.750% senior unsecured notes due 2022.
- BBVA Securities, as arranger, in a multi-currency US$300 million loan facility to Latin American finance subsidiaries of a multi-national entity and in the refinancing of extension of the facility.
- Scotia Chile in the establishment of its Reg S medium term note program for the issuance of debt securities.

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COMMERCIAL ARBITRATION

Feature for:

COMMERCIAL ARBITRATION

US Supreme Court Rules that State-Law Principles Allowing a Nonsignatory to Enforce an Arbitration Provision Against a Signatory May Be Applied to International Contracts Governed by the New York Convention

Sarah B. Biser
Fox Rothschild
New York

In cases involving contracts between US companies, courts frequently allow a nonsignatory to a contract to enforce an arbitration provision in the contract against a signatory, when the signatory to the contract relies on the terms of that agreement in asserting its claims against the nonsignatory. On June 1, 2020, the United States Supreme Court ruled unanimously that this principle—known as "equitable estoppel"—may also be applied to international contracts governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, because nothing in that Convention conflicts with the enforcement of arbitration agreements by nonsignatories under domestic-law equitable estoppel doctrines.

The Supreme Court's decision in *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*[1] overturned a ruling of the United States Court of Appeals for the Eleventh Circuit, and resolves a split on this issue between the Eleventh and Ninth Circuits, on the one hand, and the First and Fourth Circuits, on the other.

GE Energy concerned a company that entered into three contracts with F.L. Industries, Inc. for the construction of cold rolling mills at a steel manufacturing plant in Alabama. Each of the contracts contained an identical arbitration clause, providing for arbitration of disputes to take place in German in accordance with the Rules of Arbitration of the International Chamber of Commerce. After executing those agreements, F.L Industries entered into a subcontract agreement with GE Energy Power Conversion France SAS, Corp. ("GE Energy") for the design, manufacture and supply of motors for the cold rolling mills. The owner of the steel plant and its insurers filed suit against GE Energy in Alabama state court, alleging that the motors that it supplied failed, resulting in substantial damages.

GE Energy removed the action to federal court and then moved to dismiss and compel arbitration of the claims, relying on the arbitration clauses in the contracts between F.L. Industries and the original owner of the plant. The District Court ruled that GE Energy qualified as a party under the arbitration clauses because the contracts defined the terms "Seller" and "Parties" to include subcontractors and compelled arbitration.[2]

> THE DECISION PROVIDES NONSIGNATORIES WITH AN OPTION TO COMPEL ARBITRATION WHEN THE CONDITIONS FOR EQUITABLE ESTOPPEL ARE MET

The Eleventh Circuit reversed, ruling that the New York Convention includes a requirement that the parties actually sign an agreement to arbitrate their disputes in order to compel arbitration.[3] It then ruled that GE Energy could not rely on state-law equitable estoppel doctrines to enforce the arbitration agreement as a nonsignatory because, in the court's view, equitable estoppel conflicts with the New York Convention's signatory requirement. The Eleventh Circuit's ruling on the equitable estoppel was consistent with an earlier Ninth Circuit decision,[4] and inconsistent with decisions of the First and Fourth Circuits.[5]

The Supreme Court reversed. In a unanimous opinion written by Justice Thomas, the Court noted that it has previously ruled that

COMMERCIAL ARBITRATION

the Federal Arbitration Act permits nonsignatories to rely on state-law equitable estoppel doctrines to enforce an arbitration agreement. The Court ruled that nothing in the New York Convention prohibits the application of domestic equitable estoppel doctrines to international contracts providing for arbitration, and that the treaty's silence on that issue was dispositive. The Court also found support for its interpretation by looking to decision by courts of other New York Convention signatories, which it found also permitted enforcement of arbitration agreements by entities that did not sign the agreement.

Because the Eleventh Circuit concluded that the New York Convention prohibited enforcement by nonsignatories, it did not determine whether GE Energy could enforce the arbitration clauses under principles of equitable estoppel or which body of law governed that determination. The Supreme Court remanded the case to the Eleventh Circuit to make those determinations.

The Supreme Court's decision thus resolved an issue on which the federal appeals courts were split. It also brings the enforcement of arbitration provisions in international contracts into conformity with the enforcement of such provision in domestic contracts in regard to the potential for nonsignatories to compel a signatory to bring its claims in arbitration, rather than to litigate against the nonsignatory in court. The decision provides nonsignatories with an option to compel arbitration when the conditions for equitable estoppel are met.

1. Case No. 18-1048 (June 1, 2020).
2. *Outokumpu Stainless USA LLC v. Converteam SAS*, 2017 WL 401951 (S.D. Ala. Jan. 30, 2017).
3. *Outokumpu Stainless USA LLC v. Converteam SAS*, 902 F.3d 1316 (11th Cir. 20218).
4. *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996 (9th Cir. 2017).
5. *Aggarao v. MOL Ship Mgmt. Co.*, 675 F. 3d 355 (4th Cir. 2012); *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38 (1st Cir. 2008).

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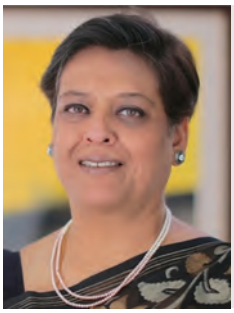

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Ms Ritu Bhalla is a senior Partner at the Firm and in the capacity of a co-chair of the practice group, oversees the Firm's practice in corporate commercial litigation, arbitrations and regulatory litigation. She specialises in Mergers, Public & Administrative Judicial Review, Insolvency-related Disputes, Shareholder Disputes, Domestic and International Commercial Arbitrations, Corporate and Commercial Litigation, Banking and Finance, Infrastructure Litigation including Building Contracts, White Collar Crimes and Extradition-related Action. She has extensively represented multinational as well as domestic shareholders in their *inter se* disputes in joint ventures, including Board room strategies

For over two and a half decades, Ritu has been a focal point in the firm's litigation practice and has worked on many fiercely contested matters across jurisdictions including before the Supreme Court of India, High Courts of various States, and other Specialised Quasi-Judicial Tribunals. Her strength in litigation rests on her ability to formulate and execute legally sound and tactical strategies on behalf of major multinationals, domestic corporates, banks, public enterprises, commercial and financial institutions involved in complex disputes.

Ritu successfully represented the majority shareholders of a Japanese Company in a one of its kind case of oppression by minority shareholders, before National Company Law Tribunal, Mumbai. She represents the investment arm of the Russian Federation in an ongoing International Commercial Arbitration and has successfully obtained an Interim Award of INR 135 crores (approx.) in favour of her client. She has been a part of several marquee cases representing TATA, Getit Info Services Pvt. Ltd., Biological E Ltd., ETA Group of Dubai, IL&FS Transportation Networks Limited, Navyuga Engineering Company Limited, Indian Oil Corporation and Indian Paints Association et al and was part of the team advising the Government appointed Board of Satyam Computer Services Ltd. (SCSL) following the confession of its promoter and was actively involved in the proceedings involving SCSL before the Company Law Board.

Ritu's deep involvement with commercial litigation and arbitration goes beyond courts and tribunals and extends to formulating valued litigation strategy. Ritu has been associated with conferences and seminars on contemporary legal issues and is an active member of the Supreme Court Bar Association and Delhi High Court Bar Association.

Recognition

Ritu has been ranked in Band 2 for Dispute Resolution by Chambers Asia Pacific 2017-20, which states, "Ritu Bhalla advises domestic and international clients on a wide spectrum of contentious matters, including private equity, restructuring, joint venture and shareholder disputes. She is also adept at handling arbitration proceedings." Chambers and Partners 2018 quotes, "Ritu Bhalla has a stellar reputation in the arbitration and litigation circle and regularly acts on private equity, restructuring, joint venture and shareholder disputes for both domestic and international clients."

She was also been Recognised as the 'Best in Commercial Arbitration' at Euromoney Legal Media Group Asia Women in Business Law awards 2019, and ranked as a Distinguished Practitioner by Asialaw Profiles, 2019 and 2020.

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Adedoyin Oyinkan Rhodes-Vivour, SAN is the founding partner of Doyin Rhodes-Vivour & Co, a firm of solicitors, advocates and arbitrators. The firm specializes in providing corporate commercial, litigation and arbitration/ADR services. Adedoyin is a chartered arbitrator and fellow of the Chartered Institute of Arbitrators and is active in international arbitration. She holds an International Practice Diploma in Arbitration. She is a CEDR [UK] accredited mediator. She is a member of the International Chamber of Commerce (ICC) International Court of Arbitration and a member of the ICC Commission on Arbitration & ADR. She is a Vice-President of the London Court of International Arbitration African Users' Council .She was a member of the Court of the Permanent Court of Arbitration (PCA), The Hague, Netherlands pursuant to her nomination by Nigeria (2010 – 2016).

Adedoyin was educated at the University of Lagos [LLB Hons], University of Lagos [LLM] and King's College London, University of London [M.A, International Peace & Security], graduating in 1980, 1986, and 2002, respectively. She is a barrister and solicitor of the Supreme Court of Nigeria [admitted in 1981] and was elevated to the privileged rank of Senior Advocate of Nigeria (equivalent to a Queen's Counsel) in 2019. She is a Notary Public of Nigeria .She is a member of the Nigerian Bar Association, International Bar Association, Chartered Institute of Arbitrators, and International Council for Commercial Arbitration.

She has practiced law for nearly 4 decades and specializes in commercial transactions, international and domestic arbitration and alternative dispute resolution. Adedoyin has conducted arbitrations under various rules including LCIA ,ICC and UNCITRAL .She is listed on various arbitration panels including the Panel of the Chartered Institute of Arbitrators [UK], London Court of International Arbitration database of neutrals(LCIA), International Centre for Dispute Resolution [ICDR], Singapore International Arbitration Centre [SIAC], Maritime Arbitrators Association of Nigeria [MAAN], Asian International Arbitration Centre (previously known as Kuala Lumpur Regional Centre for Arbitration), Lagos Regional Centre for International Commercial Arbitration and Kigali International Arbitration Centre [KIAC]. She is listed on the Panel of Neutrals of the Lagos and Abuja Multi-door Courthouses. She is a member of the Users Council of SIAC.

Adedoyin is the immediate past Chairperson of the Chartered Institute of Arbitrators, Nigerian Branch. She is a member of the International Law Association [ILA], International Committee on International Commercial Arbitration and the Pioneer Chair, Committee on International Commercial Arbitration of the Association's Nigerian Branch. She is a founding member and pioneer president of the Maritime Arbitrators Association of Nigeria [2006-2010]. She was the pioneer chairperson of the Nigerian Bar Association Section on Business Law, Committee on Arbitration/ADR [2005-2010].

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Dr Nathalie Voser is a partner in Schellenberg Wittmer's arbitration group. She has acted as counsel and arbitrator in a large number of cases under various arbitration rules. Nathalie's practice focuses on commercial and investor-state disputes relating to contracts in the fields of construction; civil engineering and energy projects; and oil and gas, and she also has substantial experience in the pharmaceutical and automotive industry. Nathalie also acts regularly in proceedings relating to arbitration before state courts.

Some of Nathalie's recent expertise in arbitration matters includes advising – An Israeli company (and its international parent company) as EPC contractor of a large scale solar thermal power station in several ICC arbitrations regarding disputes against its subcontractors concerning various aspects of the large scale infrastructure project; – A German company in ICC arbitration against a Kazakh company in a dispute under a series of supply and engineering contracts, and advising and representing an internationally renowned company in multiple complex construction disputes against both the owner and the subcontractor concerning structural defects in a cooling tower of a currently active power station.

Nathalie is currently a Vice President of the London Court of International Arbitration (LCIA) and Council Officer in their European Users division and a member of the Board of the Vienna International Arbitration Chamber (VIAC) (2020 to 2022). She is also a board member of the Swiss Arbitration Association and Swiss delegate in the ICC Arbitration and ADR Commission.

In 1988, Nathalie graduated summa cum laude from the University of Basel and was admitted to the Swiss Bar in 1990. In 1994 she earned an LLM with honours from Columbia University, New York. In 2014, she was awarded the title of professor in private law, arbitration law, private international law and comparative law by the University of Basel.

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Carolyn Lamm is Co-Head of White & Case's International Arbitration practice in the Americas. She regularly serves as lead counsel in high-stakes, cutting-edge cases, successfully resolving significant international arbitrations involving international corporations and sovereign clients. She also serves as lead counsel in arbitration-related litigation and international trade proceedings.

She advises clients in matters with ICSID and its Additional Facility, and other international arbitral proceedings involving States, and commercial arbitral fora including AAA/CDR, ICC, Vienna Centre, Stockholm Chamber, Swiss Chamber and in federal court litigation.

She is the Distinguished Faculty Chair at the University of Miami School of Law in the White & Case LLM program in International Arbitration, where she teaches International Investment Arbitration and is a member of the Board of Trustees of the University. Carolyn is also a fellow at the American College of Trial Lawyers.

Carolyn was appointed by President Clinton to the US Panel and later by the Government of Uzbekistan to the Uzbek Panel of Arbitrators for ICSID arbitration. She was a member of the American Arbitration Association Executive Committee and Board, and is currently President of the American Bar Endowment, a member of the ICCA Governing Board, an Emeritus member of the Council of the American Law Institute, and has served as an arbitrator in AAA International Rules, ICDR, SIAC, ICSID and NAFTA Chapter 11 disputes. Carolyn is a founding member of the American Uzbekistan Chamber of Commerce and currently serves as Chairman of the Board.

Carolyn is a past President of the District of Columbia Bar and the American Bar Association and until recently, was the ABA's Representative to the International Bar Association.

Prior to joining White & Case, she was employed by the US Department of Justice under the Attorney General's Program for Honor Law Graduates and served as a trial attorney in the Fraud Section, Civil Division, before obtaining the position of Assistant Director, Commercial Litigation Branch, Civil Division.

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- The Russian Federation as part of the global counsel team an in litigation before the U.S. District Court for the District of Columbia to resist the enforcement of the US$50 billion+ Yukos arbitration awards, the largest awards in the history of arbitration.
- Grupo Unidos por el Canal (GUPC) and its European partners, WeBuild , Sacyr, and Jan de Nul, in disputes with the Panama Canal Authority (ACP) regarding the construction of new locks at the Panama Canal.
- Saudi Aramco to challenge enforcement of an alleged US$18 billion arbitral award and other US cases.

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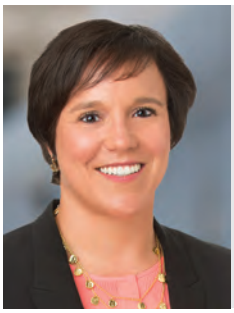

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She advises corporate clients on a wide range of commercial disputes, post-M&A disputes, and disputes concerning joint ventures and other shareholder arrangements. On the sovereign side, she advises on investment treaty disputes and oil and gas concession disputes. Ank also regularly advises on the drafting of dispute resolution clauses in international contracts. She has a track record of obtaining an early resolution through creative strategies and the use of negotiation and mediation.

Ank is a Court Member of the London Court of International Arbitration, and a member of the Board of the International Institute for Conflict Prevention & Resolution (CPR) and Delos Dispute Resolution. She is the Vice Chair of the Executive Committee of the Foundation for International Arbitration Advocacy (FIAA). She also serves on the advisory board of the Arbitration Foundation of Southern Africa (AFSA), the Program Committee of NYIAC, and the Editorial Committee of International Arbitration Case Law. Past appointments include Chair of CPR's Arbitration Committee, Member of the Advisory Board of Columbia University's Center for International Commercial and Investment Arbitration (CICIA), Vice Chair of the IBA's Arbitration Committee, and service on the ICCA-Queen Mary Task Force on Third Party Funding.

Ank is on the IEL Energy Arbitrators List and the arbitrator panels of the ICDR (American Arbitration Association), CPR, the Câmara de Conciliação, Mediação e Arbitragem CIESP/FIESP (Sao Paulo, Brazil), and the Lagos Court of Arbitration (Nigeria).

Ank is strongly committed to community service. She is a past chair of White & Case's New York's Women's Network, and serves on the Board of International Senior Lawyers Project (ISLP), an international pro bono organization, and of her children's school, the French-American School of New York. She helped Haiti build a culture of international arbitration as part of the country's efforts to rebuild and attract foreign investment, and has recently advised an African country pro bono on its new arbitration legislation.

Ank received her LL.M from Columbia University and her Licentiate in Law from KU Leuven in Belgium.

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- The investors in an ICSID claim against Argentina concerning the nationalization of the country's private pension system.
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Abby's experience includes managing claims arising out of project financing, privatizations, natural resource concessions, contracts with States and State-entities and political risk insurance.

Abby serves as counsel in arbitrations before all major arbitral fora including ICSID, ICC, VIAC, LCIA, ICDR, SIAC, PCA, and SCC, as well as in UNCITRAL ad hoc arbitrations. She handles both commercial and in investment treaty cases, including those arising under bilateral investment treaties (BITs), the Energy Charter Treaty, NAFTA, DR-CAFTA and the ASEAN treaty.

Abby's leadership positions have included: Chair of the Institute of Transnational Arbitration (ITA); Vice President of the American Society of International Law; President of LCIA North American Users Council; AAA Advisory Board Member; IBA Arbitration Committee Vice Chair and Chair of IBA Investment Treaty Sub Committee; ALI Adviser on US Restatement on International Arbitration; Chair International Law Section of Washington DC Bar. Abby is currently a member of the Singapore International Arbitration Centre Court and co-Chair of the ICCA Task Force on Standards of Practice in International Arbitration.

Abby is an alumna of the University of Chicago Law School, Vassar College, the London School of Economic, and the University of Grenoble.

Recent representations include:

- Gabriel Resources Ltd. in an ICSID arbitration of investment treaty claims against Romania relating to one of the largest undeveloped gold mine projects in the world.
- ICL Europe in an UNCITRAL rules arbitration of investment treaty claims against Ethiopia relating to investment in a potash mine project.
- The Republic of Bulgaria in numerous arbitrations over a range of industries including power (electricity and renewables) and real estate (commercial and residential).
- The Kingdom of Saudi Arabia in two ICSID arbitrations, one arising out of a construction project and the other arising out of a dispute involving luxury retail stores.
- Gold Reserve Inc. in an ICSID arbitration relating to one of the largest undeveloped gold/copper deposits in the world, in which Gold Reserve was awarded US$740 million.
- Leading Czech bank Ceskoslovenská obchodní banka, a. s. in an ICSID arbitration with the Slovak Republic, in which the bank was awarded US$877 million.

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COMPETITION AND ANTITRUST

Feature for:

COMPETITION AND ANTITRUST

Merger Control Regime In India In Relation To Minority Investments

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This article briefly discusses the treatment of minority investments under the Indian merger control regime and its implications for private equity funds.

Introduction to Indian merger control regime and minority investment exemption

An acquisition of one or more enterprises or merger or amalgamation of enterprises, where certain prescribed assets or turnover thresholds ("**Jurisdictional Thresholds**") are exceeded needs to comply with the merger control provisions provided in Sections 5 and 6 of the Competition Act, 2002 ("**Act**") and the Competition Commission of India (Procedure for transaction of business relating to combinations) Regulations, 2011 ("**Combination Regulations**").

The Combination Regulations also provide for certain exemptions for minority investments for transactions where the parties exceed the Jurisdictional Thresholds (and do not benefit from the *de minimis* exemption).

Regulation 4 of the Combination Regulations read with Schedule I provides a list of transactions that would ordinarily be unlikely to cause an appreciable adverse effect on competition in India, and therefore a merger notification for such transactions need not normally be filed with the Competition Commission of India ("**CCI**").

Of particular relevance to the private equity space is the exemption under Item 1 of Schedule I pertaining to minority investments, which applies to acquisitions:

1. made 'solely as an investment' or in the 'ordinary course of business';
2. which do not entitle the acquirer to hold 25% or more of the total shares or voting rights of the target company; and
3. do not lead to the acquisition of 'control' of the target.

(collectively, "**Minority Acquisition Exemption**").

In 2016, an explanation was added to the Minority Acquisition Exemption which clarified that an acquisition of less than 10% of shares or voting rights ***shall*** be treated as *'solely as an investment'* if the following conditions are met:

- the acquirer possesses only such rights exercisable by the ordinary shareholders of the target;
- the acquirer is not a member of the board of directors of the target enterprise and does not have a right or intention to nominate a director on the board of directors of the target enterprise; and
- the acquirer does not intend to participate in the affairs or management of the target enterprise.
- (collectively, "**Sub-10% Exemption**").

MINORITY INVESTMENTS BY PRIVATE EQUITY IN COMPETING ENTITIES IS SUBJECT TO COMPETITION SCRUTINY IN INDIA

Application of the Minority Acquisition Exemption by CCI

For the applicability of the Minority Acquisition Exemption, all the three requirements must be met and the applicability of the exemption is required to be tested on a case-by-case basis.

'Solely as an investment' or 'Ordinary course of business'

The CCI has interpreted *'ordinary course of business'* to mean *'frequent, routine and usual'* and that "*the activities for which business is established would be the activities in ordinary course*" [***Bharti Airtel Limited, (C-2017/05/509)***], whereas the phrase *'solely as an investment'* means '*passive investment*' and any investment in a target enterprise which is done with a strategic intent cannot be treated as '*solely as an investment*'. [***Zuari Fertilisers and Chemicals Limited/ Zuari Agro Chemicals Limited, (C-2014/06/181)***].

COMPETITION AND ANTITRUST

Based on the decisional guidance of the CCI, a minority investment would not be considered as being '*solely as an investment*' or in the '*ordinary course of business*' if:

1. if the transaction is a repeat investment by an acquirer in the same sector (the CCI considers such investments to be strategic even if made by a private equity investor); or
2. the parties to the transaction are competitors or are virtually situated [***New Moon BV (C-2014/08/202)***].

In a recent case of April 2020, the CCI observed that, "*…[a] holistic appreciation of the shareholding and the nature and extent of rights acquired in the target enterprise would be relevant in determining whether the given acquisition is a mere investment or not. Representation on the board of directors (nomination of a director or an observer) and/or its committees (audit committee, appointment & remuneration committee, etc.); veto or consultation rights with respect to strategically important corporate actions such as change in capital structure, mergers and acquisitions, appointment or termination of key managerial personnel, amendment to charter documents (articles of association and memorandum of association) and commencement of new line of business; and the right to access non-public information, are all relevant in determining whether the acquisition is a mere investment or strategic in nature.*" [***Canary Investment Limited/Link Investment Trust II/Intas Pharmaceuticals Limited, (C-2020/04/741)***].

'Control'

The CCI has held that a board seat and/or affirmative rights enjoyed by a minority shareholder over certain strategic commercial decisions of the target are sufficient to be considered as (joint) control, even though the acquisition of shares/voting rights is of less than 25%. These control rights include, but are not limited to, a single board seat and/or veto rights over: (i) appointment and termination of key managerial personnel (including material terms of their employment); (ii) approval of the business plan; (iii) approval of budget; (iv) entry or exit into lines of businesses, or (v) amendment to the memorandum of association or articles of association.

Pertinently, while following the decisive influence standard for several years, in ***Ultratech, (C-2015/02/246)*** the CCI lowered the threshold for control to *'material influence'*, which is internationally recognised to be the lowest threshold for control.

In 2019, the Competition Law Review Committee recommended that the concept of 'control' be clarified and a list of minority rights which would not be considered to confer control be introduced.[2] In February 2020, the Ministry of Corporate Affairs, released a draft Competition (Amendment) Bill, 2020 ("**Amendment Bill**"), which proposed to amend the definition of '*control*' to include the ability to exercise *'material influence'* over *'management or affairs or strategic commercial decisions'*.

25% threshold

In order to avail of the Minority Acquisition Exemption, the total shares or voting rights acquired pursuant to the acquisition must not be more than 25%. In case of convertible instruments, this exemption would not be available in case the acquirer would acquire over 25% of shares or voting rights post conversion.

Application of the Sub-10% Exemption by CCI

The criteria for the application of the Sub-10% Exemption means that its application will be limited and is intended to cover retail transactions undertaken on the stock exchange which do not confer any rights to the acquirer (apart from ordinary shareholder rights).

31 acquisitions of less than 10% stake have been notified to the CCI since the introduction of the Sub-10% Exemption in 2016. In many of these transactions, the stake being acquired was less than 10% with no additional rights except the right to nominate a single director to the board of the target enterprise.

There have also been peculiar instances where merger notifications have been filed with the CCI for transactions which *prima facie* appear to have been eligible for the Sub-10% Exemption. However, such filings appear to have been made by way of abundant caution as there were existing commercial relationships between the parties [***Amazon.com NV Investment Holdings LLC/Shoppers Stop Limited, (C- 2017/12/538) and Amazon.com NV Investment Holdings LLC. / Quess Corp Limited, (C-2019/08/680)***].

Assessment for private equity

Private equity funds often invest in multiple companies in the same sector. However, given the restricted scope of the Minority Acquisition Exemption, several private equity players have had to notify minority investments with the CCI owing to the (i) investor protection rights under the transaction documents being considered as conferment of control by the CCI, and/ or (ii) transactions being repeat investment in the same sector therefore being considered as *'strategic'* investments by the CCI.

In a recent transaction, ChrysCapital acquired approximately 6% stake in Intas Pharmaceuticals along with a board seat and veto rights. Given the overlaps between the ChrysCapital's existing investee company i.e. Mankind Pharma and Intas Pharmaceuticals, high market share of certain overlapping products and state of competition, ChrysCapital voluntarily offered to remove their director on the board of Mankind Pharma as a condition for approval for the acquisition of stake in Intas Pharmaceuticals. [***Canary Investment Limited/Link Investment Trust II/Intas Pharmaceuticals Limited, (C-2020/04/741)***].

