

The increasing emergence of class actions – risk for defendant companies

Class actions (or mass tort/civil wrong litigation) are well known mainly as a USA phenomenon, enabling a large group of plaintiffs having a common cause to claim against a defendant, usually a large corporation, often arising out of a personal injury claim for negligence or other claimed liability, such as a breach of a fiduciary duty. Claims against pharmaceutical manufacturers, or against manufacturers due to defective products or chemical companies for allegedly unsafe enterprises are quite common. In most jurisdictions, where permissible, a 'class action' needs to be certified as such by a judge. The legal costs for the claimants are economic because they are shared (and in fact often based on a 'no win no fee' basis), but for the defendant corporation the costs can be considerable, also with the ensuing risk of very bad publicity which can significantly damage the reputation of the company and its share value.



Pharmaceutical companies are well known to be at risk from class actions

The pressure of a large number of claims in one (plaintiff/claimant) class, theoretically gives greater notoriety and impetus to the case, but if successful the 'class' must share any award or liquidated damages; but one of the main beneficiaries can be the plaintiffs' lawyers usually working on a percentage basis (perhaps ranging from 15-30% of the award or settlement), but with the risk of committing significant investment time and expenditure to pursue the case.

Is the trend for class actions becoming a global phenomenon? World Link for Law member law firms act for many corporations. We asked some of our members if class actions are permissible in their country.

The USA style class action

In the USA a class action, as the name implies, is brought on behalf of a class of people rather than just a named plaintiff alone. The named plaintiffs are considered the "representative plaintiffs" and prosecute the suit on behalf of all the members of the class. Typically, a successful class action results in a group settlement and all the class members share in the settlement. It is designed, not so much to compensate an individual member for his or her injury, but rather to disgorge illegal profits and deter illegal business practices. Therefore, a significant driving force behind any class action claims are attorneys seeking large fees.

Most of these actions ultimately fail to obtain class certification i.e. after an American style legal debate the judge either certifies the lawsuit as a class action or denies that certification. This legal debate is fought over satisfying the criteria for class certification. There must be common issues of fact and law, making it

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unnecessary to litigate these issues over and over again on an individual basis. The people affected must be too numerous to name individually in a lawsuit.

The fact that each class member suffers individual damages does not disqualify certification because at some point in the process notice is sent to each potential class member, and advertisements are placed, to alert class members of the possibility of a class action. A potential member has the right to opt out but if he/she does not, his/her rights are determined by the class litigation. At the time of final settlement damages are designated by category of injury. Thereafter, notices are sent and advertisements placed to inform potential class members of their eligibility to collect damages. Usually there is a surplus because of unclaimed funds; the settlement always provides for how surplus funds are to be distributed. Often this is paid to a charity or utilized to advertise against the danger of the product. The defendant is not usually allowed to retain gains.

Recent research of some World Link members in about 30 countries around the world shows that in maybe only one or two jurisdictions are there 'class actions' very similar to the USA style. However many countries are reviewing the situation and the concept may (or equally may not) be formalized and regulated in the future. For example in France there is no formal concept of class actions. People (mainly consumers or victims) who want to introduce a law suit together need to gather themselves within an "association" (legal entity). Although, several recent bills tried to introduce class actions into French law, none of them were successful, in particular because of discussions about natural rights and much inevitable reluctance from large enterprises, but also from many law professionals fearing that class actions would generate many systematic style legal proceedings. 'Coupon settlements' could also constitute a source of hostility for many organisations.

What other similar procedures are there in other countries?

Many countries have 'representative' proceedings, whereby one plaintiff can represent a group in a court action. In some countries group actions or representative proceedings are limited to actions brought on behalf of a group by trade associations in relation to infringements by companies or organisations against consumers in certain market sectors e.g. financial services, banking, insurance or for example in relation to product liability by manufacturers. In some countries individuals may have the opportunity to 'opt in' before the conclusion of court proceedings as opposed to opting out (in the USA style). In other countries actions are initially brought by a named person or persons, or entity; and then other affected parties can later make personal claims based on that earlier judgment.

In some countries collective actions are allowed but they can not be used to obtain financial compensation. The group can only claim a declaratory judgment in which the court states that the defendant's conduct is unlawful and that the defendant is liable for damages caused by that unlawful conduct. The individual victims/disadvantaged parties have to start legal proceedings themselves to redeem their own individual claims. In other countries a similar declaratory style judgment can be made but with guidelines as to the later method of providing compensation to individuals and the financial limits.

At the time of the research, as examples from different jurisdictions, Croatia, Slovenia, Slovakia and Argentina have no concept such as class actions (or a similar procedure) and are without any plans for judicial discussion or implementation.

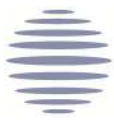
In summary many types of group actions exist but they have yet to take on the scale of USA class actions and it is debatable if that culture will spread widely in the future. However companies should be aware that through various other types of group actions there is still the risk of notoriety and bad publicity for unlawful conduct, not to mention substantial financial liability which may exceed insurance limits.

If you would like to receive the full detailed article, providing a country by country analysis (11 pages) please email: info@worldlink-law.com

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UK- The Bribery Act 2010 can affect those doing business in the UK

The Bribery Act 2010 introduces new criminal offences in connection with offering or receiving bribes, which came into force on 1 July 2011. It provides that the courts will have jurisdiction, not only over offences committed in the UK, but also over offences committed outside the UK where the person committing them has a close connection with the UK by virtue of being a British national or ordinarily resident in the UK, a body incorporated in the UK, or a Scottish partnership. In some situations, overseas organisations can be liable if they carry on a business or part of a business in the UK, regardless of where they were incorporated or formed.

Penalties for breaches are severe. Both companies and individuals can face unlimited fines. Individuals can also be sentenced for up to 10 years in prison and be disqualified from holding directorships for up to 15 years. All employers should prepare for the implementation of the new Act to provide themselves with the best possible protection in the event of alleged bribery.

What is bribery?

A bribe is defined in the Bribery Act 2010 ("BA") very widely (section 1) as "A financial or other advantage" offered, promised or given to induce a person to perform a relevant function of activity improperly, or to reward them for doing so.

