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TABLE OF CONTENTS

- **Australia** — Managing the Threat of Terrorism In Public Institutions such as Hospitals and Aged Care Facilities. ***(page 3 and 5)***
- **Belgium** — Extracts Crossroad Bank of Enterprises available in English. ***(page 6)***
  — Entry into force of the new procedure to recover undisputed B2B-invoices. ***(page 6)***
  — The Minister of Justice announces reformation Belgian company law. ***(page 6 and 7)***
- **Bulgaria** — Recent court practice in relation to unfair competition in Bulgaria. ***(page 8)***
- **Cyprus** — Enhancement of the Cyprus citizenship by investment program. ***(page 9)***
- **Denmark** — Denmark set to simultaneously relax and tighten legislation on companies. ***(page 10)***
- **France** — The new contract law entered into force since October 1, 2016. ***(page 11)***
- **Greece** — Enactment of Law 4399/2016 ("Statutory framework for the establishment of Private Investments Aid Schemes for the regional and economic development of the country – Establishment of Development Council and other provisions") in Greece. ***(page 12)***
- **Hungary**—Change in the liability of the executive officers regulated in the Hungarian Civil Code. ***(page 13 and 14)***
- **Ireland** — Recent developments in Irish Immigration Law. ***(page 15 and 16)***
  — Brexit; Potential Effect on Insolvency and Restructuring in Ireland. ***(page 16 and 17 and 18)***
- **Netherlands** — For which agreements and deeds does a director or shareholder need the consent of his spouse under Dutch law? ***(page 19)***
- **Norway** — Professional liability as a mean to recover assets. ***(page 20)***
- **Poland** — Modernization of Polish law on forms of civil acts. ***(page 21 and 22)***
- **Romania** — Arbitration in Romania : A practitioner's Guide. ***(page 23 and 24)***
- **Spain** — Fintech: a new online way of investment overregulated. ***(page 25)***
  — Crowdfunding: participative financing in the Law 5/2015 of promotion of business financing . ***(page 25-27)***
- **Switzerland** — A recent decision in Swiss banking law. ***(page 28)***

Australia

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Managing the Threat of Terrorism In Public Institutions such as Hospitals and Aged Care Facilities

Unfortunately, we live in a world today where terrorist attacks have become far too common. Counter-terrorism strategies and tactics are rightly in the consciousness of governments, employers and the public at large in the wake of attacks in Kenya, Beirut, Paris, Nice and many other locations around the world which experienced massive losses of life by the actions of extremists (not to mention the numerous shootings, bombings, and bio-attacks that continue to take place). In August 2016 there was a terrorist attack on a Pakistan hospital which killed more than 50 people. Locally, we have had our own challenges with the loss of life arising from the Martin Place Siege and attack on NSW Police Headquarters in Parramatta.

Security challenges in the workplace have, however, existed for centuries. Work Health and Safety (WHS) laws require employers to develop strategies to eliminate or control these risks. This responsibility applies equally to the security-related risks and threats.

The best method for addressing workplace violence is to prevent it from occurring in the frst place. Violence in the form of terrorism can take many forms and occur virtually anywhere at any time, so public institutions such as hospitals and aged care facilities must be diligent in taking all possible measures to avoid such incidents at their worksites, and have a risk management framework in place should they occur.

A terrorist act is not defined in the WHS legislation24 however it is defined in the *Terrorism (Commonwealth Powers) Act 2002 (NSW)*25 as:

a. action that is done or the threat is made with the intention of advancing a political, religious or ideological cause; and

b. the action is done or the threat is made with the intention of:

(i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country;

(ii) or intimidating the public or a section of the public.

That

a. causes serious harm that is physical harm to a person;
b. causes serious damage to property;
c. causes a person’s death;
d. endangers a person’s life, other than the life of the person taking the action;
e. creates a serious risk to the health or safety of the public or a section of the public; or
f. seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:

(i) an information system;
(ii) telecommunications system;
(iii) a financial system;
(iv) a system used for the delivery of essential government services;
(v) a system used for, or by, an essential public utility; or
(vi) a system used for, or by, a transport system.

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The most common types of terror attacks that may occur at a workplace include:

- **Fires and Explosions**: Caused by arson or an explosive device on a targeted location or building. Although employers cannot be expected to reasonably identify and attempt to control these hazards, they should have effective fire prevention plans in place and provide employees with action plans to safely respond to threats and incidents;
- **Bioterrorism**: The intentional use of micro-organisms to bring about ill effects or death to humans, livestock, or crops. Employees who receive materials and packages to their worksites must be trained to identify suspicious substances and minimize exposures in the work environment; and
- **Radiological Dispersal Devices (RDD)**: Known as "dirty bombs," these consist of radioactive material combined with conventional explosives. Their purpose is to disperse the radioactive chemicals over a large area, killing those in the immediate area and causing panic in the target population.

A comprehensive framework to risk management is imperative to managing the threat and risk of terrorist acts. The risk management process involves the following:

- **Establishing Context** – Looking at the environment the organization operates in to ensure that the strategies to mitigate risk are cost effective, operationally effective and appropriate;
- **Identification** – Identifying all security risks which the framework will be responsible for assessing and mitigating;
- **Analysis** – Assessing the likelihood and consequences of each risk occurring. This involves looking at worksite vulnerabilities, recognized threat, and anticipated consequences of the event. Keep in mind that although many vulnerable locations are typically identifed as public spaces, they are still the worksites for thousands of employees. These factors include the extent to which a site:
    - ◊ Uses, handles, stores, or transports hazardous materials;
    - ◊ Provides essential services;
    - ◊ Has a high volume of pedestrian traffic;
    - ◊ Has limited means of egress, such as a high-rise complex; or underground operations;
    - ◊ Has a high volume of incoming materials;
    - ◊ Is considered a high profile site;
    - ◊ Is part of the transportation system;
- **Evaluation** – Involves the application of metrics to determine relative values for each risk category and is often achieved using a risk analysis matrix (e.g. Very Low, Low, Medium, High and Critical);
- **Treatment** – Involves determining the most appropriate strategy to mitigate the risk by applying different treatment options such as accepting, avoiding, reducing or transferring the risk;
- **Communication and Consultation** – Stakeholder consultation is integral at each stage of the process and ensures an effective gathering of information and assistance with mitigating any identified risks. Consultation with local and federal agencies to discuss potential threats will assist so that they can work with you to better plan your preparedness and response procedures; and
- **Monitoring and Reviewing the Risks** – Periodic assessments and checks should be undertaken to ensure changes in the risk environment are reflected in the security measures and for public institutions assessments may need to be made more frequently than other employers.

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Preventative measures that may be considered as part of a comprehensive approach include:

- Pedestrian and vehicle access controls;
- On-site security guards;
- Appropriate surveillance systems;
- Emergency response plan and lock down capabilities – It is critical to implement an emergency response plan which facilitates and organizes employer and employee actions during workplace emergencies in the event of a terror incident. Employees should be trained to understand their roles within the plan, conduct regular fire and evacuation drills so that employees know their best way out of the worksite and where to find a safe space, and providing accessible safety equipment such as fire extinguishers and masks;
- Human resources and employee assistance programs – a Human Impact Team that is trained and prepared to specialize in the human side of crisis response and a Family Assistance Program Team as well as temporary arrangements for employees such as personal protection coaching, time off, personal security provisions, flexible work schedule and relocation to another facility may be included in these plans;
- Premises hardening (i.e. locks and other controlled access systems that keep out unwanted intruders);
- Employee workplace violence orientation;
- Hostility Management Training;
- Threat notification system – employees need to know that they share responsibility for safety and to report threats promptly and who to and what will happen next;
- Threat Response Team – Ideally you should also have a trained, multidisciplinary Threat Response Team to plan for, investigate, assess and, where possible, diffuse threatening situations. Employees should know that the organization has a team trained to respond to significant threats;
- Crisis communications – these need to be managed to and from affected stakeholders to ensure appropriate personnel are prepared to respond effectively; and
- Insurance cover for such events.