Accordingly, the CCI views the issues surrounding common shareholders in competing enterprises such as interlocking directorates and access to information very seriously, and therefore the private equity funds should be careful in their dealings while investing in competing entities.

There is an adage that if it isn't broken, then don't fix it. The CCI precedents have already reduced the applicability of the Minority Acquisition Exemption for private equity funds, and the further lowering of standard for '*control*' as proposed by the Amendment Bill should not be adopted.

Internationally, the '*material influence*' standard is followed by United Kingdom where there is a voluntary (and not mandatory / suspensory) merger control notification regime. The European Union follows a *'decisive influence'* standard, which is what the CCI has largely relied on. The adoption of the material influence standard will lead to an unnecessary burden on the industry to notify transactions on the basis of special status etc. The CCI always has the ability to enquire into a transaction which was notifiable but was not notified, and as such, this lowering of the standard of control is not required.

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2. By way of full disclosure, the author was part of the working group of the Competition Law Review Committee appointed by the Government of India.

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Ms Wei has extensive experience in financial institutions, real estate, energy, telecommunications, retail, automobile, hi-tech and traditional manufacturing industries and represents various multinational companies, Chinese companies, investment banks, and private equity funds in their merger and acquisition transactions. She has provided advice on various aspects of such projects including the design of transaction structures, due diligence investigation, drafting and the negotiation of complicated legal documents in connection with such projects. She has also advised many domestic and international clients from different industries in corporate financing, commercial transactions and general corporate matters since she joined the firm in 1994. Ms Wei also has extensive experience in the private fund formation area and has represented various fund managers or investors in such deals.

Since the effectiveness of the PRC Anti-Monopoly Law, Ms Wei has represented various multinational companies and Chinese companies in their merger control filings, AML advice on cartel, and RPM as well as AML compliance issues. Ms Wei has also led the team handing multiple government investigation cases initiated by AML enforcement agencies.

With award of the first "Beijing Excellent Lawyers Returning from Overseas Study", Ms Wei was also frequently nominated and recommended as a China leading lawyer in the Mergers and Acquisitions and/or Competition by IFLR 1000, EuroMoney Legal Media Group, Legal 500, Who's Who legal and the Asian authoritative legal media–Asialaw Profiles.

Ms Wei worked at the Hong Kong office of Mallesons Stephen Jaques from 2002 to 2003 where she advised clients on investment projects in China as well as international transactions.

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Nisha Kaur Uberoi is a Partner and the National Head of the Competition Law Practice at Trilegal, leading one of the largest competition law steams in India.

Nisha advises on a full range of competition matters, including cartel enforcement, abuse of dominance, leniency applications, merger control, competition law audit and compliance. She regularly appears before the Competition Commission of India (CCI), the National Company Law Appellate Tribunal and the Supreme Court of India.

Nisha has obtained a significant number of merger control clearances in India (over 250 of an approximate total of 725 merger notifications cleared by the CCI). She has advised on several complex merger control cases, including India's first two Phase II investigations involving divestitures.

Nisha advised on Lafarge/Holcim Euro 41 billion merger, obtained an unconditional approval on the USD 22 billion Idea-Vodafone merger in the Phase I review period itself, and represented French automation major Schneider Electric and Temasek on their USD 2.1 billion acquisition of Larsen & Toubro's electric and automation business (India's first and only behavioural remedies approval in a Phase-II merger review).

Nisha is currently the lead lawyer on the alleged cement cartel case, where she is representing Ambuja Cements Limited and ACC Limited (both LafargeHolcim companies) and Nuvoco Vistas Corporation Ltd. (formerly Lafarge India Ltd.), in which the cement companies were penalized approximately USD 1.2 billion by the CCI.

Nisha is internationally recognized as one of **India's leading competition lawyers**, including being recognized by Chambers (Band 1), Who's Who Legal Thought Leaders in Competition 2019, Who's Who Legal: Competition, IFLR 1000, Asia Law Leading Lawyers and Euromoney Women in Business. Nisha has also featured in the inaugural ALB Asia's 40 under 40, GCR 100 Women in Antitrust, RSG India Emerging Leaders 2019 as well in the A-List of India's top 100 lawyers by the India Business Law Journal and Indian Corporate Counsel Association.

The IBLJ Law Firm Awards 2018 recognizes her as "*the star among very accomplished antitrust lawyers in India*" and "*the one lawyer you want to have on your team when dealing with a challenging transaction or competition law case. She has one of the biggest and best teams of competition lawyers in India*".

She was recently named 'Competition Lawyer of the Year' at the Legal Era Awards 2018-19 and recognized as 'Woman Lawyer of the Year' at the ALB India Law Firms Awards 2020.

Nisha was part of the Working Group of the Competition Law Review Committee set up by the Ministry of Corporate Affairs, Government of India to recommend changes to the competition law regime in India.

Nisha currently serves as India's Non-Governmental Advisor for the International Competition Network (ICN). She is a member of the Unilateral Conduct and Behavioural Issues Working Group for the International Bar Association. Nisha also serves as a member of the ABA Cartel Workforce and is a member of the Editorial Board of the Global Competition Review.

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Setsuko Yufu is a senior partner at Atsumi & Sakai and is admitted to the bar in Japan. She is a member of the managing committee of the firm.

Setsuko heads the firm's antitrust/competition team, advising on international and domestic cartel/bid-rigging investigations and related civil enforcements and criminal prosecutions, including extradition issues. She also advises on international and domestic merger control, vertical restraints and abuse of dominance.

Since 2016, she has served as a member of the Antitrust Policy Council of the Japan Fair Trade Commission. She has also served as a board member of the Japan Competition Law Forum.

Setsuko was awarded the honour of Woman Lawyer of the Year at the ALB Japan Law Awards 2017 and was inducted into the 2020 Legal 500 Hall of Fame as a leading individual in antitrust/competition law. She was included in Japan's Top 100 Lawyers by Asia Business Law Journal in 2020 and awarded as asialaw Client Service Excellence 2020. She was ranked as a leading individual in antitrust/competition law by asialaw 2020 and The Best Lawyers 2021 and as a notable practitioner by Chambers Asia-Pacific 2020. She was listed in *Who's Who Legal: Competition 2019*. She was also highly recommended in *Global Competition Review 100* in 2019.

She obtained an LLB from Waseda University, Tokyo, and graduated from the University of Amsterdam, Europa Instituut as the first Japanese student to study EU law there.

Setsuko also is well-known for her extensive knowledge of EU competition law and practice and has acted as a board member of the EU Studies Association in Japan. She taught EU law at Keio University Law School and the Business Law Department of Hitotsubashi University Graduate School and publishes articles and books on the subject. She frequently speaks and participates as a panellist at experts' conferences in competition law.

She has been supported by Atsumi & Sakai's policy to develop a gender-neutral and equal-opportunity culture in its practice. Out of approximately 170 attorneys (including both Japanese and non-Japanese professionals), almost 25 % are women. Moreover, our female partners comprise a quarter of all partners, and around one third of our managing committee is female.

These efforts to promote equality have been recognised by Euromoney Legal Media Group, which named Atsumi & Sakai as the 'Best Firm in Japan' at its Asia Women in Business Law Awards, 2011. The firm has also been named 'Employer of Choice for eight times from 2009 to date (the Best/Top Firm in Japan to Work For)' by Asian Legal Business. In 2015, Atsumi & Sakai was awarded the Daini Tokyo Bar Association's first "Family Friendly Award".

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Sarah Keene is one of the few practitioners in New Zealand who specialise in providing competition, consumer and regulatory law advice across the corporate and litigation spectrum. She advises clients in relation to Commerce Commission investigations, prosecutions and appeals; the legality of behavioural arrangements and conduct; clearances and authorisations of mergers and acquisitions; and generally, in relation to competition law advice, appeals and judicial reviews. Sarah heads Russell McVeagh's highly successful competition law team, which has earned the highest New Zealand ranking from the Global Competition Review, a guide to the world's leading competition law specialists. In 2019 she was voted the Chair of Large Law Firms Group on the New Zealand Law Society council, and she currently serves as Partnership Chair of Russell McVeagh and co-Chair of Russell McVeagh's Diversity Committee.

In 2018, 2016 and 2014, Sarah was rated New Zealand's Competition Lawyer of the Year by the International Law Office Client Choice Awards. She was ranked as a Star Performer by Chambers and Partners Asia Pacific 2020 and 2019 (the only woman in New Zealand to have this ranking) and was featured in the Global Competition Review's '100 Women in Antitrust' in 2016 and 2013. She is recognised by Asialaw as a Distinguished Practitioner, and has been voted for by her peers for inclusion in The Best Lawyers® New Zealand for Competition and Consumer Law since 2014 and was awarded Lawyer of the Year in this category in 2020 and 2017.

Sarah regularly speaks at competition law conferences and contributes to the Legal 500's Cartels Country Comparative Guide, and Thomson Reuters' Merger Control in New Zealand Guide and Practical Law Competition-Restraints of Trade Global Guide.

Sarah's recent successes include acting for Nine Entertainment in engaging with the Commerce Commission in the attempted hostile filing of a clearance application after Nine had terminated negotiations with NZME for the sale of Stuff, and in successfully resisting the subsequent urgent interim injunction filed by NZME for breach of exclusivity in merger negotiations; acting for fruit and vegetable wholesaler T&G Global in obtaining competition clearance for a 3-2 merger with Freshmax; obtaining clearance for Cengage's global merger with McGraw Hill Education (New Zealand was one of the only jurisdictions to get clearance); and obtaining a "no action" termination of a non-notified 2-1 merger between patient safety software businesses, Datix and RL Solutions, which also involved a voluntary divestment to create a new second market player.

She also regularly advises Fonterra on its milk price and capital structure related matters, Auckland International Airport, ANZ and Westpac, including in relation to open banking, Spark, including in relation to spectrum acquisition, and Meridian Energy, including in relation to claims of an undesirable trading situation arising in the wholesale electricity market, and in Meridian's response to the Electricity Authority consultation on the new high standard of trading conduct prohibition (market manipulation and misuse of market power).

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The "extremely pragmatic" Rebecca Farrington "provides good market context and communications in a way that clients can easily navigate." Rebecca was recognized as "Best in Antitrust/Competition" by Euromoney LMG Americas for 2019, "Retail, Consumer, Food & Beverage Dealmaker of the Year" by The Deal — Best of the Middle Market Awards for 2020, and is nationally ranked "Next Generation Partner" by Legal 500. Rebecca's practice focuses on government merger and non-merger investigations, private antitrust litigation, and counseling on antitrust issues.

Rebecca has developed a significant track record defending proposed and consummated mergers before the Federal Trade Commission and the Department of Justice. Clients she has assisted have operated in a broad spectrum of industries, including healthcare, food products, aviation, petroleum, coal, broadcasting, gaming, software, hardware, industrial products, energy and retail sales. She has secured numerous high-profile global and US merger clearances for clients, such as:

- Saudi Aramco, the world's largest oil producer, in its US$69 billion acquisition of SABIC, the fourth-largest petrochemical company in the world;
- Newmont Mining Corporation in its US$10 billion acquisition of Goldcorp Inc.;
- Baxter International in US and Japan clearances for its US$350 million acquisition of the Seprafilm adhesion barrier device business from Sanofi S.A.;
- Vertex Pharmaceuticals, Inc. in its 2017 acquisition of CTP-656, a development-stage asset intended for the treatment of Cystic Fibrosis, from Concert Pharmaceuticals, Inc.;

Rebecca has also successfully defended non-merger investigations, including investigations of alleged market allocation and violations of Section 8 of the Clayton Act, and has advocated for government intervention on behalf of parties adversely impacted by proposed mergers, or by anticompetitive conduct.

In addition to her work in government investigations, Rebecca's clients benefit from her extensive experience advising on issues relating to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), including proposed transactions' global premerger notification requirements. Her work in this area has also involved negotiating antitrust provisions in transaction agreements, developing client HSR Act training programs and compliance procedures, and representing clients in "failure to file" situations.

A significant portion of Rebecca's practice is devoted to advising clients on critical antitrust risk issues relating to business initiatives such as joint ventures, pricing and distribution strategies, information and data-sharing and trade association and industry-wide collaborative efforts. Her practice also covers such work as conducting antitrust compliance audits, analyzing liability exposure and recommending corrective action, as well as creating and presenting in-house training programs for client legal departments and business units. She has additionally developed and implemented corporate antitrust compliance policies, and online antitrust compliance training programs.

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Ilene Knable Gotts is a partner in the New York City law firm of Wachtell, Lipton, Rosen & Katz, where she focuses on antitrust matters, particularly relating to mergers and acquisitions. Recent transactions in which Mrs Gotts advised include CenturyLink/Level 3, Danone/WhiteWave Foods, Gaming and Leisure Properties/Pinnacle Entertainment, Faiveley/Wabtec, Charter/Time Warner Cable/Bright House, J.M. Smucker's/Big Heart Pet Brands, Publicis/Sapient, Essilor/PPG Industries, Deutsche Telekom/MetroPCS, ConAgra/Ralcorp, PPG Industries/Georgia Gulf, Aetna/Coventry and International Paper/Temple-Inland. Mrs Gotts is regularly recognized as one of the world's top antitrust lawyers, including being recognized in the 2006-2017 Editions of *The International Who's Who of Business Lawyers*, as one of the top five global competition lawyers, in the first tier ranking of *Chambers USA* Guide, the "leading individuals" ranking of *PLC Which Lawyer Yearbook*, and the Antitrust Lawyer of the Year for 2016 by *Best Lawyers*, and Top Lawyer of the Year for 2017 by Cablefax.

Mrs Gotts previously worked as a staff attorney in the Federal Trade Commission's Bureaus of Competition and Consumer Protection. Mrs Gotts serves on the American Bar Association's Board of Governors and is an officer of the IBA's Competition Committee. From 2009- 2010, she served as the Chair of the American Bar Association's Section of Antitrust Law. In 2006-2007, Mrs Gotts was the Chair of the New York State Bar Association's Antitrust Section, which recognized her service to the antitrust bar with the Lifland Service Award in 2010; she has been a member of the American Law Institute for over 20 years. Mrs Gotts is a frequent guest speaker, has had approximately 200 articles published on antitrust related topics, and served as the editor of the ABA's Merger Review Process book, Law Business Research's Private Competition Enforcement Review (2008-2017 Editions) and Law Business Research's Merger Control Review (2010-2016 Editions). She is a member of the editorial board of *The Antitrust Counselor, Antitrust Report,* and *Competition Law International* publications. Mrs Gotts is a member of the Lincoln Center Counsel's Council. Mrs Gotts was named by the BTI Consulting Group as a BTI Client Service All-Star for her level of dedication and commitment to exceptional client service.

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Sarah Biser is a partner in the New York office of Fox Rothschild LLP, a national firm with 27 offices and about 950 attorneys. Ranked by Chambers USA as a leader in construction law for eleven consecutive years, Sarah represents owners, contractors, developers, architects and engineers, both in the United States and abroad, in all stages of the construction process. Co-chair of the firm's national construction law and international arbitration group, she focuses her practice on large, capital-intensive construction projects, with a particular emphasis on drafting and negotiating contracts for complex and unique construction and infrastructure, as well as litigating disputes involving such projects both in the courtroom and in domestic and international arbitration.

In a project expected to be the largest development of the decade in New York City, Sarah who co-chairs the firm's Israel practice group represented Technion-Israel Institute of Technology in connection with the Technion-Cornell joint venture, in the construction of a new applied science university and related facilities on Roosevelt Island. She was involved in the construction of InterActive Corporation's futuristic headquarters and AOL's headquarters, including the CNN newsroom, in the Time Warner building. Internationally, she represents one of the joint venture partners who constructed the expansion of the Panama Canal, and represents the EPC contractor who designed and constructed the construction of a 220-megawatt hydroelectric plant in Changuinola, Panama.

Sarah has also been involved in the construction of industrial smelters, waste ammonia recovery systems, solar power installations, power facilities, educational institutions, and health care facilities. She is currently defending a European construction company in connection with Defense Base Act claims arising out of the 1968 crash of a B-52 bomber carrying four nuclear warheads at an airbase in Thule, Greenland.

Sarah is co-author of the leading treatise on New York construction law, the New York Construction Law Manual. She also authors the chapter on New York law in Fifty State Construction Lien and Bond Law (3rd Edition) and the New York chapter in State-by-State Guide to Architect, Engineer and Contractor Licensing. Sarah also co-authored the chapter on "Legal Relationships" in Temporary Structures in Construction (3rd Edition).

Sarah is a frequent lecturer on construction issues, such as:

- How To Deal With the Insurer in the Arbitration and Mediation Process
- Construction of the Third Lane of Panama Canal
- How High Is Up? Civil and Common Law Approaches to the Typical Exceptions to Limitations of Liability in the Age Of "Gross Negligence"
- Litigation, Insolvency and Other Things When Projects Go Bad
- Preventative Lawyering: Lessons Learned from the Construction Industry
- Arbitration of Construction Disputes

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Margaretha (Greet) Wilkenhuysen is a partner with the firm and the head of NautaDutilh's Corporate practice in Luxembourg. She specialises in cross-border corporate transactions, with a particular focus on mergers and acquisitions, joint ventures and international corporate restructuring. Margaretha also has extensive experience in corporate finance and the provision of corporate governance advice to listed companies. She represents both domestic and international clients in a wide range of high-end transactions.

Prior to joining NautaDutilh in 1997, Margaretha practiced law for several years with another well-known law firm in Brussels.

Margaretha publishes and speaks regularly on selected topics of corporate law. Recent publications include a contribution to the fifth edition of *The Shareholder Rights & Activism Review* (*The Law Reviews*, 2020) and the Luxembourg chapter of *The Corporate Governance Review* (*Law Business Research*, 2012-2020 editions).

She is a member of the International Bar Association (IBA), the European Private Equity and Venture Capital Association (ECVA) and the Duke Alumni Association.

Margaretha has been named a Leading Lawyer by the *IFLR1000* since 2011 and a Women Leader since 2018 by the same directory. The *Legal 500* describes her as "authoritative, organised and forward thinking", and she is praised by *IFLR1000* 2020 as being an "excellent professional. Solution driven. Responsive."

Margaretha obtained her law degree from the University of Leuven (KUL) in 1991. She also holds a master's degree in business and tax law from the University of Brussels (ULB, 1993) and an LL.M. from Duke Law School in North Carolina (1996).

Margaretha was admitted to the Brussels Bar in 1993 and to the Luxembourg Bar in 2007.

She is a native Dutch speaker and is fluent in English, French and German.

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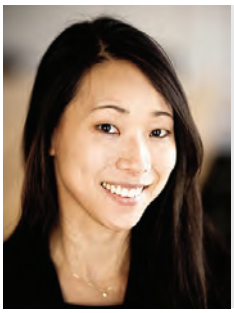

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Karessa L Cain is a corporate partner at Wachtell, Lipton, Rosen & Katz, where she focuses on mergers and acquisitions, corporate governance and securities law matters. She has worked on a range of transactions, including domestic and cross-border acquisitions, takeover defense, private equity transactions, shareholder activism, proxy contests, joint ventures and capital market transactions.

Ms Cain graduated cum laude from Yale College in 2000. She received her J.D. from Columbia Law School in 2004, where she was a James Kent Scholar and a Harlan Fiske Stone Scholar. Following graduation from law school, Ms. Cain served as a law clerk to the Honorable J. Clifford Wallace of the U.S. Court of Appeals for the Ninth Circuit.

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Germaine Gurr is a partner in White & Case's global M&A practice in New York. Germaine advises clients on mergers and acquisitions, private equity, securities offerings, capital raising opportunities, joint venture and commercial transactions, and general corporate matters. She also regularly advises global companies on legal and business considerations in corporate and commercial transactions, operational structuring and management, and compliance and governance matters. Germaine has extensive experience in the energy industry, as well as the infrastructure, software, information technology, retail, healthcare, education and telecommunications sectors.

Germaine previously served as vice president and deputy general counsel at a global Fortune 500 energy management and automation company where she was responsible for and managed all of the company's corporate transactions and corporate governance matters.

Germaine received her BA from Simmons College, and her JD from University of Michigan Law School, *cum laude.*

Recent matters include the representation of:

- Schneider Electric in the Rs 14,000 crore acquisition of Larson & Toubro Electrical & Automation Division (in partnership with Temasek).
- Sole Source Capital in its acquisition of Supply Chain Services, a premier provider of automatic identification and data capture (AIDC) and factory automation solutions to customers across North America.
- Azelis Americas in its pending acquisition of Megafarma. With this acquisition, Azelis enters into the Latin America market.
- Individual FoodService Holdings LLC and its member Sole Source Capital LLC in the sale of Individual FoodService Holdings LLC and its subsidiaries to Kelso & Company.

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Michelle Rutta is a senior partner in White & Case's New York office and a member of the Securities Group and M&A Group, with over 30 years of experience in mergers and acquisitions, securities law, corporate governance, acquisition finance, high-yield debt and complex securities offerings.

Michelle chaired the Firm's Public Company Advisory Group and advises domestic and foreign companies on stock exchange, securities law compliance and disclosure matters and corporate governance issues. Clients also seek Michelle's advice in connection with M&A of public and private companies, spin-offs, leveraged buyouts and other acquisition transactions, as well as debt and equity securities and liability management transactions.

Michelle has represented companies in numerous acquisitions and acquisition financings in the healthcare industry, including Omnicare, Inc. in financing its acquisition of NCS HealthCare, Inc., which included the first ever issuance of a contingent interest, contingent convertible trust preferred security.

Michelle has extensive experience in the retail industry, having represented the underwriters in numerous financings for CVS Health Corporation, Reebok International Ltd., Phillips-Van Heusen Corporation and JC Penney Company. Michelle has also represented The Walt Disney Company in multiple financings, including Disney's first ever Canadian dollar-denominated security and first ever Luxembourg-listed security.

Michelle is listed as a Leading Individual for Corporate Governance in the US, *Euromoney's Banking Finance and Transactional Expert Guide, 2020* and for Corporate/M&A in the US, *Euromoney's Women in Business Law, 2020.*

Michelle received her BA from City University of New York, Queens College (summa cum laude) and her JD from New York University School of Law (Editor, Moot Court Board).

Recent matters include the representation of:

- Lantheus Holdings, Inc. (NASDAQ: LNTH), developer of diagnostic imaging products, in the acquisition of Progenics Pharmaceuticals, Inc. (NASDAQ: PGNC), an oncology company.
- EchoStar Corporation (NASDAQ: SATS) in the tax-free spin-off and merger of its broadcast satellite service business, including nine satellites and certain real estate owned by EchoStar, with a subsidiary of DISH Network Corp. (NASDAQ: DISH).
- LifePoint Health, Inc., (NASDAQ: LPNT) in its US$5.6 billion sale of the company to RCCH HealthCare Partners, owned by funds managed by affiliates of Apollo Global Management, LLC (NYSE: APO).
- ETF Securities Ltd.'s sale of its European commodities exchange traded fund business to Wisdom Tree Investments (NASDAQ: WETF) in a US$611 million cash and stock transaction.

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Tali Sealman is a partner in White & Case's global Mergers & Acquisitions and Corporate Practice, based in Silicon Valley.

Tali's practice focuses on private and public M&A and general corporate representation of emerging technology and life science companies and venture capital investors. Tali represents strategic and financial buyers and sellers in public and private acquisitions. Tali also represents companies at all stages of their lifecycle and across a broad range of industries, including software, enterprise, security, digital health, fintech, gaming, autotech and blockchain.

Tali received her LLB at Tel Aviv University and her LLM at Columbia University School of Law, where she was a Harlan Fiske Stone Scholar.

Recent matters include the representation of:

- Graf Industrial Corp. (NYSE: GRAF), a special purpose acquisition company (SPAC) founded by James Graf and Michael Dee, in entering into a definitive agreement for a US$1.8 billion business combination with Velodyne Lidar, Inc., as well as in obtaining US$150 million in PIPE commitments to support the transaction.
- NICE Actimize, a leader in Autonomous Financial Crime Management and a unit of NICE Ltd. (NASDAQ: NICE), in a definitive agreement to acquire Guardian Analytics, a leading AI, cloud-based financial crime risk management solution provider.
- OpenText Corporation (NASDAQ: OTEX, TSE: OTEX), a Canadian seller and developer of enterprise information management software and one of Canada's largest software companies, on a number of acquisitions including its US$163 million acquisition of Recommind and its US$75 million acquisition of XMedius, a provider of secure information exchange and unified communication solutions with locations in the United States, Canada and Europe.
- Abu Dhabi Catalyst Partners on its US$50 million Series F investment into Lookout Inc., a fast-growing Silicon Valley-based cybersecurity company with a pre-money valuation of approximately US$1.5 billion.
- Zeltiq's (NASDAQ: ZLTQ) US$2.4 billion sale to Allergan (NYSE: AGN).
- Sale of publicly traded SteadyMed Ltd. (NASDAQ: STDY) to United Therapeutics (NASDAQ: UTHR) for up to US$216 million.
- BioTime's (NYSE: LCTX) acquisition of publicly traded Asterias (NYSE: AST).

Multiple acquisitions by Nemetschek, including:

- Acquisition of Bluebeam for over US$100 million.
- Acquisition of RISA Technologies.
- EigerBio's merger with Celladon Corporation (NASDAQ: CLDN).
- VM Pharma's sale of VM-902A to Purdue Pharma for a consideration of up to US$213 million.
- Misfit Wearable's US$260 million sale to Fossil.

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ENERGY AND NATURAL RESOURCES

Feature for:

ENERGY AND NATURAL RESOURCES

Battery Minerals: The Case of Lithium in Argentina

Florencia Heredia
Allende & Brea
Buenos Aires

Lithium has become one of the minerals with increasing relevance and potential value, due to its use in manufacturing batteries.