This description will cover many types of possible advantages including gifts, hospitality and entertainment, donations, sponsorship and publicity. Note that the timing of the advantage will not matter. It will still be a bribe even if it is given or paid after the event and liability arises even if the bribe is offered or promised (it does not actually need to be received).



An example of receiving a bribe would be if a supplier gave, for example, your nephew a job but made it clear that in return they expected you to use your influence in the organisation to ensure that the organisation continued to do business with that supplier. Another example would be if you arranged for your organisation to pay an additional payment to an official in order to speed up an administrative process, such as clearing goods through customs. Offering a bribe is also an offence; if you offered a potential client tickets to a sporting event, for example, but only if they agree to do business with your organisation, that would be an offence.

Gifts and hospitality that would not breach the BA would be, for example, corporate hospitality at a sporting event made not with the intention of influencing a third party to obtain or retain business or to reward them or in explicit or implicit exchange for favours or benefits, but rather, in order to improve the profile of the corporation generally. Generally accepted hospitality in the context of the jurisdiction you are in is acceptable.

Sometimes it may be difficult to identify what could be an offence and putting a policy in place both assists in ensuring that bribery does not arise and gives the employer a defence against a claim.

The offences

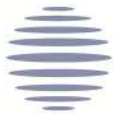
The criminal proceeding offences relate to: bribing another; being bribed; bribing a foreign public official; and failure of a commercial organisation to prevent bribery by an "associated person". A third party is "associated" with a commercial organisation if it performs services for or on behalf of the organisation, regardless of the capacity in which it does so. This will therefore be construed broadly and could cover the organisation's agents, employees, subsidiaries, intermediaries, joint venture partners and suppliers, all of whom could render the organisation guilty of the offence of bribery.

The offence is a strict liability offence. This means that there is no need to prove negligence or the involvement and guilt of the "directing mind and will" of the organisation. This makes the offence easier to prove and probably will lead to more corporate prosecutions and convictions.

Possible defence

An employer has a defence if it can show it had in place "adequate procedures" designed to prevent bribery. The BA does not provide any definition or explanation about what will constitute adequate procedures but draft guidance has been issued about how commercial organisations can prevent bribery and these set out 6 key





principles intended to give commercial organisations a starting point for planning, implementing, monitoring and reviewing their anti-corruption and bribery policies and procedures. The final version has still not been published but the key principles under the draft guidance are set out below, in summary.

The full guidance is available at:-

<http://www.justice.gov.uk/downloads/guidance/making-reviewing-law/bribery-act-2010-guidance.pdf>

Proportionate procedures: An employer's procedures to prevent bribery by persons associated with it should be proportionate to the bribery risks it faces and to the nature, scale and complexity of the employer's activities. They should also be clear, practical, accessible, effectively implemented and enforced. The term "procedures" embraces both bribery prevention policies and the procedures which implement them.

Top level commitment: The guidance requires that top level management is openly committed to preventing bribery. This can be achieved by implementing a policy and ensuring that it is clearly communicated by top level managers to all workers and all those they do business with.

Conduct a risk assessment: Employers should carry out a risk assessment in relation to both internal and external risks. Internally this would include, for example, training of workers; considering if any issues arise as a consequence of remuneration structures; and reviewing policies on gifts etc. For external risks you should look at the particular transactional risks to the business. For example if you regularly need to obtain licences, permits or other approvals are there any risks of bribery in relation thereto; are you involved in high value projects or projects involving large numbers of contractors thus giving rise to a risk of bribery in relation to those contractors?

Due diligence: Employers need to make sure that they know who they are doing business with, why, when and to whom they are releasing funds, ensuring that those they do business with also have anti bribery policies and are aware of their risks. Of course, as always, document steps that you have taken and ensure that the due diligence process is reviewed regularly.

Communication (including training): The employer should ensure its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training that is proportionate to the risks it faces.

Monitor and review: The employer should regularly monitor and review procedures and make improvements where necessary.

Key issues for employers

The recruitment stage: Consider whether you should carry out additional background checks and vetting, such as bankruptcy checks, criminal record checks and obtaining additional references. Where an individual appointed has some relationship with a current client or business contact, for example, make sure that this is documented in order to reduce any risk of corruption allegations. Include training on anti corruption and bribery within the induction procedure.

Expenses: Ensure that these are regularly and properly audited.

Gifts and hospitality: Have a clear policy on your approach.

Disciplinary procedures: Amend your disciplinary procedures to make it clear that breach of your anti corruption and bribery policy and any related procedures may amount to gross misconduct.

Employment contract: Consider whether to make it a specific contractual requirement that employees and other workers comply with the anti corruption and bribery policies and procedures. Particularly where you are in a high risk sector or work in high risk countries it is recommended that the contract makes express reference to the policy.

Whistle blowing policies: Do make sure that an up to date whistle blowing policy is in place and has been communicated to all workers.

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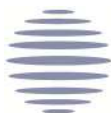
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Belgium- The end of bank secrecy?

A couple of years ago Belgium was temporarily on the "grey list" of the OECD but disappeared from this list of countries that do not comply with international cooperation in tax matters after having signed agreements on the exchange of information including bank details with more than 40 countries. In 2010 Belgium also approved the principle of the automatic exchange of information on administrative request from an EU member State.

Nowadays Belgium is again under pressure from the OECD and the EU, due to the existence of so-called "bank secrecy". In Belgium bank secrecy is not protected by law but is more a duty of confidentiality from the bankers rather than, for example, the professional secrecy of doctors or attorneys. An internal Survey Commission has also recently concluded that bank secrecy is an obstacle to a correct application of the taxation rules by the domestic tax authorities.



In this framework three parliamentary bills were deposited in 2010 that all aim at suppressing Belgian bank secrecy. Notwithstanding the strong willingness from the Belgian authorities to abolish bank secrecy to comply with new OECD trends, these parliamentary bills have been discussed by the Parliament, notably in respect of the privacy issue. Two of the deposited bills provided for the outright end of the bank secrecy and the communication by the banks of all their data to the tax authorities. The third bill which has finally been amended and adopted by the Parliament proposed to submit the communication of the bank information about a tax payer on a number of conditions.