A terror attack can be catastrophic to an organization financially, on the employees and to its reputation. Although there is no way to completely eliminate the threat of a terrorist attack taking place at a worksite, organizations that are effective in managing the risk are more likely to be prepared for such an event were it to take place and minimize the loss of life as result and less likely to be accused of being negligent for failing to prepare and plan for it.

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Belgium

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Extracts Crossroad Bank of Enterprises available in English

A new addition to the Belgian Commercial Code has recently been adapted by the Belgian legislator enabling Belgian companies to obtain an English extract of their business registration immediately at their explicit request. In this way, companies can more easily compete for a contract with foreign companies or governments.

Up until now these extracts were only available in Dutch, French and German, creating a true barrier for companies to participate in contract biddings since now they either need an intervention of a sworn translator, or they should request the city council to authenticate a self-made translation. A limited extract can be requested by anyone, but a complete extract can only be requested by the company to whom the extract relates.

By creating the possibility for companies to request an immediate extract of their registration in English, the legislator lowers the financial as well as the administrative threshold for companies to participate in cross-border relationships.

Entry into force of the new procedure to recover undisputed B2B-invoices

As already announced in the newsletter of spring 2016, a new procedure was decided upon to deal with the recovery of undisputed invoices between companies. As of the 2nd of July 2016, this new procedure to recover undisputed invoices in business-to-business relationship (B2B) came into force, following a global revision of the Belgian Judicial Code implemented on the 19th of October 2015 in order to reduce the backlog of court cases. The new procedure should allow creditors to recover undisputed debt claims without having to go to court.

The procedure is available for any undisputed debt claim between businesses (B2B), of a certain amount of money which is fixed and payable at the day of notice and includes recovery costs and a maximum of 10% of the principal amount on interests and penalty clauses.

The course of the procedure has already been explained to a certain extent in the last newsletter, however, since then a lot has been written on the introduction of this extrajudicial manner of recovering invoices.
Whether this new procedure will be a success is strongly disputed as many believe only the judicial procedure guarantees adequate legal protection, namely by an impartial judge who was not mandated by the creditor. It is even feared that creditors, who still want to make use of the judicial procedure, will be discouraged to do so or that this procedure might even disappear hereby creating a form of vigilantism since no independent instance judges on the vast, claimable and undisputed character of the claim. On the other hand, the intention of the government creating this new procedure, was to reduce the workload of the courts by creating a procedure outside of the courts for undisputed debt claims. Only time will tell whether this procedure will be an actual improvement.

The Minister of Justice announces reformation Belgian company law

Belgian company law as we know it today is on the verge of a revolution. The Belgian minister of Justice announced his plans for a makeover of the Belgian Company Code in his policy paper of the 10th of November 2015, supported by the Belgian Centre of Company Law, ensuring a modernisation and simplification of Belgian company law.

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In a nutshell, the following reforms are planned: 1. Abolition of the distinction between commercial companies and civil companies. Association law will be incorporated in the Belgian Company Code, 3. The number of company types will be reduced and the remaining type will be adjusted. In this short article the focus will be on the reduced number of company types.

With regard to the reduction of the company types, only 4 types would remain (next to the European types), namely the simple partnership, the private company with limited liability, the cooperative company with limited liability and the limited liability company.

The private limited liability company, which will become the standard type company, will undergo the biggest change. This company form will be a lot more flexible than it is today, abolishing entirely the heavily argued capital requirements and capital protection rules. Whoever wants to start up a private limited liability company will be free to decide the amount of capital needed.

In this way Belgium hopes to become more competitive, to promote entrepreneurship and further put forward the private limited liability company as the standard company form. It needs to be noted however that with the removal of the capital protection rules, an alternative protection mechanism will be put into place to safeguard the rights of the creditors whereby monitoring of solvency and liquidity will be more stringent implying liability fines for directors based on sufficient starting capital, a decent financial plan, etc.

As to the other company forms, it needs to be mentioned that following thorough investigation, it was decided to preserve the capital requirements and the capital protection rules for the limited liability companies. And as to the cooperative companies, this type of company would go back to focus on its original purpose, namely to achieve the cooperative ideology whereby substantially all profits are reinvested.

It goes without saying that this reform will take into account all existing companies in their actual form and will allow conversion of these companies into one of the four basic types of companies gradually. Without a doubt, more will be written on this subject as these plans of the government will take shape over the next months.

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Bulgaria

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Recent court practice in relation to unfair competition in Bulgaria

In the past year the Commission for protection of competition has been extremely active for ascertaining violations of the competition law in the country. Amongst violations such as abuse of monopoly power, cartel agreements and tender manipulations, special consideration is paid to the general prohibition for '***unfair competition***'.

In accordance with the provisions of Competition Protection Act (CPA) unfair competition encompasses acts related to harming of the reputation of competitors, misleading information, misleading or comparative advertising,
imitation of goods, services, firms, trade marks, geographical indications or a domain name, unfair alluring of customers, disclosure of manufacturing or trade secrets.

Usually claimants seek legal protection of their rights on the specific grounds as enumerated in the act, which refer to active behaviour only. However it is also possible to claim unfair competition on the grounds of the general
prohibition and in such a case also the lack of adequate action may engage the legal liability of the defendant.

In a very recent decision*(1)* the Supreme Administrative Court makes a clear distinguishing between the imitation of a trade mark and the use of a similar trade mark. It is vital to consider the manner of use, presentation of the products as well as the similarity in shapes and colours, especially in Internet commerce. In such cases it is also important how the competitive market will be described specifically for Internet stores offering various types of goods*(2).* The claim for unfair competition cannot be combined with a proceeding for protection of rights deriving from a registered trade mark.

In public procurement there may also be unfair competition. Submitting of false information in the procurement bids is considered as unfair competition conduct, which creates preconditions for deceiving and harming the interests of competitors. For example, another recent decision *(3)* of the Supreme Administrative court rules that indication of an increased number of retail places, where the services of the bidder are provided, leads to an undue advantage in assigning the public procurement. The reliability of the information in the procurement bids is recognised as a material obligation of the loyal merchant.

(1) Decision № 10690 dated 13.10.2016 of Supreme Administrative Court on adm. case № 7480/2016
(2) Decision № 8952 dated 18.07.2016 of Supreme Administrative Court on adm. case № 2149/2016
(3) Decision № 4053 dated 07.04.2016 of Supreme Administrative Court on adm. case № 1319/2016

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Enhancement of the Cyprus citizenship by investment program

In 2013 Cyprus introduced a "citizenship by investment" programme, allowing individuals of good character who invest substantial sums in Cyprus to obtain Cyprus citizenship by naturalisation on an accelerated basis, typically within three months. As Cyprus is a member of the EU, and Cypriot citizenship brings with it the considerable travel and visa benefits applicable to all EU citizens, the programme has proved very popular.