As predictions raise on electric vehicles use and the lithium-ion batteries as energy storage systems, the evolution of this mineral is being closely monitored by the mining industry.

World lithium resources are concentrated in specific areas of the globe; countries such as Argentina, Bolivia and Chile (the lithium triangle) have gained the attention of the world as they represent a major share of these resources.

Lithium cannot be found as a pure element; rather, it needs to be extracted from other minerals and brines. Lithium carbonate is not traded on international stock exchange markets, and therefore its price is dependent on direct negotiations between producers and end-users. In the past decade, its average value has increased fivefold, with a particularly significant increase between 2016 and 2017. However, there remain many areas of uncertainty and ongoing research around this mineral and its applications.

Argentina is one of the few countries in a position to consolidate major reserves of lithium, with two projects already in production in the Olaroz salar and in the Salar del Hombre Muerto, plus a relevant number of exploration projects with potential for development in the next few years. These vary in size, technical conditions, etc, and it remains to be seen how many could become productive in reality, and to what extent.

Independent from the availability of resources, other factors also play a role in the competitive development of these projects. Such factors relate to technical expertise; methods of extraction; the infrastructure needed; and relations with the impacted communities, which may differ from province to province or even within the same province.

All over the world the mining industry have faced and will continue facing challenges to bring projects into production and the interaction among mining companies, governments and communities will be crucial. Therefore, it will be of the essence to work together on a joint policy for the long-term development of these resources in certain regions.

Regulatory aspects for the lithium market

Argentina lacks specific regulation for the development of lithium projects; however, provisions of the Mining Code and procedural provincial regulations apply to lithium and the granting of concessions as ruled by the Mining Code. Given the very particular nature of lithium in salars, there are many technical hydrogeological aspects related to its extraction which need to be considered in a specific way. As such, Argentina is anticipating discussions that will work towards regulation that can encompass all the aspects relevant to lithium and the extraction thereof. In such discussions, the following aspects will have to be considered.

GLOBALLY, THE MINING INDUSTRY HAS AND WILL CONTINUE TO FACE CHALLENGES TO BRING PROJECTS INTO PRODUCTION. INTERACTION AMONG MINING COMPANIES, GOVERNMENTS AND COMMUNITIES WILL BE CRUCIAL

Mining public policy and the role of provinces within a federal organisation

Argentina is a federal country and this plays a crucial role in any discussion of natural resources, since these are located within the country's provinces. In terms of lithium, this is mainly found as brine salars in the provinces of Catamarca, Jujuy and Salta.

Provinces within a federal country usually have their own constitution and legislation (though in certain areas they would also be bound to federal law); these boundaries are sometimes unclear. The main impact on natural resources is the power to rule and decide on specific policies related to the mining industry, even within the scope of a federal or national resources policy.

As a federal country, and in order to develop the industry in a long-term, sustainable way, it is vital to consider the views and needs of the interested provinces, and the national legislation as it takes in local policies and interests.

This process will require specific technical knowledge from the government at all levels. It also anticipates, firstly, the interaction between future developments and current plans for infrastructure development; and the economic and production agendas of the provinces involved.

Also necessary for discussion is the role and scope of interaction to be played by public provincial mining companies and their participation in lithium projects – for example, in the case of Jujuy, lithium is considered a strategic mineral and this fact has several implications.

Provinces will also have relevant saying in terms of local procurement and the developement of the industry in a more local inclusive way.

Shared Resources and Water extraction

One aspect that will become more relevant as lithium projects evolve and make their way into production at a larger level, will be the case of resources within the boundaries of certain provinces. In this regard, the Provinces of Salta and Catamarca share lithium resources, as well as other minerals, in a certain area between the two provinces which is subject to a dispute regarding the border limits and exact demarcation.

Independent from this dispute, resources that would belong to more than one province and which due to its nature (brine salars) would transit naturally and phiscally notwithstanding any legal boundary, will require specific analysis and regulation.

Same situation will apply to water resources which extraction may also affect more than one province. Hydrogeological research to determine the acquifers capacity and the way they evolve (recharge, etc) will be critical to regulate this aspect also intimately liked to lithium extraction.

Shared resources by states (either at the international level and/or within a country) is one of the most sensitive areas of natural resources law and given the fact that lithim may act as a fluid, such fact adds another level of complexity. Regulation on these aspects will certainly require research and multiple skills of different legal areas.

Social licence

Environmental protection, water resources and access to economic benefits are at the top of the agenda when working in the mining sector, and lithium projects are no exception.

Community interests affected by the specific projects may differ substantially from province to province – or even project to project, when located within the same province.

Successful benefits – including improvements to the basic infrastructure, local procurement and, in general terms, the living conditions of communities impacted by mining projects – would eliminate, to a significant degree, much of the grounds for social unrest and potential conflict.

Climate Change and the new Environmental Agenda post COVID 19

The increasing trend on climate change concern will be also a relevant aspect to add within all the other issues to consider. As more countries adapt their legislations to include climate change considerations in several areas and industries, the interaction and impact on the extractives sector will become more evident.

However, COVID- 19 pandemia may change the intensity of this trend either accelerating such or the contrary in certain regions of the world. Africa and Latinamerica are regions where the impact of the post-pandemia could be devastating from an economic perspective with a very slow recovery and therefore, how these trends may apply will have to be closely monitored.

No matter the degree of intensity, the environmental agenda towards a low carbon future and therefore a transition in the energy matrix has made its way and will remain in force.

Lithium projects and future development of the elecetric vehicles market will be an essential piece within such agenda.

This article represents a very brief overview of the main issues and trends that would have to be considered for future regulation of the lithium sector in Argentina.

The best laws and regulations, when considering their application and enforcement, have proven to be those where consensus among all stakeholders is reached (or at least taken into account during the process).

It is to be expected that governments, communities and industry players work together effectively in order to develop certain general guidelines relating to the lithium sector. Within these guidelines as a general framework, specific protocols for each province and more specifically for each particular salar and its operation, could be developed. This could be a way to integrate general parameters with the situation of each project taking into consideration the relevant aspects and issues at stake.

The concepts and views described in this article belong exclusively to the author and do not represent the views of the firm or any client or company.

ENERGY AND NATURAL RESOURCES

Q&A with Florencia Heredia

Partner

Allende & Brea

What challenges and obstacles have you (and other women) faced in your practice area?

I have been practicing in the extractives sector for 28 consecutive years which is indeed a very long time though it seems to me that I started yesterday. I guess that I never focused in the obstacles or challenges, I took all the difficult tasks as something quite natural to the sector and tried to do my best. Having said this, and even when mining and oil & gas have become more diverse in the last few years, still these areas are dominated by men as also is the case of other sectors and industries.

One aspect that is hard to balance is certainly family life and work specially if travel is part of the the routine. I think there is no perfect solution and this aspect of life is always in tension. It requires dedication to family and work at the same time and how much dedication to each aspect changes with time and how each of us want to address it, it definitively also requires relevant help at home.

In terms of gender diversity, how has your practice area changed since you began your career?

As mentioned, there is an increasing trend to appoint more women in high rank positions and relevant decision making areas. This was not the case 28 years ago. At that time there were very few or hardly any women in relevant positions in the companies and/or organizations for the extractives. I definitively can say that such situation has changed. I have been for many years heading the Natural Resources and Energy practice, in different firms and also actively working in organizations dedicated to the research and promotion of these areas, though my case has been the exception. We need to change the exception and convert it into the normal. Today I see many women getting more involved and one of my goals is that they can with time reach relevant positions based on merits though giving them the opportunity and this requires some extra effort from organizations..

Changes have to come mainly from a change in culture and social trends which ultimately will impact the different industries. In this regard, as mentioned above I note that there is an increasing pressure from investors to have more gender diversity in the boards of public companies and I see this as a good way to work towards a change in the companies also taking into account merits and capacity of the candidates to appoint.

In general, do you feel the legal profession within Argentina treats women and men equally?

With reference to the legal profession, progress has been made, though still there is a long way to reach equal guarantee of opportunities. Firms need to work effectively in more and better policies which need to prove useful and if they are not, they should be changed and adapted according to times and features of each organization. Some sort of metrics and monitoring should be implemented and this also entails permanent open channels and communication with the younger generations.

> WE NEED TO MAKE THE EXTRAORDINARY AND EXCEPTIONAL BE THE NORMAL

Do you feel women are well represented at partner level and in management positions in firms in Argentina? Should mandatory quotas exist?

Today all firms have female partners still in a low proportion though they all have however, extremely few or none have female partners in their executive committees and from such extremely few it would be hard to tell if any of such partners have relevant sayings in the firm.

It is fair also to say that it is very hard work to have a role in the firms and also lead a practice and not every women and men are willing to take such load of work.

Regarding mandatory quotas, I have always been adamant to support such however, I may change my view nowadays. I still need to assess whether effectively they are proving

to be useful and provide for a change in the mindset. I would support them if they prove to contribute to make the path easier for wome though always stressing the fact that merits should also be taken into account.

What initiatives do you think should be put in place to make your practice area more inclusive?

I think that rating better the companies for their more diverse composition in senior positions would be very valuable. As investors are pressing more for public companies to include more women in boards, I think also regulation may be enacted in such a way. However, in order to see whether this will be really useful we need to see it through time. There is a cultural change involved and this takes time in order to be really effective.

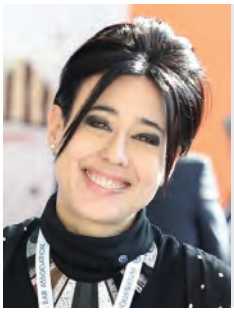
Where do you see the future of your practice area in the coming years?

I see the future of the extractives sector related to more social, economic and environmental interaction in all these aspects. Concepts like Inclusion and productivity will have a predominant role in the years to come. How these concepts will be articulated at the local levels of each project will make the difference. In this regard, it is relevant to note that eg. mining is a global industry with local impacts. Each project in each different country is quite unique and the approach has to be taylor made, considering all the aspects mentioned. This is sometimes not an easy task, it involves public policies, regulation and values from the companies, communities and governments.

What advice would you give to women in junior positions to encourage them to work towards attaining senior positions?

To continue working hard, merits will always have to be the driver, impose their views with respect and try to be disruptive in organizations that do not adapt to modern trends and cultural changes. Perseverance, tenacity and endurance through difficult times need to be exercised, and I see these virtues very alive in every woman. COVID-19 has set a real proof for all of us and hopefully a more diverse and fair world may come out of these very difficult times.

ARGENTINA



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Florencia Heredia is a senior partner of Allende & Brea, where she heads the Natural Resources and Energy practice. She is an expert in natural resources matters including forestry, fisheries and in particular, mining law with 28 years' extensive experience advising financing institutions and companies in complex mining and energy transactions in Argentina. She has repeatedly represented lenders in mining project finance in the country.

She obtained her law degree with honors (*summa cum laude*) from Universidad Católica Argentina (1991), a Masters degree in Business Law with honors (*summa cum laude*) from Universidad Austral (1995), and a degree in Corporate Sustainability with honors (*summa cum laude*) from IESC. She was a researcher in the Doctorate program of Universidad Austral in Natural Resources and Environmental Law.

She was founder of HOLT Abogados (2008-2017), a Natural Resources boutique firm, and prior was a member and partner of Estudio Beccar Varela (1992-2008) for 16 years, where she headed the Natural Resources and Environmental Law department for 9 years. From 1997-1998, she worked for Beiten Burkhardt based in Münich, and also worked in the Moscow and St. Petersburg offices in energy, natural resources and environmental-related projects.

She is an active member of the International Bar Association, where she held the position of Chair of the Mining Law Committee (2014-2015) and is currently council member of Seeril. She is the Vice Chair of this section and oversees all related committees. She has twice been Trustee at *Large of the Rocky Mountain Mineral Law Foundation*, for which she also served as Secretary to the Board (2014-2015) and is a member of the Executive Committee of the International Women Forum (Argentinean Chapter) among other relevant entities. She is a member of the Academic Board of RADHEM in Argentina, which specialises in Energy and Natural Resources.

She joined the Women Corporate Directors foundation, and since January 2018 holds the position of Non-Executive Independent Director of Galaxy Lithium, the Australian public company leader in the lithium sector.

She was Visiting Professor at Denver University, USA, where she taught "Comparative Latinamerican Mining Law" at the Environmental and Natural Resources Law and Policy graduate course directed by Professor Don Smith.

As of 2018, she is a member of the Advisory Board to the Law School of Universidad Torcuato di Tella in Buenos Aires. She is a member of Allende & Brea's Executive Committee.

Consistently nominated as a leading mining lawyer and star individual by Chambers and Partners and Legal 500, she has also been recognized as a Leading Mining Lawyer of the world by Who's Who over the last twenty years. She received the Mining Lawyer of the Year award for 2013, 2015, 2016, 2018 and is a highlighted women in the Women in Law reviews.

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Feature for:

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Private Funds and Liquidity Management

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Introduction

Liquidity management continues to be an important topic in the private fund industry. The recent COVID-19 pandemic and the substantial uncertainty surrounding its effect on local and global markets have enhanced the topic's prominence. Although the suddenness and extremity of this pandemic are truly unprecedented, the strategies and tools for fund managers to successfully navigate resulting liquidity challenges are already in place.

Open-End Funds

Open-end funds (such as hedge funds) are traditionally able to offer periodic liquidity based on the assumption that their assets are liquid, have readily known values and can be quickly sold.[1] In any liquidity crisis, however, these assumptions may prove incorrect about some or all of a fund's holdings. Issues related to market illiquidity are magnified when open-end fund managers find themselves facing a growing number of redemption requests as investors seek immediate cash to manage their own liquidity challenges. Certain open-end funds that face substantial redemption requests or hold a portfolio that has sustained significant losses may no longer be viable, with dissolution as the only option. However, other funds may find that certain liquidity management tools included in their governing documents may help them weather the storm.

One such widely recognized tool is an open-ended fund's ability to suspend redemption requests and/or the payment of redemption proceeds in certain circumstances, provided that such circumstances for suspending redemptions are expressly disclosed in the fund's governing documents.[2] A less drastic, and, thus, a more palatable tool for many open-end fund managers is to rely on gates to manage redemption requests. Investor-level gates require an investor to stagger its redemption over multiple redemption dates. Open-end funds sometimes instead provide for gates at the fund level (e.g., caps on redemption based on a designated percentage of the aggregate redemption requests received by a fund or class during a given period). However, we have found fund-level gates to be a less effective device as they can create panic and increase demands for redemption from investors who fear being left behind with the least saleable assets in a failing fund.[3]

Open-end funds also typically provide the manager with general authority to distribute assets in kind as a way to satisfy redemptions. Investors can either receive distributions of fund assets directly in kind from the fund or through distributions of interests or shares in special purpose vehicles, which house such assets until they are liquidated.[4] The flexibility to distribute assets in kind helps to limit an increased concentration of illiquid assets and a depletion of cash in an open-end fund to the detriment of non-redeeming investors.

"Side pockets" may also be a useful mechanism to manage illiquidity by enabling managers to segregate illiquid assets from those that are more liquid. Redeeming investors often do not have the right to redeem amounts attributable to "special investments" until the investment is realized. It is worth noting, however, that investors are not always willing to accept inclusion of side pockets in fund documents, particularly where the fund's investment strategy would not otherwise require illiquidity.[5]

Notably, these liquidity management tools may not only be useful in and of themselves, but also in negotiations with investors. That is, open-end fund managers that are armed with

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the authority to suspend redemptions or to redeem investors in kind may have some bargaining power, in certain circumstances, to negotiate with existing investors to add other liquidity management mechanisms into a fund's governing documents where such tools did not previously exist.[6] For example, an open-end fund manager may propose that investors agree to the addition of an investor-level gate where such tool was not originally included in the fund's governing documents. In return, the fund manager would agree to avoid invoking more drastic liquidity management measures, such as the suspension of redemptions.

Co-investment opportunities pursued in alternative vehicles or segregated classes may serve as a means for open-end fund managers to invest in less-liquid or more concentrated investments without creating a liquidity mismatch that can complicate redemptions, cash management and investor relations with respect to the main pool. Activism and distressed debt strategies are particularly conducive to co-investment opportunities. Open-end fund managers may determine to offer co-investment opportunities for at least five reasons: (i) illiquid investment opportunities in liquid funds; (ii) concentration and capacity issues; (iii) cultivation of goodwill with investors and creation of a track record in illiquids; (iv) expertise and access; and (v) an opportunity to distinguish product offerings.[7] Co-investment capital is sometimes raised through creation of new classes in existing feeder funds, avoiding the delays and costs incurred in launching an entirely new investment vehicle.[8]

Private Equity Funds

In contrast to open-end funds, private equity funds typically do not provide investors with a voluntary right of redemption, and, thus, a liquidity crisis for private equity funds at the fund level tends to be less severe. Still, a liquidity crisis, such as that caused by the pandemic, may impact the underlying portfolio companies in which such private equity funds invest, particularly those portfolio companies in hard-hit industries (e.g., travel and entertainment).

General partners of private equity funds whose portfolio companies have liquidity needs, should confirm the availability of credit lines for portfolio companies and consider drawing on those credit lines where appropriate. They should also review the terms of their funds' governing agreements and their agreements with existing investors, including co-investors, to ensure they understand the leverage limits and how these can be exceeded if necessary. Leverage limits are typically measured at the time leverage is incurred, but declines in asset values can make it difficult to incur additional leverage, and replacement leverage is often problematic for the same reason.[9]

In addition, general partners may seek to create new preferred equity classes in their existing flagship funds or at the portfolio company level, especially in a distressed scenario where it is difficult to attract and add additional debt.[10] This type of fundraising can often be completed quickly. Limited partner consent will likely be required if the preferred equity is added at the fund level. In most cases, private equity managers will allow all existing investors to participate in the new class.

Limited partners in private equity funds may seek liquidity at the fund level, even though they do not have a contractual right to it. Furthermore, private equity funds nearing their maturity dates may continue to hold assets as to which a successful exit has not been achieved. To appease disgruntled investors, general partners may allow limited partners to transfer their fund interests or shares on the secondary market. There has been an increase in activity on the secondary market during the pandemic, with bidders offering to assume private equity fund interests and their related commitments from cash-hungry investors at a discount.[11]

Finally, liquidity crises sometimes lead to limited partners defaulting on their capital calls. General partners typically have substantial discretion to decide what action to take against a defaulting investor, if any. Electing not to take any action against defaulting investors may lead to complaints from other investors. Uncured defaults also may suggest a lack of confidence in the fund's holdings and prospects, encouraging other limited partners to default or pursue other actions against the general partner. Though a private equity fund manager does not necessarily have to exercise the same remedy against each defaulting investor, it should have a rationale for any remedy chosen (or not chosen) and why it is in the best interest of other investors in the fund (and not, for example, driven by the fund manager's outside relationship with the defaulting investor).[12]

Conflicts

In challenging markets such as those created by COVID-19, non-market-correlated strategies and distressed strategies can thrive. However, this shift to particular strategies, plus the need to infuse capital into existing holdings, can lead to conflicts, particularly where the same fund sponsor invests in different levels of the capital structure of portfolio companies for different pools of investor capital. Advance disclosure as to how these conflicts will be resolved is critical. Fund sponsors should evaluate, with counsel, whether they need to supplement the offering materials of funds open for fundraising and funds that have investors that have the right to redeem, and what disclosures and consents are required from limited partners and advisory boards of private equity funds when these conflicts arise.[13]

During extraordinary markets such as that caused by the pandemic, the interests of the investors themselves aren't always aligned — some want liquidity now, even at a hair cut, while others want the portfolio retained until market conditions improve.[14] Similarly, some investors may be eager to allow the fund sponsor to shift direction to take advantage of new market conditions, while others do not want the fund's investment program to change course. The challenge for the fund sponsor is to balance these objectives and avoid drifting, without the requisite consent, from the expressed investment program and terms of the fund.

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1. *See* "Schulte Partner Stephanie Breslow Discusses Hedge Fund Liquidity Management Tools In Practising Law Institute Seminar," *The Hedge Fund Law Report*, Vol. 5, No. 43 (Nov. 15, 2012).
2. *See SRZ Publication* "Considerations During Volatile Markets for Hedge Funds and Credit, Direct Lending and Distressed Funds," (March 16, 2020).
3. *See* "What Are Hybrid Gates, and Should You Consider Using Them When Launching Your Next Hedge Fund?" *The Hedge Fund Law Report*, Vol. 4, No. 6 (Feb. 8, 2011).
4. *See* "Hedge Fund Managers Using Special Purpose Vehicles to Minimize Adverse Effects of Redemptions on Long-Term Investors," *The Hedge Fund Law Report*, Vol. 2, No. 15 (April 16, 2009).
5. *See* "Six Important Lessons for Hedge Fund Managers, Investors, Administrators and Others in Structuring Side Pockets and Monitoring Their Use," *The Hedge Fund Law Report*, Vol. 4, No. 8 (March 4, 2011).
6. *See* "When Can The Liquidators of Non-U.S. Hedge Funds Access U.S. Bankruptcy Courts to Obtain Ancillary Relief for Fund Investors?" *The Hedge Fund Law Report*, Vol. 4, No. 32 (Sept. 16, 2011).
7. *See* "Co-Investments Enable Hedge Fund Managers to Pursue Illiquid Opportunities While Avoiding Style Drift (Part One of Three)," *The Hedge Fund Law Report*, Vol. 7, No. 7 (Feb. 21, 2014).
8. *See SRZ Publication* "Ideas for Raising Capital During the COVID-19 Dislocation," (March 26, 2020).
9. *See* "Private Equity Sponsors — Considerations for Private Equity Sponsors Related to the Effects of COVID-19," *SRZ Alert* (March 16, 2020).
10. *See SRZ Publication* "Private Funds — Market Trends Report," (May 13, 2020).
11. *See* "Ideas for Raising Capital," *supra* at 8.
12. *See* "Considerations During Volatile Markets," *supra* at 2.
13. *See* "Considerations for Private Equity Sponsors Related to the Effects of COVID-19," *supra* at 9.
14. *See* "Considerations for Private Equity Sponsors Related to the Effects of COVID-19,: *supra* at 9.

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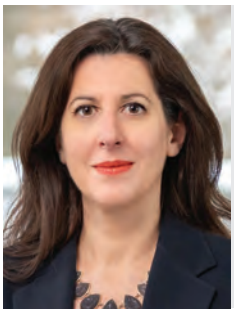

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Some examples of Caroline's expertise include acting as counsel to major Swiss fund management companies for the set-up of complex funds; advising fund managers on obtaining their FINMA licence as fund manager in Switzerland and implementing their new organization; and as counsel to the industry for the implementation of new regulations

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Stephanie R Breslow is co-head of the Investment Management Group and a member of the firm's Executive Committee. She maintains a diverse practice that includes liquid funds, private equity funds and the structuring of investment management businesses. She focuses her practice on the formation of private equity funds (including LBO, mezzanine, distressed, real estate and venture) and liquid-securities funds (including hedge funds, hybrid funds, credit funds and activist funds) as well as providing regulatory advice to investment managers. She also represents fund sponsors and institutional investors in connection with seed-capital investments in fund managers and acquisitions of interests in investment management businesses and funds of funds and other institutional investors in connection with their investment activities, including blockchain technology and virtual currency offerings and transactions.

Recently serving as chair of the Private Investment Funds Subcommittee of the International Bar Association, Stephanie is a founding member and former chair of the Private Investment Fund Forum, a former member of the Advisory Board of former Third Way Capital Markets Initiative, a former member of the Board of Directors and current member of 100 Women in Finance, a member of the Board of Visitors of Columbia Law School and a member of the Board of Directors of the Girl Scouts of Greater New York. Stephanie has received the highest industry honors. She was named to the inaugural Legal 500 US Hall of Fame in the category of "Investment Fund Formation and Management: Alternative/Hedge Funds." Stephanie is also listed in Chambers USA: America's Leading Lawyers, Chambers Global: The World's Leading Lawyers, Crain's Notable Women in Law, IFLR1000 Women Leaders, Best Lawyers in America, Who's Who Legal: The International Who's Who of Business Lawyers (which ranked her one of the world's "Top Ten Private Equity Lawyers"), Who's Who Legal: The International Who's Who of Private Funds Lawyers (which ranked her at the top of the world's "Most Highly Regarded Individuals" list), Who's Who Legal: Thought Leaders: Global Elite, Who's Who Legal: Thought Leaders: Private Funds, Expert Guide to the Best of the Best USA, Expert Guide to the World's Leading Banking, Finance and Transactional Law Lawyers, Expert Guide to the World's Leading Women in Business Law and PLC Cross-border Private Equity Handbook, among other leading directories. Stephanie was named the "Private Funds Lawyer of the Year" at the Who's Who Legal Awards 2014 and the Euromoney Legal Media Group's "Best in Investment Funds" and "Outstanding Practitioner," both at the Americas Women in Business Law Awards. She is also recognized as one of The Hedge Fund Journal's 50 Leading Women in Hedge Funds and was named one of the 2012 Women of Distinction by the Girl Scouts of Greater New York. Stephanie's representation of leading private investment funds has won numerous awards, including most recently Law360's Asset Management Practice Group of the Year. She is a much sought-after speaker on fund formation and operation and compliance issues, and she regularly publishes articles on the latest trends in these areas.

Stephanie earned her J.D. from Columbia University School of Law, where she was a Harlan Fiske Stone Scholar, and her B.A., cum laude, from Harvard University.

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Jennifer M Dunn focuses her practice on advising hedge funds, private equity funds (including mezzanine and distressed funds), hybrid funds, funds of funds and investment advisers in connection with their structuring, formation and ongoing operational needs, general securities laws matters, and regulatory and compliance issues. Her experience includes structuring and negotiating seed and strategic investments, advising investment managers regarding the structure and sale of their investment management businesses and the structure of their compensation arrangements, and representing investment managers in connection with managed accounts and single investor funds.