In practice a central data base of all the Belgian bank accounts shall be created within the National Bank, Belgium's central bank. As from July 1, 2011 Belgian tax controllers who suspect tax fraud based on defined signs of tax evasion are authorized to request access to such information. The suspected tax payer must however have the opportunity to provide the information voluntarily.

The parliamentary bill provides for compulsory prior notification of signs of tax evasion to the tax payer. Then if the suspected tax payer fails to cooperate with the authorities and if the tax controller has obtained the authorization of his/her regional head of the tax service, the tax controller is authorized to request information about bank account numbers from the offices of the National Bank. (Please note that the parliamentary bill also provides for more opportunities to reach an amicable settlement between the tax authorities and the tax payer).

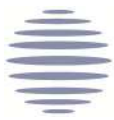
What is the impact of these new regulations?

Previously the tax authorities only had the right of access to bank information under certain defined situations (according to various legislation). As from July 1, 2011 and like in other EU member States where bank secrecy does not exist, the Belgian tax authorities shall now have access, upon request and provided they have signs or suspicion of tax evasion, to all banking information for Belgian residents as well as for non residents of Belgium. That shall include, amongst others, information on bank transfers, dividend and interest income. In practice and given the limitation period of seven years in case of signs of tax evasion, it may imply that the Belgian tax authorities will consider themselves authorized to request information from the banks about operations that occurred on or after January 1, 2004!

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France - Non-recognition of the status of commercial agent

Who can establish your clientele and help grow your business? Among others: commercial agents! They are key characters in the worldwide development of your business, particularly in France.

Realising their importance, the European Union passed the Directive of 18 December 1986 to coordinate the laws of the Member States relating to self-employed commercial agents. French commercial law generally defines commercial agents as those permanently entrusted with negotiating and possibly entering into sale, purchase, rental or service provision contracts for and on behalf of manufacturers, industrialists, traders or other agents.



The implementation of the commercial agent status depends on the conditions in which the agents are actually doing their jobs. For instance, up to now, agents have often been denied the application of the legal status of 'commercial agent' when real negotiating power is missing. Moreover, an agent cannot be regarded as a commercial agent within the meaning of the French law if he is entrusted with negotiating referencing agreements only. Indeed, this intermediary makes two parties communicate and then they decide whether they want to enter into a contract in the future. The decision to enter into contract is not made by the intermediary but by the parties themselves.

As the protective French law for commercial agents does not refer to such agreements, a Court of Appeal decided (February 2011) that the relationship between the principle and its agent is not governed by the commercial agent law in such a situation. As a consequence, among others, the agency agreement binding the agent and its principal can only be terminated by mutual consent. Furthermore, although he is entitled to get money upon termination of his contract, such an agent does not have a right to the usual indemnity granted to a commercial agent benefiting from his legal status.

In the light of the above, it is doubtful that the intermediary in charge of an enterprise's bids and proposals can be regarded as a 'commercial agent'. Actually, only a precise analysis of the agent's contractual and working duties would enable a determination of whether the agent benefits from this type of 'legal status'.

All this applies when the relations between the principle and the agent are governed by French law. However, as the definition of a commercial agent under French law is wider than the European Directive of 1986, the same situation could apply in other European jurisdictions, so be mindful of the status of your agent and his actual work!

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UK - Privacy law - sending personal data outside the EEA

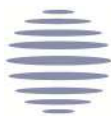


Broadly, for the purposes of the provisions of the Data Protection Act 1998 ("the Act"), it is best to assume that all information about a living, identifiable individual is "personal data." Similarly broad is the definition of "processing," which means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data.

Therefore, it is very likely that as a company, business or organisation you are processing personal data and are subject to requirements of the Act.

Companies, businesses and organisations should be aware of the strict rules that govern the processing of personal data and in particular where there is a need to transfer personal data outside the European Economic Area ("EEA") there are a number of practical considerations to take into account.





The Eighth Principle of the Act states that personal data *"shall not be transferred to a country... outside the European Economic Area unless that country... ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data."*

Under the Eighth Principle, a 'transfer' of data will simply mean sending data to someone in another country. Even if you are collecting information on paper and sending it to someone in another country for them to input into a computer or filing system, you are still processing the data and your actions are caught under the Act. Similarly, if you load information onto a server based in the UK that can be accessed in other countries via a website then this is likely to be a transfer and captured by the Act.

There are no restrictions on the transfer of personal data to other EEA countries. The European Commission maintains a list of some countries outside the EEA that it deems have adequate levels of protection for personal data. It should be noted that whilst the United States is not currently on this list, US companies that have signed up to the "Safe Harbour" arrangements will be deemed as providing adequate protection for personal data. There are, however, many countries outside the EEA that are not on this list and you will need to consider carefully before transferring data to such places.

So, how can you send personal data outside the EEA to a country not approved by the European Commission? If you are intending to send personal data outside the EEA and the recipient country is not approved by the European Commission there are a number of ways in which you can still send the data:

- You can assess the adequacy of protection yourself by conducting a risk assessment taking into account the type of personal data being transferred, how it will be used and the relevant laws of the country in question;
- You can use the set of European Commission approved "Model Clauses" in your contracts with companies in non-EEA countries that will process your data. If such clauses are properly incorporated into your contracts to deal with data protection issues, you will not have to make your own assessment of adequacy;
- Different rules apply where multinational organisations transfer data outside the EEA but within their group of companies and in such circumstances binding codes of corporate conduct can be adopted;
- There are exceptions to the rule, such as when you have an individual's consent to transfer their data, where it is necessary for the performance of a contract, when it is necessary for reasons of public interest, when it relates to matters of life or death or when it is necessary in connection with legal proceedings.

As a final point, before you transfer personal data outside of the EEA, you should consider whether it is actually necessary to do so. If you can make the data anonymous and no individual can be identified as a result, the Act will not apply to such data and there will be no restrictions on a transfer.



But what about circumstances when data is taken outside the EEA by virtue of being stored on a portable device such as a Blackberry, Laptop or memory stick?