On 13 September 2016 the Council of Ministers approved a number of changes to the programme, making it even more attractive than before and allowing investors to file a stand-alone application on the basis of a €2 million investment plus purchase of residential accommodation in Cyprus at a cost of at least €500,000.

In addition, several other changes were made: the parents of the applicant are also entitled to be granted citizenship, provided they purchase a home in Cyprus, the list of qualifying categories of investments has been extended and applicants now apply for a residence permit in tandem with the main application.

The Cyprus economic citizenship scheme gives successful applicants citizenship of an EU member state, with the right to live, work and study in all 28 EU countries. Holders of a Cyprus passport enjoy visa-free travel to more than 150 countries around the world. There is no need to relinquish an existing nationality, as Cyprus allows dual nationality. Full citizenship and passports are granted to the applicant and his or her dependants. Furthermore, applicants are not required to make any form of donation; citizenship merely requires the acquisition of assets in Cyprus, whether financial or tangible.

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Denmark

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Denmark set to simultaneously relax and tighten legislation on companies

The Danish parliamentary year is set to kick off with a number of changes to The Danish Companies Act, including changes to the rules regarding public ownership and a legalization of shareholder loans. According to the proposal, the changes are scheduled to enter into force on January 1st, 2017.

Sanctions for failing to publicize ownership

Since June 2015, it has been mandatory for companies in Denmark to register ownership information with The Danish Business Authority. The information is published in The Public Owners Registry and includes the identity of owners with an ownership or voting stake of more than 5% as well as the date of acquisition and the size of each respective owners' stake.

Thus far, no sanctions have been imposed for failing to comply with these requirements. However, a number of companies, including ones founded after the rules mandating registration entered into force, have yet to register the necessary ownership information.

A proposed change to The Danish Companies Act would prevent the foundation and registration of a company before proper ownership information has been provided. This also applies to companies which are created as part of a cross-border merger or demerger as well as to European Companies (SE's).

Additionally, The Danish Business Authority would be authorized to initiate compulsory dissolution of existing companies lacking registration of ownership, if they do not comply with the rules after being prompted to do so. Company owners and management who received little or perhaps no counseling on their company affairs now face the possibility of a summons to probate court and the compulsory dissolution of their company. The change therefore accentuates the necessity of proper routine and proficient advisors when establishing a company in Denmark.

Shareholder loans no longer illegal

The provision of funds by a company to shareholders or management is at present illegal in Denmark except in a few select instances. Additionally, the recipient of the loan is subject to taxation of the borrowed amount as dividend or salary, and this taxation is not lifted upon repayment of the loan.

Denmark is one of the few remaining EU countries where shareholder loans are illegal, and this is one of the primary motivations for the proposed change to legalize them. Legislators wish to provide Danish companies with the same level of flexibility that they would enjoy in other countries.

In order for a shareholder loan to be legal according to the proposed changes, the company must have publicized its first annual report, and the size of the loan must be supported by the equity of the company. If the company is subject to mandatory auditing, the auditor is required to assert whether or not the conditions for providing the loan are met, and The Danish Business Authority will conduct sample tests as part of its ordinary review of annual reports.

Simultaneously, the provisions would allow for the possibility of legalizing currently illegal loans if the abovementioned conditions are met.

However, even recipients of a legal shareholder loan will continue to be subject to the abovementioned taxation, which will remain unchanged according to the proposal. The taxation only applies to recipients with a controlling influence in the company providing the loan, but in spite of the legalization, the tax conditions for these types of loans remain rather unfavorable, and it therefore remains to be seen if the proposed changes will create the desired flexibility.

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France

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The new contract law entered into force since October 1, 2016

In 2016, we saw the advent of a thorough reform of contract law through the ordinance no. 2016-131 of February 10 which entered into force since October 1st.

This reform will have a huge impact even if most of the provisions are just a codification of precedents.

The real changes brought with this reform can be summarized to these few points:

- the consecration of an obligation to act in good faith at all stages of life of the contract (the public order character of this obligation is affirmed);
- the introduction of a new category of contracts: the adhesion contracts, in which unfair terms can be challenged;
- a new understanding of the concept of "violence" (a close relative in civil law from the abuse of weakness in criminal law);
- the widespread of the prohibition of the clauses depriving essential obligations of the debtor of their substance;
- the possibility for one party to invoke the nullity a contract due to the disappearance of another contract because of their interdependence;
- the creation of a device to allow a judicially review or an annihilation of the contract in case where a party has to face with the occurrence of unforeseen circumstances at the conclusion of the contract which make contract performance excessively onerous;
- the legal definition of some concepts applicable to the contract: "period of extension", "renewal" and "tacit renewal";
- the recognition of the right of a party to invoke the exception of non-performance for the future;
- a new sanction for breach of contract: the price reduction;
- the consecration of the right of a party to exercise unilateral termination of the contract, apart from the application of any termination clause.

There are also more technical changes such as:

- the establishment of actions of questioning, particularly in terms of representation and of nullity of contract, in order to allow a party to secure the relationship with questioning of his co-contractor;
- the expansion of the scope of the exceptions to the principle that silence does not constitute acceptance; the treatment of the quality of provision in the contract;
- the modification of the legal system regarding the disposals of a contract or a claim in terms of formality required for their validity and their enforceability;
- the possibility offered to the parties regarding unilateral fixing of prices in the framework contracts or in the service provision contracts and their limitations;
- about the representation, with the adoption of a rule which strictly controls the conditions of representation of both parties to a contract by the same person;
- about the treatment of termination of the contract, with the assumed maintenance of the effects of certain clauses such as clauses non-compete or confidentiality clauses.

The new provisions are applicable to the new contracts concluded since October 1st, 2016; the previous provisions remain applicable to the contracts concluded before this same date.

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Greece

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Enactment of Law 4399/2016 ("Statutory framework for the establishment of Private Investments Aid Schemes for the regional and economic development of the country – Establishment of Development Council and other provisions") in Greece

Greece has recently introduced a series of legislative reforms aiming at facilitating and enhancing the implementation of investment projects. The reforms on licensing legislation, the adoption of a 'fast-track' mechanism for strategic investments and the establishment of the institution of 'Ombudsman' constitute measures designed to unblock the implementation of investment projects, which have considerably improved the institutional business framework of Greece.

More specifically the new Investment And Incentives Law Numbered 4399/2016 ("Statutory framework for the establishment of Private Investments Aid Schemes for the regional and economic development of the country – Establishment of Development Council and other provisions") has been ratified by the Greek parliament in June 2016 and was recently published on the National Government Gazette Issue nr. 117/22.06.2016.

Law 4399/2016 was set to take effect in September 2016. For that reason, and given prior experiences, the government has elected to include in the said Law certain provisions that dictate the ongoing and ex post evaluation process of the provisions of the Law in order to allow flexibility and the ability to amend the Law accordingly in the future.

The new Law provides a general framework, which is expected to be specified for each aid scheme through the ministerial circulars to be issued.