Jennifer was named among the world's "50 Leading Women in Hedge Funds" by The Hedge Fund Journal. A member of the board of directors of 100 Women in Finance, Jennifer is recognized by The Legal 500 US, Expert Guide to the World's Leading Banking, Finance and Transactional Law Lawyers (Investment Funds), Expert Guide to the World's Leading Women in Business Law (Investment Funds) and has been named an IFLR1000 "Rising Star" (Investment Funds). She co-authored Hedge Funds: Formation, Operation and Regulation (ALM Law Journal Press) and presented at conferences on topics, including ESG investing, attracting and retaining capital, operational due diligence, compliance issues, co-investments, credit funds, hedge funds, management company issues and considerations for emerging hedge fund managers.

Jennifer earned her J.D. from Columbia Law School, where she was a Harlan Fiske Stone Scholar, and her B.A., cum laude, from the University of Pennsylvania.

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Phyllis A Schwartz focuses her practice on the structuring, formation and operation of private equity funds, including buyout funds, venture capital funds, mezzanine funds, distressed funds, litigation financing funds and real estate funds. She represents both fund sponsors and investors in her practice. In addition to assisting fund sponsors with their internal management arrangements, succession planning, capital call borrowing facilities and formation of co-investment vehicles, she has extensive experience with institutional investors and regularly advises clients on market terms of investment funds. Phyllis also advises private equity funds in connection with their capital call credit lines and investments in, and dispositions of, portfolio companies.

Phyllis is listed in The Legal 500 US, The Best Lawyers in America, New York Super Lawyers, Who's Who Legal: The International Who's Who of Private Funds Lawyers, Expert Guide to the World's Leading Banking, Finance and Transactional Law Lawyers (Investment Funds, Private Equity) and the Expert Guide to the World's Leading Women in Business Law (Investment Funds). A member of New York's Private Investment Fund Forum, Phyllis frequently shares her insights on effective fund formation strategies at industry conferences and seminars. She recently discussed compliance concerns for co-investments and issues related to fund restructuring and secondary transactions. Interviewed by Private Funds Management in the article "Ringing the Changes," Phyllis is also the co-author of Private Equity Funds: Formation and Operation (Practising Law Institute), which is considered the leading treatise on the subject. In addition, she contributed to the Fund Formation and Incentives Report (Private Equity International in association with SRZ), as well as a chapter on "Advisers to Private Equity Funds — Practical Compliance Considerations" in Mutual Funds and Exchange Traded Funds Regulation, Volume 2 (Practising Law Institute).

Phyllis received her J.D. from Columbia Law School and her A.B. from Smith College.

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Emi Uchida is a partner from Atsumi & Sakai and experienced lawyer who has provided labour and employment law services. She started her career in 2000 at Anderson Mori & Tomotsune (October 2000-March 2014). Then, she had worked for legal firms which are member of "big 4" accounting firms, EY Law Co. (April 2014-May2015) and DT Legal Japan (May 2015-July 2017).

Throughout her career, she has provided various labour and employment law services to multinational companies which include UK, US and other countries'/areas' inbound clients. She has advised inbound clients having Japanese subsidiaries or branches by directly communicating with global or Asia regional HR heads. She has also handled outbound engagements for Japanese multinational companies having oversea subsidiaries or branches by closely collaborating with foreign lawyers.

Examples of her services include:

- Advised non-Japanese multinational companies starting business in Japan on hiring officers, employees or consultants in Japan including immigration law advice;
- Advised non-Japanese multinational companies' Japanese subsidiaries or branches including (i) preparation or review of HR policies (such as work rules/employee handbook/code of conducts) by adopting global policies to the extent permissible and proper under Japanese laws and practices, (ii) advice on the communications with the employees for the implementation of new or revised HR policies;
- Advised on the implementation of new or revised salary, retirement allowance or DB/DC pension schemes;
- Advised on inbound, outbound and domestic M&A transactions and post-merger integration projects (e.g. restructuring, integration of salary schemes and other HR related policies, amendment to work rules, etc.);
- Advised on reduction in workforce including giving legal advice to the management, advising on severance packages and communications with employees, and preparing relevant documents in and outside Japan;
- Advised on daily HR related issues (e.g. poor-performers, mental health issues of employees, harassment issues, temporary workers related issues, disciplinary actions, dismissals) including explanation to, or negotiation with, the authorities (e.g. Labor Bureau) or labor unions;
- Acted as a litigator for the Japanese and non-Japanese multinational companies in lawsuits, preliminary dispositions and labour trials, and represented Japanese and non-Japanese multinational companies in the negotiations with labour unions; and
- Conducted in-house training seminars for the management or employees such as harassment prevention seminars.

She is a member of the Management Lawyers Counsel in Japan and the Labor Legislation Committee of Dai-ichi Tokyo Bar Association. She has also been appointed as a member of the Headquarters for the Promotion of Gender Equality of Dai-ichi Tokyo Bar Association.

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Annie Elfassi is the Partner in charge of the Litigation and Employment departments of Baker & McKenzie's Luxembourg office. She has over 19 years of experience. Prior to joining the Firm in 2019, Annie Elfassi was a Partner in the Litigation and Risk Management practice group of a leading law firm in Luxembourg and headed its Employment department. Prior to this experience, she worked for nearly 8 years in a local law firm as counsel and litigation attorney. She also has a working experience in France in the legal and insurance sectors.

Practice focus

Annie Elfassi is a renowned expert in Dispute Resolution matters. She advises clients in relation with disputes involving civil law, corporate law and intellectual property rights. Annie has a strong experience in commercial litigation, insolvency procedure and debt collection. She handles all aspects of cases involving shareholder disputes, companies' directors or managers, breach of contract, breach of fiduciary duty and/or fraud and implements strategies for recovery of debts on behalf of clients. She represents defendants before courts and acts on behalf of clients as claimants before both the first instance and appeal courts. She has also been involved in the recognition and enforcement of arbitral awards.

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Jeannemarie O'Brien is a partner in the New York law firm of Wachtell, Lipton, Rosen & Katz, where she is active in the firm's merger and acquisition practice, focusing on the executive compensation and employee benefits aspects of transactions, with a particular emphasis on transactions involving financial services institutions. She has been involved in over $500 billion of mergers and acquisitions transactions over the last decade. Ms O'Brien also advises companies and their boards on governance issues and assists companies and senior executives on executive compensation matters in both the public and private sectors, and has particular expertise regarding the compensation structures at financial institutions and the related regulatory considerations.

The transactions in which Ms O'Brien has been involved include many major financial institution transactions, both bank and non-bank, including: City National/Royal Bank of Canada; National Penn Bancshares/BB&T; Chubb/ACE Limited; Hilltop Holdings/Plains Capital; CapitalSource/PacWest Bancorp; Umpqua Holdings Corporation/Sterling Financial Corporation; Huntington Bancshares/Camco Financial; Marshall & Ilsley/Bank of Montreal; Alleghany Corporation/Transatlantic Holdings; Comerica Incorporated/Sterling Bancshares, Inc.; Bank of America Corporation/Merrill Lynch; Wells Fargo/Wachovia; Countrywide/Bank of America Corporation; FleetBoston Financial Corp./Bank of America Corporation; MBNA/Bank of America Corporation; J.P. Morgan/Bank One; J.P. Morgan/Bank of New York; Warburg Pincus/The Mutual Fund Store and TMFS Holdings, LLC; Bank of America Corporation in its sale of Balboa Insurance Group to QBE Holdings, Inc. She also has been involved in transactions outside of the financial sector, including: Pfizer Inc./Allergan plc; United Technologies (Sikorsky Aircraft)/Lockheed Martin; Carefusion/Becton Dickinson; Cox Automotive/Dealertrack Technologies; United Technologies Corporation/Goodrich Corporation; Thermo Fisher Scientific/Life Technologies Corporation; Vantiv/Mercury Payments Systems; Leap Wireless/AT&T; Rayonier Inc.'s spinoff of its performance fibers business; and CBS Outdoor Americas' initial public offering.

Ms O'Brien frequently writes and speaks on executive compensation and corporate governance issues and is recognized as a leading executive compensation lawyer in the Chambers USA Guide to America's Leading Lawyers for Business and The Legal 500. In addition to memos and articles on recent developments in the executive compensation area, she is an author of the chapter on executive compensation in Wachtell, Lipton, Rosen & Katz's "Financial Institutions M&A," an annual review of leading developments.

Ms O'Brien received a B.A. cum laude from Mount Holyoke College in 1989, and a J.D. cum laude from Fordham Law School in 1994, where she was an associate editor of the Fordham Law Review. She is a member of the New York State and American Bar Associations. Ms O'Brien serves as a member of the Board of Trustees of the Trinity School in New York City and of the non-profit organization Prep for Prep and is on the Advisory Board of St. Bartholomew Community Preschool in New York City.

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Andrea K Wahlquist is a partner in Wachtell Lipton's Executive Compensation and Employee Benefits Practice, specializing in executive compensation and benefits matters, with an emphasis in representing target companies in strategic mergers and a background in representing some of the largest private equity sponsors in the acquisition, management and disposition of their portfolio companies.

Ms Wahlquist regularly counsels private and public companies on the design, implementation and treatment of employee compensation and benefit programs – and routinely negotiates executive employment and separation arrangements – both in connection with corporate transactions and in the ordinary course of ongoing company representations. Ms Wahlquist also has extensive experience with a broad range of executive compensation-related and benefits issues that arise in IPOs, spin-offs and in bankruptcy/restructuring transactions.

Ms Wahlquist is included in The Best Lawyers in America – *Employee Benefits Law*, is recognized as a leading lawyer in both *The Legal 500* and *Chambers USA Guide to America's Leading Lawyers for Business*, and was named in *The American Lawyer's 2007* "Dealmakers of the Year" issue. Ms Wahlquist has spoken as a panelist at a variety of industry conferences addressing executive compensation and governance issues.

Ms Wahlquist served as a law clerk to Judge Stephen J. Swift of the United States Tax Court (1995-97), and after her clerkship began practicing as an executive compensation and employee benefits lawyer in New York City. Ms Wahlquist received her B.A. from the University of Virginia (1992) and her J.D. from the Washington & Lee University School of Law (1995), where she was the Editor-in-Chief of the *Environmental Law Digest*, a publication of the Virginia State Bar Association.

Ms Wahlquist sits on the Executive Committee of the Tax Section of the New York State Bar Association, and is a member of the American Bar Association and its Joint Committee on Employee Benefits. She also serves on the Board of Trustees of Washington & Lee University and of The Children's Aid Society in New York City.

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Dr Lorenza Ferrari Hofer (dual-qualified in both Switzerland and in England and Wales), is a partner in Schellenberg Wittmer's Intellectual Property and Life Sciences teams. She specializes in intellectual property, data and data protection law, unfair competition and contract law and has profound knowledge in complex, cross-border matters relating to product development, licensing, trade and distribution of technology, therapeutic, health and food products, as well as in product liability defense. Lorenza is very active in disputes, covering patent infringement and injunction proceedings, as well as trade secrets cases. Lorenza has broad experience in media (including social media), advertising, marketing and sponsoring matters.

Lorenza Ferrari Hofer has a strong expertise in structuring and negotiating intellectual property rights-related agreements, including R&D, transfer and licensing, and distribution agreements across a multitude of sectors. Her life sciences practice includes matters relating to patent licensing and litigation, regulatory and compliance, as well as product liability defence.

Lorenza Ferrari Hofer regularly represents clients in legal proceedings and regulatory matters in front of Swiss courts, arbitral tribunals and administrative authorities.

Lorenza Ferrari Hofer regularly lectures and publishes in the fields of international licensing and technology transfer, and in several areas of unfair competition and intellectual property law. She is President of the Swiss Group of the International Association for the Protection of Intellectual Property (AIPPI). She practices in German, Italian, English and French.

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LITIGATION

Features for:

LITIGATION

Portuguese courts are up and running

Inês Gomes da Cruz
PLMJ Dispute Resolution
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September marks the return of different activities and institutions after the summer break and this includes the courts that resume full operations at the beginning of the month. The circumstances are, however, very different from previous years. The pandemic has forced a change in the way we interact with each other and, in turn, this reflects on the way the courts operate.

During lockdown in Portugal and in the period between 9 March and 3 June, procedural deadlines for non-urgent cases were suspended and, as a rule, no procedural acts were to be carried out, except for automatic acts like the distribution of cases to the appropriate courts, or summonses and notifications.

However, whenever all parties were able to take steps online, using the official platform of the courts (Citius) or by means of distance communication resources, including teleconferencing, video calls, or similar (such as Webex or Skype), in-person acts such as a preliminary hearings or trials were held, and non-urgent acts that could be carried out remotely were performed. In that period, the Superior Council of the Judiciary announced that 157 virtual rooms came into operation in the courts of first instance, the appeal courts, and the Supreme Court of Justice.

Additionally, all steps in enforcement actions were suspended including sales, collective insolvency proceedings, transfers of real property, and attachments and their preparatory acts. The only exception was if the non-performance of such acts would cause serious harm to the livelihood of the creditor, or irreparable harm. The decision on the harm and the consequent conclusion of the act depended on a prior judicial decision.

Following the end of the state of emergency measures and from 3 June, the deadlines and in-person acts were resumed, but few hearings were scheduled to happen before the summer break that started on 15 July. Only now, after the summer break, will the new rules and requirements for the courts operation be put to the test.

To reassure all intervening parties, the Ministry of Justice has announced that "More than 90% of the Portuguese court rooms were considered suitable for holding court hearings and around €700,000 was invested in protective and hygiene materials that include more than 2,000 separation acrylics, 11,000visors, 12,000 litres of surface disinfection material, and 15,000 litres of disinfectants for personal use, among others."

FOLLOWING THE END OF THE STATE OF EMERGENCY MEASURES AND FROM 3 JUNE, THE DEADLINES AND IN-PERSON ACTS WERE RESUMED, BUT FEW HEARINGS WERE SCHEDULED TO HAPPEN BEFORE THE SUMMER BREAK THAT STARTED ON 15 JULY. ONLY NOW, AFTER THE SUMMER BREAK, WILL THE NEW RULES AND REQUIREMENTS FOR THE COURTS OPERATION BE PUT TO THE TEST

Moreover, "Recruitment procedures for operational assistants, through mobility of staff, were opened in 108 centres distributed throughout the various districts and addenda to the cleaning service contracts in force were signed for the placement of more cleaning stations at an expense of around €5 million."

In contrast, the president of the Portuguese Bar Association feels that "the Ministry of Justice's concern has only been to ensure protection for magistrates and officials, and it has completely disregarded the risks that exist for lawyers and citizens that it calls to the courts". He also argues for the "return of the courts to decent buildings" as a measure to ensure safe working conditions for all participants in their acts. Considering the current trend pushing for the use of distance communication and the increasing importance of teleworking, this call for real estate investment by the Ministry of Justice seems misplaced.

More importantly, as previously addressed the performance indicators of the Portuguese justice system have been improving significantly in recent years and, tackling a possible negative impact of the pandemic on the pre-existing bright state of affairs, the Ministry of Justice's announcement adds that, in December 2019, the first instance

LITIGATION

courts had reached the lowest number of pending cases since statistical record began. It further states that the judicial year closed with 754,228 cases across the country, excluding cases in the penalties enforcement courts, down from 1.3 million cases at the end of 2015. The government's release also states that "This decrease will contribute decisively to balancing the increase in cases that is expected for autumn 2020.".

In fact, the Portuguese Minister of Justice has acknowledged that the measures to suspend deadlines and limit court hearings and the expected increase in demand from the justice system will inevitably bring great pressure to bear on the courts. However, she has also pointed out that our justice system is now equipped with means that make it possible to find out in good time about trends in the number of cases and for local and central management bodies to communicate and organise faster.

Moreover, even if the pandemic had not intervened, in dispute resolution, negotiating should be the first option. As a rule, judicial actions are time consuming and expensive, so it is essential to be proactive, approach business partners, start negotiations early and consider all negotiation possibilities before going to court.

The negotiation stage is intended to settle the dispute, but the preparation of a potential court case should not be neglected, because some of them will be unavoidable. It is important that this stage is subject to without prejudice privilege and the obligation of confidentiality. It is also important that any agreement effectively binds the parties and stands up in court in the event of non-compliance. Of course, in more critical situations, the diagnosis will have to consider participating in recovery proceedings with creditors or debtors, or to apply for or submit to insolvency. Needless to say that these circumstances can only be steered with the assistance of a litigation lawyer early on in the process.

In a nutshell, these are times of great uncertainty that the Portuguese civil justice stakeholders need to navigate with the appropriate actions, and considering our pre-existing conditions and the measures in place, we see no reason to fear a dramatic deterioration in the courts' clearance rate, nor in the average time taken to resolve a case.

LITIGATION

The Bahamas: Employment Challenges With COVID-19

Tara Archer-Glasgow
Higgs & Johnson
Nassau

Introduction

The current global pandemic has caused great disturbance within the employment market in The Bahamas. The forced closure of businesses during intermittent, necessary, lockdowns has strained profit streams; and the resultant temporary closure of our boarders had a freezing effect, in particular, on the tourism sector. Many commercial businesses such as hotels, banks, food chains and airlines have had to mitigate the financial consequences of this crisis by making employment adjustments. Most places of employment have had to establish a new way of operation and many employees, if among the fortunate, have had to learn to work from home. This economic woe has affected not merely our closet trading and touristic partner, but the entire world. In order for many businesses to survive they have had to down size and avail themselves of the legal provisions that facilitate lawful layoffs, redundancies and termination of employment relationships.

In this article, we will provide practical guidance for employees and employers to avoid unnecessary litigation whilst navigating through employment challenges precipitated by this COVID-19 crisis.

Legal Framework

The employment relationship in The Bahamas is governed by the Employment Law Act, 2001 which was amended by the Employment (Amendment) Act, 2017 ("the EA"). The EA prescribes the minimum rights and benefits that are to be applied to the employment relationship. If there is an employment contract in place which contains greater benefits for the employee a court will apply the more favourable provisions to any employment dispute. The EA also sets out the manner in which an employment relationship can be manipulated lawfully in an economic down turn. The EA provides for employers, in the appropriate circumstances and upon complying with the correct procedure, to be able to make an employee redundant (with a consideration for suitable alternative employment), to lay off an employee for a set period of time and to place an employee on short time ("alternative working arrangements")[1]. Many employers utilize these aids in a bid to avoid a complete termination and some employees tend to be amenable to management implementing such alternative working arrangements as a business strategy to at least preserve employment.

NAVIGATING THROUGH THE EMPLOYMENT CHALLENGES FACED DURING THE COVID-19 PANDEMIC REQUIRES CAREFUL FOCUS AND ANXIOUS CONSIDERATION

If ultimately termination is inevitable due to the economic despair of the business, the EA provides for termination of employment with notice or with payment in lieu of notice along with severance pay[2]. During the infancy stages of interpreting the termination provisions of the EA, it was generally opined that a reason for the termination of an employment relationship was not necessary. The only obligation was to ensure that the correct notice and service pay were provided. However, recent case law has suggested that employers should be mindful that whilst they may not be subject to a claim for wrongful dismissal, due to terminating without cause, they may be liable to a claim for unfair dismissal[3].

Unfair dismissal is a creature of statute and there is no similar provision known to the common law. The EA states four express grounds upon which a dismissal is deemed unfair; and they are: (1) dismissal relating to trade Union Membership, (2) dismissal on the grounds of unfair selection in a redundancy, (3) dismissals on the grounds of pregnancy and (4) dismissal in connection with a lock

LITIGATION

out, strike or other industrial action. It has been argued that the express grounds in the EA were the only grounds upon which an employee could make a claim of unfair dismissal. However, Section 35 of the EA states that the question of whether dismissal of the employee was fair or unfair is to be determined in accordance with the substantial merits of the case. Accordingly, this section has been interpreted by Judges, in recent cases, to mean that the express grounds in the EA are indeed not exhaustive. Additionally, it is almost settled law now that an employee has a right not to be unfairly terminated notwithstanding any terms that may or may not exist in his/her employment contract. Consequently, an employee can make a claim for both wrongful and unfair dismissal[4]. In current circumstances, it is not unthinkable that an employee may advance an argument that termination during the Covid-19 crisis, when recovery is possible, is unfair. Finally, the EA also makes provision for summary dismissal for misconduct which traditionally requires no notice or severance pay to be provided. However, a summary dismissal does require a reasonable investigation into the alleged misconduct; and recent case law suggests that the employee may have a right to be heard prior to such dismissal.

What to do if Termination is Imminent and Unavoidable

- Most businesses globally, regardless if they admit it or not, are undergoing introspection to determine how and if they will be able to survive during this conundrum. Whether the concerns are alarmist or not, it must be conceded that there is going to be, even if only temporarily, a lack of availability of jobs to meet the demands of the employment market. The anticipated downsizing of business and closure of various operating locations will force most employers to consider terminating employment relationships as a cost cutting mechanism. During these times, employees also tend to become more litigious in a bid to obtain a more generous severance package in order to outlast the downturn.
- The first step to avoiding litigation is to make a sound business decision and ensure that termination is not a knee jerk reaction to the current crisis. Before deciding to terminate an employee, the employer should give consideration to whether the termination of a particular employee is a sacrifice of long term value for short term relief. In a bid to avoid termination, in the first instance, the employer should consider alternative working arrangements. If in the end termination is inevitable, the employer should ensure due consideration of, amongst other things, the following:
- whether the employee ought to be made redundant or whether the termination of the employee's contract is more appropriate;
- the position of the employee;
- whether notice is required;
- the selection process and acting in good faith;
- the correct calculation of severance pay;
- whether the dismissal is being carried out fairly; and
- whether a release is appropriate;

Conclusion

Navigating through the employment challenges that most businesses now face during the COVID-19 pandemic requires careful focus and anxious consideration in order to find the best course of survival for employers and employees. When we are at our most vulnerable, economically, the propensity to litigate increases. Whilst The Bahamas boasts of a robust judiciary, should an employment dispute arise, ligation is a costly and time consuming exercise. As such, employers should seek to avoid litigation by taking the appropriate advice, prior to varying or ending an employment relationship. Being ever the optimist, it is hoped that with the implementation of a sophisticated restructuring of the business and with employers and employees working together, organizations should be able to successfully weather the current turbulent environment.

1. Section 26 &28 of Employment Act
2. S.29 of the Employment Act
3. S.34 of the Employment Act
4. Bahamasair v. Omar Ferguson in Scciv App No.16 of 2016 & Cartwright v. US Airway (2016) 1 BHS J. No. 96

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Tara Archer-Glasgow is a highly experienced dispute resolution lawyer with over 20 years of experience in all aspects of commercial litigation including banking and compliance, employment, company law, admiralty law and industrial property. Tara is a partner at Higgs & Johnson and Leads the firm's asset recovery unit. She chairs the intellectual property group and is co-chair of the marketing and business development committee of the firm.

Tara regularly appears as counsel in many complex and high value cases in the Supreme Court and the Court of Appeal in the Commonwealth of The Bahamas and has also appeared before the Privy Council in England. She provides legal advice to individuals, major financial service providers and global corporations regarding multi-jurisdictional litigation, shareholder disputes, fraud, asset-tracing and internal operations. She has assisted clients in the tracing and recovery of millions of dollars and represents clients in franchise and intellectual property disputes.

Tara recently and successfully represented an international cruise line company against numerous claims involving a dispute between shareholders, fraud and the wrongful restriction of access to sale proceeds valued in excess of $20 million. She also acted in a bankruptcy matter for an international commercial bank that was a creditor to a wealthy individual owing in excess of €40,000,000 ; and currently sits on the creditor's committee. She acted as co-counsel in a landmark court action which clarified the principle of freedom of contract to limit liability in commercial maritime agreements in cases involving collisions or allisions globally.

Tara is recognised as 'an experienced, well regarded and accomplished litigator' in Chambers Global and listed as a 'recommended lawyer' by The Legal 500 Caribbean. Clients speak highly of Tara, reporting that she is 'client-friendly, accessible, knowledgeable and gets the job done.' According to Client Choice Awards, she provides 'accurate, in-depth and well researched advice.' Considered an asset recovery specialist by Who's Who Legal, Tara is a 'favourite among clients who describe her as very professional, approachable and as an experienced attorney within the high valued commercial litigation arena.'

Tara is actively involved the International Bar Association (IBA) serving as Vice-Chair of the poverty and social development subcommittee and is the past Chair of the Consumer Litigation Committee. She is also a former law lecturer at the University of The Bahamas. Tara is often invited to share, as a speaker, her expertise at international and local conferences and to provide motivational talks to young persons, particularly young women, in the community.

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Claudine Columbres is a partner in the Firm's Commercial Litigation Practice, with a wide range of experience in complex business disputes, securities litigation, merger litigation and bankruptcy-related litigation. Claudine also serves as the Co-Chair of the New York Women's Alliance.

Claudine's work has spanned a broad range of industries including financial services, foodservice distribution, energy, and oil & gas. She has worked with clients including Anthem, Inc., JPMorgan Chase & Co., Hess Corporation and Major League Baseball.

Dedicated to helping her clients achieve the best possible outcomes, Claudine has also successfully represented defendants in numerous pro bono cases involving family and matrimonial law.

Claudine received her BA from Georgetown University and her JD from Columbia University School of Law.