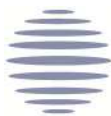
In these circumstances you should be aware not only of the Eighth Data Protection Principle but also of the Seventh Principle, which governs data security and states *"Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data."*

The portability and risk of loss of these devices poses issues in a data protection context. Largely such risks can be minimised and managed through education and security measures.

As long as the data stored on the device remains in the possession of the employee and security, such as encryption and passwords, has been adequately addressed by the employer there is likely to be adequate protection for any personal data stored on the device. In these circumstances the employee will not necessarily be transferring the data to someone in the non-EEA country under the Eight Principle in any event.

However, the problems can be heightened by new technology, for example the increasing use of "cloud-based" platforms for storing or transferring data. It is often difficult to know where data is being stored in such models. If you are controlling or processing personal data that is passing through or being stored in a "cloud" it is important to have in place the correct contractual terms and conditions with any party with access to such data.





In the UK the Information Commissioner's Office ("ICO") has already issued an online code of practice confirming that there must be a written contract in place between the data controller and cloud service provider, stating that it will act only on the data controller's instruction and will maintain a level of security equal to the data controller. The ICO has recently increased the level of fines to £500,000 for serious breaches of data security.

The clear message for organisations, companies and individuals storing and processing personal data is to liaise with your IT departments to ensure security and confidentiality when it comes to transferring your data.

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Madeira – A review of double taxation treaties and favourable possibilities

Companies licensed to operate within the legal framework of the Free Trade Zone of Madeira are Portuguese companies and the double taxation treaties concluded between Portugal and its treaty partners therefore generally apply to Portuguese companies registered in Madeira. Not only is treaty access available but so is access to the EU Parent Subsidiary Directive.

However, certain treaties are particularly advantageous and when combined with the benefits enjoyed by a Madeira licensed company, such advantages are further enhanced. Treaties worth noting include:

Double Taxation Treaty between Portugal and China

The above mentioned treaty is unique as regards the taxation of capital gains from the sale of shares. Taxation only occurs in the state where the seller is resident. This is contrary to other treaties China has signed. Therefore, and in the case of a Madeira licensed company, capital gains realised from the selling of shares in China would be taxed in Portugal, i.e. at the low tax rates (0% or 4%) available to Portuguese companies licensed in Madeira.

Double Taxation Treaty between Portugal and South Korea

This treaty contains a 'tax sparing' clause. Therefore, and in accordance with the treaty, a Portuguese company licensed in Madeira that distributes dividends to a Korean company is exempt in Portugal from taxation on the dividends. Even though this is the case, when such dividends reach Korea, the Korean tax authorities treat the dividends as if they had already been taxed in Portugal, i.e. as if the exemption of dividend withholding tax in Portugal had not existed.

Double Taxation Treaty between Portugal and Turkey

Unlike the majority of double taxation treaties signed by Turkey, the treaty with Portugal allows for a withholding tax rate of 5% on dividends. Considering that Portuguese companies licensed in Madeira are exempt from withholding tax, an overall tax on dividends of 5% (should Turkish Controlled Foreign Company legislation requirements be met) is possible.

A broader table of countries and details of dividends, interest and royalties are set out by accessing this link:

<http://www.worldlink-law.com/pdf/Madeira%20tax%20treaty%20table.pdf>

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USA - Choosing a business entity for real estate purposes-how do they compare?

Much has been said and written about LLC's and Corporations in a real estate acquisition context. A brief comparison of both entities can be made as follows:

- Liability of owners. Both Corporations and LLC's provide for limited liability to the owners and officers. This means that in general, only the funds that you invest are at risk.
- Number of owners. The minimum for both entities is one (either resident or non resident of the U.S.) and there is no maximum.
- Federal income taxes. This is where the difference is significant. The corporation is taxed once at the corporate level based on the amount of net income earned by the entity. In addition, there is a second level of tax on dividends to shareholders. This is in contrast to the LLC wherein there is no tax at the LLC level. The net profits are reported by the members pro rata and income tax is paid at this level only.

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UK- The benefits of Limited Liability Partnerships

A Limited Liability Partnership ("LLP") despite its name is not a partnership, but rather a body corporate. It was introduced by the Limited Liability Partnerships Act 2000, in particular to provide a vehicle whereby professional practices could limit their liability. However the LLP is being used in different ways and in various sectors. In this article we will highlight some of the advantages of the LLP and describe the various uses to which they are now being put:-

What are the advantages of an LLP?

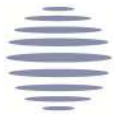
An LLP can be quickly and cheaply incorporated like a company at Companies House. Same-day incorporation is possible. The minimum requirement is two members being in business with a view to profit. There is no need to prepare or file at Companies House any written agreement between the members as to the operation of the LLP. However most members will want to put in place a written agreement at some point, as otherwise there are certain default provisions in the LLP Regulations which could lead to unintended consequences. A written agreement is certainly to be recommended when using an LLP for one of the specific uses we mention below.

Limited liability of members is the main attraction of the LLP compared with a traditional partnership. The LLP is a separate legal entity, so its members will not be liable for the debts of the LLP, except in certain circumstances where the LLP becomes insolvent. A member will not generally be liable for the acts or defaults of other members. He could in certain circumstances still be liable personally for his only defaults, but steps can usually be taken to limit the risk by using terms of business with clients which state that the members assume no personal responsibility.

Flexibility of management and ownership; and tax transparency

The members can agree between themselves how an LLP will be managed and how capital will be owned and profits shared. These arrangements can be changed simply by agreement of the members at any time. It is easier to effect succession planning within an LLP compared with the procedures to be followed for the issue or transfer of shares in a company.





Also in general terms an LLP is tax-transparent like a traditional partnership, and the members are taxed directly on their profit shares. The overall tax burden could well be lower than if a company is used, especially if the member is not liable to tax. There is generally no tax charged when a new member is introduced or when interests are changed or members leave. This compares favourably with the tax treatment of employee shares in a company. There could also be savings in National Insurance contributions on earnings compared to salaries of employees in a company. As members are self-employed, no employer's NI contributions are payable on the profits declared.

