C A N A D I A N

INTERNATIONAL LAWYER

REVUE CANADIENNE DE DROIT INTERNATIONAL

Vol. 10, No. 1 2014

In This Issue / Dans ce numéro

THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN
INFLUENCE. LEADERSHIP. PROTECTION.

Vol. 10 No. 1 2014
ISSN 2291-2347 Online / ISSN 1911-1355 Print

Table of Contents / Table des matières

Citation: The ***Canadian International Lawyer*** should be cited as: ***Can Int'l Law***.

Subscriptions: The Section membership fee of the International Law Section of the Canadian Bar Association includes online access to the ***Canadian International Lawyer*** for the current year. Receiving a print copy requires notification at time of membership renewal and defrayal of print and shipping costs. Non-members are invited to subscribe by contacting the Editor for futher information.

Back Issues: A limited quantity of back issues may be available for a fee, upon written request to the Editor.

Advertising: Advertisers are invited to contact the Editor to discuss their needs.

The ***Canadian International Lawyer*** is sponsored by the International Law Section of the Canadian Bar Association, with world-wide circulation. The primary objective of the publication is to provide Canadian practitioners of international law with information on current developments throughout the world that are pertinent to all areas of public and private international law and transnational law.

Submissions in the form of lead articles, case commentaries, practice notes, treaties' news, legal developments, and book reviews are welcome.

Manuscripts that have been accepted for publication or published elsewhere will usually not be considered. No compensation is paid for any manuscript, and the ***Canadian International Lawyer*** reserves the right to refuse, to withdraw acceptance of, or to delay publication of any manuscript.

Opinions expressed in signed contributions remain those of the individual authors, and neither the Canadian Bar Association nor the ***Canadian International Lawyer*** accepts responsibility for them.

Please direct inquiries to:

The Editor
Canadian International Lawyer
Canadian Bar Association
500 - 865 Carling Avenue
Ottawa, Ontario, K1S 5S8

Citation: La ***Revue canadienne de droit international*** doit être cité de la manière suivant : ***RCDI***.

Abonnements : La cotisation de la Section du droit international de l'Association du Barreau canadien comprend l'abonnement en ligne à la ***Revue canadienne de droit international*** pour l'année en cours. Au moment du renouvellement de l'adhésion, un membre peut se procurer un exemplaire moyennant les frais d'impression et d'expédition. Ceux qui n'en sont pas membres sont invités à s'abonner en communiquant avec la rédaction, qui leur fournira les renseignements nécessaires.

Numéros antérieurs : Nous pouvons fournir une quantité limitée de numéros antérieurs, moyennant des frais; en faire la demande par écrit à la rédaction.

Publicité : Les annonceurs sont invités à communiquer avec la rédaction pour discuter de leurs besoins.

La ***Revue canadienne de droit international*** est une enterprise de la section de droit international de l'Association du Barreau canadien, diffusée à l'échelle mondiale. L'objectif premier de cette publication est d'offrir aux practicien(ne)s canadien(ne)s du droit international des renseignements sur les nouveautés qui surgissent de par le monde et qui sont pertinents à tous les domaines relatifs au droit international public et privé et au droit transnational.

Nous recevons les documents présentés sous forme d'articles de fond, de commentaires d'arrêts, de notes de pratique, de nouvelles sur les traités, de développements juridiques et de critiques de livres.

Généralement, nous ne considérons pas les manuscrits acceptés pour publication ou publiés ailleurs. Aucune somme n'est versée aux auteurs des manuscrits, et la ***Revue canadienne de droit international*** se réserve le droit de retirer son acceptation, de refuser, de revenir sur sa décision de publier ou de reporter la publication d'un manuscrit, quel qu'il soit.

Les opinions exprimées dans les communications signées sont propres à leur auteurs et dégagent l'Association du Barreau canadien et la ***Revue canadienne de droit international*** de toute responsabilité.

Prière d'adresser vos demandes de renseignements à :

Rédaction
Revue canadienne de droit international
L'Association du Barreau canadien
865, avenue Carling, bureau 500
Ottawa (Ontario) K1S 5S8

Editor's Note / Mot de la rédactrice en chef

This issue of the *Canadian International Lawyer (CIL)* (Vol. 10 No. 1) marks the beginning of a new era in the life of our flagship journal. Established in 1990 as a joint OBA/CBA National International Law Section (NILS) project, it is now fully and exclusively housed with the CBA NILS. It is an honour that comes with a considerable dose of responsibility, to be entrusted as the first Editor-in-Chief of the journal in its new iteration. *CIL* is a superb publication that provides a platform for Canada's finest international legal talent to shine. It shares with Canadians and the rest of the world the extensive and profound knowledge in public and private international, and transnational, law. It does so with the aim of providing tangible and practical information for international law practitioners as they face new developments and complex issues in their practice.

Confident that I am echoing the sentiments of the current NILS members, I take this opportunity to thank the founders of the journal and all those who carried it through to the present. A very special thank you goes to Elo Tulving-Blais, outgoing Editor-in-Chief, for ensuring the *CIL*'s consistent highest standards. Thank you also to *CIL*'s new Editorial and Advisory Boards, and the anonymous peer reviewers, and in particular, Andrew Lanouette, *CIL*'s Senior Editor, and Gathoni Njuguna, the past NILS Liaison Officer, for their dedicated assistance in transitioning the journal to the NILS and producing its first re-modelled issue.

In its new format, the *CIL* is an e-journal available to the CBA membership electronically, offered in print only upon specific *CIL* subscription. The journal now features a new section on book reviews in addition to maintaining all the previous sections.

The current issue features three thematic twin contributions, each in a certain subject area: Anti-Corruption, business in China, and dispute settlement. A subject that attracted considerable attention over the past year, anti-corruption legislation and implementation is the focus of the feature article by Sean Murphy who proposes guidelines to lawyers unsure of whether to counsel client to self-report under the *Canada's Corruption of Foreign Public Officials Act* (CFPOA). Those interested in the application of Canada's anti-corruption law will find in the Legal Developments section a discussion by James Klotz who reviews the ONSC judgment in the *R. v. Karigar*, the first jail sentence in Canada under this legislation.

When doing business with China, Canada's trans-Pacific neighbour, one is advised to check out Peter Corne's and Ray Liu's piece in the Legal Developments section in which the authors describe and assess China's newly introduced procedures applicable to foreign-invested enterprises in China. This is supplemented by Caroline Berube's Practice Note offering a detailed account of very handy strategies and tips to consider when negotiating a contract with Chinese companies.

Dispute settlement is addressed in the Legal Development section in Jane Wessel's and Gordon McAllister's update of the London Court of International Arbitration (LCIA) rules expected to become effective around the time of this publication (October 2014). Asymmetric dispute resolution clauses, which are common in commercial contracts, are the subject of Christina Porretta's and Vanja Ginic's Practice Notes contribution which provides a comparative review on the validity of asymmetric clauses in several national jurisdictions.

In addition to the aforementioned three themes, *CIL* features two case comments. David Matas looks at how Canada is negotiating the breadth of refugee protection and its obligations under the 1951 *United Nations Convention Relating to the Status of Refugees* from the vantage point of the SCC decision in *Ezokola v. Canada*. In the other case comment, Monique Pongrecic-Speier offers an overview of the litigation initiated pursuant to the 2012 coming into force of the Justice for *Victims of Terrorism Act* and related amendments to the *State Immunity Act*. In the Treaties section, Paul M. Lalonde and Olivia Wright highlight for us the main features of the recently concluded Canada-Korea Free Trade Agreement, Canada's first FTA in the Asia-Pacific market. A book review of Mohan Prabhu's *Canada's Laws on Import and Export* presented by Konrad von Finckenstein concludes this *CIL* issue.