Select matters include the representation of:

- Anthem, Inc., in a high-profile merger litigation resulting from the failed US$54 billion acquisition of Cigna Corporation. The court determined that Cigna breached the merger agreement and relieved Anthem of the obligation to pay the US$1.85 billion contractual termination fee. Anthem also defeated each of Cigna's claims.
- Anthem, Inc., in a US$12 billion dollar lawsuit against one of the largest pharmacy benefits managers in the US, Express Scripts, Inc. (ESI), arising from ESI's breach of its contractual duties to negotiate in good faith to ensure that Anthem receives market pricing for pharmaceutical drugs and for certain operational breaches.
- Advance Auto Parts, Inc., a national auto parts retailer, in a securities class action in the United States District Court for the District of Delaware.
- JPMorgan Chase & Co. in a lawsuit alleging contract, restitution and reformation claims challenging amounts allegedly owed by JPMorgan Chase under a chapter 11 plan of reorganization. The case raised complex tax issues and involved multiple discovery disputes before it was successfully resolved via settlement.
- Fibria Celulose, a Brazilian pulp and paper company, in a federal securities class action alleging violations arising from foreign exchange derivative pricing practices.
- The Office of the Commissioner of Baseball, doing business as Major League Baseball, in the unique bankruptcy of the Los Angeles Dodgers and in connection with the sale of the team.
- Hess Corporation against numerous putative shareholder class action lawsuits filed in state and federal courts in Nevada and Colorado, challenging Hess' acquisition of American Oil & Gas. We consolidated the cases in the District of Colorado and then negotiated a disclosures-only settlement that resolved all the cases, and Hess' acquisition of American Oil & Gas closed without any changes to the merger's terms or price.

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Elaine P Golin is a partner in the Litigation Department at Wachtell, Lipton, Rosen & Katz. Her practice includes contracts, corporate governance, RMBS and securities litigation, as well as other types of complex commercial litigation. Ms Golin also focuses on the negotiated resolution of complex matters.

Recently, Ms Golin has represented Bank of America, PNC and other financial institutions in numerous disputes concerning mortgage related matters. Representations include Bank of America's groundbreaking settlement of claims relating to Countrywide mortgage-backed securities and related litigation, Bank of America's multi-faceted resolutions with FHFA, MBIA, FGIC and AIG, Bank of America's global RMBS agreement with the Department of Justice, and PNC in mortgage litigation with RFC.

Other significant representations include: J.C. Flowers, Bank of America and JPMorgan Chase in material adverse change litigation with Sallie Mae; IAC in litigation with Liberty Media; Rohm and Haas in its suit to enforce its merger agreement with Dow Chemical; and senior secured lenders in the Spectrum Brands bankruptcy litigation. Ms Golin also participated in the pro bono representation of artist Christoph Büchel in a successful First Circuit appeal involving the Visual Artists Rights Act of 1990.

As a litigation associate, Ms Golin worked on several of the firm's highprofile matters, including its representation of IBP in IBP v. Tyson and of Larry Silverstein in insurance litigation arising out of the destruction of the World Trade Center.

Ms Golin received a B.A. from Yale College, a diploma in Literature from the University of Edinburgh, and a J.D. from Columbia Law School, where she was an articles editor of The Columbia Law Review and a James Kent Scholar. She clerked for the Honorable Judge Sandra Lynch of United States Court of Appeals for the First Circuit. Among other professional recognitions, Ms Golin has been named by Lawdragon as one of the 500 leading lawyers in the United States and by Benchmark Litigation as one of the top 250 women in litigation.

Ms Golin serves on the board of the Sadie Nash Leadership Project, a non-profit providing leadership education to high-school and college women.

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Carrie M Reilly is a partner in the Litigation Department at Wachtell, Lipton, Rosen & Katz.

Carrie joined the firm's Litigation Department in 2005. During her time at Wachtell Lipton, Carrie has worked on several of the firm's high-profile matters, including successfully defending Goldman Sachs in *Baker v. Goldman Sachs*, a five-week jury trial in federal court; representing Bank of America in its comprehensive multi-billion dollar settlement with the Department of Justice, federal agencies, and state attorneys general, as well as its groundbreaking $8.5 billion settlement of claims relating to 530 mortgage-backed securitization trusts issued by Countrywide and its multidimensional settlements with MBIA and AIG; representing respondents in *Morrison v. National Australia Bank*, in which the Supreme Court held for the respondents and found that Section 10(b) of the Securities Exchange Act does not apply extraterritorially to so-called "foreign-cubed" securities claims; and representing the National Football League in a contract dispute over the simulcast of the Patriots-Giants game in 2007.

Carrie has also worked on many other significant matters at the firm, including representing Goldman Sachs in litigation arising from the acquisition of TIBCO by Vista Equity Partners, defending Allergan in response to a hostile bid from Pershing Square and Valeant, expedited deal litigation over JPMorgan's acquisition of Bear Stearns, the material adverse change litigation between J.C. Flowers, Bank of America, JPMorgan and Sallie Mae, litigation brought by monoline insurers against Bank of America, commercial real-estate arbitrations, and the firm's representation of a major international corporation in investigations by federal and state authorities in the United States.

Carrie received her B.S. from the Wharton School at the University of Pennsylvania, where she graduated *summa cum laude*, and her J.D. from Harvard Law School, where she graduated *cum laude*. She serves on the Steering Committee of the Kate Stoneman Project, is a Fellow of the American Bar Foundation, and is a member of the American Bar Association and the New York City Bar Association. In 2016, Carrie was recognized as a "Rising Star" by the *New York Law Journal*.

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WOMEN IN BUSINESS LAW AWARDS 2020

The Women in Business Law Awards 2020 for Europe and the Americas celebrates excellence at the firms advancing diversity in their workforce, encouraging representation at senior levels and supporting an improved work-life balance. The awards also recognise the very best women lawyers and rising stars from these regions in a wide variety of practice areas.

In September, we are announcing the winners for our European and Americas awards online. We are unable to hold the usual celebratory awards dinner due to the ongoing global pandemic. Instead, the awards will be virtual presentations providing an opportunity for participants to congratulate colleagues and commend best practice.

There is a fantastic cross-section of work from both continents that has been shortlisted this year, from firms providing improved working conditions for women to excellence in practice areas such as financial law, IP and tax. The awards have a new website where you can view the shortlisted firms and where the winners will be announced. You can also register online to watch the winners presentation live.

The European awards will take place on September 10.

The Americas awards will take place on September 17.

We hope to host the awards in person with you next year.

Please visit **awards.womeninbusinesslaw.com** for more information.

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Vaishali Mittal is a Litigation Partner and Strategist at Anand and Anand.

Designated the "leading light" in India for SEPs, Ms Mittal has to her credit India's first post-trial SEP judgement. She is described as an "engine of Anand and Anand's patent practice, an outstanding advocate and deal negotiator" by the IAM 300.

Ms Mittal has 17 plus years' experience in litigation, prosecution, drafting and advisory to various Fortune 500 companies and big-ticket clients worldwide on disputes concerning patents, trademarks, copyright infringement and passing off etc.

Outside of courts, she combines her knowledge of law and ingenuity of a writer to pen articles for renowned publications like GTDT, MIP etc. She is also the creative mind behind 'IPONOMICS', a picturesque coffee table book co-authored by her compiling legendary IP matters; 'Origami', an in-house knowledge manual on Best Practices and Procedures of IP practice in India. She also conceptualized and created 'IP Thinker' a digital newspaper to celebrate World IP Day, 2020.

Highlights of her path-breaking work

- Represented Koninklijke Philips NV in two patent disputes, Philips v KK Bansal and Philips v Rakesh Bansal, securing the first final decision in SEP litigation in India
- landmark judgment on aggravated damages being the highest ever quantum in a copyright, trademark and design infringement case (Philips vs Amazestores)
- Represented Vifor Pharma International (Galenica Group) in Vifor v High Court of Delhi in a writ petition resulting in, to the relief of many IP owners, a stay on transfer of at least 20,000 IP lawsuits (valued under R10 million) from the High Court to subordinate courts in wake of the Commercial Courts Act 2015
- Represented Nokia in various pre-suit mediation claims concerning SEP infringement
- Secured an interim injunction for Astra Zeneca in a patent infringement suit against pharma majors Emcure and MSN Laboratories
- Secured relief for patent holders from strict liability under the disclosure regime of Section 8 of the Patents Act in a landmark judgement in Maj Sukesh Behl v Philips
- India's first judgment declaring colour-combination (green & yellow) a well-known trademark;
- Landmark judgement on trans-border reputation

Memberships: APAA; AIPPI; INTA

Awards/recognition

- Features in the IAM 300 Strategy list 2019 & 2020
- Features in the IAM Patent 1000 list 2019 & 2020
- Recognized amongst the "Super 50 Lawyers in India" by Asian Legal Business Law Journal 2020;
- Recognised among the "Top 15 Dispute Lawyers in India" across all verticals by Asian Business Law Journal 2019
- Star Women in Law Award, Legal Era Woman in Law Awards 2019
- Milestone Case for SEP Judgment of the Year at Legal Era Awards 2019

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Anita Varma is chair of White & Case's Global IP practice group. She is based in the Firm's Boston office, with a dual practice in London. She is qualified is qualified to practice before the US Patent and Trademark Office (USPTO) and the European Patent Office (EPO).

Anita provides strategic patent counselling to life sciences industry companies, guiding them through every stage of a product's lifecycle. She works with clients in obtaining enforceable claims and supporting them in post-grant proceedings, as well as in developing and executing both offensive and defensive patent strategies. She also conducts strategic review of patent portfolios to identify strengths and weaknesses, and opportunities to minimize threats and maximize revenue.

As part of this strategic counselling, Anita regularly advises on patentability, validity and freedom-to-operate issues, provides pre-litigation assessments and opinions regarding patentability, conducts IP due diligence for strategic transactions, and advises on listing and delisting matters in the US Food and Drug Administration's Orange Book.

Clients also benefit from Anita's experience in navigating biosimilar litigation strategies. She has skilled expertise among diverse life sciences subjects, including immunology, antibody therapeutics, RNA interference therapeutics, small molecules, gene therapy, biotechnology, pharmaceuticals, clustered regularly interspaced short palindromic repeats (DNA sequences), ocular products, biophotonics, messenger RNA therapeutics, protein therapeutics and protein traps.

Anita is named one of the top lawyers in the United States for patent prosecution matters (*Legal 500*), and is viewed by competitors as "an extremely skilled attorney with both legal and business smarts" (*LMG Life Sciences*). Clients appreciate her "'business savvy' approach and her familiarity with the biotechnology and pharmaceutical industries" and note that "the experience [of working with Anita] has been very positive" (independent survey by *Chambers and* Partners).

Anita is named to *Managing Intellectual Property's* guide to the "Top 250 Women in IP." *Intellectual Asset Management ("IAM")*, the world's leading IP business media platform, has named Anita to their Global Leader's Guide as well as IAM Patent 1000 and IAM Strategy 300, which feature the elite private practice patent professionals.

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PRODUCT LIABILITY

Feature for:

PRODUCT LIABILITY

An efficient product liability practice must be multifaceted and diverse

Sylvie Gallage-Alwis
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The title of this article can be read in different manners. It can be perceived as bold, mysterious, obvious or aggressive. The truth is that the past decade has shown that the manufacturing and placing of products on the European Union market (and even worldwide in fact) can lead to claims filed by an increasing number of plaintiffs on an increasing number of legal grounds.

Multifaceted legal grounds

At first, product liability specialists dealt with claims filed by plaintiffs following an incident or accident caused by a product they purchased before a jurisdiction. Such a case implied working on technical evidence, with the potential assistance of experts, and demonstrating that the product design was compliant with regulations and standards, with the incident or accident being caused by misuse or an external factor. The legal risks associated with such claims could foreseeably be assessed whether or not the company considered that the product was defective. Indeed, in case of a defect, companies would generally settle pending claims and have corrective measures implemented for products already placed on the market, with most of the time, insurance coverage involved. Such cases could be "easily" managed or at least were not source of major concerns for the legal team.

This past decade has shown that even when a company handles a product issue in the right way, taking appropriate measures if need be, it will face litigation which will likely have an international reach and be mass litigation.

One of the biggest concerns currently lies with claims filed by plaintiffs or consumer associations which challenge the use of some ingredients or substances in the manufacturing process of products. One could believe that the fact that the use of such ingredients or substances is legal would be sufficient to withdraw such claims. Courts however have started to grant damages on the ground of the fear to develop a disease in the future or the mere exposure to a risk. Such compensation has already happened in the scope of employment claims with employees claiming that they are exposed to substances that could lead to cancer when manufacturing products. It has also occurred in medical device-related cases. Claims are now pending against manufacturers of standard consumer products, whether filed by employees or consumers. If successful, this will mean that manufacturers should stop using any ingredient or substance which is subject to a negative study so as to avoid any litigation risk. However, experience shows that even when some push for substitutes to some substances, it is not long before said substitutes are then criticised as well.

> THIS PAST DECADE HAS SHOWN THAT EVEN WHEN A COMPANY HANDLES A PRODUCT ISSUE IN THE RIGHT WAY (…) IT WILL FACE LITIGATION WHICH WILL LIKELY HAVE AN INTERNATIONAL REACH AND BE MASS LITIGATION

In such cases, safety is being challenged, even if the product is compliant. The future potential risks associated with the use of a compliant product are being discussed, as well as whether or not a compliant product can be deemed unsafe on a legal standpoint.

But manufacturers also face claims that do not challenge the safety of the products at all. For instance, manufacturers or distributors are now being successfully sued for breaching their duty to inform even if the information which would have been missing is not safety-related information that would have caused a risk of harming the user. In some countries, such as France, this lack of information is a criminal offense, i.e. deceit or misleading advertising. Fines, recalls and/or damages can be ordered against the company while the safety of the product is not even being discussed.

Another example is the recent trend to file claims against manufacturers on the ground

PRODUCT LIABILITY

that their products or their manufacturing process (and notably their choice in suppliers) would not be sustainable and would be at the origin of climate change. Legal grounds vary from, again, a breach of duty to inform, misleading advertising, or a breach of compliance with environmental law. Again, the safety and even the mere design of the product are not discussed.

One can finally refer to claims filed against manufacturers and distributors on the ground of alleged lack of compliance with environmental law or lack of sustainability of the products placed on the market. Safety is not at stake nor is design compliance. In such cases, the impact of the product on the environment is being discussed. This is the so-called climate change litigation. Such claims have first mainly targeted States, cities or municipalities as well as the oil and gas industry. They are now spreading against consumer products manufacturers and are filed on various grounds. Lack or misleading information is one of these grounds with plaintiffs analysing in detail all the declarations made by a company on its environmental pledge and asking it to justify the measures taken in this respect and their efficiency.

Multifaceted plaintiffs

While legal grounds to target companies are multiplying and can actually add up against one company, the type of plaintiffs can as well. Indeed, today, a manufacturer can face, in parallel (with claims b) to e) being possible even when the product does not present a safety risk):

- Claim in damages by plaintiffs who faced an accident or incident, if any;
- Claim in damages by plaintiffs who fear facing a similar accident or incident, or by plaintiffs who just fear to be exposed to a risk based on the design/composition of the product;
- Claim by the regulators for deceit, misleading advertising or breach of duty to inform, irrespective of whether or not there is a compliance or safety issue linked to the product;
- Claim by regulators, NGOs and/or plaintiffs on the ground that the product would have a negative impact on the environment;
- Claim by competitors for unfair competition;
- Claim by suppliers for undue termination of their contracts should the manufacturer decide to mitigate its risks in the scope of claims, such as the claims described in b) to d), by ending its business relationship with some of them.

Such claims can further be made through different legal mechanisms such as, depending on the jurisdiction, criminal complaints, civil individual claims (leading to mass litigation), class action, group litigation orders, etc., forcing companies and their lawyers to know what each of these proceedings imply.

What this means for law firms is that in order to have a credible and efficient product liability practice, you need your lawyers not only to master product liability and safety concepts and litigation but also to be experts in relevant areas of employment, environment, finance, criminal law and to know how to handle individual civil claims as well as collective redress mechanisms. Your team should also be able to handle claims with thousands of plaintiffs, before dozens of jurisdictions. Here, size is not the key aspect. Experience shows that a small size team, if properly organised, can handle much more than dozens of lawyers.

As a practice, you also need a proper pool of experts, technical and legal scholars, whom you know you can rely on to provide statements and reports that will help your case. On some topics, the number of these experts is very limited. You need to know them before a case is handed to you to make the difference.

In other words, diversity is key for an efficient product liability practice today. You need diversity in the legal background, in handling different types of proceedings, in the types of industries you have worked with, in experts in your portfolio, etc.

How best to achieve this but to start having a diverse team?

I am very proud of having a team composed of members with diverse family backgrounds, diverse nationalities, diverse education, as well as a gender, racial and religious diversity. This allows us to have a panel of different views and ideas which necessarily complete each other and to have everyone find his/her own role to play for a more effective assistance to the benefit of the client.

Do not underestimate, when thinking of whom is part of your team, the need to include everyone. I have gained so much by involving PAs, paralegals and even receptionists in the core of the claims we handle. You would be amazed how much people know about a product that you do not know.

When handling product liability claims, knowledge is key not just about the product, but also about the client, the NGOs who pay attention to your client, about who the regulators are, about the media coverage your client is subject to, etc. This is in addition to mastering Law and procedure. Having sharp lawyers' minds in your team is an advantage, having diverse minds working jointly at all levels of your firm, is what will make the difference.

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After 10 years practicing in a major international law firm, Sylvie Gallage-Alwis became one of the founding partners of the Paris office of Signature Litigation in January 2019. Since then, Signature Litigation has been the first and only cross-channel dispute resolution only firm, providing assistance in handling major and complex litigation, arbitration and regulatory investigations.

Sylvie heads the firm's product liability practice. She specialises in all cutting-edge complex disputes linked to products, namely product liability, product safety, toxic tort, mass litigation/class actions, regulatory compliance, and the environment. She is involved in the most innovative pending legal topics for her clients, such as defending them against claims filed on the ground of planned obsolescence or deceit towards consumers. She is involved in the *dieselgate* litigation as well as in brand new climate change litigation, and the first claim filed against a manufacturer on the ground of the anxiety of developing a disease linked to the substances included in the product.

Sylvie is both an *Avocat à la Cour* in France and a Solicitor in England & Wales. She has been described by Who's Who Legal over the years as a "*dynamic and determined litigator*", who is "*a firm favourite among clients*" as "*she always goes the extra mile to support her clients, and is proactive in seeking commercial solutions to disputes*". Who's Who Legal France: Product Liability Defence 2020 notes her "*rigorous analysis, strategic guidance and seasoned litigation*" on complex product disputes, her "*customer-centric and financially aware*" approach and acknowledges her as "*a star in the international world*" and "*well-connected expert*". She has also been awarded the "Best in Product Liability" award at the 2019 LMG Euromoney Europe Women in Business Law Awards. In The Legal 500 EMEA 2020, France chapter, Sylvie is recognised as the only Next Generation Lawyer for product liability under Dispute Resolution: Commercial Litigation.

Sylvie "*stands out in the product liability space for her creative solutions and strategic understanding of the many cases she works on*" and represents a variety of globally recognised manufacturers from industries such as the automotive industry, electronic products, cosmetics, new technologies, steel, energy, food, toys, etc.

Sylvie is further known in the French market as a leading toxic tort/mass litigation lawyer. As such, she has been involved in most pro-company case law rendered in recent years, notably in asbestos-related cases, with some cases mentioned in the French Civil and Social Security Codes because of the significant reversal in case law they represent.

Sylvie is an active member of the International Association of Defense Counsel (IADC), the Association of Defense Trial Attorneys (ADTA) and the International Consumer Product Health and Safety Organization (ICPHSO).

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Dolly Mirchandani's practice focuses on infrastructure and public private partnerships projects, reflecting over 20 years' of experience working on some of the most significant deals in the sector. She represents sponsors, infrastructure funds, commercial banks, institutional lenders, contractors, government agencies and secondary market investors in the development, acquisition, divestiture and financing of greenfield and brownfield infrastructure projects. She has played a leading role in the introduction of private investment and finance in the infrastructure sector in North America, having advised on multiple, award-winning transactions, many of which were first of a kind.

She is ranked Band One in both Chambers Global and Chambers US for PPP projects. She was awarded Global Leader status for both 'Project Finance 2019' and 'Government Contracts 2019' by Who's Who Legal.

Dolly received her LLM from Harvard Law School and her BA Jurisprudence from the University of Oxford.

Recent deal highlights include the representation of:

- Ridgewood Private Equity Partners in connection with their acquisition of an interest in Vista Ridge LLC, the concessionaire for a 142-mile water pipeline in Texas the offtaker of which is the San Antonio Water System.
- The lenders on a US$310 million senior secured term loan facility and US$33 million letter of credit facility provided to EWR Conrac, LLC in connection with the project financing of the Consolidated Rent-A-Car project at Newark International Airport. The project was awarded "Airport Deal of the Year" by IJ Americas Awards 2019 and "North America PPP Deal of the Year" by Proximo 2019.
- Morgan Stanley Infrastructure Inc. in its acquisition of Seven Seas Water Corporation, AquaVenture Holdings Inc. and AquaVenture Holdings Curacao N.V. from AI Aqua (Luxembourg) S.a.r.l, a company owned by Advent International Corporation.
- ACS Infrastructure Development, Balfour Beatty Investments, Bombardier Transportation, Fluor Corporation and Hochtief PPP Solutions in their successful bid for and financial close of the APM project of the LAX Landside Access Modernization Program. "Best Transit Project" by P3 Bulletin 2018, "Americas P3 Deal of the Year" by Project Finance International 2018 and "North American PPP Deal of the Year" by IJGlobal 2018.
- Abertis Infraestructuras S.A. and Goldman Sachs Infrastructure Partners in connection with the commercial and financial closing of the successful bank-financed bid for the long-term concession of the PR-22 and PR-5 toll roads in Puerto Rico. "Americas Deal of the Year" by Project Finance International 2011, "Deal of the Year" by Project Finance 2011 and Infrastructure Investor's "Global Infrastructure Deal of the Year".
- OSU in relation to ongoing matters related to the Comprehensive Energy Management P3 Program with Ohio State Energy Partners, including the implementation of a new CHP plant.
- Regional Transportation District of Denver on the US$1.2 billion Eagle P3 Rail Project in Denver, Colorado. American Road and Transportation Builders Association's "P3 Project of the Year", "North American Transportation Deal of the Year" by Project Finance 2010.

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Elena is a partner in the Project Development and Finance Group in White & Case's New York office. She has significant experience in a variety of project financings in the Americas, primarily in the power, oil & gas and infrastructure sectors.

Elena's cutting-edge approach to deal structure enables her to develop innovative solutions to help clients achieve their business objectives. She combines a keen understanding of the commercial arrangements that underpin energy and infrastructure projects with a sophisticated knowledge of term loan B, mezzanine and hybrid finance structures. She also has extensive experience on acquisition financings, project bonds/private placements and other debt-structured products as well as equity financings.

Elena has worked on multiple award-winning, first-of-their-kind transactions. The Legal 500 describes Elena as "a leader in hybrid project finance" and clients add, she has "finely tuned commercial sense," and provides "strong support and advice through complicated transactions," according to Chambers USA.

Elena is ranked as a leading lawyer for the categories Project Finance and Energy Transactions: Conventional Power by Chambers USA.

Elena received her BA from University of California, Los Angeles and JD from University of California, Berkeley, Boalt Hall School of Law.

Recent matters include the representation of:

- Antin Infrastructure Partners, a leading independent private equity fund focused on infrastructure investments, in a US$625 million term loan A to finance its acquisition of Veolia's district energy assets. The portfolio comprises steam, hot and chilled water and electricity production plants, including cogeneration and 13 networks in ten US cities.
- Deutsche Bank and JPMorgan Chase & Co. in the provision of a US$1.385 billion term loan to Traverse Midstream Partners LLC. Traverse Midstream Partners LLC is a pipeline investor formed by The Energy & Minerals Group with a portfolio of non-operated midstream assets, including the 715-mile Rover Pipeline and the 52-mile Ohio River System pipeline that both harness natural gas from the Marcellus and Utica shales.
- Carlyle in term loan B to finance its acquisition of Revere Power, a 1,100 MW portfolio of three combined-cycle gas-fired facilities In New England.
- Global Infrastructure Partners on its agreement to acquire Medallion Gathering & Processing, LLC (Medallion), the owner of the largest, privately held crude oil transportation system in the Midland Basin of West Texas.

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Aline joined the firm in 1997 and is now a partner in the Paris legal department. She is specialised in real estate law, more specifically in the following domains: commercial leases, hotel leases, off plan leases, building leases, business leases, transfers of lease rights, sales of operating assets, real estate sales, real estate development contracts, delegated project management contracts.

As a French lawyer, Aline manages advisory assignments, drafts legal documents and handles disputes. She has been advising both French and Foreign groups for nearly 20 years.

For 5 years, she was a lecturer on Property Law for Master degree programme at the University of Paris I – Panthéon Sorbonne; and at the Paris Bar Law Training College on the subject of commercial leases. She regularly publishes articles on real estate subjects in French and International publications. In this context, she is part of the editorial team of Francis Lefebvre's Commercial Leases and Property Management handbook.

Aline graduated in corporate and tax law from the University of Paris II – Panthéon Assas and obtained the specialisation in Real Estate Law. She is a registered lawyer, who was a member of the Bar Council of the Hauts-de-Seine department from 2013 to 2015.

Aline is a member of GRI Club.

A French native, Aline is fluent in English.

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D.J. Miller is a partner in the insolvency and restructuring group at Thornton Grout Finnigan LLP and has represented all types of stakeholders in complex restructuring proceedings and insolvency litigation for the past 25 years. She is known for her deep knowledge of the insolvency framework, both domestic and international, and for applying strategic skills to achieve successful outcomes. Mandates include acting as lead Canadian insolvency counsel for the largest single creditor in the worldwide Nortel Networks insolvency proceedings, where her client was successful in obtaining a decision of the Canadian and US Courts allocating US$7.3 billion of sale proceeds on a pro rata basis among 40 worldwide insolvency estates in 19 countries.