The main points raised on the newly established law are in brief the following:

-The main focus of the said law, is directed at the tax incentives in comparison to the other types of aid.
-A threshold is being provided for the types of aid available to individuals investment projects, as well as to companies and group of companies, in order to achieve dispersion of the beneficiaries of state aid.
-Special categories of state aid schemes are being determined, either (a) on the basis of the performance of the companies or (b) on territorial basis.
-Beneficiaries of the aid Terms and prerequisites for participation are identified
-Terms and prerequisites for participation are provided (type of investment projects, minimum investment amount range)
-Types of aid are described in detail which may include the following types: Tax exemption Subsidy of funds in order to cover part of the eligible expenses of the investment project; Subsidy of leasing for the acquisition of new machinery and other equipment; Subsidy of employment cost; Fixed corporate income tax rate for a period of 12 years from the completion of the investment project, exclusively for investment projects of major size; Funding of corporate risk through Funds of Funds. etc
-Maximum amount of aid per investment scheme
-Description of eligible expenses
-Procedure regarding the filing of applications and evaluation of investments projects
-Implementation process and completion of investment projects

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Hungary

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Change in the liability of the executive officers regulated in the Hungarian Civil Code

A significant amendment was accepted by the Hungarian Parliament in connection with the Hungarian Civil Code. This Act consists of substantive rules which regulate – inter alia – all the legal entities, company law, as well as contract law, non-contractual damages and liability rules.

The amendment came into force on the 1st of July 2016. The purpose of it was revising the inefficient and inequitable provisions from the Code and to minimise the liability of the executive officers of the legal entities vis-à-vis third people. The intent of the legislator was to dissolve the legal interpretation problems which arose in legal disputes.

The prior provisions – liability for the actions of an executive officer

According to the previous regulation: “if an executive officer of a legal person causes damage to a third party in connection with his office, liability in relation to the injured person lies with the executive officer and the legal person jointly and severally”. This provision was stipulated under the *non-contractual liability for damages* part of the Code, as one of the subtypes of it, called: *liability for the acts of another person*. The executive officers do not have contractual relationships between themselves and third persons. The creditors – who have contractual relationships with the legal person itself – are also considered third parties in this content. The joint and several liability was a sufficient and satisfactory guarantee for the creditors. Accordingly they were highly protected by law.
But on the other hand, this provision was inequitable for the executive officers, as they could have been held liable for a damage, which was not caused by, not even attributable to them, but only connected to the office of theirs. This liability of the executive officers was unlimited, and the extent of the compensation was determined by the amount of loss.

Repeal and amendment

The abovementioned regulation was repealed entirely from the *non-contractual liability for damages* part, and an amended version was codified into another part of the Civil Code, which regulates the rules of legal entities.

The new rules state that “the legal person shall be liable for damages caused to third parties by the executive officer in that capacity. Liability for any damage caused by the executive officer intentionally lies with the executive officer and the legal person jointly and severally.”

The first main change is in connection with the relocation of the modified rules. It is extremely important, that – as instead of being placed in the non-contractual liability for damages part – it was placed into the part which regulates legal entities. The new section does not include, that the executive officers can be held liable according to the rules of the liability for non-contractual damage or by being unlawful, which stipulations – in the previous provision – were obviously referred to the provision, because of their location in the Code.

The legislator decided to change the part “in connection with its office” to “in that capacity” as well. It is a significant modification, as it stresses that the executive officer itself has to perpetrate the act or be negligent to be held liable, as opposed to the previous regulations. It is the so-called attributability / imputability rule, which was taken into consideration meanwhile the modification process. On one hand it protects the executive officers from disproportionate liability and on the other hand it still provides adequate and sufficient protection for the third parties, creditors.

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The third main modification in the clause is that – as a general rule – the legal entity is liable for the damage caused by an executive officer acting in his power. The amendment was reasonable because the executive officers are the legal representatives of the legal entities; therefore they act on behalf of and in the name of them, which means that their actions are regarded as the actions of the legal persons'. Therefore it was justifiable to reduce the liability to the legal entity itself.

Nevertheless, as a supplement, a significant correction was added to this provision. The legislator took the intent of the executive officers into consideration. The legal entity and the executive officer can be held liable jointly and severally if the damage was caused intentionally by the executive officer. This amendment provides equitable legal consequences and it is justifiable, as a legal entity should not bear the legal consequences of its executive officer acting in bad faith.

Undoubtedly, new regulations will change the position of the executive officers, and will force them to act in good faith and as the interest of the legal entity requires. On one hand these rules reduce the unlimited liability and provide rightful legal consequences for the executive officers' acts. On the other hand the Civil Code still confers appropriate protection for third people and creditors. What is more, the new regulations can solve the earlier uncertainty in jurisprudence. Eventually the court practice will determine the possible interpretation of the new conception, when legal disputes will arise. Besides it will clarify the new provision's exact meaning as well.

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Recent developments in Irish Immigration Law

Hosting Agreement Scheme ("the Scheme")

In the wake of the Brexit vote, British universities are set to lose about £1 billion in EU research grants, casting doubt over the future prospects of researchers in the UK.

As the only English-speaking country in the EU, Ireland will be in a unique position, with guaranteed access to European research funding. The Irish Research Council has now launched an initiative to promote Ireland as a prime research destination and expects an increase in EU research funding in the wake of Brexit. Under the Scheme, Ireland offers researchers who meet certain criteria the opportunity to work in Ireland without requiring a work permit for up to five years. Other benefits of the Scheme include:

- There is no charge for a hosting agreement.
- Family members (spouse and dependants) may accompany or join a researcher in Ireland.
- The Agreement lasts for the duration of the employment contract with the academic body.
- The researcher will be eligible to apply for Irish residency after two years' continuous employment under a Hosting Agreement.

While researchers are not required to obtain a work permit under the Scheme, non-EEA nationals intending to remain in Ireland beyond three months are required to register with Ireland's national police service, the Garda National Immigration Bureau ("the GNIB"). Non-exempt nationals must also obtain an entry visa prior to entering Ireland. Without the correct advice, these registration requirements can cause problems for those seeking to work in Ireland.

The Immigration Team at Eugene F. Collins can provide expert advice to those seeking to progress their research careers in Ireland, and will ensure a seamless transition for any person seeking to avail of the Hosting Agreement Scheme.

New Employment Permits Online System (EPOS)

A new Employment Permits Online System (EPOS) will be available to all applicants for employment permits from September 2016. Under the new system, employment permit applications and the submission of supporting documentation can be made via EPOS along with payments of fees through a secure payment gateway.

The Department of Jobs, Enterprise and Innovation ("DJEI") has stated that EPOS will offer:

- An intuitive online user experience.
- Ease of application completion with helpful information and relevant mandatory fields.
- Mandatory documentation identified per Permit Type with helpful information.
- Fast turnaround of Applications.

European Union (Posting of Workers) Regulations 2016 ("the Regulations")

In July 2016, the Government transposed an EU Directive in relation to the enforcement of posted workers' rights. The intention of the Regulations is to ensure workers posted to Ireland are better protected and can enforce their rights under the original Posted Workers Directive.

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From previous page ...

The Regulations impose a new requirement on EU-based service providers when posting workers to Ireland to provide a declaration to the Workplace Relations Commission ("the WRC"), providing information which will allow the WRC to monitor posting activity and ensure compliance with posting rules.

Due to the broad definition of a "posted worker", it appears the declaration to the WRC is an additional notification obligation in respect of certain employees seconded or "posted" to Ireland from an EU-based entity pursuant to a:

1. Contract for Services Employment Permit;
2. Intra-Company Transfer Employment Permit;
3. Atypical Working Scheme Visa; or
4. The Van der Elst exception.

Failure to comply with this requirement is an offence and may result in financial penalties against both the service provider and its responsible individuals of up to €50,000.

Online Booking System for Appointments for Immigration Registration

In August 2016, the Irish Naturalisation and Immigration Service ("INIS") announced the introduction of a new online system for booking appointments for immigration registration at the GNIB. This system is only applicable to those registering at Burgh Quay in Dublin.