I wish you a pleasant reading.

Noemi Gal-Or, Editor-in-Chief

Le présent numéro de la *Revue canadienne de droit international* (vol. 10, no 1) marque le début d'une nouvelle ère dans la vie de notre revue phare. Créée en 1990 comme un projet commun de la Section nationale du droit international (SNDI) de l'ABC et de sa division de l'ABO, elle loge désormais entièrement et exclusivement à la SNDI. Se voir confier le rôle de première rédactrice en chef de la *Revue* dans sa nouvelle mouture est un honneur qui vient avec une énorme dose de responsabilité. La *Revue* est une superbe publication et une plate-forme qui permet aux meilleurs talents canadiens du droit international de briller. Elle partage avec les Canadiens et le reste du monde leur connaissance étendue et approfondie du droit international — et transnational — public et privé. Elle le fait en se donnant pour objectif de fournir des informations concrètes et pratiques aux praticiens du droit international, qui sont constamment confrontés à de nouveaux développements et à des questions complexes.

Sûre de me faire l'écho des sentiments des membres actuels de la SNDI, je saisis cette occasion pour remercier les fondateurs de la *Revue*, ainsi que toutes les personnes qui l'ont portée jusqu'à présent. Un merci tout particulier à Elo Tulving-Blais, rédactrice en chef sortante, pour avoir invariablement appliqué les normes élevées de la *Revue*. Merci également au nouveau Comité de rédaction et au nouveau Comité consultatif de la *Revue*, de même qu'aux évaluateurs anonymes, et enfin à Andrew Lanouette, rédacteur principal de la *Revue*, et Gathoni Njuguna, personne-ressource sortante de la SNDI, pour leur assistance dévouée dans la transition du journal à la SNDI et pour la production du premier numéro remanié.

Dans son nouveau format, la *Revue* est une publication en ligne disponible aux membres de l'ABC, offerte en version imprimée pour certains abonnements seulement. La *Revue* dispose désormais d'une nouvelle section de recensions de livres, en plus de conserver les sections antérieures.

Le présent numéro comporte trois paires d'articles, chacune dans un secteur particulier : la lutte contre la corruption, les affaires en Chine, et le règlement des différends. Un sujet qui a attiré une attention considérable au cours de la dernière année, la loi anticorruption et sa mise en œuvre sont au centre de l'article de fond de Sean Murphy, qui propose des lignes directrices aux avocats qui ne sont pas sûrs s'ils doivent conseiller à leur client de faire une déclaration volontaire en vertu de la *Loi sur la corruption d'agents publics étrangers* (LCAPE). Ceux qui s'intéressent à l'application de la loi canadienne anticorruption trouveront dans la section « Développements juridiques » une discussion par James Klotz du jugement de la Cour supérieure de l'Ontario dans l'affaire *R. v. Karigar*, la première peine d'emprisonnement prononcée au Canada en vertu de cette loi.

Avant de faire des affaires avec la Chine, voisin transpacifique du Canada, il est conseillé de consulter le texte de Peter Corne et Ray Liu dans la section « Développements juridiques », dans lequel ils décrivent et évaluent les nouvelles procédures adoptées par la Chine pour les entreprises à participation étrangère en Chine. En complément, la note de Caroline Bérubé dans la section « La pratique en bref », qui offre un compte rendu détaillé des aspects pratiques à considérer lorsqu'on négocie un contrat avec une entreprise chinoise.

Le règlement des différends est abordé à la section « Développement juridique » par Jane Wessel et Gordon McAllister, dans un article portant sur les nouvelles règles de la Cour d'arbitrage international de Londres, qui devraient entrer en vigueur ces jours-ci (octobre 2014). Les clauses asymétriques de règlement des différends, courantes dans les contrats commerciaux, font l'objet de la note de Christina Porretta et Vanja Ginic dans la section « La pratique en bref », qui propose une étude comparative de la validité des clauses asymétriques dans plusieurs pays.

Outre les trois thèmes susmentionnés, la *Revue* propose deux commentaires d'arrêt. David Matas examine la façon dont le Canada est en train de négocier l'étendue de la protection des réfugiés et de ses obligations en vertu de la *Convention relative au statut des réfugiés* de 1951, à la lumière de la décision de la CSC dans *Ezokola c. Canada*. Dans l'autre commentaire d'arrêt, Monique Pongracic-Speier propose un survol de la poursuite intentée en vertu de la *Loi sur la justice pour les victimes d'actes de terrorisme*, entrée en vigueur en 2012, et des modifications connexes à la *Loi sur l'immunité des États*. Dans la section « Traités », Paul M. Lalonde et Olivia Wright exposent pour nous les principales caractéristiques de l'accord de libre-échange récemment conclu avec la Corée, le premier ALE du Canada dans le marché de l'Asie-Pacifique. Une critique du livre de Mohan Prabhu *Canada's Laws on Import and Export* (Les lois canadiennes en matière d'import-export), par Konrad von Finckenstein, conclut ce numéro de la *Revue*.

Je vous souhaite une agréable lecture.

Noemi Gal-Or, rédactrice en chef

Articles

Six Practical Considerations Before Self-Disclosing a CFPOA Foreign Bribery Offence

*Sean Murphy**

Whether or not to self-disclose is one of the first and foremost questions a company will face upon discovering a violation of Canada's *Corruption of Foreign Public Officials Act* ("CFPOA").[1] The decision-making process of self-disclosure can be broken into two steps. The first is quantifying the volatile impact of criminal penalties and a scarred reputation versus the potential for leniency and reputation-salvaging that may arise from timely self-disclosure and cooperation. The second step is balancing that calculus against the probability that the conduct goes undetected by law enforcement authorities. Performing this analysis is usually challenging and complex. A myriad of intangible factors and hard facts unique to each case must be projected into the uncertain future against a backdrop where there is no established protocol for self-disclosing. This article offers practical insights into some of the broad considerations that should occupy the minds of directors and officers before determining whether or not to self-disclose a CFPOA offence in Canada.

The CFOPA

Canada's CFPOA is a criminal law prohibiting the bribery of foreign public officials, and certain related books, records and accounting practices. In essence, Canadian citizens, companies, and others[2] are prohibited from giving, offering or promising a bribe to an official of a foreign country in order to gain an advantage in the course of business.[3] It is also a violation of the CFPOA to obfuscate a company's books, records, or accounts for the purpose of bribing a foreign public official or hiding such bribery.[4]

The CFPOA is the result of Canada's international obligations as an OECD member country which has ratified the OECD Anti-Bribery Convention.[5] The Convention, signed in 1997, establishes legally binding standards to criminalise bribery of foreign public officials in international business transactions. It has been adopted by all 34 OECD member countries and a handful of non-member countries. Each party country is responsible for implementing laws to give force and effect to the obligations established by the Convention. A phased mutual evaluation process undertaken by the OECD Working Group on Bribery, made up of all the parties, reviews and monitors the adequacy of each country's implementing laws and their effectiveness.