What are some of the potential uses of an LLP?

Financial services - the LLP is now frequently used for financial services and fund management ventures. It can be structured so as to provide the management required, whether close control or loose regulation, and in particular it can provide for the different earnings and bonus schemes found in these areas. The requirements of a large number of individuals, sometimes at several levels, can often be factored into the LLP arrangements. There can be significant savings in NIC compared with a company.

Commercial property development - the LLP is proving to be a useful vehicle to enable parties to combine their resources for a property investment or development. Compared with a company an LLP can have tax advantages for a party which does not pay tax, such as a pension fund or local authority. An LLP can borrow and charge the property to secure the loan, and the members need not be liable for the loan though they might have to charge their interest in the LLP. The flexibility of the LLP allows a venture to be structured so that the members can participate in or delegate management as they prefer.

Non-profit making bodies - entities such as museums, galleries and sport or other non-profit making bodies may find an LLP attractive where they wish to enter into a joint venture or a similar arrangement with a third party. Any important rules of the body can easily be reflected in the members' agreement of the LLP. Any profits are passed direct to the members for tax purposes, and tax is avoided if the member is not liable to tax.

Overseas private clients - there can be opportunities for overseas clients to own their investments and interests through an LLP and withdraw profits in a tax efficient manner. The LLP also provides a legal structure in a jurisdiction with a good reputation which is not OECD blacklisted.

The LLP has increasingly become a valuable vehicle that can be used in different types of joint venture situation. It is not restricted to use by the traditional professional partnership.

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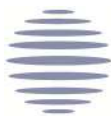
Israel: How can you protect yourself from selling to a company in trouble?

In the course of regular business, many companies that purchase goods and services will receive credit from the seller, so that they can pay their debt some time after receiving the goods/services. In a situation in which a company can't pay its debts to credits and refund the credit, the company sometimes enters into insolvency and liquidation.

When the company goes into insolvency, sometimes its credits are left in a very problematic situation as the total monies and properties held by the company liquidator (appointed by the court) is less than the company's debts, and the liquidator must decide which creditor's debt takes precedence.

In certain cases, creditors can insure themselves by making a "maintenance of ownership" agreement when supplying the merchandise, which means that the merchandise remains the property of the supplier/creditor (even though physically it's transferred to the purchasing company) until the debt is entirely paid. Thus, if the company goes into liquidation, the relevant merchandise (and in some cases even the money earned from its sale) is not actually part of the company's property, and is not divided between the creditors, but rather returned to its owner.





However, there are firm conditions for the court to accept the "maintenance of ownership" agreement as legitimate, and this was the topic of a decision recently issued by the District Court of Tel Aviv.

An example recent case and the claims of the parties

The Vita Pri Galil Company (New) Ltd. supplied frozen and dried food products to the Kaplan Meat Marketing Company Ltd. After the Kaplan company went into insolvency, Vita claimed that a "maintenance of ownership" agreement had been signed between it and Vita, so that the merchandise supplied to Kaplan, which had not yet been paid for, remained in the possession of Vita. In light of this, Vita asked the court to instruct the liquidator for the Kaplan Company to give it the merchandise held by Kaplan.

Vita claimed that in the meeting between the companies' managers, it was agreed that Vita would supply Kaplan the merchandise under "maintenance of ownership" conditions and this agreement appeared on the invoices which Vita gave Kaplan, and which were signed by the managers of the Kaplan Company. In opposition, the liquidator claimed (in the name of the Kaplan Company) that no "maintenance of ownership" agreement existed between the parties, but rather the parties intended to create a lien (that is to say, until the remuneration was paid, Vita had an encumbrance on the merchandise).

The court's decision

The court quoted prior precedents under which an agreement between the parties regarding "maintenance of ownership" is not sufficient, and such agreement will not decide the question of ownership of the merchandise, but instead the court will have to check whether a hidden lien transaction was made between the parties, or whether ownership of the merchandise was actually not transferred as yet, based on economic and commercial logic of maintenance of ownership in the specific case, and according to the rest of the circumstances of the case.

Examining these circumstances, the court noted that the deal between Vita and Kaplan was one of many deals, such that Vita has been supplying merchandise to Kaplan for a long time and at large quantities. In light of this, the court ruled that it is reasonable to assume that if the parties wanted to reach a real "maintenance of ownership" agreement, they would have done so expressly in a written agreement, and not made do with writing on the invoices; it was further proved that in other deals which Vita made, a similar "standard" clause was generally noted and sometimes, for large customers, it was not recorded or noted. The court also noted that after Kaplan had been declared insolvent, Vita's managers referred to Kaplan and requested that they quickly pay their debt before liquidation began, and in Vita's referral to the liquidator, the claim of "maintenance of ownership" was not mentioned.

For these reasons, the court reached the conclusion that an analysis of the business reality between the companies did not justify deviation from the accepted practice in commercial transactions, in which ownership in a sale transfers to the buyer when the merchandise is transferred to the buyer. In light of this, it was ruled that no "maintenance of ownership" agreement was made between the parties, but Vita was only trying to "read" such an agreement into the relations between the parties, in order to receive an unfair advantage over the rest of the company's creditors. In light of this, the court rejected Vita's request that it should rule that a "maintenance of ownership" agreement existed, and charged Vita to pay legal expenses in favor of the liquidator of 10,000 NIS, plus VAT.

Conclusions

Importers and exporters are the community most vulnerable to cases of corporate insolvency, since all their business involves buying and selling merchandise, generally under credit conditions. Therefore, an importer who sells merchandise under credit conditions is almost always vulnerable to the risk that it won't be paid for the merchandise. Therefore, it is advised that those dealing in international trade be fully aware of the dangers involved.

In light of this decision, an efficient way of making sure that those engaged in international trade don't find themselves exposed to risk is to make the buyer sign a "maintenance of ownership" agreement phrased in such a way as to convince the court that this is absolutely in the parties' intent.