With the introduction of the online booking system, applicants will be given clear appointment times and will no longer be required to queue for lengthy periods in order to register.
The new Scheme is set to be launched in late August 2016.

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EUGENE F COLLINS

Brexit – Potential Effect on Insolvency and Restructuring in Ireland

We now know that the United Kingdom ("UK") intends to trigger Article 50 of the Treaty on European Union to commence the so-called "Brexit" process in the first three months of 2017.

Once triggered, there will be a strict time limit of two years for the UK to reach agreement with the European Union ("EU") on the terms of its exit. Unless the EU agrees to extend that deadline the UK will exit after that date, regardless of whether there is an agreed exit arrangement in place, and it will no longer have automatic access to the EU single market.

This article highlights the key implications this will have for Ireland in the area of insolvency and restructuring.

1- No automatic recognition of Irish Insolvency Proceedings in the UK, and vice versa

At present, EC Council Regulation 1346/2000 (the "Insolvency Regulation") determines which courts in the EU have jurisdiction to commence insolvency proceedings and which EU country's law applies to those proceedings.It also provides for mandatory recognition of those proceedings in other member states, which is critical to the efficient management of cross-border insolvencies within the EU. On 26 June 2017, the Recast Insolvency Regulation, which updates and amends the Insolvency Regulation following years of negotiation, is due to come into force to further increase the efficiency of the process.

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From previous page ..

The Insolvency Regulation currently has direct effect across the EU member states which means that no domestic legislation is required to implement it. Once the UK has exited the EU the Insolvency Regulation will cease to operate there and, as it imposes a requirement on other EU member states to reciprocate in order to function, it cannot simply be replaced by the UK adopting its wording into domestic legislation. Rather, some form of alternative multilateral agreement would need to be negotiated between the UK and the EU, or separate bilateral agreements would need to be put in place with certain key member states.

Given the particularly close ties between the UK and Ireland there is a clear need for us to recognise each other's insolvency proceedings. Without the benefit of the Insolvency Regulation, creditors of an Irish debtor with assets in the UK would have to bring separate insolvency proceedings there, or apply separately to the UK for recognition of the existing Irish insolvency proceedings. The same would apply in reverse for creditors of a UK debtor with assets in Ireland and/or another EU member state. This would greatly increase the cost, time, complexity and uncertainty of cross-border insolvencies and inevitably worsen the outcome for creditors.

With regard to insolvency proceedings currently in play under the Insolvency Regulation, there is uncertainty in relation to how they will be treated once Brexit is finalised and transitional arrangements may need to be put in place. It should be noted that member's voluntary liquidations, schemes of arrangement and receiverships are not considered to be insolvency processes within the framework of the Insolvency Regulation and will not be directly affected by its absence. However, the enforcement of cross border judgments discussed below may be an issue in some cases.

It is worth mentioning that the UK has enacted the UNCITRAL Model Law on Cross Border Insolvency ("UNCITRAL") which provides a separate framework for cross-border insolvencies by way of cooperation and coordination between signatory parties. The assistance provided by UNCITRAL, however, is much more limited than the automatic recognition enjoyed under the Insolvency Regulation and, more importantly, Ireland is not currently a signatory to it.

2- Cross Border Bankruptcy

The Insolvency Regulation also applies to cross border bankruptcies. Historically, the UK with its favourable twelve-month bankruptcy period was the destination of choice for Irish and other EU bankrupts who would engage in so-called "forum shopping"; endeavouring to establish their centre of main interests ("COMI") in the UK to avail of that more favourable regime. The recent reduction of the bankruptcy period in Ireland to twelve months, bringing it into line with the UK, has eliminated the need for Irish debtors to forum shop in this way. This change, coupled with the forthcoming Brexit, has the potential to make Ireland the new jurisdiction of choice for EU member state debtors to establish their COMI for the purposes of EU bankruptcy proceedings.

3- Enforcement of Cross Border Judgments

Jurisdiction and enforcement of judgments between the UK and other EU member states is currently regulated by the Brussels I Regulation (44/2001) which will cease to apply upon completion of Brexit in the same way as the Insolvency Regulation. As this also operates on the basis of reciprocity, unless an alternative arrangement is put in place with the EU, Irish and indeed other EU proceedings and judgments will not be as easily recognisable and enforceable in the UK. This will apply conversely to UK proceedings and judgments, which will no longer have guaranteed extra territorial effect in EU countries. It has been suggested that this could be at least partially addressed by the UK signing up to the Lugano Convention 1988 in a similar way to other non-EU parties such as Iceland, Norway and Switzerland, but that is not as comprehensive as the current regime.

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From previous page ..

In conclusion, there will be no immediate impact on the law in this area when Article 50 is triggered until the expiry of the two-year deadline in early 2019. However, there may be structuring issues for any existing insolvency cases with a cross-border element in the UK at the time Brexit is completed. A close eye will need to be kept on any proposed transitional arrangements.

The UK has to date been viewed as having a well-established, creditor-friendly insolvency regime and the direct effect of the Insolvency Regulation was the cornerstone of the UK's appeal as the destination of choice for creditors of insolvent individuals and companies. Even if the UK does reach an appropriate agreement with the EU prior to the completion of Brexit, once it leaves the EU it will have limited power to influence future negotiations in relation to the EU insolvency regime, which may adversely affect its interests. Even worse, if no agreement is reached it is reasonably foreseeable that companies and individuals may decide to move their COMI out of the UK to another member state.

What is clear is that for the time being uncertainty is the only certainty we have in relation to the full effect of Brexit. Whilst Irish insolvency practitioners may be understandably concerned, we are of the view that there is a significant opportunity for them, together with bodies promoting Irish insolvency across the EU, to promote Ireland as a new, safe destination of choice for creditors seeking to commence insolvency proceedings within the EU.

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Netherlands

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For which agreements and deeds does a director or shareholder need the consent of his spouse under Dutch law? Or: why are Dutch spouses so well informed about their partners businesses?

This contribution is about a typical Dutch rule: the provision of Article 1:88 DCC. Under this provision a married or registered partner has to include the consent of his partner if he enters into an agreement in which he commits himself as surety or as a joint and several co-debtor, vouches for a third person or provides security for a debt of a third person.

The provision is aimed at the protecting of the family life of the director and the shareholder. Agreements to which the consent requirement applies entered into without the necessary permission granted, can be nullified by spouses with a simple notice.

The rule has affected many personal warranties given by Dutch shareholders given in SPA's (e.g. personal warranties that the equity of the company of a seller will be maintained during a specified period) and personal guarantees for loans granted to a company.

The effect of the spouse consent rule is limited to agreements other than agreements in the course of a professional practice or business (paragraph 1c of article 1:88 DCC). Paragraph 5 furthermore carves out agreements made by director of a company, provided that this Director - solely or together with his co-directors - holds the majority of the shares of this company and that the juridical act is performed on behalf of the normal course of business of that company.

Dutch courts nowadays tend to extend the carve out in paragraph 1c of article 1:88 BW to acts typical for the business of the company in the sense that they are often performed within the company (HR May 31, 1991, LJN ZC0260, NJ 1991 / 777 and HR February 21, 1992, LJN ZC0519, NJ 1992/336).
The exception in paragraph 5 has also been extended by the courts. The current criterion focuses at the underlying agreement for which a guarantee is issued. In case the underlying agreement clearly serves the interests of the company and all other requirements of paragraph 5 are met, a spouse permission is not necessary (HR July 8, 2005, LJN AT2632, NJ 2006/96).