Canada has only recently begun to actively enforce the CFPOA, despite it being in force since 1999. The RCMP established two International Anti-Corruption Units (IACUs) in 2007, in Calgary and Ottawa, following increasingly pointed criticism of Canada's lack of enforcement.[6] The IACUs investigate allegations of foreign bribery.

Canada's increased enforcement of the CFPOA has recently spurred a

Six facteurs délicats à considérer avant de déclarer volontairement une violation de la LCAPE

Sean Murphy*

Contrairement à la *Foreign Corrupt Practices Act* des États-Unis, la *Loi sur la corruption d'agents publics étrangers* du Canada (LCAPE) ne prévoit aucun mécanisme de déclaration volontaire. Pour cette raison, toute décision prise par une entreprise canadienne de faire une déclaration volontaire en vertu de la LCAPE nécessite l'évaluation difficile des conséquences imprévisibles et potentiellement sévères de l'application du droit pénal.

Il y a six facteurs que les entreprises doivent prendre en compte avant de décider de faire une déclaration volontaire. Premièrement, l'absence de mécanisme de déclaration volontaire dans la LCAPE signifie qu'il n'y a aucune garantie qu'une déclaration volontaire conduira à une quelconque réduction de peine. Ainsi, mis à part les facteurs généraux de détermination de la peine prévus au *Code criminel*, la déclaration volontaire ne conduit pas nécessairement à une plus grande clémence. Deuxièmement, il y a la question de savoir si la violation sera découverte d'une façon ou d'une autre, par une vérification préalable effectuée dans le cadre d'une transaction potentielle ou par une dénonciation. En ce cas, les autorités d'exécution de la loi risquent de ne pas reconnaître la bonne foi de l'entreprise.

Troisièmement, il n'y a pas

wave of enforcement activity; the RCMP reported 36 ongoing CFPOA investigations in their Fourteenth Annual Report to Parliament tabled on November 7, 2013.[7] To date, there have been four convictions (three companies and one individual) for bribing a foreign public official under the CFPOA. The three convicted companies are: Hydro Kleen Systems Inc. of Red Deer (fined $25,000 in 2005, which was less than the bribe involved),[8] Niko Resources Ltd. of Calgary (fined $9,499,000 in 2011),[9] and Griffiths Energy International Inc. ("Griffiths") of Calgary (fined $10,350,000 in 2013).[10] The convicted individual, Ottawa-based businessman Nazir Karigar, was sentenced in late-May 2014 to three years' imprisonment for violating the CFPOA.[11] At least five individuals formerly associated with Canadian engineering giant SNC-Lavalin, and in a separate investigation, three individuals formerly associated with the now bankrupt Cryptometrics, are currently facing charges for violating the CFPOA.[12]

The latest company to be convicted under the CFPOA self-disclosed its violation. In late-2011, Griffiths voluntarily disclosed to the RCMP and other law enforcement authorities that it bribed the then Chadian ambassador to Canada in its pursuit of oil blocks in Chad. Griffiths marked new ground in Canada as the first company to turn itself into the RCMP for a CFPOA violation. However, in the United States under the *Foreign Corrupt Practices Act* ("FCPA"),[13] the practice of voluntary self-disclosing had started long before.

The FCPA

In the U.S., the practice of voluntarily self-disclosing FCPA violations (a U.S. law similar to the CFPOA) has been a trend for nearly a decade since the U.S. Department of Justice ("DOJ") and the U.S. Securities and Exchange Commission ("SEC") dramatically increased their enforcement activity.[14] During the period of increased enforcement, the DOJ and SEC, both responsible for enforcing the FCPA, were publicly extolling the virtues of self-disclosing, mainly leniency.[15]

Self-disclosing FCPA violations is a controversial issue as various commentators have called into question whether it actually resulted in better outcomes for self-disclosing companies. For example, a recent quantitative study by New York University School of Law professors Stephen J. Choi and Kevin E. Davis, which examined FCPA enforcement actions from 2004 to 2011, found no discernible evidence that voluntary disclosure of FCPA violations resulted in lesser penalties.[16] The study places considerable doubt on the merits of considering leniency in the self-disclosure calculus. Without leniency, many companies would find the self-disclosure option much more difficult to justify. However, each case and each company is unique, and even if the potential of receiving tangible leniency is uncertain, other qualitative business or ethical factors may carry the day.

Six Practical Considerations Before Self-Disclosing

Below is a practical analysis of six topics a company should consider before self-disclosing a CFPOA violation in Canada: money, timing, whistleblowers, collateral damage, burden of proof, and the expectations of disclosure.

de prescription en matière d'infractions à la LCAPE; si une entreprise décide de ne pas faire de déclaration volontaire, la possibilité que la violation soit découverte existe toujours. Quatrièmement, l'absence de procédure civile pour résoudre les violations de la LCAPE signifie que l'opprobre d'une condamnation pénale s'attachera inévitablement à toute entreprise qui fait une déclaration volontaire. Cela peut conduire à de graves conséquences, comme être interdit de contrat avec de nombreux gouvernements. Cinquièmement, les condamnations pénales en vertu de la LCAPE sont difficiles à obtenir pour la Couronne. Celle-ci doit faire la preuve de l'intention, et elle est généralement confrontée à la difficulté d'obtenir ces preuves de pays étrangers qui ne sont pas toujours coopératifs. Ainsi, même une preuve *prima facie* d'une violation de la LCAPE ne signifie pas automatiquement que la Couronne obtiendra gain de cause. Enfin, une déclaration volontaire signifie une divulgation complète. Si une entreprise décide de faire une déclaration volontaire, mais de cacher des faits importants, les autorités peuvent être encore plus sévères à leur égard. Ainsi, avec une déclaration volontaire, une entreprise subira l'obligation importante de mener sur elle-même une enquête approfondie et envahissante.

**Sean Murphy est un avocat pratiquant le droit international en matière d'anti-corruption au sein des bureaux de Calgary du cabinet Gowlings. Il conseille régulièrement des clients sur diverses questions relatives à la* Loi sur la corruption d'agents publics étrangers (LCAPE) *et sur d'autres questions de corruption à*

Consideration #1: Money

Unlike self-disclosing under *Canada's Competition Act*,[17] there are no written rules, prescribed processes, guarantees of outcome, or well-established incentives to self-disclosing a CFPOA violation in Canada. Self-disclosing companies will endure months or years of investigation, negotiation, and remediation involving considerable direct upfront costs until the matter is resolved. At or near the end of this process, companies pleading guilty to violating the CFPOA will receive a fine, and there is no limit to how high it can go.[18] This leaves companies struggling to identify how much, if any, tangible reduction in the fine they will receive for self-disclosing in Canada and asking whether it is worth the expense.

Quantifying leniency

Credit for self-disclosing can come in many different forms: a declination to institute proceedings (i.e., no charges), withdrawn or reduced charges, a lesser fine, and avoidance of corporate probation are just some examples. As a general rule, it is impossible to test the waters before jumping into a self-disclosure. In the CFPOA context, Canadian enforcement authorities will usually decline information "without prejudice" or refuse to negotiate immunity or concessions, such as a reduced fine or an agreement not to seek corporate probation, prior to the disclosure of the relevant facts. Unlike the U.S. where FCPA settlements often involve the application of an advisory penalty range under the United States Sentencing Guidelines, Canada does not provide for a mechanism to formulaically determine the range of credit for self-disclosing.[19] And even in the U.S., the application of the United States Sentencing Guidelines involves subjective factors and negotiation which undermine quantifying leniency. In these early days of CFPOA enforcement, there is little guidance available to help quantify leniency; it comprises of the broadly stated "purpose and principles of sentencing" set out in Canada's *Criminal Code*,[20] and a comparison of the facts and sentences of the *Niko* (non-self-disclosed) and *Griffiths* (self-disclosed) cases.