Recognized as "Insolvency Litigator of the Year" (2016 and 2018) by Benchmark Canada, D.J. is also the recipient of a Lexpert Zenith award (2017), TMA Toronto "Exemplar" award (2017) and is consistently recognized as a leading practitioner in both the Insolvency Litigation and Financial Restructuring practice areas of The Canadian Legal Lexpert Directory, and in Who's Who Legal for Restructuring and Insolvency. D.J. is also ranked as a leading individual by The Legal 500 Canada, Chambers Canada and by Chambers Global where she is recognized for her involvement in significant matters and is described by interviewees as "extremely strategic." She is considered a "go-to" counsel for all types of stakeholders requiring creative advice to achieve effective workouts both within, and outside of, formal court proceedings.

D.J. is a past guest lecturer at three Canadian law schools, is a regular speaker at conferences, and is the author of numerous articles and publications. She currently serves as VP – Chapter Relations on the TMA Global Executive Board in respect of 53 worldwide Chapters of the Turnaround Management Association, and is past President of the TMA Toronto Chapter. D.J. is also Co-Chair of the Canada / U.S. / Caribbean Region of the International Insolvency Institute.

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SHIPPING AND MARITIME

Feature for:

SHIPPING AND MARITIME

Malta's Maritime Vocation reflected in our Maritime legal development

Ann Fenech*
Fenech & Fenech Advocates
Valletta

As a maritime legal practitioner I consider myself to be very fortunate indeed to operate out of a jurisdiction which is synonymous with the maritime sector.

Starting with our geographic position, Malta straddles one of the busiest waterways in the world, equidistant from the Straits of Gibraltar and the Suez Canal and from Italy and Libya. This strategic location has meant that we have been occupied by every single power that dominated over the Mediterranean basin since time immemorial including the Phoenicians, Carthaginians, Romans, Arabs, Normans, the Knights of St. John of Jerusalem, French and the British. In addition to our enviable location, Malta boasts the deepest natural harbour in the Mediterranean.

These two factors – location and physical geography have ensured that Malta has been used as a trading post first between the middle east and the southern shores of Europe and North Africa for hundreds of years and then as a trading post between the Far East and the southern shores of Europe and North Africa since the opening of the Suez Canal. Thus, anything to do with the carriage of goods by sea became second nature to Malta and the Maltese. Fast forwarding this to modern day, these activities were the precursor of the Malta Freeport Company Ltd which today sees an average of 2.72 million TEU's per annum passing through the terminal discharged from mother ships coming from the Far East to be loaded on feeder vessels to the European mainland.

The Knights of St. John of Jerusalem, in Malta for some 250 years used Malta as their base housing their substantial fleet, leading to the development of a thriving ship building and ship repair industry. When the British came to Malta in 1801 they built the most sophisticated system of dry docks in a number of the natural creeks within the Grand Harbour leading to what was in turn used as a substantial repair naval dockyard pre, during and post the 2nd world war. Fast forwarding this to modern day, from a naval yard the Malta Drydocks became a commercial ship repair yard with one of the docks developed to being capable of taking vessels up to 300 meters. Today the docks are run by Palumbo shipyards providing a first-class repair yard in the centre of the Mediterranean.

Other smaller creeks on the northern and southern shores of Valletta have been ideal for the development of yacht marinas with the Maltese being very keen yachtsmen leading to Malta being used as an ideal base for both local and foreign yachtsmen with interest in yachts ranging from competing in the legendary Rolex Middle Sea race to super yachts of over 100 meters using Malta as their base.

Our position lends itself to all other related maritime activities including the provisioning and supply industry, bunkering industry, towage and pilotage, quite apart from a thriving cruise line industry with Malta being one of the most popular stops in cruise line itineraries.

It is therefore no small wonder that another hugely important maritime activity is of course our shipping register which we consider a very natural development of our maritime vocation. Today the Malta flag is the largest flag in Europe with over 83 million tons.

> TODAY THE MALTA FLAG IS THE LARGEST FLAG IN EUROPE WITH OVER 83 MILLION TONS

This substantial maritime activity lent itself to the development of a very healthy and robust maritime legal presence.

Any commercial activity must count on a stable, certain and reliable legal system. Prior to British rule in 1801, we had occupiers from continental Europe for centuries. Thus, our basic law was based on Roman law similar to Italy and to France. By the time the British arrived we already had a codified system of law

with our British colonizers finding a highly developed legal system and a University which had already been churning out academics for over 200 years. However, the British Period in Malta, 1801 to 1964, coincided with a very important legislative period in England during which a great number of maritime statutes were promulgated by the British Parliament. As a British colony these laws such the Vice Admiralty Court Acts, Merchant Shipping Acts, the Companies Act, and so many other important statutes became law in Malta.

As a result our Merchant Shipping Act today is based on the English model, the grounds of jurisdiction in Rem now contained in our Code of Organisation and Civil Procedure were first governed by the Vice Admiralty Acts of 1840 and later in 2006 were based entirely on the UK Supreme Court Act of 1981 and the grounds found in the Arrest of Ships Conventions of 1952 and 1999.

As far as the meteoric rise of the Malta flag is concerned, this has occurred because of a number of very interesting factors. The law has been very carefully drafted and is subject to regular and periodic amendments to ensure that the legal regime supporting this important pillar of our maritime industry is constantly in line with the prevailing international conventions; English is an official language; the Registry is open on a 24 hour basis; Malta is a signatory to all the important international conventions ensuring the highest possible standards; it is on the white list of the Paris MOU; it has been a Council Member of the IMO for many years and finally and very importantly, whilst the atmosphere and dynamics are commercially driven with owners' and charterers' specific requirements in mind, Maltese law provides a great deal of security to a vessel's creditors. Crew rank very high up in the list of creditors in the case of a defaulting owner as do the providers of supplies. What is however very important and a decisive factor when considering the appropriate flag, is that mortgagees, the financiers of the acquisitions, enjoy a very privileged status under Maltese law. The mortgage is considered to be an executive title. What this means is that in the case of a defaulting owner, a mortgagee can proceed directly against the vessel and enforce its executive title against the vessel without the need to commence an action on the merits. This has, on a number of occasions, proven to be the deciding factor in favour of the Malta flag. In seeking financing from reputable lenders, very frequently owners find themselves in the position of having to suggest flags which give such financiers all the security and comfort they need. In this respect nothing beats providing the lender with a security which is certain and which is not dependent on interminable years in court in the event that things do not work out. So very frequently it is the owner's themselves who bring this important dynamic to the attention of financiers.

Of course, it is one thing to talk about something as being possible and quite another to see how it actually works in practice. Unfortunately, as a result of both the 2008 global recession and as a result of the effect which the Covid 19 Pandemic had on the international shipping sector, we have seen numerous owners go through very challenging times, struggling with repayments of their mortgages. On a number of occasions, the mortgages were refinanced, on other occasions mortgagees decided to cut their losses and proceed with the enforcement of their mortgages in Malta. Once the vessel is brought to Malta and arrested by the mortgagee it is possible for the mortgagee to have the vessel sold either in a Judicial Sale by Auction or by virtue of a Court approved Private Sale in a matter of 6 weeks. This brings to a quick conclusion what are usually interminable delays for the bankrupt owners, the mortgagees and importantly the crew who are often left languishing in no man's land until these matters are resolved.

In addition to the above, our law is continuously being updated to provide for the necessary framework and solutions required by today's international maritime community ranging from yachting to bunkering. All of this is evidence of the fact that our maritime legal practitioners work hand in glove with Transport Malta – the maritime regulator and the legislator, with the aim of continuing to provide a maritime legal framework which can properly support all of these diverse aspects of the maritime sector which are constantly developing and in constant evolution in response to the ever changing demands of the international shipping community.

*Ann Fenech is also the Vice President of the Comite' Maritime International

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Ms Reiko Yoshida is an attorney (*Bengoshi*) admitted in Japan and the Republic of the Marshall Islands, and a partner in Atsumi & Sakai; she has advised on ship financings for some twenty years, representing Japanese and non-Japanese shipping owners, shipping operators, governmental and private financial institutions, leading complicated multi-jurisdiction shipping finance transactions and advising on the financing of high value vessels such as LNG carriers; she also advises on corporate and maritime matters under the laws of the Republic of the Marshall Islands, domestic and international M&A, reorganizations of groups of companies and successions of business of companies engaging in shipping business.

Her recent transactions include:

- advising on M&A and succession of business of major Japanese shipowners with values of USD 150,000,000;
- advising a major Japanese shipping operator leading a consortium of major Japanese shipping operators and a local government-related shipping operator on the financing and/or transfer of shares in respect of three LNG ships, with values of USD120,000,000-190,000,000;
- advising a senior lender in program debt consisting of ECA facilities, senior bank facilities, senior bonds, subordinated bank facilities and subordinated bonds, to a wholly owned subsidiary of a middle east government-related gas transportation operator through 25 separate and cross collateralized SPCs incorporated in the Marshall Islands, with values of USD 5,700,000,000;
- advising a major Japanese shipping operator on the acquisition of a company engaged in an LNG project, with a value of USD500,000,000;
- advising Japanese financial institutions on the financings of numerous LNG ships, with values of USD160,000,000-200,000,000;
- advising Japanese governmental and financial institutions on the financings of a number of 14,000-20,000 TEU container vessels, with values of USD70,000,000-200,000,000;
- advising a Japanese financial institution as lender to Luxemburg trust as fiduciary owner of the rights as lender in a bilateral loan transaction in respect of three MR Tankers and a VLGCA to four SPCs owned by group companies of European multiple shipowners with value of approximately USD 77,000,000;
- advising Japanese and non-Japanese financial institutions, shipping operators and shipowners on the financing of some 60 vessels of various types per year with values of USD30,000,000-180,000,000; and
- advising a major Japanese bank on a USD117,000,000 financing for construction of a dockyard by a Japan-China JV company, and registration of foreign debts with the State Administration of Foreign Exchange of China (SAFE).

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Ann Fenech is the managing partner of Fenech and Fenech Advocates and head of the marine litigation department. In 1986 she qualified as a lawyer and joined the shipping and commercial firm of Holman Fenwick and Willan in London until 1991 when she joined Chaffe, McCall, Phillips, Toler and Sarpy in New Orleans.

In 1992 she joined Fenech and Fenech Advocates setting up the marine litigation department. She deals exclusively with the whole spectrum of ship-related matters ranging from disputes arising out of salvage, collisions, towage, pilotage to ship building contracts, and from shortage and contamination claims to bunker disputes. She has substantial experience in providing immediate casualty response acting for both plaintiffs and defendants. She represents a number of banks and other financial institutions in enforcement proceedings and has extensive experience in judicial sales by auction and court-approved private sales.

She is the president of the Malta Maritime Law Association and was the chairman of the pilotage board in Malta from 1994 to 2008. She was responsible for the drafting of the Pilotage Regulations and the sections on jurisdiction in rem in the Code of Organisation and Civil Procedure; she is an accredited arbitrator with the Malta Arbitration Centre and is a lecturer at the University of Malta on Charter parties, Salvage, Towage, Pilotage and Collisions and at the International Maritime Law Institute where she lectures on the practice of maritime law. She is the legal correspondent of the West of England P&I Club, The American Club and Steamship Mutual. Over the years, she has been involved in the majority of high profile shipping casualties either in Malta or affecting vessels flying the Malta flag.

In October 2013, she was appointed Honorary Patron of the Malta Law Academy. In June 2014, she was elected to the Executive Council of the Comité Maritime International (CMI), she Chaired the international working group on Ship Finance Security Practices and is a member of the international working group on Illegal Arrests. In June 2017 she was elected to serve a second term on the Executive Council of the CMI. In November 2018 she was elected Vice President of the CMI. She was also appointed co-chair of the CMI International Working Group on the international effects of judicial sales and is the co-ordinator for the project at UNCITRAL Working Group V1. In October 2015 she was elected to sit on the Board of the Malta Maritime Forum.

In 2012, 2014 and 2015 she was awarded Best in Shipping Law at the European Women in Business Awards held in London.

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Vasanti Selvaratnam QC is a senior Silk practising as both Counsel and Arbitrator across a wide range of industry sectors, regularly handling multimillion dollar commercial disputes in shipping, trade and commodity disputes, banking and finance, insurance, jurisdiction disputes, conflict of law issues and civil fraud. She also specialises in all forms of interim relief, including freezing orders and anti-suit injunctions. Vasanti is particularly noted for her user friendly "hands on" approach to cases and for her ability quickly to get to grips with disputes raising complex factual and technical issues which require a sound grasp of expert evidence and mastery of detail. Vasanti was shortlisted as Chambers and Partners Shipping Silk of the Year in 2019 and has been consistently highly rated in the legal guides throughout her many years in practice at the English Bar. Vasanti also speaks and publishes on a variety of legal topics, including most recently an article on English law and good faith published in the May 2020 edition of the LMCLQ.

Reported leading cases include The Alexandra 1 [2018] EWCA Civ 2173, (leading Court of Appeal decision concerning the inter-relationship between the narrow channel rule and the crossing rule under the international Collision Regulations, due to be heard on appeal by the Supreme Court in October 2020); the well-known House of Lords decisions in The Starsin [2004] 1 AC 715 and The Nagasaki Spirit [1997] AC 455, the Court of Appeal decision in The Wadi Sudr [2010] 1 Lloyd's Rep 193 (leading case on the arbitration exception, the Judgments Regulation and issue estoppel), Joint Stock Asset Management Co Ingosstrakh-Investments v BNP Paribas [2012] EWCA Civ 644 (leading case on non-contractual anti-suit injunctions), The Stolt Kestrel [2015] EWCA Civ 1035 (leading case on extensions of time under section 190 Merchant Shipping Act 1995); and a number of important first instance decisions including The Rubicon Vantage [2020] 1 Lloyd's Rep 383 (first reported case to consider a hybrid parent company guarantee and the principles applicable to its interpretation) and Emirates Trading Agency v PMEPL (ground breaking 2014 decision on multi-tiered friendly discussion clause as a condition precedent to right to commence arbitration).

Vasanti was called to the Bar in 1983 and received her LLM in 1984. She has been a practising barrister at the Commercial Bar since 1985, a Recorder from 2000 – 2018, Queen's Counsel since 2001; a Bencher of Middle Temple since 2011 and a member of the LOF panel of arbitrators since 2013. She is chair of the education sub-committee of the London Shipping Law Centre and a Consultation Board member of Practical Law Arbitration. Vasanti is also joint head of Chambers of The 36 Group, one of the largest multi-disciplinary sets of barristers chambers in London.

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TAX

Features for:

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Permanent establishment: a tax concept that every business executive should appreciate

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The concept of permanent establishment (PE) is arguably one of the most important issues in treaty-based international tax law. Indeed, it is largely this concept that decides how much tax a company selling goods or services from Country A to Country B is charged – by both countries, in the end.

It is perhaps the most dynamic issue, too.

The first statement is confirmed by the fact that virtually every single one of the thousands of present-day bilateral tax treaties —the very bedrock of the cross-border tax architecture — use PE as the main tool via which to establish taxing right for the source jurisdiction over a foreign entity's unincorporated business activities.

The second statement is validated by the fact that PE – or, more accurately, *changes* to the PE concept – sits at the very heart of government and Organisation for Economic Co-operation and Development (OECD) focus alike, forming the central crux of the Base Erosion and Profit Shifting or "BEPS" project[1], often referred to as the largest set of changes experienced since tax treaties themselves were developed.

Today, the focus on PE (and its family member, nexus) is equally (if not more) strong as it was in the 2015 BEPS work[2]. This is due to the advent of the BEPS 2.0 program of work[3] — originally conceived as a way to mop up hitherto unfinished parts of the original BEPS project that were designed to address the tax challenges brought about by the existence of the digital economy, but quickly moving past that ring-fenced descriptor, affecting virtually every single company doing business internationally.

Looking forward, this unfinished work is at the center of the global tax debate today and, should consensus be found on an increasingly complex project, will impact cross-border taxation for years to come. These are not small changes. They are fundamental. Who should have the rights to tax companies? And on what basis?

It is for that reason alone that business leaders outside the tax department should ensure they have a robust understanding of PE, its history and its role in a debate that may define the next hundred years of taxation.

PE 101

In the simplest terms, having a PE means having a taxable presence outside your company's state of residence. That may seem like a simple enough concept, but fast forward from the advent of tax treaties[4] and 100 years into a future of globalization, communications and what some have described as technological "scale without mass"[5] and tax authorities have expanded the concept way beyond the "bricks and mortar" definition. Tax authorities now identify PEs caused by overseas contractors, short-term business travelers, warehouse space, digital activity and many more activities.

> PE SHOULD BE A TOPIC THAT ANY COMPANY EXECUTIVE SHOULD FEEL THAT THEY UNDERSTAND

The existence of PE will typically give rise to several tax effects. The most important and obvious effect, both from legal and practical viewpoints, is that the PE principle under tax treaties is decisive in determining a non-resident enterprise's tax obligation due to business activities with economic allegiance[6] to more than one country – through a branch office, representative, project office or even the simple signing of a contract. But while PE might seem like a relatively straight-forward concept to manage, the opposite is in fact true.

While a charge to tax might not be entirely expected by a business, it is unlikely to

cause a business to exit a market or change its business model. But while a failure to disclose a PE is often the first investigation a foreign tax authority will undertake, such an investigation has been compared to layering back an onion — uncovering layers of multi-year and multi-geography consequences (which arise through successive amended returns) and, ultimately, making one's eyes water as a result.

As is the case with many tax issues, the penalties (both civil and criminal) that may be applied as a result of the failure to disclose a PE vary wildly. While Thailand may only charge a 1.5% monthly surcharge on tax shortfall, Italy is a completely different ball game – imprisonment is possible, along with a penalty of the unpaid tax[7]. Additionally, an increasing number of countries are making their criminal tax laws extra-territorial and/or simultaneously targeted at non-tax-department executives within a company; in 29 of the 42 (69%) countries responding to an EY criminal sanctions survey in 2019, such laws could apply to a company or their legal representative acting or existing in another country. These are not reasons to not do business in a market – but they do highlight the need to ensure that appropriate tax corporate governance is in place, and that ever-shifting local regulations are continually assessed and managed.

BEPS 1.0

While it would be wrong to sweep nearly a century of technical developments under the rug, it is also fair to say that it was not until after the global financial crisis of 2008-9 that policy-maker's attentions really turned to look more closely at PE.

What arguably began as a crackdown on tax havens quickly evolved into a broad debate regarding how and where multinational enterprises report their income and pay their taxes. In the 2013-2015 design phase of the BEPS project, many countries expressed concern that cross-border tax systems had not kept pace with how companies do business in a globalized, digitally-driven economy. The international community does not easily reach consensus on issues that affect sovereign purse strings, yet in response to G20 requests, and with the input of its member countries, the OECD developed and issued its 15-part BEPS recommendations, Action 7 of which addressed PE[8]. These recommendations, described by the OECD's Secretary-General, the "most fundamental change to the international tax rules since the 1920's" effectively tightened many of what policy-makers saw as the most open-to-abuse elements of PE rules, used by companies, they say, to avoid having a taxable presence in a jurisdiction.

Action 7 proposed several changes to the definition of permanent establishment in the OECD Model Tax Convention[9] (the template upon which the majority of countries base their PE and other tax rules) to counter such avoidance. These include:

- Changes to ensure that where the activities that an intermediary exercises in a jurisdiction are intended to result in the regular conclusion of contracts to be performed by a foreign enterprise, that enterprise will be considered to have a taxable presence in that jurisdiction unless the intermediary is performing these activities in the course of an independent business.
- Changes to restrict the application of a number of exceptions to the definition of permanent establishment to activities that are preparatory or auxiliary nature and will ensure that it is not possible to take advantage of these exceptions by the fragmentation of a cohesive operating business into several small operations; and
- Changes to address situations where the exception applicable to construction sites is circumvented through the splitting-up contracts between closely related enterprises.

BEPS Action 7 was implemented by a large number of jurisdictions in the years after the recommendations were made.

BEPS 2.0

While the BEPS recommendations were clearly significant, they did not quite finish the job as the OECD intended. This is especially the case as it relates to Action 1[10] of the BEPS recommendations, those designed to tackle the Tax challenges arising from the digital economy. Here, the work was explicitly carried forward into 2020, on the basis that more time was needed — especially when the task at hand is to carve up the revenues earned by large tech-heavy multinational companies, many of whom are the champions of the countries in which they are headquartered.

These companies can foster, it is argued, a mismatch between where profits are currently taxed and where and how certain digital activities create value. As was noted in an EY publication in early 2018[11]:

> *"To be clear, notwithstanding the fact that taxing digitalized activity was first addressed within the OECD's BEPS project, the current debate is not about tax avoidance or the existence of stateless income. It is, rather, about the division of tax rights among countries who consider that their citizens contribute to the profits made by some digitally focused companies, even if they do so via unconventional means."*

Many policymakers believe that the value creation mismatch is the result of a combination of several factors. First, they say that businesses can today supply digital services where they are not physically established, for which the European Commission coined the phrase "scale without mass." Second, they posit that digital business models tend to have a heavy reliance on intellectual property assets, and are therefore more mobile. And third (and perhaps the biggest challenge in the debate) the Commission believes that a higher level of value than currently assessed comes from users' participation in the digital activities that some platforms enable — commonly described as "user value creation".

Through 2019, though, it became clear that the so-called BEPS 2.0 program (as it quickly became known) was not just about taxing digitally-native companies who were selling into other countries without being physically present there. Instead, it was clear, it had (and has) the potential to impact virtually every company that carries on cross-border business today. Indeed, EY's early-2019 comment letter to the OECD[12] illustrates this:

> *"..while the digitalization of the economy is a factor that fuels this project, the project has implications that go well beyond digital business models and potentially affect virtually all cross-border activity. We would encourage the OECD to limit the use of digital references in describing this project. It should be clear to country policymakers and stakeholders that this project is more sweeping than a digital label might suggest."*

Final thoughts

The objective of this short article was not to delve into the deepest coverage of BEPS 1.0 or 2.0. Instead, it is to highlight that the very concepts of nexus and PE are likely to see change in the years ahead, and that that change can affect businesses at both institutional and personal levels.

I noted earlier in this article that PE is pervasive. In fact, even COVID-19 has a significant PE element to it – personnel working in a foreign country may have become stranded there, a company's supply chain may need to be reworked in order to locate scarce

materials and many companies may be running up against risks from rules such as India's Place of Effective Management[13], when managers use virtual connectivity to run operations from afar. Put simply, businesses need to be vigilant about every aspect of their value chain to mitigate any unforeseen tax and other risks caused by PEs.

Tax rates aside, ask the leader of the tax department of any large company which one technical topic is the most important to track and address, and it is likely that PE will be the answer. As such and given its close interaction with the strategic plans of any business pursuing overseas growth, PE should be a topic that any company executive should feel that they understand.

The author wishes to extend special thanks to the EY Global Tax Policy team for their supports to this article.

The above are the views of the author and do not represent the views of the EY organization.

1. Source: https://www.oecd.org/tax/beps/
2. Source: https://www.oecd.org/tax/beps/beps-actions/
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Preparation – the key to mitigating post-Covid-19 tax controversy

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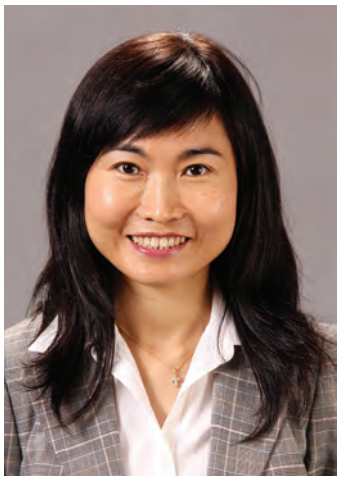

In response to the economic impact of COVID-19 quarantines and lockdowns, governments around the world have offered unprecedented fiscal support and stimulus packages to assist businesses and protect jobs. Because many took on additional debt to provide this relief, it is reasonable to expect they will eventually return their focus to tax increases and tax collection. With this comes increasing potential for tax enforcement and controversy.

In order to minimize their risks, businesses should consider taking steps now to establish internal best practices and develop robust working relationships with tax authorities.

The global tax landscape is complex and multi-faceted. In addition to new laws providing fiscal support and stimulus packages, many tax authorities worldwide relaxed tax compliance obligations – albeit temporarily – to help businesses overcome the challenges arising from the pandemic. In some instances, physical audits and court hearings were paused or suspended.

The key objectives of such measures were to give businesses more time to comply, more time to pay, not to penalize them for late tax filings or payment, and in some cases to lower their tax bases or allow businesses to carry back their losses more generously. The overarching aim was to help ease cashflow and relieve staffing issues.

Yet approaches varied from jurisdiction to jurisdiction. Singapore, Thailand and Vietnam, among others, allowed deferral of tax payments for instance, while Australia, Germany, Japan, Malaysia and the UK, along with other jurisdictions, also waived penalties and interest on late payments to help businesses.

Indirect taxation measures included postponement of general sales tax or value- added tax (VAT) filing obligations in jurisdictions such as Denmark, Japan and the Philippines. Deferred payment of these taxes was allowed in Australia, Taiwan and Vietnam among others. In Mainland China, there were exemptions for small-scale VAT taxpayers in Hubei, and reduced VAT collection rates for those in other regions.

This varied and constantly shifting landscape continues to be reflected on an ongoing basis in EY Tax Controversy COVID-19 Response Tracker [https://www.ey.com/en_us/tax/how-covid-19-is-causing-governments-to-adopt-economic-stimulus—], a comprehensive and regularly-updated compendium of measures taken across 138 jurisdictions around the world.