Despite these relaxations it often goes wrong due to the lack of a spouse permission. Especially when an agreement is not considered simple or standard the nullity sanction often applies. In HR July 8, 2005, LJN AT2632, NJ 2006/96 a not ordinary loan was affected. HR December 19, 2008, LJN BF3942 involved a husband / director who had signed four checks for aval, vouching for his company. The court held that this guarantee was not issued on behalf of the ordinary course of the business of his Company and considered the act subject to spouse approval. A similar judgment was given in a case where a bridging loan was secured by a guarantee (HR December 18, 2015, ECLI: NL: HR: 2015: 3606, NJ 2016/29).

The grey area left by the courts necessitates lawyers in the Netherlands to encourage their clients and counterparts to obtain a spouse permission. Better safe than sorry is the motto.

The marital persuasion is usually left to the client!

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Norway

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Professional liability as a mean to recover assets.

A common problem facing creditors when being defrauded or in other ways ending up with the shortest end of the stick in a bad deal, is how to recover the assets lost. The party who has ended up with the clients assets may be hard to locate and even harder to initiate legal proceedings towards. And even a victorious verdict may be a Pyrrhic victory, as there might be even harder to enforce the verdict. A common denominator for such deals are often that they are facilitated by a professional middleman. The professional in question might be a real estate broker, a chartered accountant, a lawyer. These professionals are most often insured. In these cases Advokatfirmaet Hulaas AS and its attorneys have had success in using professional liability suits against a middle man to recover some of the assets lost.

This short article does not envision to give an extensive representation of the legal situation regarding professional liability, but as a reminder to the Cicero members of other ways to pursue claims on behalf of their clients.

In real estate transactions, a broker has, according to Norwegian law, an obligation to make inquiries as to the financial situation of the buyer and his identity. Failure to properly confirm such information may lead to liability on behalf of the professional.

If the transaction is based on investments in companies, most of these will have an independent auditor. Failure to discover deficiencies in the books might have been instrumental in a fraudulent scheme to deceive investors. We have acted both on behalf of creditors and auditors in such cases, and we have experienced that this might be an alternative road to the recovery of assets.

As lawyers we often act as middlemen in transactions. And the trust we carry among the public as lawyers can be misused to carry out frauds. If a party to a deal pays to a trustee account held by the law firm, he is often more willing to pay than otherwise. A lawyer might therefore be a useful tool to conduct a fraudulent transaction. On behalf of clients, we have pursued claims against other lawyers, in situations where they have been an instrumental part in a fraudulent deal.

In order to make a claim against the professional, there has to be negligence on part of the professional, and there has to be causality connecting the negligent act and the economic loss on the client’s parts.

However, since the professional often is a prerequisite for the faulty deal, this causality often exists. In recent verdicts we can see a trend where the courts puts less weight on proving causality.

The highest hurdle to overcome in order to prove a claim is negligence on behalf of the professional. One has to prove to that his acts or omissions are something that a Bonus Pater Familias member of his profession would not do. Should the professional have spotted any red flags, and are there any special features about the transaction which should lead to extra caution. If there is, there might be negligence and in the end liability on behalf of the professional.

Initiating proceedings against other professionals is of course not something to be taken lightly or to be undertaken without properly considering the pros and cons. These cases tend be draining resources and your client’s opponent will be an insurance company with sharpened battle axes and a loaded war chest.

All the same we recommend that you consider professional liability as an option when advising your client on how to recover lost assets.

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Modernization of Polish law on forms of civil acts

Substance of the amendment

In 2016 many significant amendments to the Polish Civil Code came into force (most of them recently, in September 2016). The new provisions are declared to modernize civil law in Poland as they provide for some facilitating measures for civil law relations (important for establishing and termination thereof, proving the content of an legal act, and for disputes as well). Most of all, the amendments introduce new forms of performing legal acts, basically associated with less legal requirements than the existing ones.

Forms of legal acts already governed by Polish Civil Code

The already existing main forms of the legal acts in Poland are as follows: **1)** written, **2)** with a certain date, **3)** with signatures certified by a notary public, and **4)** a notarial deed. For the observance of the written form of an act in law (**1**), basically it is sufficient to append one's handwritten signature to the document containing the declaration of intent. An act in law "with a certain date" (**2**) is (simplifying) a document containing the declaration of intent with official certification of the date (according to the Civil Code an act in law shall have an authenticated date also in the following cases: a) if the performance of the act in law is confirmed in any official document; b) if any statement is made by a State authority, an authority of a unit of territorial self-government or by a notary on the document pertaining to that act in law; **and since October 7th, 2016** c) if an electronic document is provided with an advanced electronic timestamp). A form of the legal act with signatures certified by a notary public (**3**) is a written document including declaration of will with attached a notarial confirmation of a date of signing up thereof and of the identity of the persons signing. Drawing up a notarial deed (**4**), the notary public certifies not only the date of the declaration of will and the identity of persons signing it, but he or she also makes sure that the content of the statements made is not in breach of the law.

New forms of legal acts in Poland

As mentioned above, the discussed amendment (in force since September 2016) provides for two additional (separately defined) forms of legal acts, and those are: **5)** document form and **6)** electronic form.

The declaration of will is made in document form **5**) if it is made in the form of a document allowing one to verify the identity of a person making the mentioned declaration. What is important, according to newly introduced provisions of the Civil Code, **a "document" constitutes any information carrier enabling a person to become acquainted with the "carried" information.** Consequently, the new **document form includes modern means of communication such as SMS text messages or emails** (which are widely used in practice, also during negotiations of contracts, but basically have not met the existing requirements of a written form as they lack handwritten signatures).

On the other hand, the electronic form (which existed previously as an equivalent to a written form but now has been introduced as separately defined form) (**6**) is observed if declaration of will is signed with an advanced electronic signature based on (verified by) a qualified certificate. Importantly, a declaration of intent made in electronic form is equivalent to one made in writing (which means that the mentioned forms can be used interchangeably).

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This equivalence, however, may be excluded by an agreement of parties or by the provisions of law. Namely, **if a written, document or electronic form is required (by the law or parties' settlement), the legal act performed without observing such a form will be invalid as long as the law or agreement between the parties directly provides for nullification in case of the non-observance of that form** (on the other hand, if the law stipulates that a legal act be made in another specific form e.g. a notarial deed, an act made without observing this form is invalid). But if the parties reserved the performance of a legal act in a written, document or electronic form without defining the effects of the non-observance of that form, it is assumed in case of doubt that it has been stipulated solely for evidentiary purposes. Please however note that **in relations between entrepreneurs a failure to observe a written, document or electronic form when it was not required under the pain of nullity, does not result in specific evidentiary, and it has no effect on the validity of a legal act.**

Termination of contracts after amendments

Please also note that if the agreement was made in written, electronic or document form, it is sufficient that its termination upon mutual consent, withdrawal or termination by notice are drawn up **in document form** (which means that the above acts may be executed also by e-mail, SMS or any other "information carrier" allowing for verification of a sender and for becoming acquainted with the "carried" information) - **unless otherwise was agreed by the parties, or stipulated by law.** However, since the agreement was concluded in another special form (e.g. a notarial deed) the existing rules apply, which means that termination of such an agreement with the consent of both parties still requires the form either provided for by a statute or agreed by the parties for conclusion of the contract; withdrawal from the mentioned agreement or its termination by notice, should be stated in writing **(a document form is not sufficient).**

Summary

As mentioned before, the amended Civil Code covers modern ways of communicating and provides for regulation referring to the market reality. It constitutes a necessary "update" of Polish law and hopefully will make life easier not only for entrepreneurs but also for other entities entering into legal relations. Especially as some corresponding amendments to civil procedure code have been introduced as well.