Criminal Code sentencing factors

No specific principle of sentencing in the Criminal Code directs a judge to consider a voluntary self-disclosure. In a general sense, however, "a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender…"[21] A self-disclosure usually follows an investigation and leads to cooperation, a guilty plea, and a joint sentencing submission, all of which are meaningful mitigation factors in and of themselves. It should be given even greater weight where the conduct would have otherwise gone undetected.

The *Criminal Code* also includes additional sentencing factors that must be taken into consideration when a sentence is being imposed on an organization (i.e., a company).[22] Three of these additional factors are likely to be considered mitigating factors on sentencing following a self-disclosure: (1) the cost to public authorities of the investigation and prosecution of the offence, (2) any penalty imposed by the company on a representative for their role in the commission of the offence, and (3) measures that the company has taken to reduce the likelihood of reoffending. Where the company has self-disclosed following its own internal investigation, has held those involved accountable, and has remediated its anti-corruption compliance program, it will have likely already satisfied these three mitigating factors by the time a sentence is considered.

Despite the absence of specific guidance, the sentencing provisions of the *Criminal Code* do allow for consideration of self-disclosing, and are the first basis upon which a self-disclosing company would request some form of leniency.

Niko versus Griffiths

Without specific guidance from the *Criminal Code*, one must look into the facts and sentences of the only two comparable CFPOA precedents to gain insight into how leniency might be quantified: the non-self-disclosed *Niko* case versus the self-disclosed *Griffiths* case. When comparing the sentences in *Niko* and *Griffiths*, it appears at first glance that Griffiths received no credit for self-disclosing as the fines imposed on both companies were substantially the same ($9,499,000 and $10,350,000, respectively). However, a slightly deeper look at the facts, suggests that based on the magnitude of the bribes involved in each case, Griffiths likely received considerable leniency for

l'étranger. Les points de vue exprimés dans le présent article sont ceux de l'auteur uniquement, et découlent souvent de l'expérience de ce dernier dans le cadre de dossiers relevant de la LCAPE; ils ne doivent pas être considérés comme étant des conseils juridiques.

Courriel : Sean.Murphy@gowlings.com

self-disclosing. Niko paid a bribe to the then Bangladeshi Minister of Energy consisting of the use of an expensive vehicle (a Toyota Land Cruiser Cygnus) valued at $190,984 and the provision of a personal trip to New York and Chicago with a value of $5,000, for a total aggregate value of $195,984. Griffiths paid a bribe to the then Chadian Ambassador to Canada and the U.S. of $2 million dollars in cash formalised in a consulting agreement with the Ambassador's wife.[23] In both cases, the bribes were paid to high-ranking public officials. Though the bribe paid by Griffiths was in cash and over ten times larger than that paid by Niko, Griffiths received a fine that was only nine percent higher than Niko's and avoided corporate probation (Niko's sentence included a three-year term of corporate probation).

The theory that Griffiths' self-disclosure resulted in considerable leniency is further supported by statements made at the company's sentencing hearing by the Crown prosecutor, Mr. Sigurdson, and at the sentencing by the judge, the Honourable Mr. Justice Brooker. At the sentencing hearing, Mr. Sigurdson made three statements emphasizing the impact of Griffiths' self-disclosure which facilitated the joint sentencing submission. First, he read the agreed statement of facts which discussed a number of factors instrumental in justifying the proposed fine, including "…the full and extensive cooperation shown by GEI in bringing this matter to the attention of authorities…"[24] Second, while comparing the circumstances to the *Niko* case, he stated that by voluntarily self-disclosing, Griffiths had taken the "ethical route."[25] Third, in discussing the reasons why probation was not sought in the case, he stated "[f]irst and foremost, as I indicate, it was strictly [voluntary] compliance."[26]

At the sentencing, Brooker J. presented his views of the most significant aggravating and mitigating factors of the case in comparison to *Niko*, and stated:

> "The major aggravating factor in this case is the size of the bribe made. It was a considerable sum; far more than the Toyota Land Cruiser and trips in the Niko case.
>
> On the other hand, there are a significant number of mitigating factors present in this case. […] Most importantly, in my view, when new management came in at Griffiths and discovered the bribe, they acted quickly and decisively to fully investigate the matter and they self-reported the crime to the various relevant law enforcement authorities. Conceivably, had they not done so, this crime might never have been discovered."[27]

Brooker J. also emphasized that:

> "[Griffiths'] entire course of conduct since discovering the bribe demonstrates a complete and genuine remorse for the illegal conduct manifested by its former officers. […] These are very significant mitigating factors and must be accounted for and reflected in the sentence I impose."[28]

The precedent set by the *Griffiths* case serves to reassure companies considering self-disclosing and cooperating that they are likely to receive significant leniency in sentencing on a relative basis. In future cases, however, it will remain difficult to precisely quantify the credit awarded for self-disclosing. *Griffiths* and *Niko* represent the only two data points available for comparison to date, and both companies' sentences were the result of joint submissions accepted by the same judge (Brooker J. handled both cases) and considered a multitude of other factors included in the submissions.

The point of no return

Given the inability to test the waters ahead of a self-disclosure, what happens if the company and prosecutors are unable to agree on the sentencing credit to be given for the self-disclosure? The company has two options: one is to cease cooperating and defend against any charges laid, the second – to continue cooperation in order to reach agreement on the plea, but leave the sentence in the hands of a judge without seeking a joint sentencing submission. Of course, depending at which point the disagreement on sentencing is realized, the first option may practically no longer exist.

Even where the prosecutor and company reach agreement on the sentence, the sentencing judge is not bound to accept the joint submission if he or she considers the sentence unfit. In such a case, the judge must provide reasons for deviating from the joint submission. This only happens in rare circumstances in Canada, but adds a small degree of residual uncertainty, namely that whatever leniency is negotiated between the parties is subject to adjustment by the sentencing judge.

Despite all the uncertainty on sentencing credit, from a practical

standpoint, it is preferable that the Public Prosecution Service of Canada ("PPSC")[29] be inclined to agree to visibly lesser penalties for companies self-disclosing CFPOA violations. Otherwise, as appears to have happened lately in the U.S., a chilling effect would occur leading to a decrease in the overall number of prosecutions.

Cost of investigations

In addition to the fine, the cost of conducting an internal investigation is a major financial factor to consider in the disclosure process. Accurately predicting such costs at the outset of an investigation is usually difficult because investigations involve looking into the unknown, often expanding as new information comes to light. Some of the factors greatly impacting costs include the number of individuals involved in the conduct, the number of countries that need to be visited to collect evidence, the complexity and duration of the financial transactions underpinning the bribery scheme, and the company's timeline for completing the investigation. Companies may gain some insight into investigative costs by reviewing the initial facts of a potential violation and benchmarking against the reported costs of other similar bribery-related investigations. Griffiths' investigation reportedly cost in the range of $5 million dollars.[30] Nordion Inc., a Canadian medical isotope supply company that initiated an internal inquiry and investigation of a foreign supplier and related parties focusing on CFPOA and FCPA compliance, reports that as of April 30, 2014, it had spent $23.4 million on its investigation of this still unresolved case.[31]

In evaluating the financial impact of internal investigations, the cost should not be looked at as purely accretive to the ultimate fine resulting from the self-disclosure as the company likely received a reduction in fine by self-disclosing and cooperating. Reported investigative costs also often include remedial costs for bolstering or putting in place an effective anti-corruption compliance, controls and monitoring program.