Businesses who weren't able to operate normally welcomed the government support they received in the areas of both direct and indirect taxation. Those measures also helped ease the burden on the governments themselves, with many tax authorities suspending their public-facing services at the height of the lockdowns.

However, with massive support and stimulus packages having been enacted around the world in order to aid economies and businesses, governments now need to shore up their treasuries, recoup their investments by way of increased tax revenues; action of this type may already be underway. Indeed, a number of juridictions have introduced tax incentives to bolster inbound investments, including Malaysia, Mainland China and Indonesia.

We also see that tax authorities have resumed activities in the past few months and have begun sending letters querying tax submissions. This is not to say that tax audits have increased but rather that tax authorities are making up for lost time.

> THOROUGH AND TIMELY PREPARATION CAN INDEED PREVENT POOR PERFORMANCE AND INSTEAD, ENCOURAGE SOLID TAX RISK MANAGEMENT

The fact that there is likely to be a lag before tax authorities return to a full pre-COVID-19 audit environment provides businesses with a significant opportunity to prepare and get ahead of the game – to be proactive and prevent audits from occurring in the first place.

There are a number of steps which, if taken now, can help businesses avoid or at the very least minimize tax controversy and build good working relationships with their tax authorities. Investing in these now may save time, money, stress and potential sanctions further down the line.

TAX

Ensure complete accuracy

Making sure that everything is correct and error-free is one sure way to give tax authorities nothing to query. This means investing in accounting and tax submission processes. Ask where errors or inaccuracies could creep in and strengthen the way in which work is carried out, so that information is easily retrievable and verifiable.

Establishing leading practice and being able to demonstrate to tax authorities what the business has done can help build trust and remove tax controversy from management's to-do lists, allowing them to concentrate on the post-COVID recovery of their businesses.

Utilize advance tax rulings

Where there could be doubt over the tax treatment of a particular structure or transaction flow, early dialogue with tax authorities can be valuable. This is particularly true for businesses with activities across a number of jurisdictions among which tax treatments may vary.

Obtaining an advance tax ruling-where available – can save uncertainty, misunderstanding and potentially cost at a later date. This will also show tax authorities that the business is focusing on tax issues and is keen to "do the right thing". This is especially the case where COVID-19 disruptions to businesses have introduced additional payments or costs which can pose tax deductibility issues to the payers and taxability issues to the recipients.

Take advantage of advance pricing agreements

Complex transactions, typically in relation to transfer pricing for international transactions, can be controversial. They may give rise to investigations that can prove costly in both time and money. It may be advisable to apply for an advance pricing agreement (APA), so that a business can explain its prospective transactions or proposed arrangements to tax authorities in advance and gain a ruling on their treatment. An APA can help avoid an audit of the price attached to particular goods or services, and can enhance dialogue and trust, and minimize misunderstandings at a later date.

Participate in "co-operative compliance" programs

Many jurisdictions, including Singapore and Australia, offer special compliance programs and there are benefits to be had from participating, not least because doing so establishes a regular dialogue with the tax authority. This means the business and the authority know each other, which can lead to agreements on tax treatment being forged well in advance of the possibility of a tax audit or investigation being triggered.

Engage with the tax authority

Not all tax authorities offer such programs, so it can be worthwhile establishing a relationship through regular dialogue. Discussing complex transactions and effectively developing and enhancing the relationship over time leads to less likelihood of future tax surprises and investigations.

Implement a tax governance framework

Tax authorities around the world are increasingly keen to ask businesses to put tax governance frameworks in place. These, like other governance measures, establish procedures and processes and appoint the board and management to take responsibility for all tax matters within a business. Having established such a framework, it is always available to demonstrate to tax authorities the seriousness with which the business treats its tax obligations.

There is a significant internal benefit for businesses too – that of being in full control of tax risk and being able to report on it to stakeholders in the business, such as shareholders, lenders and regulators. This enables enhanced control of reputational risk arising from tax risk, especially in jurisdictions where tax authorities may publicize non-compliant businesses.

Going digital

Increasingly, tax authorities are equipping themselves with cutting-edge technology to assist in retrieving lost or errant tax revenues. This involves use of wide-ranging and powerful tools to track business activities across a variety of national and international data sources. It also includes exchanging account and tax information with authorities in other jurisdictions – global initiatives encouraged by the Organization for Economic Co-operation and Development (OECD) and the G-20.

On a more granular level, the use of software and algorithms to explore company accounts and ledgers is becoming more common place among tax authorities. It makes sense from a tax compliance perspective, therefore, for a business to ensure that when tax authorities call for a set of data, it is in a position to provide it, with confidence, often in near real time.

A new world

In summary, keeping abreast of the kaleidoscopic international tax landscape is a huge data collection and analysis job for any business. The more geographically spread its operations are, the more complex and rapidly changing the rules are likely to be. As tax authorities resume operations post-COVID-19, they will be tasked with being as efficient as possible in generating revenues, helping to defray the cost of government support and stimulus.

It is therefore vital that businesses are proactive but also flexible in adopting new tax laws, new internal procedures and new adaptions to the way in which they manage tax. Installing robust systems, processes and governance will go a long way toward avoiding tax controversy – and regular dialogue with tax authorities plays an important role too.

Prevention of tax controversy is far less damaging and time-consuming than trying to cure a problem once it has occurred. Thorough and timely preparation is, as ever, the key to solid tax risk management.

The views in this article are the writers' and do not necessarily reflect the views of the global EY organization or its member firms.

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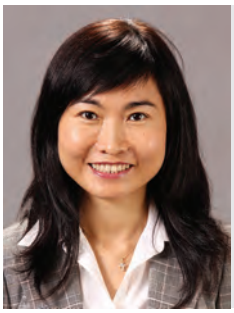

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Tracy has been the Asia Pacific Business Tax Services ("BTS") Leader over 3 years. Before this role, she had been the Tax Managing Partner of EY Hong Kong and Macau for more than 6 years.

She has been voted as one of the "leading tax advisers" in Hong Kong by the Legal Media Group Guide to the World's Leading Tax Advisers in each edition since 2007. She regularly contributes articles and presents tax seminars on latest tax development and changes.

Tracy has been a partner of 16 years and is experienced in providing tax consulting advice for conglomerates which are active in inbound and outbound investments activities. Tracy is based in Hong Kong and works closely with her fellow partners of various EY offices outside Hong Kong in advising client's cross border supply chain and distribution models. Her roles on these significant engagements included direct tax planning, advising on the information possibly requested by and assistance in explaining the business models and transactions in question to the Hong Kong tax authorities ("IRD").

Tracy is often approached for advice on seeking agreement with the IRD on transactions with significant tax implications. Examples included – a refund claim on past withholding tax paid of over US$60M, a deduction claim on approximately US$200M of payments to group companies operating outside Hong Kong, etc.

In her role of Asia Pacific Area BTS Leader, Tracy drives the relevant tax services growth across 6 Regions – APAC FSO, ASEAN, Greater China, Japan, Korea and Oceania which covers more than 20 countries. EY is a globally connected tax planning and advisory practice. BTS combines Private Client Services, Tax Policy and Controversy, Quantitative Services, Customer Tax Operations Reporting Services, Business Tax Advisory services enabling to provide insightful, multi-country tax advisory services in a connected and consistent manner throughout every stage of the tax life cycle; planning, accounting, compliance and controversy.

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Head of White & Case's Global Tax Practice, Kim Marie Boylan is a highly respected tax attorney. She has a long track record of creating innovative, practical approaches for the successful resolution of tax disputes. A renowned tax litigator, she also effectively utilizes the IRS's administrative appeals procedures, fast track, mediation and other alternative dispute resolution processes. Kim represents a broad spectrum of companies in connection with sophisticated domestic and international tax issues. Her practice focuses mainly on civil tax matters, but throughout her career, she has also successfully represented clients on criminal tax matters.

As recognized authority on privilege, Kim often advises companies in connection with the complicated issues that arise in this area, and numerous clients seek her knowledge and insight in judicial proceedings in the United States Tax Court, United States Court of Federal Claims, and in various district and appellate courts. Her practice encompasses transfer pricing, as well as the Advance Pricing Agreement process, an area of practice that is greatly enhanced by her credentials as a Certified Public Accountant. Kim has also testified on clients' behalf before the United States Treasury Department, Internal Revenue Service and the Financial Accounting Standards Board.

Many of Kim's cases are never made public because of her success in resolving tax disputes at the administrative level. Recent successes include obtaining an almost 90 percent concession of a cost sharing buy-in issue for a global company undergoing an IRS audit and settling a contentious audit involving novel issues in the insurance industry through the IRS Fast Track process, again obtaining an almost complete IRS concession. Kim is also one of only a handful of tax controversy lawyers representing a Swiss bank in connection with the U.S. Department of Justice's Program for Non-Prosecution or Non-Target Letters for Swiss Banks.

Notwithstanding her success at resolving cases short of litigation, Kim is a skilled litigator who has litigated some of the seminal cases in tax controversy over her almost 30 year career. Examples include 'United Parcel Service of America v. Commissioner (economic substance)' and 'Riggs National Corporation & Subsidiaries v. Commissioner (foreign tax credits)'. She was also involved in virtually every case in the series of cases that culminated in the U.S. Supreme Court's recent decision in Home Concrete & Supply, LLC v. United States (six-year statute of limitations). Unlike many tax litigators, Ms. Boylan is skilled at handling cases in all three potential tax litigation forums – the United States Tax Court, the United States Court of Federal Claims, and the various United States district courts. Clients know that her development of a case at the administrative level always takes into account possible litigation and her cases are managed with that possibility in mind.

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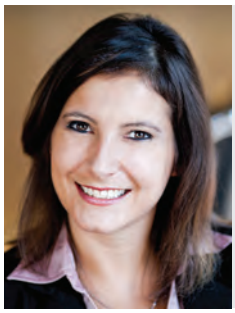

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Ms Dvornic is a member of the Executive Committee of the Tax Section of the New York State Bar Association and a member of the Tax Section of the American Bar Association.

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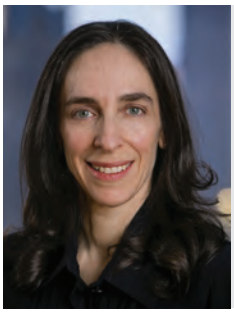

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Deborah L Paul is a partner in the Tax Department at Wachtell, Lipton, Rosen & Katz where she focuses on the tax aspects of corporate transactions, including mergers and acquisitions, joint ventures, spinoffs and financial instruments. Ms Paul has been the principal tax lawyer on numerous domestic and cross-border transactions, including strategic acquisitions and private equity buyouts, in a wide array of industries, including telecommunications, oil and gas, food, defense and energy. Ms Paul is a frequent speaker at Practising Law Institute, American Bar Association, New York State Bar Association and New York City Bar Association conferences on tax aspects of mergers and acquisitions and related topics. She is rated a leading tax lawyer by *Chambers USA, Super Lawyers,* the *Legal 500* and *Who's Who Legal.* She was elected partner in 2000.

Ms Paul is an active member of the Executive Committee of the Tax Section of the New York State Bar Association. Prior to joining Wachtell Lipton in 1997, Ms Paul was an assistant professor at the Benjamin N. Cardozo School of Law (1995-1997) and an acting assistant professor at New York University School of Law (1994-1995).

Ms Paul received an A.B. from Harvard University in 1986, a J.D. from Harvard Law School in 1989 and an LL.M. in taxation from New York University School of Law in 1994.

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Jodi J Schwartz focuses on the tax aspects of corporate transactions, including mergers and acquisitions, joint ventures, spin-offs and financial instruments. Ms Schwartz has been the principal tax lawyer on numerous domestic and cross-border transactions in a wide range of industries. She was elected partner in 1990.

Ms Schwartz received her B.S. in Economics *magna cum laude* from the University of Pennsylvania in 1981, her M.B.A. from the University of Pennsylvania (Wharton School) in 1984, her J.D. *magna cum laude* from the University of Pennsylvania Law School in 1984 and her LL.M. in taxation from the New York University Law School in 1987.

Ms Schwartz is recognized as one of the world's leading lawyers in the field of taxation, including being selected by *Chambers Global Guide to the World's Leading Lawyers, Chambers USA Guide to America's Leading Lawyers for Business, International Who's Who of Business Lawyers* and as a tax expert by *Euromoney Institutional Investor Expert Guides.* In addition, she is a member of the Executive Committee and past chair of the Tax Section of the New York State Bar Association and also is a member of the American College of Tax Counsel.

Ms Schwartz serves as an officer of both the UJA-Federation of NY and the Jewish Federations of North America, serves as a member of the board of Steep Rock Association and serves on the Board of Overseers of the University of Pennsylvania Law School. Ms Schwartz lives in Manhattan with her husband, son and daughter.

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TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS

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Chie Kasahara leads the IP, TMT and Life Sciences teams at Atsumi & Sakai, and advises many leading non-Japanese and Japanese corporations on protecting their intellectual property and rights in a broad range of businesses, including technology, media and retail. Her practice is focused on Intellectual Property, Data Protection, Entertainment, Information Technology, Life Science, Cross-Border Commercial Transactions and Corporate Law.

Her recent transactions include advising:

- major telecommunications carriers on telecommunication business and IT issues;
- a major international social networking service provider on various aspects of its business in Japan, including data protection and privacy issues;
- a leading networking service provider on data search and data collection issues, including regulatory issues on deep packet inspection;
- the Japanese subsidiary of a major pharmaceutical production company on trademark disputes and brand protection;
- Japanese and non-Japanese advertising agencies on advertising agreements, disputes, etc.;
- software development and distribution companies on software licensing;
- major television production companies and advertising agencies on the legal and regulatory requirements for TV production and advertising;
- a leading international software developer in copyright infringement (including claiming compensation from infringers);
- Japanese and non-Japanese pharmaceutical companies on data protection and privacy issues; and
- a major computer company in relation to data protection in Japan.

Chie is a managing director of the Entertainment Lawyers Network, an active member of the IP Lawyers' Network Japan, the Global Advertising Lawyers Alliance (GALA) and the Corporate Law Study Group of the Dai-ichi Tokyo Bar Association.

She has also authored many commentaries on IP, Data Protection, Corporate Law, and Commercial Law issues. Her publication includes:

- "Publication of clinical trial information and the disclosure of conflict of interests in research in five countries – National laws and regulations in UK, France, Germany, Netherlands, and the US –," Journal of Clinical Therapeutics & Medicines No.34 No.6, published in Japanese (2018) [Co-author]
- Getting the Deal Through – Telecoms and Media 2018, Japan Chapter, Law Business Research Ltd. (2018)
- Getting the Deal Through – Advertising and Marketing 2018, Japan Chapter, Law Business Research Ltd. (2018)
- The Intellectual Property Review – Seventh Edition, Japan Chapter, Law Business Research Ltd (2018) [Co-author]
- Q&As about Entertainment Law: Rights, Contracts, Troubleshooting, Related Laws and Overseas Transactions, Civil Law Institute (2017, 2019) [Co-author]

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Arlene Arin Hahn is a partner in the Technology Transactions Practice, within White & Case's Global M&A Group and Global Intellectual Property (IP) Group. Arlene also serves as the Chair of the White & Case's Global Diversity Committee, Co-Chair of the New York Women's Initiative, and a member of the Firm's Global Women's Initiative.

Arlene represents clients in a variety of IP and technology matters ranging from technology licensing and other standalone technology transactions to the IP aspects of private equity, M&A and corporate transactions as well as restructurings and workouts.

Arlene has advised on hundreds of consummated transactions, ranging from formative license agreements and joint development agreements to initial start-up investments and whole business securitizations to some of the largest M&A deals in their respective industries. She represents strategic and financial clients in a broad range of industries, including software, cloud/SAAS, AI/ML, semiconductors, consumer products, industrial products, retail, media, digital healthcare, and telecommunications.

Arlene has extensive experience with stand-alone IP matters, including patent licensing, technology transfer, joint ventures and strategic alliances, joint development, software licensing, outsourcing, content licensing, trademark coexistence, and merchandising and brand licensing, as well as settlement of IP disputes. Arlene also regularly oversees significant IP and commercial due diligence investigations in the context of analyzing complex commercial or technical aspects of corporate transactions.

Prior to focusing on transactional work, Arlene also litigated a variety of intellectual property disputes, including patent infringement, trademark and copyright infringement, counterfeiting, unfair competition and trade secret misappropriation.

From January 2006 to April 2007, Arlene lived in Osaka, Japan where she was seconded to work as in-house counsel to major international conglomerate.

Arlene has appeared as a featured guest on Bloomberg TV and is a member of Law360's 2019 Advisory Board for Intellectual Property. Arlene has been recognized by numerous publications, including Intellectual Asset Management (IAM) Patent 1000, Legal 500, and Euromoney. She is an Advisory Board Member to NYU School of Law's Grunin Center for Law and Social Entrepreneurship and Co-contributing editor of author for "Technology M&A", Lexology/Getting the Deal Through, 2018-2020.

Arlene received her B.S. in Biology from MIT and her J.D. from NYU School of Law (*Associate Editor, NYU Law Review*).

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TRADEMARKS

Feature for:

TRADEMARKS

My Lockdown Memoirs

Uwa Ohiku
Jackson Etti & Edu
Lagos

I went into lockdown on 24th March, this year, after a week of speculations on what the government would announce. I simply stayed back home from that day and have not been back at work, physically, since the day before.

The words coronavirus, covid-19 and Wuhan, first made their appearance in my subconscious in mid-January and I remember musing……..whatever is going on in China? As quickly as those thoughts came, I dismissed them; and why ever not? China is over 10,000 kilometers from Lagos, where I live and surely, that distance meant that whatever was going on couldn't get to me. It would first have to cross many oceans, seas and rivers wouldn't it? Silly me. I totally forgot that with all the international traveling taking place, we humans, would be the transmitters, wouldn't we!

Fast forward to March 5th and I am at an awards ceremony in London, in the midst of 400 or more. No social distancing (that was soon to come), no masking either, but I must have irritated everyone at my table with the number of times I sprayed liquid disinfectant into my palms. Probably every 2 minutes or less. After a while, my paranoia got the better of me and I started offering a spritz or two to the other occupants at the table, some of whom politely declined, trying hard not to roll their eyes. I pretended not to notice. Little did we know what was about to hit us all!

I have now effectively been in lockdown for 5 months and its looking like another 6 weeks or potentially longer, as I fall within the age range that cannot take chances, even as we begin the process of returning to some modicum of life as we knew it. I have learned a lot about myself and others; about situations and things; about what truly matters (good health, family, relationships) and what quite honestly, doesn't cut it (the increasing grey hairs on my head, ha ha!). Lockdown has taught me patience in many ways, but also impatience in different ways too (I simply don't have time for irrelevancies anymore). It has taught me to be kinder and more accepting of others and myself. I mean, the other day I had a video meeting with a client; I wore no makeup, no wig or hair extensions either. The meeting was excellent. Wow! That was definitely an epiphany moment for me!

These are a few more of my lockdown lessons and experiences:

Getting Ready For Lockdown: Stocking Up; Local Remedies, Myths, etc.

In the run up to lockdown, I was in full shopping mode, stocking up on everything we could possibly require for the next 3 months, in the first instance: enough Vitamin C, Cold & Flu meds and Cough syrups to run a small pharmacy; several hundreds of bottled water, Groceries, toiletries, etc. My pantry was a mini store. Everything was available, as the thought of running out was unbearable. We were going to 'war' against this virus and taking no chances!

Then came the avalanche of video clips from doctors, nurses, patients and a host of other 'experts', sharing their knowledge, expertise and experiences about this pandemic-causing virus, resulting in information overload. It seemed that everywhere you turned, there was a remedy being proffered or treatment protocol advocated, with local herbs taking a center stage in other cases. We were advised to stop using air conditioners, because the virus apparently thrives in cold conditions. So, I have gone more than 3 months without any air conditioning, which is unbelievable, as pre-covid, I couldn't do without it. I tried various immunity boosting combinations – Turmeric, Ginger, Black Pepper, Lemon, Selenium, Zinc, Garlic. Name it, and I tried it. I now have a vegetable and herb patch in my garden, where am growing Ginger, Garlic and Turmeric as well as lettuce, spinach and chillies.

FIND YOUR 'HAPPY'…… ……; THIS TOO SHALL PASS

TRADEMARKS

Change is Constant; Think Differently & Outside the Box

These are clichés we hear so many times, but the lockdown means they are constantly in our face, playing out every day, with the changes in work structures and processes, meetings with clients and colleagues (all remote), habits, etc. You know how your hand is forced when things are out of your control? That's exactly how it has been. That technology you didn't think you could ever understand? Well, covid didn't give you any choice anymore; you simply got on with it! We were and are still constantly thinking of new ways to do things. On a few occasions I was faced with getting things done, sometimes in rather bizarre ways, but by focusing on the desired outcomes rather than the processes involved, I pulled through. I remember a particularly stressful project, which report I had to stay up all night to re-format to the client's specific taste. How I survived that night is still a wonder, but that experience tells me how resilient and tenacious we can be, bringing to mind, 2 more clichés: **a).** Begin with the end in mind and **b).** The end justifies the means. Very true.

Pace Yourself; Find Your Rhythm, Switch Off Sometimes

'Life is a Marathon, not a Sprint', as a very dear friend always reminds me, every time I reach out, with complaints about work stress, impossible deadlines, etc. Life is a marathon, so please pace yourself. At the start of lockdown, I thought surely this would be only for a month, maybe two at the most. How wrong I was. It has been 5 months and counting and I could potentially work this way till the end of 2020.

I find that I can work frenetically on some days whilst I cannot stand the sight of my laptop, tablet or phone on other days! On some days, I wake up very early, and put in a few hours whilst the rest of my household is still asleep and on others, I sleep in for a couple more hours and can only pick up rhythm mid-morning. In all, I try to pace myself day after day, focusing more on outcomes and my deliverables.

Establish Routines; Set Boundaries.

At the start of lockdown, I went through each day in a haphazard manner, often starting out early and working through till late, with hardly any breaks in between; eating and/or taking clients calls whilst working through deadlines etc. At the back of my mind was the need to replicate how things were, before lockdown, when I went to the office physically. This did not last, and I realized soon enough, that I needed to set a routine that made sense. This includes my morning exercise routine, short (stretch) breaks during work hours, mindful eating, fix meetings using my calendar, switch off at weekends, etc.

I have also set certain boundaries, especially around taking non work-related calls during work hours, and refusing, as much as possible, to discuss work-related issues at weekends. These boundaries help keep me sane.

Avoid Negativity: News, People, Situations, etc.

As much as possible, avoid all that negativity that the tabloids, tv stations, etc., all seem to revel in. For long periods, I simply refused to follow any day-to-day updates on the coronavirus infections, or worse, the death rates being recorded country-by-country. International news media is replete with all the sad and discouraging news of the ravaging pandemic as well as the wars (wars in the midst of a pandemic, really??!), bombings, shootings, etc., and I simply had enough and decided to use the power in my hands to switch off! The same goes for people who only call or share whatsapp messages that depress you or put you under undue stress and I have blocked out some contacts on my phone as a result. My thinking is that there's already a lot happening in the world, so please, do not offload more negativity on me! I do not need any additional stress.

Find Your 'Happy': Mind Your Mental & Physical Health.

At the start of lockdown, as with most people, I struggled with a number of mental and physical health issues, one of which was overeating. It was terrible. It just seemed as if I lost control over my ability to see food of any type and not want to put it in my mouth. I opened the fridge so many times every day, it was ridiculous. I just couldn't stop. The result? Unwanted weight gain. I thought I was alone in this until I spoke to colleagues, friends, family, etc. Turned out I was not, and we were all struggling. This went on for about 2 months until I spoke to myself very sternly one morning, as I reached out for yet another slice of bread (funny thing is, bread isn't even my thing at all, but I ate so much of it those first weeks; it was my comfort food) and then began to cut back and to tame this strange 'hunger'.

I have done relatively okay in terms of physical exercise, walking 30 minutes, 3/5 times weekly, with brief cardio and yoga sessions 2/3 times as well, although I have had a couple of lazy weeks with zero interest in exercising. I watched a neighbor walk morning, afternoon and night, **everyday**, for the first month of lockdown, but happily, never felt pressured to follow suit.

Finding my 'happy', involves food (again!), gardening and redecorating. I love to cook (when I feel like it) and to share my food with others. Listening to a mental health expert's advice that we should all figure out, and do what makes us happy at this time, was all I needed to give this special OCD, a boost and I have cooked and shared so much food during the lockdown, sometimes dispatching to close family and friends using uber, if pick-ups (socially-distanced of course) are not possible. I am in love with my garden and watching the flowers bloom in a kaleidoscope of colours, is so uplifting and whenever possible, wifi signal permitting, I work from the garden. Adding a vegetable and herb patch in the last month has been brilliant. The last one month has also seen me redecorating our home – really, just simple stuff, as moving furniture around and upgrading light fittings, but the joy and peace these seemingly simple actions have brought, have been phenomenal.

This Too Shall Pass.....

As dire as things sometimes appear to be, I tell myself often: Remember, this too shall pass. It is important that we remain positive and follow the guidelines of social distancing, masking up and washing our hands often. Beating this virus is not just about ourselves, but our loved ones: children, parents, families, friends, colleagues, etc., so let us do our part in stopping it in its tracks. We can each commit, consciously, to not being a transmission agent for the virus, so that it can eventually run out of steam.

Let's stay positive, stay grateful, focus on what is important, and do all we can, to stay alive. As Jack Ma aptly put it, we would all have made profit this year by staying alive.

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Cecilia is a proactive attorney. She practices law mainly in Intellectual Property and has particular strength in copyrights, trademarks and geographical indications, ancestral knowledge and biodiversity. She is also an expert in regulatory affairs and efficiently advices her clients in compliance providing effective solutions to their needs.