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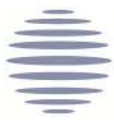
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Czech Republic – New obligations in respect of Commercial Register information



Entities registered in the Commercial Register are legally required to lodge particular documents in the Collection of Documents maintained with the Commercial Register. These Documents are subsequently made public – either through a respective Registration Court or through the electronic Register, found at <http://portal.justice.cz/>. The Collection of Documents is a part of the Commercial Register. According to a new provision of the Commercial Code any entity registered in the Commercial Register must provide to the Register, Closure of its Accounts and Annual Financial Statements within 30 days of their approval and verification by an auditor (or from the time the last of these conditions is satisfied). In case that a Closure of Account has not been approved or has not been verified by an auditor, such entity must provide to the Collection of Documents information regarding this failure to obtain approval or verification before the end of the next accounting period. Among sanctions and recourses for breaching the responsibilities attached to the lodgement of documents in the Collection are following: recourse by the Registration Court, pursuant to the Commercial Code and the Civil Court Process; recourse by the Tax Office, pursuant to the Law on Accounting; recourse of an Administrative Authority, pursuant to the Trespass Law; and recourse pursuant to the Criminal Code.

It has been common practice that relevant entities often do not fulfill their duties to lodge documents within the Collection of Documents in the Commercial Register. This practice has subsisted as the relevant offices have not rigorously enforced these duties and have thus effectively tolerated their breach. The risk of sanctions for breach of these duties has now distinctively increased and therefore greater attention should be given to complying with these duties. Furthermore, the fulfilment of this obligation, as it also relates to accounting documents, has been actively investigated by the Tax Offices from the beginning of this year. Although this has not been the practice in the past, Registration Courts and the Tax Offices have begun enforcing these duties, even through the use of sanctions.

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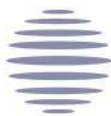
Australia - Business judgment rule - recent lessons for all company directors

Some recent well publicised cases have resulted in significant adverse consequences for directors; particularly noteworthy is the Fortescue Case.

On 18 February 2011, the Full Federal Court of Australia handed down its appeal decision in the case of Australian Securities and Investments Commission v Fortescue Metals Group Ltd (*FMG*).

In early 2004, FMG and one of its directors, Andrew Forrest (*Forrest*), entered into negotiations with three Chinese companies in relation to the construction of a mine, port and railway as part of a mining project known as the Pilbara Infrastructure Project. These negotiations led to the execution of three agreements. FMG then made disclosures to the Australian Securities Exchange (ASX) and issued media releases stating that FMG had executed binding agreements to build, finance and transfer the railway, port and mine.





In or about March 2005 (almost a year later), it became known that these agreements were merely framework agreements. The agreements did not bind the Chinese companies to build the infrastructure and provide finance. The agreements only obliged the Chinese companies to enter into further negotiations with FMG.

Allegations

The Australia Securities and Investment Commission (ASIC) commenced proceedings against FMG and Forrest. It was alleged that FMG had engaged in misleading and deceptive conduct by falsely representing to the investing public that the framework agreements were enforceable agreements to build, finance and transfer the infrastructure; FMG breached its continuous disclosure obligations to the ASX; Forrest was involved in these contraventions as he authorised the disclosures to the ASX and the media releases and breached his duty as a director of FMG to act with care and diligence.

Defence

As part of Forrest's defence to the claim that he had breached his duty of care and diligence to FMG, he sought to rely on section 180(2) of the Corporations Act which is also known as the 'business judgment rule'. Section 180(2) of the Corporations Act provides as follows:

A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they: (a) make the judgment in good faith for a proper purpose; and (b) do not have a material personal interest in the subject matter of the judgment; and (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and (d) rationally believe that the judgment is in the best interests of the corporation'.

Decisions

At the first hearing before a single judge, the judge found in favour of FMG and Forrest and dismissed ASIC's claim. On appeal, the Full Federal Court overturned the decision of the trial judge. It found that: Statements made by FMG were 'likely to' mislead and deceive ordinary and reasonable members of the investing public who read the announcements into believing that the framework agreements were binding; FMG and Forrest (in his capacity as an officer of FMG) had breached its and his continuous disclosure obligations under the listing rules of the Australian Securities Exchange. Forrest had also breached his duty as a director of FMG to act with diligence and care as he knowingly participated in events leading up to FMG's misleading conduct. Forrest could not rely on the 'business judgment rule' – as he was not able to provide sufficient evidence to show that he made the judgement in good faith and for a proper purpose; his shareholding in FMG did not amount to a material personal interest in the subject matter of the judgment; his decision did not relate to the business operations of FMG but, instead, to FMG's compliance with the requirements of the Act.

The court was of the view that Forrest could not rely on the business judgement rule to avoid liability for a decision that the Company should not comply with a provision of the Corporations Act. Penalties are yet to be decided. FMG has announced that FMG and Andrew Forrest intend to apply for special leave to appeal to the High Court.

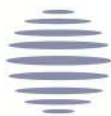
Lessons

There have been various recent similar cases. Consequently as a summary, it is obviously important for listed companies and their directors (which are subject to more onerous disclosure obligations than those imposed on proprietary limited companies), to take note of the following.

Directors should take care when making a statement on which someone is going to rely. Public announcements – particularly pertaining to matters of public interest – should be treated in a similar way to representations made in a contract. There may be many instances where, with an established system, such statements can be reviewed and approved by a delegate of the board. However, on some occasions, the matter will be serious enough for the board to insist on directly reviewing and approving the proposed statement prior to publication. If a director becomes aware of an error or omission in a statement that has been made public, prompt action should be taken by the board to correct the misstatement.

Ignorance of the law is no excuse. If in doubt, the better course is to take professional advice. Advice can be sought collectively by the board or by directors individually. Even if the advice ultimately proves incorrect, the fact that advice was sought should assist with the mitigation of penalties.





A director should be aware of what he or she is being asked to decide and whether he or she is being asked to make a decision on a matter that involves compliance with the law (where a director will not be able to rely on the business judgment rule).

A director seeking to rely on the business judgment rule will be greatly assisted if he or she is able to demonstrate that each component of the rule has been satisfied. To achieve this, a director should: ensure an accurate written record of all decisions made by the board is kept - so there is no doubt about what the decision was; if the director wants to demonstrate he or she did not join in the decision, ensure that the record of the decision includes any votes against the resolution and any abstentions; ensure that he or she has all of the information (including any appropriate professional or technical advice) required to make a decision. A director should also ensure, having reviewed available information in respect of the decision, that he or she has an honest belief that approval of the decision will be in the best interest of the company.