Long-term costs and benefits

Investigative costs, remedial costs and fines are just the direct, upfront financial considerations to self-disclosing. They play a central role in evaluating the pros and cons of self-disclosure. However, there can also be collateral longer-term costs that far outstrip the amount of the direct upfront costs: lost business opportunities, debarment, asset forfeiture and civil lawsuits. These are usually more difficult to quantify and are discussed in more detail below under Consideration #4: Collateral Damage.

On the bright side, the direct investment in investigating, remediating and negotiating during the course of self-disclosure can result in long-term returns. For instance, it may be that the company would be less likely to incur another violation of the CFPOA as a result of having endured the pain of prosecution and improved controls; it can confidently move forward with a major business transaction free of the blemish of an unresolved CFPOA issue; or its shareholders' trust in the company's management is enhanced, rewarding the company for coming clean and affirming its reputation for honesty. These are just a few of the possible longer-term benefits of self-disclosing that help to balance out the costs.

Consideration #2: Timing

Timing can be critical to the self-disclosure process. If the company is choosing to self-disclose, when should it do so? If the company is choosing not to self-disclose, does there ever come a time when it is safe from prosecution?

When to self-disclose?

Timing a CFPOA self-disclosure is a delicate balance between taking time to verify the basic facts underpinning a potential violation and the uncertainty that the violation will be disclosed by someone else in the meantime (see Consideration #3 regarding whistleblowers below).

The risk in approaching the RCMP too soon with a vague, unverified allegation, only to discover shortly thereafter that there was no violation, is that the RCMP will likely want to conduct their own independent investigation. This unnecessarily puts the company under the microscope and may trigger disclosure obligations for publicly traded companies. The danger in waiting too long to self-disclose is that a company will not gain as much credit (or possibly any credit) for voluntarily self-disclosing if it approaches the RCMP after they have already become aware of the violation (for example, from a whistleblower).[32] If a whistleblower perceives the company as unresponsive or slow to act, they may be inclined to notify the RCMP before the company has had a chance to conduct an initial investigation, thus removing the company's ability to benefit from a self-disclosure.

In the face of an allegation, the usual initial approach is to move quickly to verify the core details of the

allegation, keep the initial investigation privileged, highly confidential and contained, and if there is an internal whistleblower involved, reassure the whistleblower that the company is investigating.[33] Once the company has taken these initial steps and determined that a violation was probable, the company would be better-positioned to choose its next step in handling the matter; either self-disclose, continue the confidential investigation to gather more important facts, or remediate and close the matter.

Waiting out the clock

A company with a probable violation choosing not to self-disclose cannot simply try and wait out the clock. Conversely, and just as importantly, is the fact that there is no obligation to self-disclose a CFPOA offence to the RCMP in Canada.

Consequently, a company with a violation is in limbo – it does not need to report it to the RCMP, but the risk of prosecution never goes away.

There is no limitation period for laying criminal charges for a CFPOA offence, and thus an undiscovered CFPOA violation never becomes immune from prosecution in Canada. This differs from the U.S. FCPA, where a five-year limitation period begins to run at the completion of the commission of an FCPA violation. In theory, after the five years are up, the company cannot be charged with the FCPA offence. In practice, U.S. prosecutors will often lay a conspiracy charge to effectively subvert the limitations period, only having to prove that one act in furtherance of the conspiracy occurred during the limitations period (for example, laundering the proceeds of the bribe). The sale or merger of a company with a CFPOA violation is also not going to immunize the recipient or merged entity from a CFPOA prosecution. A company's liabilities follow its shares ("successor liability"), and in the case of an asset sale, the purchaser could be purchasing tainted assets characterized as offence-related property or the proceeds of crime. In essence, the buyer is buying a CFPOA violation, which explains companies' increasing inclination to conduct pre-acquisition anti-corruption due diligence and insistence on robust anti-corruption representations and warranties.

How long will it take to conduct an investigation?

The length of time it takes to complete an internal investigation is primarily governed by the scope of the investigation and affected by the same factors as the cost of an investigation, namely the number of individuals, entities and countries involved in the conduct, the accessibility of witnesses, the complexity and duration of the financial transactions underpinning the bribery scheme, the number of law enforcement authorities investigating the conduct, and the resources available to conduct the investigation. If there are multiple allegations of bribery spread across the company, then the scope will have to be relatively wide to capture probable instances of misconduct. If the allegation is isolated to one individual employee who is in a lower-level position in the company or one particular third-party agent, and the company has had an effective anti-corruption compliance program in place, then a narrow investigation centering around that individual employee or agent will likely suffice. Serious breaches routinely take a year or more to investigate, convey the results to law enforcement authorities and negotiate a resolution. As mentioned above in relation to predicting the costs of investigation, investigations may expand in scope and take longer as a result of new discoveries made in the earlier phases of the investigation.

Timing a self-disclosure is a high-stakes predicament with no one-size-fits-all approach. In the initial stages of discovering and investigating a potential CFPOA violation, confidentiality is paramount to preserve a company's chance to be the first to disclose. If the RCMP discover the violation before the company has self-disclosed, the company will lose some ability to advocate for leniency. However, all is not lost as the company may still be able to cooperate with the RCMP in the conduct of the investigation and with the PPSC in the negotiation of a resolution.

Consideration #3: Underwriters, Purchasers, Auditors, Whistleblowers, Competitors and Disgruntled Employees

An imminent threat of exposure overrides most considerations in deciding whether to self-disclose. The threat of whistleblower disclosure is highly impactful; once someone else makes a credible report to the RCMP, the company has lost the opportunity to benefit from self-disclosure.

Assessing the urgency and likelihood of exposure requires an answer to two questions: Who knows about the violation and who will find out? A quick overview of the varied means by which non-self-disclosed CFPOA violations have come to light offer an insightful answer to those questions: it is very difficult to predict how, when or where an allegation may

come to the attention of the RCMP. In *Hydro Kleen*, the company's competitor was able to obtain an Anton Pillar order[34] permitting its representatives to conduct a search on Hydro Kleen's premises during which they discovered documentary evidence that Hydro Kleen illegally hired a U.S. immigration inspector to ease the entry of their employees into the U.S.[35] In *Niko*, the High Commission of Canada to Bangladesh in Dhaka reported the bribery allegations to the RCMP after stories emerged in a local Dhaka newspaper about Niko gifting a vehicle to the Bangladeshi Energy Minister.[36] In *Karigar*, Mr. Karigar himself expressly disclosed the bribery scheme to Annie Dubé, Canadian Assistant Trade Commissioner in Mumbai, in a face-to-face meeting in May 2007, and then a few months later to the U.S. DOJ in an anonymous email.[37] In the still unresolved SNC-Lavalin case, the RCMP was tipped off by the World Bank alleging SNC-Lavalin employees were involved in corruption related to the multibillion-dollar Padma bridge project in Bangladesh.[38]

Even without the threat of a whistleblower, a company may be compelled to self-disclose to avoid road blocks in the course of a major business transaction or a routine audit. Below is an overview of the various means by which a company may face external pressure to self-disclose.