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Romania

Leaua & Asociatii

Arbitration in Romania – A practitioner's Guide

The Arbitration practice in Romania exceeds over sixty years and continues day-by-day. Questioning what this 60 years means and how the arbitration practice developed, the response came from the arbitration community in Romania. Romania needs a practitioner guide, to support international practitioners in understanding arbitration in Romania.

A guide was needed because a large part of the international arbitration community is confronted with arbitration cases connected to Romania. Also, international perception on the arbitration practice in Romania needed more details on the development and the current status of arbitration in Romania.

Under the above circumstances, Arbitration in Romania, a practitioner's guide was released in October 2016. The book was edited by Crenguta Leaua and Flavius Baias, the Dean of the Law Faculty of the Bucharest University and published by Kluwer Law International.

The authors and the contributors of this book are professors of law lecturing in Romania and abroad, recognized practitioners with tremendous experience as judges, as arbitrators or as counsels in arbitration, lawyers who received their legal education in Romania only or in various foreign universities as well. Among the authors of the Guide there are a number of lawyers of the Leaua and Asociatii team, respectively Mrs. Crenguta Leaua, Mr. Stefan Deaconu, Mrs. Mihaela Maravela, Mrs. Andreea Simulescu, Mrs. Andra Filativ-Dodul, Mrs. Corina Tanase.

Arbitration in Romania provides an overview of the Romanian arbitration law and practice and is the first detailed presentation in English of the current legal framework applicable to arbitration and other alternative dispute resolution methods in Romania.

The issues and topics covered include:

- law applicable to the arbitration agreement;
- appointment, challenge, and liability of arbitrators;
- taking of evidence;
- allocation of costs;
- time limit for rendering the award;
- role of courts during arbitral proceedings;
- recognition and enforcement of foreign arbitral awards;
- regulation of ad hoc arbitration;
- investment arbitration;
- domain name disputes; and
- the role of Romania's Dispute Adjudication Board.

Arbitration in Romania starts with a chapter containing information both on the history of arbitration law in Romania to put into context the current status of the legal framework and a detailed presentation of the current legal framework applicable to arbitration as well as to other alternative dispute resolution methods. Legislation was commented from both a theoretical and a practical perspective, so that case law and statistics of the most important arbitration institutions used by Romanian companies are also present.

In a second chapter, the authors discuss the choice of law in arbitration, and address issues such as the law applicable to the arbitration agreement, the law applicable to the arbitration procedure, the law applicable to the merits of the dispute, commenting also relevant decision that cover such aspects.

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Then the authors describe the arbitral procedure starting from the appointment of the arbitrators, going through the entire arbitral proceedings, including the arbitral costs that the parties incur, and ending with the arbitral award. The authors also discuss at length the arbitrability of the disputes and conditions for the validity of the arbitration agreement which is at the heart of arbitration proceedings.

A substantial discussion is made on the investment arbitration in Romania and the cases brought against Romania by foreign investors. The last chapter of the Guide deals with other alternative dispute resolution methods such as mediation in Romania, UDRP domain name disputes concerning .ro domains, and the dispute adjudication board in Romania.

As mentioned above, some of the authors of various chapters of the Arbitration in Romania guide are part of the Leaua and Asociatii team.

As such, one of the editors of the guide is Crenguta Leaua, the first ICC Vice-President magistrate coming from an Eastern European country (other than Russia), an experienced referee in over 100 cases, being on the referees' lists of the arbitration Courts upon Chambers of Commerce and Industry in Romania, Austria, Poland, Bulgaria and Slovenia, as well as in Kuala Lumpur and Shanghai arbitration centers. Crenguta Leaua is the author of the chapters *The Arbitration Agreement, The Arbitral Award* and, together with Corina Tanase, co-author of the chapter *Dispute Adjudication Board in Romania.*

Stefan Deaconu, senior partner in Leaua and Asociatii law firm is the author of the chapters *The Legislative Framework of Arbitration in Romania* and *Arbitration and Constitutional law*. Stefan Deaconu is a PhD supervisor and professor of the Bucharest University Faculty of Law.

Mihaela Maravela, partner in Leaua and Asociatii law firm is the author of the chapter *.RO Domain Name Disputes in Romania.* Mrs. Maravela is a member of the WIPO list of neutrals solving domain name disputes under UDRP. She is a lawyer experienced in arbitration, acting as counsel under the ICSID Rules, ICC Rules, UNCITRAL Rules and CICA-CCIR Rules.

Andreea Simulescu, partner in Leaua and Asociatii law firm is the author of the chapter *The Arbitral Costs.* Mrs. Simulescu is a member of ICC-YAF, is listed as arbitrator by the Court of Arbitration of the Brasov Chamber of Commerce and has a wide experience as counsel in numerous arbitration proceedings under the CICA-CCIR Rules, ICC Rules or UNCITRAL Rules.

Andra Filatov-Dodul, senior associate in Leaua and Asociatii Law Firm is co-author of the chapter *Forced Execution of Arbitral Awards*, together with Claudiu Dinu. Mr. Filatov is a member of ICC YAF and YIAG and has participated as an arbitrator at the Willem C. Vis International Commercial Arbitration Moot Court Competition.

Corina Tanase, senior associate in Leaua and Asociatii law firm is co-author of the chapter *Dispute Adjudication Board in Romania* together with Mrs. Crenguta Leaua. She is a graduate of the LLM International Commercial Arbitration programme of the Bucharest University Faculty of Law and is experienced lawyer in international commercial arbitrations under the rules of ICC and CICA-CCIR as well as in adjudication procedures (DAB).

The book was launched in Romania, at the Bucharest University Faculty of Law and a second event for releasing the guide is scheduled in Paris at the Romanian Embassy, on 27 October 2016.

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Spain

Ceca Magán Abogados

Fintech: a new online way of investment overregulated

In Spain, Fintech Startups are a reality. They provide online financial services, which offers an alternative to traditional financial institutions because of their disruptive business model, and provide useful financial services demanded by the community that are challenging traditional financial entities. The Fintech Spanish Association is working on improving market conditions for local Fintech Startups and has proposed drawing up a White Paper. Giles Andrews, co-founder and executive Charmain of Zopa (UK's largest peer-to-peer lending service) identify regulation as the biggest impediment to growth *"there is still faith that regulated industries are more trustworthy than unregulated industries"*.

Regarding Fintech is difficult to talk about "regulation" due to the breadth of regulation. There is a set of rules of each sector or service provided by Fintech Startup:

- Money Laundering and Financing Terrorism Act (Law 10/2010, April 28) and its development regulation;
- MIFiD2 rules, Securities Market Act (Royal Decree Legislative 4/2015, October 23), Royal Decree 217/2008, February 15, regarding the legal framework of financial entities, and Collective Investment Institutions Act (Law 35/2003, November 4);
- Law on Consumers Protection (Law 1/2007, November 16) and Data Protection Act (Organic Law 15/1995, December 13) and its development regulation;
- Law on Information Society Services and Electronic Commerce (34/2002, July 11), Payment Services Act (Law 16/2009, November 13) and Electronic Money Law (Law 21/2011, July 26); and,
- Circular Letters and guidelines issued by CNMV.