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Malta - The re-domiciliation of offshore private investment funds

Maltese law permits the continuation, migration or re-domiciliation of a corporate entity which has been formed, incorporated or registered in any country outside Malta. In fact, by means of subsidiary legislation, provision is made for both inward and outward continuation/migration of companies. The laws of Malta also consider common and private investment funds as corporate entities. Private investment funds (PIFs) may be migrated to Malta once all criteria set out by Maltese law is satisfied.



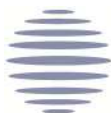
The main legislation which regulates the field of investment services on the island is Chapter 370 of the Laws of Malta. This law authorises and recognises the continuation of collective investment schemes in Malta, supported by various subsidiary legislation. Before considering the many possibilities Maltese law offers in the sphere of re-domiciliation, it is advisable to consider preliminary requirements which a foreign fund must satisfy before delving into the process of migration.

First and foremost, one must refer to the applicable law of the foreign jurisdiction of the corporate entity, which must ensure that continuance/migration of such an entity is permissible. Consequently, eligibility to register such an entity in Malta must also be authorised through its charter or statutes (or memorandum and articles), or any other instrument which defines the fund authorising such continuation. This instrument must be submitted to the Maltese Authority to set the ball rolling. This constitutional instrument must be accompanied with a so-called "Offering Memorandum", which must include details of the current Directors.

Once the above procedures have been verified and the continuation is deemed to be legal, an application for a Collective Investment Scheme licence under the Investment Services Act must be submitted to the Maltese Financial Services Authority (MFSA). This application should be accompanied by the relevant documentation, which will be reviewed by the Authority and must be drafted on the basis of the Scheme operating post re-domiciliation. This means that it must refer to the Scheme as a Malta based scheme and refer to the Board members and service providers of the fund servicing the Scheme once it is re-domiciled.

An important document which is essential to the continuation of a fund in Malta is a signed resolution from the existing Board of the Directors. This resolution must confirm the Directors' intention to re-domicile the scheme to Malta; as well as authorising those persons authorised to sign the application referred to above and thus effect all necessary changes to the company as per the proposed final version of the Offering Memorandum.





Additionally, recent copies of the audited financial statements of the investment scheme must be submitted to the Authority. Moreover, it is to be ensured that there are no contra- regulatory issues related to the re-domiciliation and no pending litigation or disputes that the Directors are aware (or any potential litigation or disputes).

The compilation of these documents may be a daunting task, for the preparation of relevant material, but the process should be followed correctly to avoid risk to the fund's migration which must also continue to be registered abroad to avoid being struck off before it is registered in Malta. Additionally, relevant due diligence enquiries must be undertaken by the MFSA, including enquiries of the existing regulator of the overseas scheme.

Once all documentation is approved and consultation is carried out by the Authority, a principle decision will be issued with respect to the scheme. This 'in principle' decision is then communicated, together with an 'in principle approval', involving any pre-licensing issues to be addressed.

Subsequently, the promoters must then finalise the relevant documentation required by the Authorisations' Unit and the Registrar of Companies. Once the Authorisations' Unit (au@mfsa.com.mt) liaises with the Registrar of Companies, and a satisfactory resolution is reached the Scheme would be said to be licensed on the same date as it is validly re- domiciled to Malta.

It is to be noted and highly advisable that, at all times, the Registrar of Companies is consulted about the proposed re-domiciliation. Also it must be ensured that the proposed structure and the documentation to be used by the Scheme are in line with the requirements specified in the Investment Services Rules for Professional Investor Funds.

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Cyprus - Suspicions of oligopoly in the milk industry

In reality, few markets are perfectly competitive and many are oligopolistic. The general trend in recent years has undoubtedly been towards an increase in industrial concentration. Some oligopolies are benign in terms of competition, and others are considered malign where they are particularly conducive to uncompetitive outcomes. Oligopoly is a phenomenon that exists on the spectrum between monopoly and perfect competition. The term 'oligopoly' indicates a market form in which an industry is dominated by a small number of sellers, but it is not the small number in itself that is the problem. It is market power - whether individual or collective - that confers the ability to suppress output and raise prices to the detriment of consumers. In simple terms, oligopoly produces non-competitive stability.

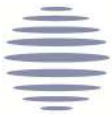
General arguments against oligopolies

The main argument against oligopoly is that the structural conditions of the market in which oligopolists operate are such that they will not compete with one another on price and will have little incentive to compete in other ways. Furthermore, they will be able to earn supra-competitive profits without entering into the type of collusive agreement or concerted practice generally proscribed by competition law.

In an oligopolistic market rivals are inter-dependent. They have a heightened awareness of each other's presence and are bound to match one another's marketing strategy.

All firms want to maximise profits and, in reality, profits are greater in monopolistic markets in which output is suppressed. However, oligopolists recognise their interdependence as well as their own self-interests. By matching each other's conduct they can achieve and charge a profit-maximising price, which will be set at a supra-competitive level, without actually communicating with one another in any way at all. The structure of the market is such that, through inter-dependence and mutual self awareness, prices will rise towards the monopolistic level.





The Cyprus milk industry

Cyprus produces the most expensive milk in the European Union. This is an ongoing issue that has prompted the commerce minister to write to the European Commission requesting approval to set a ceiling on the price of milk, supporting official claims of a lack of competition. There is also an ongoing investigation by the Committee for the Protection of Competition into the entire system.

There have been claims of price collusion between two milk companies which reportedly sell milk at exactly the same price. There could also be collusion among the cow farmers who sell milk to the companies at the same, high price. However, cow farmers point out that the price they charge to companies for milk is high because, unlike most EU countries, Cyprus has no grass pastures for cows to graze on and they have to buy fodder. The main grain supplier is the state, which enjoys a monopoly. As it dictates the price of grain, the state also has a share of responsibility for the lack of real competition in the fresh milk market. If there was competition in the supply of grain, perhaps fresh milk prices would decline. However, this is far from certain, as too many cow farmers are used to selling their milk at exactly the same price via the monopolist Milk Marketing Board.