Anti-Corruption due diligence and representations

In most major business transactions, if there are obvious risk factors present, the counterparty will conduct anti-corruption due diligence and require the target company to make anti-corruption representations. Some examples include where a company is being acquired, seeking private or public financing, bidding on a major project, or entering into a joint venture. Anti-corruption representations are negotiated and differ in form, but almost invariably require the company to represent that it had not bribed foreign officials to gain a business advantage. As mentioned above, purchasers are essentially purchasing past violations, so the discovery of a significant undisclosed violation can scuttle a deal or result in a reduced purchase price.

Contemplating a major business transaction will, in most cases, weigh in favour of self-disclosure to eliminate the possibility that an unresolved violation turns away potential business partners. If time is of the essence (due to market conditions or other factors), then it may be possible to accelerate the resolution of the self-disclosure by offering extensive cooperation to the RCMP. Generally speaking, if a self-disclosing company conducts a robust, thorough and credible independent investigation right from the outset, and regularly shares developments with the RCMP, it will likely encourage the RCMP to rely more heavily on the results of the company's investigation. This can help shorten the overall time it takes to reach a resolution by several months by reducing the time needed by the RCMP to resource and conduct its own parallel investigation. This is especially true where the company was able to gather evidence that would have been out of reach or highly time-consuming to obtain by law enforcement (for example, where Canada would have had to resort to using the mutual legal assistance treaty[39] ("MLAT") mechanism to obtain evidence from within a foreign state). Griffiths self-disclosed after the company's new management discovered the potential CFPOA violation while conducting due diligence in anticipation of its initial public offering. In light of the discovery, Griffiths cancelled its IPO until the ensuing internal investigation was completed. This scenario exemplifies one of the many means by which an undisclosed or unresolved CFPOA violation can interfere with a company executing its business strategy, but where it could salvage its plans by quickly and cooperatively resolving the issue.

Audit disclosure

In the case of financial audits, auditors rely on the representations of management in order to express an opinion on a company's financial statements. Standard management representation letters used by external auditors require management to disclose actual or suspected non-compliance with laws and regulations, all information in relation to fraud or suspected fraud affecting the company's financial statements, and material weaknesses or significant deficiencies in the design or operational effectiveness of the company's internal control over financial reporting.

One example of financial statement disclosure is in SNC-Lavalin's 2011 Financial Report, where the interim CEO and CFO identified two material weaknesses in the company's internal controls. One related to payments to commercial agents, and the other to incorrect entries in the company's books and records for agent payments.[40] As a result of the material weaknesses identified by the CEO and CFO, the Report states:

> "…the Interim CEO and the CFO have concluded that the Company's internal control over financial reporting, as at December 31, 2011, was not effective to provide reasonable assurance regarding the reliability of the Company's financial reporting and the preparation of its financial statements for external purposes in accordance with applicable accounting principles."

It was later revealed by former SNC-Lavalin International engineer Mohammad Ismail that the code word "PCC", meaning "project consultancy costs" was being used as a euphemism to describe the cost of bribes to be paid to foreign officials through third-party agents for various projects around the world.[41]

The risk of audit disclosure is particularly significant to widely-held or publicly traded companies due to the extremely high probability that such disclosures will be investigated by law enforcement authorities. Companies and senior company officials failing to comply with these disclosure requirements can face serious individual and corporate fines and penalties.

Whistleblowers

Transactional and financial disclosures are predictable – even though they may be inevitable, management knows they are coming and can self-disclose before they become public. Whistleblower disclosures are not predictable, making them an uncontrollable possibility. For example, Nazir Karigar, the former Ottawa-based businessman representing Cryptometrics who was recently sentenced to three years' imprisonment for violating the CFPOA, actually acted as his own whistleblower using an anonymous email address "craftysmiles@yahoo.com" and signing off as "Buddy" to tip off the U.S. DOJ about Cryptometrics' transgressions in attempting to secure a contract from Air India.[42]

Whistleblowers are motivated to report to authorities for a number of different reasons: Someone may feel that senior managers are ignoring unethical business practices, an employee may be involved in making the bribe and seeking immunity in exchange for offering cooperation (such as Mr. Karigar), a competitor may feel it lost a bid because it was competing against a bribe payer, or a public official may gain leverage for exposing a colleague as the recipient of a bribe. Companies that are U.S. issuers, must also contend with the SEC's whistleblower program. As part of the 2010 *Dodd-Frank Wall Street Reform and Consumer Protection Act*, whistleblowers who provide "original information" to enforcement authorities in an investigation resulting in monetary penalties of over $1 million may recover between ten and thirty percent of the penalty collected.[43] In essence, the SEC offers a bounty to employees and citizens who blow the whistle on U.S. issuers violating the books and records provisions of the FCPA. There are no such monetary whistleblower incentives related to CFPOA offences in Canada.

Companies may be surprised to discover that even their own legal counsel have certain whistleblowing obligations (albeit internal) when they discover a CFPOA violation being committed by their company. In Alberta, for example, the Law Society's *Code of Professional Conduct* requires a lawyer to report 'up the ladder' if he or she learns that the corporation has acted, is acting or proposes to act in a criminal way.[44] Rule 2.02(11) of the Code states that a lawyer must advise the person from whom they take instructions and the chief legal officer ("CLO"), or both the CLO and CEO, that the act is illegal and should be stopped. If that fails, the lawyer must report progressively to the next highest persons or groups, including ultimately the Board (or appropriate committee of the Board). If that fails, the lawyer must withdraw from acting in the matter.

Taking steps to foster an internal culture of trust and integrity can help avoid an external whistleblower disclosure. This can be achieved by making accessible an anonymous and confidential internal whistleblowing mechanism to encourage internal reporting, investigating and acting on such reports, and containing confidential information gained in the course of the investigation.

Consideration #4: Collateral Damage

Unlike the FCPA, there exists no civil process to resolve a breach of the CFPOA. The defense bar has criticized this aspect of the CFPOA because it means that a self-disclosing company would end up with a judge-imposed criminal conviction through a guilty plea or a declination; there is no middle ground.[45] A criminal conviction can bring with it unanticipated collateral consequences including reputational damage that could result in missed business opportunities, debarment from government contracts (both domestic and foreign), imprisonment

(for convicted individuals), prosecutions in other jurisdictions, asset forfeiture, and follow-on class action lawsuits by shareholders. These collateral consequences represent the costs of self-disclosure that are borne by a company over and above the cost of investigating the violation and paying a fine. They are often much more impactful than the hard upfront costs, and thus should be analyzed as thoroughly as possible before self-disclosing.