She constantly participates in several working groups regarding trends for the industries and works on advocacy papers towards policy making. She co-chaired the ICC IP Commission Task Force on the Hague Convention on the Apostille and participates with opinion constantly. She chairs the ICC Ecuador IP Commission and actively cooperates with juridical criteria for several projects of law and regulations on IP rights, and promoting observatories for customs watch.

She is quite dynamic at ECTA now serving at the ACC Committee, same with INTA, and at ASIPI she chairs the Geographical Indications Committee for her second period for which she has been recognized for her hard work and impeccable job. She is also involved with orIGin as law firm member.

She had a leading role on the negotiation of a biodiversity access contract between Yale University and the Environmental Ministry of Ecuador. Her advice regarding the protection of intellectual property has meant that her clients have been able to develop new ventures safely and expand their business in Ecuador and into foreign markets. Her vast experience in managing IP portfolios has allowed her to advise clients on how to achieve strategic business objectives through audits of intangible assets, acquisition of rights, licenses and franchises.

She has successfully advised and managed administrative litigation procedures having favorable results and client satisfaction. Also, she is an expert in piracy, counterfeit actions, and border measures concluding with definite cease of infringements on copyrights and trademarks. Appellation of origin infringements had also been handled successfully. Cecilia represents clients in a wide range of business sectors, and has experience in advising in beverage, clothing, cosmetics, veterinary products, pharmaceuticals, cleaners and disinfectants, agriculture, timber, entertainment, literary, and editorial business industries.

Currently she leads a team of professionals in FPA dedicated to the Hemp & Cannabis industries from the regulatory perspective on agro-industrial and medicinal, cosmetics and food & beverages. Cecilia is a founder member at the Quito Chamber of Commerce Hemp Cluster being it s exclusive legal advisor.

Cecilia's performance has been recognized by important international legal boards such as: Chambers & Partners and WTR 1000.

"Cecilia Falconi Pérez is recognised in the market for her activity and is described by a client as their *"reference for IP in Ecuador."* Her practice spans trade mark and patent work across entertainment, food and drink and pharmaceuticals." (Chambers Review, 2020)

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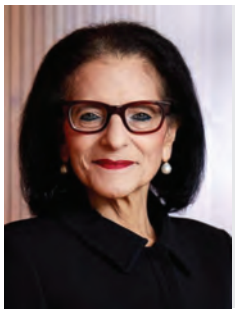

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Magda Streuli-Youssef is a partner of the Swiss law firm Rentsch Partner. She represents parties before courts and state authorities in all kind of intellectual property, media and unfair competition law matters. She has a broad litigation practice including several landmark court cases in the field of copyrights, trademarks and unfair competition law. Her practice areas also include IP strategies, IP audits and licensing, drafting and negotiating all types of IP-related contracts and advising clients in intellectual property, media and unfair competition law matters.

Born in 1953, Magda Streuli-Youssef was educated at the University of Zürich (lic. iur. 1975, Dr. iur. 1978). Her working experience as an attorney stretches back to 1980; she was a lecturer at the University of Zürich and at various institutions such as SAWI in Bienne and the EMBA of the University of St. Gallen.

She was a member of the Federal Commission for the Exploitation of Copyrights and Neighbouring Rights and former Vice-President of the Federal Appeals Commission for Intellectual Property. She has been active in several professional associations, notably the International Association for the Protection of Intellectual Property (AIPPI) and the Swiss Institute for Industrial Property (INGRES). She publishes and lectures regularly on various IP topics.

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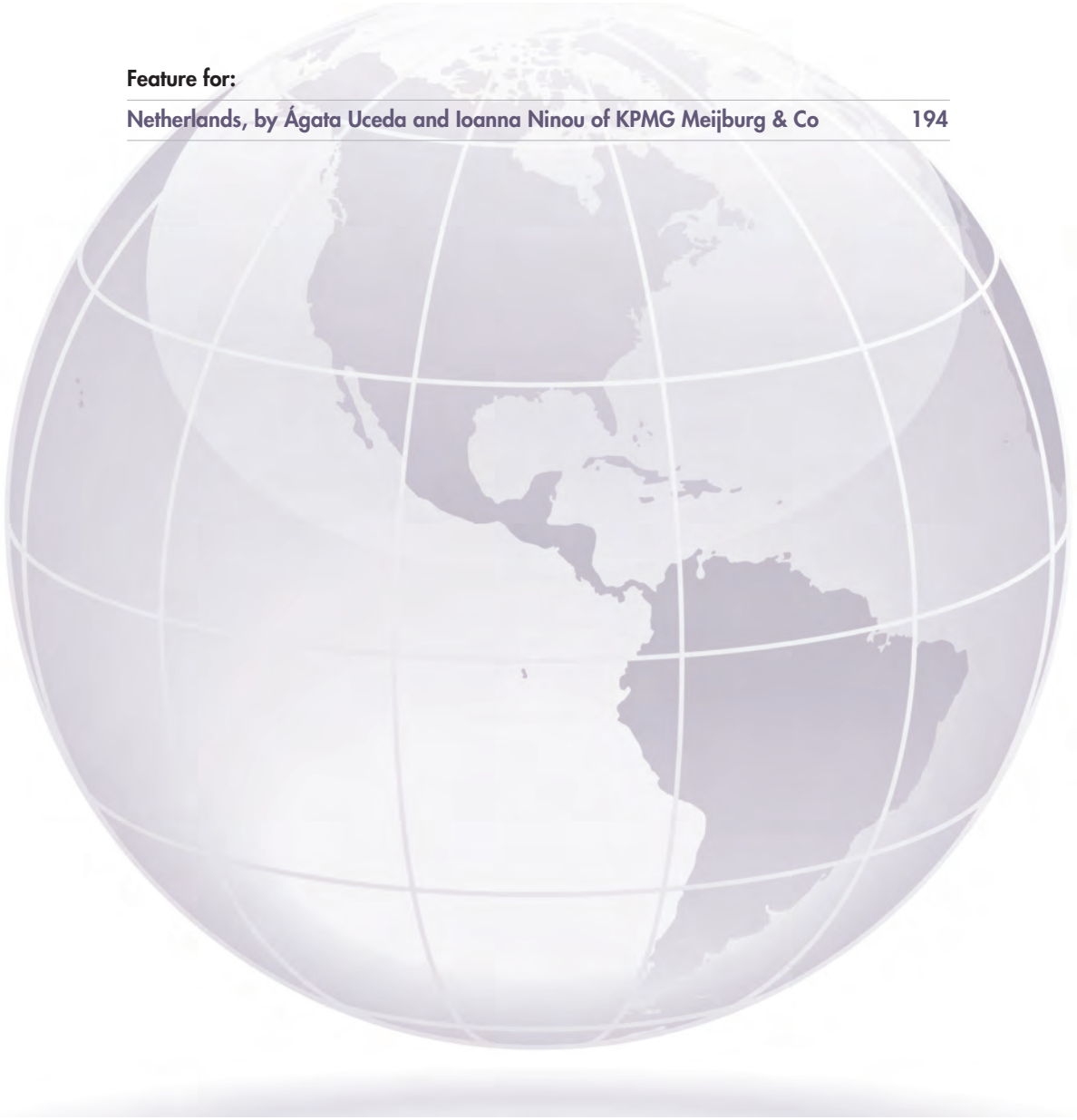

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TRANSFER PRICING

Transfer pricing planning and documentation during a global pandemic

Ágata Uceda (left) and Ioanna Ninou
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The outbreak of COVID-19 has led to a global healthcare crisis that is having ripple effects across the world economy. The actions taken by most governments to contain the spread of the virus resulted in an unprecedented disruption of global supply chains, a general decrease in the aggregated demand and a reduction in the supply capacity of most companies. Risk aversion has increased, and business and consumer confidence have dropped dramatically. All of this has heightened liquidity and credit constrains for many businesses.

MNEs have taken immediate mitigations measures and have put their focus on evaluating recovery strategies for their businesses. Recovery measures range from those required to address their businesses' shorter-term liquidity needs, to the ones that will bolster the resilience of their global supply chain. There is also a broader question about whether purchasing habits and global demand will shift permanently to more sustainable products, lower consumption and online products and services.

The aim of this article is to describe a number of transfer pricing considerations and opportunities that MNEs may consider when developing and implementing their sorter and longer-term recovery strategies. The article further discuses points of consideration for MNEs looking to adjust their intercompany arrangements and transfer pricing policies and highlights the importance of having robust documentation in place to ensure their proper and smooth implementation and avoid potential tax implications resulting thenceforth.

Financing and liquidity

While most governments worldwide are enforcing immediate measures to address businesses' liquidity and credit concerns resulting from the sudden demand shock, businesses are exploring options to generate or save cash in the short term, while making selective use of relief measures offered by various governments worldwide. The economic downturn has led MNEs to reassess their existing intercompany financing arrangements and to devise appropriate structures for cash and liquidity management.

Cash pools

Intercompany financing arrangements could be used by MNEs to deploy cash to the location where it is needed. Existing or new cash pool arrangements could serve as useful liquidity management tools in times of economic stress[1]. Cash pooling practices enable group companies to make efficient use of their available cash while reducing external funding costs, including transaction costs, and maximizing the group's total return on short-term cash. In the current economic environment, MNEs may consider practical solutions, such as increasing the balances of participating entities in the case of zero balancing cash pools, and reducing or not charging interest on short term debit positions at least temporarily. The new Chapter 10 of the OECD Guidelines on Financial Transactions ("OECD FT")[2] provides guidance on a number of important consideration, e.g. (1) when certain debit or credit positions of cash pool members will be treated as long-term deposits or loans, (2) how to determine and allocate cash pool benefits, and (3) how to determine an arm's length remunerations for the cash pool leader[3].

> MNEs LOOKING TO BOLSTER THE RESILIENCE OF THEIR SUPPLY CHAINS ARE CONSIDERING CHANGES THAT COULD IMPACT THEIR GLOBAL TRANSFER PRICING POLICIES

Intercompany loans

The OECD FT highlights the importance of considering the lender's and borrower's perspectives and their options realistically available when analysing their commercial and financial relations and the economically relevant characteristics of an intercompany loan.[4] Going forward, such considerations should be assessed by MNEs when modifying the terms of existing intercompany loans and entering into new financial intercompany arrangements.

In order to manage the impact of the sudden economic downturn to their current cash position, corporate borrowers are looking to reassess the terms of their external financing arrangements. MNEs looking to reassess and modify the terms of their intercompany loans

should consider third party behaviour, including any modification or renegotiation of the group's third-party debt. Possible adjustments may include the deferral of interest and periodic principal payments, a payment-in-kind option, or temporarily waiving the application of financial covenants. The OECD FT introduces the possibility of renegotiating the terms of intercompany loans when macroeconomic factors affect and change the financing costs in the market.[5] Taxpayers should proactively assess potential tax consequences resulting from a modification or adjustment to the terms of their intercompany loans.[6]

In the longer term, group companies may conclude new intercompany financing arrangements to access capital within an MNE. To accommodate the group borrowers' continuing liquidity issues, MNEs could consider provisions included in their third-party debt arrangements, such as the option for a payment-in-kind, and assess the possible introduction of similar provisions to their intercompany financing agreements.[7] For new intercompany loans to be issued to group borrowers that had their credit profile impacted by the crisis, robust documentation, including an analysis of the debt capacity and credit profile of the borrower, as well as a search for third-party debt extended to similarly credit-rated borrowers, could help support the arm's length nature of the contemplated transaction.[8]

Third party debt and guarantees

In the current market conditions, parent guarantees may be required for subsidiaries that borrow directly from third-party financial institutions. Section D of the OECD FT provides guidance on how to accurately delineate and determine an arm's length price for an intercompany guarantee.

MNEs will need to determine if a parent guarantee provides an incremental economic benefit beyond implicit support to the borrowing subsidiary, and, if so, consider an appropriate intercompany charge for such benefit. Consistent with the guidance from the OECD FT, a transfer pricing analysis will need to distinguish between guarantees that allow for more favorable terms, i.e. in the form of a reduced interest, and the ones that increase the borrowing capacity of a group company. Guarantees on loans that expand the borrower's capacity may risk having part of the loan recharacterized as being provided to the guarantor and subsequently contributed as equity to the borrower.[9]

Impact on transfer pricing policy setting and testing

MNEs are trying to address the impact of the sudden disruption and proactively evaluating future changes that may be required in their supply chain. In particular, MNEs that have been exposed to an abrupt demand shock (fashion retailers, restaurants and hotels, any company in the leisure and event management sector) are questioning how to apply existing transfer pricing policies with targeted profit margins in order to reflect this unexpected economic disruption. MNEs looking to bolster the resilience of their supply chains are evaluating their existing global footprint, i.e. reducing manufacturing capacity or relocating warehousing closer to the consumer, and consequently considering changes that could impact their current transfer pricing policies.

In the short term, taxpayers setting up their transfer prices for 2020 using transfer price policies designed during an economic expansion phase are being faced with challenges when updating their "comparability analysis": how to account for the current economic circumstances, and any related changes in the business strategies.[10] One important limitation is the lack of real time data for the comparable companies. In particular, financial data used for setting and testing various profit margins is generally only available with a lag of 5 to 6 months for North American databases, and up to 18 months for EMEA and other databases.[11] To account for this limitation, different approaches could be considered. These approaches range from (a) using the most recent financial data (e.g., 2016-2018 or 2017-2019) and using financial and other comparability adjustments to account for the sudden economic disruption, (b) using 2020 quarterly or half year data of public companies, to (c) using the margins from previous recessions (e.g., from the 2008-2009 financial crisis). Each of these approaches has different pros and cons and may be more or less suitable per geographic region.

In the EMEA region, some taxpayers are considering the use of the most recent comparable data (e.g., 2016-2018 or 2017-2019 financials) with appropriate adjustments to account for the availability of data and the current economic conditions. A more practical approach could be an adjustment of the targeted margin to a lower point within the arm's length range of results. More elaborate approaches suggest the use of regression analysis that assess the correlation between certain economic indicators and the margins of the comparables. Such regression model would then allow MNEs to extrapolate and project the adjusted profitability of comparable companies.

In the medium term, once data for 2020 becomes available MNEs may consider adjusting their search strategies to include the most recent data in order to better support the results of 2020. In determining their future benchmarking strategies, MNE's should consider revisiting the industries and geographies included in their search strategies to account for the diverse effect of the economic disruption between companies, industries, or markets. Also, using one year of data instead of three years may be more appropriate to support MNEs transfer pricing positions for 2020. Furthermore, adjusting traditional benchmarking strategies that reject loss making companies may allow to partially mitigate but not completely exclude concerns of having a survival bias in the comparable sets that would skew the observed arm's-length range.

Supply chain changes

Restructuring

In the current turmoil many MNEs are required to revisit their global operations and assess the commercial viability and the future resilience of their supply chains. The contemplated actions differ per industry. Companies that have been negatively impacted by the sudden disruptions are taking immediate steps, such as downsizing or temporarily shutting down operations in various jurisdictions, while others are looking to manage the more long-term consequences of the current healthcare crisis by creating more agile and flexible sourcing strategies and digitalizing their business models. On the other side of the spectrum, companies with businesses that have been benefiting from this crisis (e.g. technology, life sciences, food, or home entertainment) are scaling-up or even starting up new business operations to fulfil demand. Tax departments need to work in close cooperation with the business in order to identify possible tax opportunities and risks resulting from any business changes.

Important transfer pricing considerations that need to be addressed include, the calculation and allocation of local restructuring costs, i.e. extraordinary asset write off, redundancy costs and people lay-offs, the remuneration for a loss of a future profit potential, or any other indemnification upon the termination and/or the substantial renegotiation of an existing arrangement (e.g. manufacturing arrangements and distribution arrangements), which may or may not involve a cross-border transfer of something of value.

Chapter 9 of the OECD Transfer Pricing Guidelines[12] outlines the framework for the transfer pricing analysis of business restructurings. This analysis includes (a) the accurate delineation of the restructuring

transactions, and the identification of the functions, assets and risks analysis before and after the restructuring, (b) the identification of the business reasons and the expected benefits, including any synergies, resulting from the restructuring and (c) an analysis of the bargaining position and the options realistically available to the parties involved at arm's length. The analysis should not just consider the commercial rationale from the group's perspective but also consider the perspective of the restructured entity.[13]

The starting point for MNEs looking to downsize their operations would be to consider the relevant terms of their intercompany agreements.[14] In the absence of an indemnification clause in favour of the restructured entity upon termination or non-renewal, the parties will need to consider whether such indemnification clause would be considered in a third party situation and try to mirror this conduct in the intercompany arrangement. If the terms of the modification or termination of a contract are consistent with third party behaviour, the agreement should be respected as arm's length.[15] When no comparable transactions exist, the OECD Transfer Pricing Guideline stipulate that the bargaining positions, i.e. the options realistically available of the transferor and the transferee, will need to be considered.[16] In addition, the analysis of the arm's length nature of the indemnification term will need to consider the remuneration received by the restructured entity.[17] The OECD Transfer Pricing Guidelines highlights the case whereby the restructured entity, e.g. a manufacturing entity, has undertaken a significant and specialized investment in order to be able to perform its obligations under a contract. In a third party situation, the manufacturer assuming and controlling the risk inherent in the investment made would negotiate a term that would allow him to recover and make a profit on its capital expenditures and manage the risk of an early termination through the introduction of an indemnification clause or through the agreed pricing/margin for its services.[18]

Once the arm's length indemnification amount has been determined the next question is who should bear these costs. Deductibility of such costs could allow MNEs to limit their tax liability and improve their overall cash position. In the case of local restructuring costs, it is expected that the entity controlling and managing the economically significant risks related to this business decision and the one that ultimately benefits from this decision will bear these costs.[19] For example, a contract manufacturer with no control over market risk, capacity utilization and supply chain risk would not be expected to bear these restructuring costs, such as write-down, and closure costs. On the contrary, a manufacturer could bear such costs if they would have control over these risks or there was no option realistically available to the restructuring.

Related party contracts

The business reality during COVID-19's outbreak has forced many third parties to modify, revisit, or even terminate some of their contractual arrangements in order to address their urgent needs and requirements.

In the case of intercompany contractual arrangements, MNEs may consider invoking a common "force majeure" doctrine that is typically found in agreements. Force majeure is defined as an event that no human foresight could anticipate or which, if anticipated, is too strong to be controlled. Such event prevents either party from performing its obligations under a contract. A form of force majeure clause (similar but not identical to the common law and civil law concepts of the term) is included in Article 7.1.7 of the UNIDROIT Principles of International Commercial Contracts. The latter provided that a relief from performance is granted "if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences."[20]

In the medium to long term and prior to any contemplated changes in their supply chain, MNEs are required to evaluate whether the termination, non-renewal or substantial renegotiation of any of their intercompany agreements would give rise to any form of compensation or indemnification.

Concluding remarks

As the COVID-19 outbreak is evolving, the way of doing business is drastically changing. Immediate mitigations measures and strategies are being assessed and implemented by MNEs. In this article the authors outline a number of transfer pricing considerations and opportunities that MNEs should consider in their shorter and longer-term recovery strategies. In particular, the authors discuss transfer pricing considerations for companies looking to address their immediate liquidity and financing requirements, the operational changes in their supply chains and the revision of related party contracts. Furthermore, the authors outline some of the approaches that MNEs could consider when trying to adjust their current transfer pricing policies in the current economic environment.

Tax and transfer pricing will become all the more important in future years as changes in governments' fiscal policies will be required to manage looming deficits and restore public finances. In this respect, more audits and scrutiny of intercompany transactions is expected. Well supported and documented transfer pricing policies may allow taxpayers to manage future scrutiny from tax authorities.

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Andrea is a member of several professional associations, including the Swiss Bar Association, the Zurich Bar Association, the International Association of Young Lawyers (AIJA) and the Society of Trust and Estate Practitioners (STEP). She regularly publishes and speaks in her field of specialisation.

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Kinga M Weiss has graduated magna cum laude from the University of Zurich (Switzerland) in 1996 and continued in academia, such that in 1999 she promoted to doctorate at law. In 2000 she passed the bar and thus is qualified as an attorney and is admitted to all courts in Switzerland. She completed her LLM at the University of New York focusing on trust and estates. In 2011 she further expanded her expertise and became Certified Specialist SBA Inheritance Law at the University of Zurich and Lucerne.

Kinga M Weiss started her professional career in 1996 in academia as an assistant to Professor Dr Anton Heini. 1997-98 she moved on to work as a clerk at the District Court of Meilen. Thereafter, she joined 1998 Lenz & Staehelin and worked until 2003 in the Litigation Department of the firm and also advised private clients. In 2003 she switched into the Private Clients Department and concentrated her work on trust & estates until 2010. Thereafter she joined Walder Wyss as a counsel and co-chair of the private client team and became a partner of Walder Wyss in 2016.

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Clients benefit from Kerry's distinctive experience acquired both during her 18-month secondment to the wealth management division of one of the world's largest banks and prior to attending law school. Kerry previously worked as an investment banker at Morgan Stanley, where she advised health care companies on M&A and capital markets transactions, and at Accenture in the Office of the CFO, where she evaluated and executed strategic corporate transactions and financial projects.

Kerry is a frequent writer and speaker. She is recognized in Chambers and Partners' High Net Worth guide as an Up and Coming lawyer for New York Private Wealth Law. In 2019, she was shortlisted for *Euromoney* Legal Media Group's 2019 Women in Business Law "Best in Wealth Management" Award and previously appeared on the shortlist for the organization's "Rising Star" in Tax award. Kerry has been quoted in The Wall Street Journal and the Financial Times on tax and wealth management issues.

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Clara Poglia is a partner in Schellenberg Wittmer's dispute resolution, white-collar crime and compliance, and internal corporate investigations groups in Geneva.

Clara's key areas of expertise and practice focus on white-collar crime, international mutual legal assistance both in criminal and tax matters, extradition, asset tracing and recovery, and internal corporate investigations. Clara is also specialised in regulatory and compliance issues.

Clara has acted as counsel for both individuals and corporate entities in civil, criminal and administrative proceedings before cantonal and federal authorities and courts, including the Swiss Supreme Court.

Some of Clara's expertise in white-collar crime includes: representation and assistance to a company in a major investigation involving potential wrongdoing (allegations of corruption) harming the client's interests and giving rise to Swiss criminal proceedings; representation of a corporation in criminal proceedings targeting a large Ponzi scheme and in related bankruptcy proceedings and asset recovery; representation of European corporations targeted by a request of mutual legal assistance in criminal matters addressed by the US Department of Justice to Switzerland; representation of the same entities in the Swiss domestic related criminal proceedings; and representation of a foreign businessman in the frame of domestic criminal proceedings for alleged funds mismanagement and money laundering (assets frozen for around US$1 billion).

Clara is recognized in the Global Investigations Review's Women in Investigations 2018 list and in their Top 40 under 40 2020 list. She is the chapter leader of the Women in White Collar Defense Association's Swiss chapter.

Prior to joining Schellenberg Wittmer, Clara was a law clerk at the Swiss Federal Criminal Tribunal (for French and Italian languages) and an associate in another Swiss business law firm. She was also active as a translator for a renowned Swiss legal magazine.

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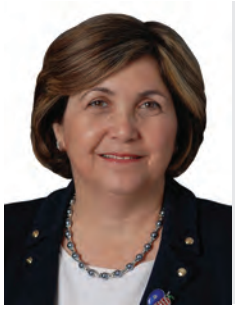

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Betty Santangelo joined Schulte Roth & Zabel as a partner in 1997. She focuses her practice on white-collar criminal defense and securities/bank enforcement. A former Assistant U.S. Attorney for the Southern District of New York, she specialized in securities and commodities fraud prosecutions. Her practice includes representing financial institutions (banks, broker-dealers, mutual funds, FCMs, insurance companies, investment advisers, hedge funds and private equity funds), other corporate entities and individuals in matters brought by the U.S. Attorneys' offices, by various regulatory agencies, including the SEC, the bank regulatory agencies, the CFTC, FINRA, international regulators and state and local prosecutors. Betty also has significant experience conducting internal investigations for these entities. In addition, she has served as an independent consultant in SEC enforcement matters examining both the NYSE and a regional broker-dealer. Prior to joining SRZ, Betty served as First Vice President and Assistant General Counsel for Merrill Lynch, where she managed the firm's securities and criminal regulatory investigations group and represented the firm and its employees in enforcement proceedings before federal and state regulatory agencies, and in criminal matters before U.S. Attorneys' offices and state prosecutors, as well as in foreign jurisdictions.

Betty is nationally recognized and a sought-after speaker for her expertise in corporate compliance issues, including anti-money laundering, OFAC and FCPA. She has extensive experience advising in these areas, including for business transactions. In addition to *International Who's Who of Business Crime Defence Lawyers*, she is listed in *Best Lawyers in America*, *Expert Guide to the World's Leading Women in Business Law* and *The Legal 500 US*, among other leading directories. Among her many professional activities, she has served as the Securities and Futures Industry's representative on the Bank Secrecy Act Advisory Group of the U.S. Department of the Treasury and for over 10 years as counsel to the Securities Industry and Financial Markets Association's Anti-Money Laundering and Financial Crimes Committee. In 2014, SIFMA honored her for her extraordinary contributions to the committee and recognized her dedication to improving industry compliance. In 1998, the Financial Crimes Enforcement Network of the Treasury Department awarded her its Director's Medal for Exceptional Service. That same year, she represented the U.S. securities industry at the Financial Action Task Force (FATF) meeting in Brussels. In 2002, she represented SIFMA, the Futures Industry Association and the Investment Company Institute at the FATF meeting in Paris.

Betty is a graduate of Fordham University School of Law and Trinity College, where she participated in its honors program at the University of Oxford. Among her personal activities, Betty is a member of the Board of the National Organization of Italian American Women, where she previously served as a chair of the organization.

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