These supportive regulatory framework may cause ambiguity and confusion to many founders and investors, but from our point of view overregulation give us tools to incorporate new financial projects to the market, while the regulatory bodies provide a legal framework adapted to the new reality, as were the case of crowdfunding startups.

Crowdfunding: participative financing in the Law 5/2015 of promotion of business financing

Crowdfunding is a collaborative way of raising finance where promoters request and receive funds from individuals. The collective participation entails pooling of funding resources to support projects started by third parties. Internet has driven the collaborative financing with platforms, as intermediaries that distribute the risk of each investment between the participants, which invest in each project with small contributions.

As crowdfunding grows up in Europe, the Spanish government drafted a regulatory proposal for crowdfunding in 2015, approved on April 27, 2015 through the Law 5/2015 of promotion of business financing.

This Law 5/2015 provides the legal regime of the participative financing, which covers equity-based crowdfunding. Essentially, any kind of crowdfunding, where there is a capital gain involved, either through equity sharing or through money. Loans without interest, sale of goods and services and regular donation crowdfunding is still unregulated and unaffected by this law.

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CECA MAGÁN ABOGADOS

Legal framework of crowdfunding platforms

Crowdfunding platforms are defined as authorized companies that perform activities in Spain consisting on the professional linking, through websites or other electronic means, of a variety of natural or legal persons offering financing in exchange for a financial yield. These persons are "investors" (*crowdfunders*) and the natural or legal persons requesting funds to use for a crowdfunding project are "project owners" (*promoters*).

Therefore, crowdfunding is presented in the Law 5/2015 as a framework of relations between three parts: (i) a promoter; (ii) an investor; and (iii) the platform of participative financing.

In addition, the Law 5/2015 established a reservation of activity and denomination "*plataforma de financiación participativa*" or "PFP".

Authorization and registry at CNMV

The activities of crowdfunding platforms are subject to authorization from the National Securities Market Commission ("**CNMV**") and registration in the CNMV's registry created for this purpose according to Law 5/2015. The problem founds by this platform was the absence of a guide to apply for the authorization until September 2015, which has delayed the granting of authorizations. That is why –combined which the insufficient regulation of the Law 5/2015 –there are only nine platforms registered in CNMV's registry.

CNMV, as a regulatory body, in collaboration with the Bank of Spain is in charge of the supervision, inspection and discipline of the platforms or any other –natural or legal –person, which violate the provisions of the Law 5/2015.

Specific requirements are established for carrying out the activity. These requirements include compliance with certain financial requirements (share capital, interchangeable and combinable with other types of guarantee, and different levels of minimum own funds depending on the financing raised).

Qualified and non-qualified investors

The Law 5/2015 makes a distinction between qualified and non-qualified investors, based on proven economic capacity or, in case, the investor expressly applies to be considered a qualified investor.

Non-qualified investors may not invest more than EUR 3.000 in a single project published in a single crowdfunding platform or more than EUR 10.000 within a period of twelve-month, in projects published in a single crowdfunding platform.

Furthermore, prior to the investment, the platform must be sure that the investor has received and accepts, in general terms, the following aspects: (i) the project has not been submitted to the supervision of the CNMV and the Spanish Bank and the information offered by the promotor was not reviewed by the platform; (ii) the risk of loss, in whole or in part, the investment; and, (iii) the invested capital is not guaranteed.

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Legal framework of promoters and projects

The project owner must be incorporated or have its residence in Spain or in a Member State of the European Union and neither have been disqualified pursuant to insolvency law nor be serving a sentence for commission of crimes or offenses against the company's assets, the social-economic order, the Public Treasury, the Social Security, or money laundering.

The platform shall supervise that a promoter only publishes one project at the same time. For each project, the platform must ensure a funding target and a time limit by project. If the funding target is not reached within the time limit, all funds must be returned. This limit might be exceeded over 25% if the rules of the platform provide such event. The maximum limit for funds raised for a project in a single platform is EUR 2.000.000 –in one or several financing rounds in a year. When the project is addressed exclusively to qualified investors, the maximum amount is EUR 5.000.000.

Regarding the project or the project owners, the platform must ensure that the information published in the platform is complete. Nevertheless, the promoter is the party liable to investors for the information provided.
Projects may be structured as loans or as issuances of securities. Projects based on loans may not include a mortgage guarantee created over the project owner's habitual residence and information on the loan's essential characteristics must be provided. For project based on the issuance of securities, investors must be informed of the basic information on the issuer company and the securities issued. In addition, the articles of association of the project must contain certain shareholder's rights.

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Switzerland

BRS Avocats

BRS AVOCATS

A recent decision in Swiss banking law

Swiss banking secrecy has been for long used against what it was set up for. When the law on Banks was enacted in 1934 the idea was to protect the privacy of the clients.

It unfortunately then became a tool for tax evasion, as it was commonly admitted that the local banks had not to monitor their clients and ensure the funds deposited with them were taxed, the responsibility of paying taxes lying with the client.

Against what is sometimes believed, the situation has completely changed.

As of January 1st 2017, Swiss banks will communicate to the Swiss Federal tax administration all the data concerning their foreign clients, in view of further communication of these information to the respective foreign tax administrations of the taxpayers in 2018. This is probably one of the consequences of what has happened in the saga between Swiss banks and the US tax administration and Department of Justice (“DoJ”).

Everyone is aware of the crisis in the recent years between Swiss banks and the US administration. In 2007, Mr Birkenfeld, former employee of UBS (the largest Swiss Bank) disclosed to the DoJ information on a “massive tax fraud scheme” which had been set in place at the time, and this was the start of a long dispute.

In 2008, a US Federal Judge in Miami issued summons to the Bank to force it to disclose the name and addresses of the US clients of the Bank.

UBS concluded with the DoJ an agreement (“deferred prosecution agreement”) and the proceedings against the Bank were suspended. UBS paid a fine in US $780 million, and the names of 255 clients were remitted to the DoJ. This procedure raised several legal issues, in particular as to banking secrecy, but the Swiss Supreme Court confirmed the Bank was entitled to provide the name of its clients to the DoJ, notwithstanding the banking secrecy. This has been widely criticized in doctrine, and even one of the Judges at the Supreme Court issued a dissenting opinion. It was said the decision was more political than legal.

Approximately 100 Swiss banks have announced themselves in the frame of the program to solve the tax conflict with the US. Not only names of clients have been provided to the US authorities, but also names of the employees of who handled them within the Banks. It has been widely considered in Switzerland that these employees, who never did anything wrong under Swiss law, were abandoned by their respective employers.

Interestingly, a recent decision of the Swiss Supreme Court has decided against the trend of providing any and all information (sometimes even prior they were requested by the foreign authorities). In a recent decision (not yet published) the Swiss Supreme Court has refused the transmission of the name of attorneys who were signing on the accounts of US clients as well as the name of a law firm who referred the client to the Bank. The decision (of September 22nd 2016, ATF 4A_83/2016), based on the Federal Act on protection of data of June 19th 1992 has refused the disclosure of the names of these attorneys, such disclosure not being “indispensable for the safeguard of public interests”. The decision however notes that such disclosure could have appeared necessary, if there has been a threat that ”the tax conflict with the US authorities would intensify again”. No doubt the saga has not ended yet….

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