Missed business opportunities

Each company must assess what changes or challenges it will see in its day-to-day and longer-term business as a result of a criminal conviction. The consequences can vary depending on the norms of the company's industry. For example, suppliers of goods or services to major oil and gas producers are often asked by their customers to certify that they have never been convicted of a bribery-related offence as a pre-condition of qualifying as a supplier. If the convicted supplier has strong relationships with its customer base and can demonstrate that, concurrent with the conviction, it has implemented or bolstered its anti-corruption compliance program, it may be able to convince its customers that its CFPOA conviction does not present a risk to them. There is always the risk, however, that companies sensitive to the issue will take an unforgiving stance when other supply options are available. This type of issue is not just limited to suppliers. Other types of business relationships, such as distributors, agents, consultants, and joint ventures can also be hindered as a result of the reputational impact of being convicted of foreign bribery.
Companies seeking to raise money may find it more difficult to attract willing financiers in the face of an internal investigation or bribery conviction. In a Wall Street Journal article discussing bribery charges filed in Brazil against a unit of Canadian real estate investment company Brookfield Asset Management, William Atwood, executive director of the Illinois State Board of Investment, speaking generally and not specifically to the Brookfield case in Brazil, is quoted saying, "just the hint of that kind of an issue is highly problematic, [if a manager is discussing a new fund while under investigation], that conversation would come to an end until that issue is resolved."[46]

Companies may lose important commercial contracts. For several years now, it has been common practice to include anti-bribery provisions in important commercial contracts. Usually such provisions afford the customer the right to terminate the contract if the supplier breaches applicable anti-corruption laws in its provision of goods or services to the customer. Such contracts should be reviewed prior to making a self-disclosure so that mitigation efforts can be taken with the affected customer.

Debarment

Public Works and Government Services Canada ("PWGSC"), the central purchasing agency of the Canadian federal government, incorporates a suite of Integrity Provisions into all of its solicitations. The Integrity Provisions name a number of offences which render suppliers ineligible to bid on government contracts for a period of 10 years from the conviction or conditional or absolute discharge. The offences cover both the bribing a foreign public official and accounting offences under the CFPOA, and recently, also include "any foreign offence that Canada deems to be of similar constitutive elements to the offences listed in the Integrity Provisions."[47] Other countries, and even international development banks, such as the World Bank, have debarment and cross-debarment policies of similar effect. In April of 2013, SNC-Lavalin Inc. was debarred by the World Bank for 10 years following a World Bank investigation into allegations of bribery schemes involving SNC-Lavalin and officials in Bangladesh.[48]

Debarment policies could seriously affect a company's ongoing viability if they are heavily dependent on government contracting. Companies that contract with foreign governments, and which consider self-disclosure, should undertake a detailed analysis of whether and where self-disclosure could lead to debarment upon conviction. This includes examining the potential reach of debarment provisions to its subsidiaries, parent companies and other affiliates. In some cases, it may be possible to mitigate the impact of debarment if certain remedial actions are taken (such as terminating involved employees). Canada's policy however, is quite unforgiving with only a "public interest" exception which overrides the application of the policy when no one else is capable of performing the contract, or for reasons related to emergency, national security, health and safety or economic harm.[49]

The first test of Canada's expansive debarment policy may be felt by technology supplier HP Canada, a subsidiary of the U.S.-based multinational technology company Hewlett-Packard Company. As a result of HP Russia's guilty plea

to violations of the FCPA in early September 2014 in a U.S. court, Public Works and Government Services Canada is "examining the impact of this court decision on [its] current and future business with HP Canada."[50]

Prosecutions of individuals and immunity agreements

The prosecution of individuals, either in addition to the prosecution of the company, or absent the prosecution of the company (i.e., where the company receives a declination), is always a possibility arising out of a self-disclosure. The conduct of individuals will be looked at by the RCMP and PPSC in making the determination of whom to charge and prosecute. If certain company directors, officials, employees or agents were centrally involved in setting up, making, assisting, authorizing, turning a blind eye to or hiding a bribe, the PPSC prosecutors assigned to the case may decide on the basis of those material facts that it is in the public interest to prosecute one or more of those individuals.

With the recent rash of CFPOA charges laid by the RCMP against individuals associated with SNC-Lavalin and Cryptometrics, companies may wonder whether they can protect their individual directors, officers and employees from prosecution for involvement in a CFPOA offence if the company agrees to a guilty plea. The newly published Public Prosecution Service of Canada Deskbook ("PPSC Deskbook")[51] does not directly address the notion of exchanging a corporate guilty plea for individual immunity in the context of a prosecution arising from a self-disclosure. The PPSC Deskbook does state that in negotiating the terms of immunity agreements, PPSC prosecutors should explore the potential of "…dropping or reducing the charges of others, such as family members or friends."[52] How this statement would apply in the context of a corporate CFPOA self-disclosure is unclear. It does seem to at least open the possibility of negotiating immunity for company officers and employees, however, based on the author's experience and discussion of the matter with PPSC prosecutors, companies considering self-disclosure would be mistaken to believe that this is likely to be a successful strategy for protecting culpable individuals. This is consistent with the position taken in the U.S., where the practice is not permitted except in special circumstances, and the commentary in the U.S. Attorney's Manual states that "[p]rosecutors should rarely negotiate away individual criminal liability in a corporate plea."[53]

Conversely, where a violation of the CFPOA is discovered and the company chooses not to self-disclose, a company official involved in the conduct may, depending on the nature of the involvement, be able to seek an immunity agreement for blowing the whistle to the RCMP and agreeing to cooperate in the prosecution of the company and other involved individuals, especially for an ongoing violation that is difficult to detect.[54] In the *Karigar* case, the prosecution relied heavily on the testimony of Robert Bell, formerly Vice-President, Business Development, for Cryptometrics Canada, and who was "intimately involved in virtually the entire course of events." Despite his extensive involvement, he was still able to obtain immunity in exchange for cooperating with the prosecution.[55]

Multiple prosecutions

Self-disclosure in Canada can lead to prosecution in other jurisdictions. Given the nature of international bribery, it is likely that multiple countries will have jurisdiction over the offence and the company. At the very least, for CFPOA offences, the bribe recipient's (i.e., foreign official's) country is likely to take some interest in prosecuting the bribe payer regardless of what Canada does. The international web of increasingly extraterritorial anti-corruption laws makes overlapping jurisdictional issues complex to resolve. Fortunately, countries often cooperate with one another to determine which will take the lead in investigating and prosecuting the offender; it is typically the country where the company resides or where the bulk of the offence took place. This is not always the case, however, and companies should be wary that they can be prosecuted and penalized in more than one country. Similarly, where the conduct was carried out by a foreign subsidiary, both subsidiary and parent can be charged and convicted if certain facts allow for it, such as involvement or authorization by the parent company of the subsidiary's activities.[56]

Asset forfeiture

The forfeiture of proceeds of crime or offence-related property under the *Criminal Code* is a very real possibility for companies that had violated the CFPOA and as a result gained a valuable asset. "Proceeds of crime" is defined as any property, benefit or advantage, obtained or derived directly or indirectly as a result of the commission of a designated offence.[57] "Offence-related property" is defined as any property, by means or in respect of which an indictable

offence under the *Criminal Code* or CFPOA is committed, or is used, or intended to be used, in any manner in connection with the commission of such an offence.[58] It is easy to see how either of these broad definitions could capture the various assets that change hands during the course of a bribe. Assets may also be subjected to forfeiture in the foreign country where they were obtained, including in some countries, under forfeiture regimes that are misused by the ruling government for economic and political gain.

Class action lawsuits

Various types of lawsuits against the company, its managers or directors are yet another form of collateral damage that can emanate from a self-disclosure. Class action securities lawsuits are usually the most common, particularly for publicly traded companies that suffer a share price drop in the wake of disclosure. SNC-Lavalin's latest Annual Information Form identifies two class-action shareholder lawsuits against the company claiming damages for drops in SNC-Lavalin's share price related to its internal investigation and authorities' investigations of the company.[59]

Consideration #5: Proof and Politics

Canada's interstate relations with the foreign country involved in a CFPOA violation can impact both the investigation and prosecution of the violation. In conducting an investigation, Canada must gain the cooperation of the foreign country in order to collect evidence in that country; this is not always done with ease. Canada may consider its affairs with the foreign country when making decisions in the course of a prosecution.