A recent *Cyprus Mail* newspaper article on the issue stated:

"We are sure that there is profiteering throughout the chain, from producers to pasteurisers and retailers. There is an oligopoly in the production and distribution of milk and more pressure should be put on these sectors if prices are to reduce. The milk distribution system is ailing and it is vital to put an end to the oligopolies. An end to this will result in the operation of a free market."

The Commerce Minister is one step closer to achieving fixed prices after the European Commission authorised the right to set a price ceiling in the free market. Legislation is being drafted by the legal services; this needs the final blessing from the European Commission, after which it must be approved in Cyprus. This will enable the minister to intervene in the market and fix prices, eventually resulting in the end of the existing oligopoly in the milk industry. This should also enable profiteering in the production and marketing of milk to be tackled.

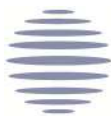
Comment

Competition authorities should not be price regulators. They should be the guardians of the competitive process. Where markets are oligopolistic and entry is limited, competition authorities should be concerned with the question of whether there are barriers to entry and whether the state itself is responsible for a lack of competition. As a matter of policy, direct regulation should be a last resort remedy.

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Italy – New changes to the labour law reform of 2010

An Italian labour law reform (called “*Collegato lavoro*”, Law Nr. 183/2010 that came into force on 24th November 2010) recently introduced several changes to try to avoid court litigation in labour law matters through mediation and arbitration; also giving the possibility for the parties to agree in an employment contract, examples of what may constitute a justified dismissal.

An employee that wants to challenge a dismissal must (firstly) object, not later than 60 days after the notice of dismissal is received. The objection to the dismissal has to be made in writing and must indicate the will of the employee to challenge the dismissal. (The objection can also be made through the labour unions). It is important to point out that the deadline for starting action against an unlawful dismissal has now been drastically reduced by the reform to 270 days (it was five years before!) with time running from the date of the objection of the dismissal by the employee. An employee has now three ways to challenge the dismissal and search for a solution.

Mediation

The attempt to find a solution through mediation proceedings with the local labour commission is not compulsory anymore, but will be a free decision/option by the employee if desired. The employee has to present the reasons and legal view points; the employer, if it accepts mediation, has 20 days to answer. If the mediation is unsuccessful, the mediator will suggest a proposal of settlement and if a party (without giving any reason) does not adhere to the settlement, the judge in any future trial must consider that behaviour. An employee then has 60 days to start legal proceeding in front of the labour court (*as presented below*).

Arbitration

Apart from the possibility that the parties during the mediation ask the local commission to solve the dispute by arbitration (this is an informal arbitration that has the value of a contract between the parties), the reform introduces three other forms of arbitration: arbitration foreseen in the collective agreements of specific industries; arbitration by certification; arbitration at the board of conciliation (informal arbitration established at the initiative of the individual parties of the employment relationship). Each party appoints an arbitrator and together they appoint a president of the arbitration board; in absence of an agreement, such person will be nominated by the court. A short time exists for the deposit of written submissions and replies. Then, there is a hearing where the board tries to reconcile the dispute, interrogates the parties and hears the evidence. The dispute must be decided within 20 days from the hearing, with a final award. The arbitration award is voidable by the court only in certain cases; for example if the arbitration agreement is invalid, if the arbitrators were illegally appointed, or if the arbitrators have not followed the rules established by the parties.

The real innovation is the possibility of agreeing, before a labour dispute arises, arbitration clauses by which the employee and the employer establish that any future disputes (with the exception of a dismissal) will be decided by arbitrators, rather than by a court. The arbitration clause must be signed in front of a certification committee, which must ascertain the real intention of the parties.

Court proceedings

As stated before, within 270 days from the notice of dismissal, an employee can start an action in the labour court. At the first hearing, the judge attempts to reconcile the parties, (which can also be reached with the magistrate at any time during the process). In case of success, the agreement is enforceable.

Cause of dismissal agreed by the parties

Finally, it deserves a special mention that the notion of ‘just cause’ was introduced by the reform. Consequently a judge, in assessing the reasons for dismissal, must take into account ‘just cause’/ good reasons for the dismissal established in collective agreements or individual contracts, if certified. The employer and the employee may sign a clause stating some hypothetical situations that can justify a dismissal. This innovation will undoubtedly ensure greater certainty about the causes of interruption of employment.

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World Link for Law and members' news

World Trade Links

World Link for Law has established a database and search enabled web site of principal members' clients, to help enable international business matchmaking possibilities for members' clients (or other businesses). Further information and investigation of opportunities can be found at:

www.worldtradelinks.net

New members

World Link for Law has recently appointed the following new members:

- Aavik & Partners, Tallin, Estonia
- LEXCO, Bordeaux, France
- Eluchans y Cia, Santiago, Chile
- Franklin & Franklin, Montreal, Canada
- Heimsath Alexander, Auckland, New Zealand
- The Lohn Law Firm, Budapest, Hungary
- Kiveld International Lawyers, The Hague, The Netherlands
- Karahmet Luz & Greenberg LLP, New York, USA

New publications update

World Link for Law has updated its **International company formation guide**, which now has information for over 35 countries (it is being developed all the time). It identifies different types of company formation options and general procedural requirements in various countries around the world.

You can download the latest information at:

www.worldlink-law.com/publications.htm

And finally..... how should almonds taste?



The Czech Ministry of Agriculture has amended the regulation setting up conditions for both fresh and manufactured fruit and fresh vegetable, nutshell fruits, mushrooms, potatoes and products made from them, as well as ways of their labelling. Thanks to the Czech Ministry of Agriculture today we know that dried fruit must be 'dry enough' and its taste must be 'typical for a particular kind of dried fruit and without any strange smells'. The taste of almonds should be 'typically almond'. And what about taste of coconut? It should be 'typically coconut' of course. This bizarre legal regulation defends our lives from the coconut which taste of peaches and almonds with a taste of cheese!

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