Proof beyond a reasonable doubt

Prima facie evidence of a CFPOA violation does not necessarily equate to a provable CFPOA violation. There is a high and potentially difficult burden on the prosecution to successfully prosecute CFPOA offences: proof beyond a reasonable doubt of the criminal act and intent of the offence, without a valid defence.

In order to meet this burden, the Crown prosecutor will likely need to present evidence gathered abroad (for example, from the foreign country where the alleged bribe took place, from intermediary countries, from countries with bank secrecy laws where payments were made and received, etc.). This presents challenges, particularly where the public official benefitting from the bribe is in a powerful enough position to influence his or her country's cooperation with Canada in allowing the RCMP to enter the country to collect evidence. In many countries, if the RCMP cannot reach an informal cooperation agreement with their foreign counterparts, the RCMP can take advantage of Canada's bilateral and multilateral Mutual Legal Assistance Treaties ("MLATs") to facilitate the evidence-gathering process. However, the MLAT process of gathering evidence can be politically sensitive and notoriously slow.

While companies may surmise that investigators will not be able to gather enough evidence to obtain a conviction, which may weigh in favour of restraint from self-disclosing, from a practical standpoint, it is not easy to predict where or how the RCMP may obtain key evidence, especially in a world that is increasingly unified in fighting corruption. In the *Niko* case, which was the first significant CFPOA prosecution led by the IACU, the RCMP describes the extent of cooperation received from foreign countries in uncovering the bribery scheme that took place:

> "The IACU conducted interviews in the United States, Barbados, Zimbabwe, Japan, the United Kingdom and Bangladesh. They even got co-operation from Switzerland — a country with notoriously difficult disclosure laws.
>
> Through extensive and innovative investigation techniques that had never before been used by the IACU, investigators were able to find out that Niko's subsidiary in Bangladesh had purchased the SUV, and that it also paid for the minister to travel to both New York and Chicago to visit his family — all in an attempt to persuade the minister to lower the company's damages."[60]

Black money

Bribe payers often use intermediary offshore numbered accounts to obfuscate the flow of funds. Thus, it may appear that another potential challenge faced by investigators is tracking money into "black holes" to prove that a bribe ultimately benefited a foreign public official. This very point was argued by the defence in the *Karigar* case. The Honourable Mr. Justice Hackland of the Ontario Superior Court recognized this difficulty and soundly rejected the defence's argument on several grounds, including the notion that potential witnesses would be unlikely to risk their own safety in providing evidence against their country's own public officials:

> "…to require proof of the offer of or receipt of a bribe and the identity of a particular recipient would require evidence from a foreign jurisdiction, possibly putting foreign nationals at risk and would make the legislation difficult if not impossible to enforce and possibly offend international comity."[61]

As result of this ruling, companies should not take any comfort in believing they cannot be found guilty where their own investigations fail to actually trace the money into the hands of a foreign official but otherwise show a high likelihood that a bribe was paid. Not only has the *Karigar* ruling refuted this notion, but the RCMP also have investigative tools at their disposal, such as MLAT requests, that may allow them easier access to foreign bank records.

Corporate criminal liability

A company can only act through its representatives. Consequently, another challenge for the prosecution, when pursuing a company, is to prove that the offence can be attributed to the company. For CFPOA offences, the *Criminal Code* requires the Crown to prove that a "senior officer" of the company, with the intent, at least in part, to benefit the company either (a) is a party to the offence while acting within their scope of authority (i.e., the senior officer themselves committed the CFPOA offence), (b) directs another company representative to carry out the offence, or (c) knowing that another company representative is about to commit the offence, does not take all reasonable measures to prevent him or her from doing so.[62] A senior officer is defined in the *Criminal Code* as someone who "…plays an important role in the establishment of an organization's policies or is responsible for managing an important aspect of the organization's activities and, in the case of [corporations], includes a director, its [CEO] and its [CFO]."[63] In simplistic terms, there must be some involvement, complicity, knowledge or wilful blindness by senior management in order to implicate the company itself.

Where a rogue employee acts in relative isolation to circumvent a company's controls to make a bribe, the facts typically lend themselves to seeking a corporate declination on the basis that the evidentiary foundation to support a charge against the company has not been met. If the case is close to the line in terms of corporate liability (for example, where the rogue employee has what might be considered a senior role in the company), then in all likelihood, the chances of a self-disclosing company obtaining a declination will be greater if the company has a quality anti-corruption compliance program in place.[64]

Interstate relations

Political considerations and international relations can also factor into the investigation and prosecution of CFPOA cases. By virtue of the principles of international comity, CFPOA matters are inextricably linked to Canada's foreign affairs policy. The RCMP is sensitive to this issue; Sgt. Kelly Brophy, an RCMP police liaison officer with the Canadian High Commission in New Delhi, India stated that "IACU investigations are extremely sensitive and laden with implications affecting both Canadian international relations and the perception of law enforcement at home and abroad."[65]

The PPSC is also sensitive to Canada's foreign affairs policy when it comes to their internal handling of CFPOA prosecutions. The PPSC Deskbook states that:

> "Given the inherent international dimension of prosecutions under the CFPOA and the potential impact on Canada's relationship with other states, it is essential to coordinate prosecutions under the Act at a national level. […]
>
> Headquarters counsel are available to provide support to Regional Offices in the form of subject matter expertise in relation to the interpretation of the CFPOA, sentencing considerations, comparable foreign statutes and consultation with other government departments as required."[66]

The PPSC Deskbook further states, under the heading "The decision to initiate a prosecution or refuse to prosecute," that the decision to initiate or decline a CFPOA prosecution should consider Article 5 of the OECD Anti-Bribery Convention, which provides that:

> "Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved."[67]

The PPSC Handbook directs prosecutors to be mindful of Article 5 of the Convention only concerning the

decision on whether to prosecute or not, and not the actual conduct of the prosecution. Furthermore, the PPSC Handbook directs prosecutors to record the reasons for deciding or declining to institute proceedings in writing to dispel any suggestion of "…improper political concerns influencing prosecutorial decision-making" (as opposed to *any* political concerns.)[68] The PPSC Handbook allows for a consideration of the potential of disclosure of information injurious to international relations to be factored into the determination of the public interest value of a prosecution.[69]

It is unclear how these positions should be taken together when assessing the potential impact of political influences on the conduct of a prosecution of a CFPOA violation in a sensitive situation. The circumstances under which the PPSC might alter its normal course of prosecution due to Canada's relations with a foreign state remains also unclear. Simply put, companies should be aware that where the self-disclosed offence involves high-ranking domestic or foreign officials or other politically sensitive situations, it may entail national political deliberations that will affect the PPSC's view of, and negotiation strategy to resolve, the case.

Consideration #6: Full Disclosure

Self-disclosing companies must be careful about how they conduct their investigation and how they disclose information to investigating authorities. Often, the biggest worry of investigating authorities in the context of a self-disclosure is that they are not being told the entire story. Withholding salient facts, evidence or information known about the commission and circumstances of the offence can be viewed as a serious breach of trust and may result in a worse outcome than had the disclosing company offered nothing at all. It would also likely breach the eventual plea agreement underpinning the resolution of the violation between the Crown and the offender, rendering the company subject to further prosecution.

Conducting investigations

At the core of this consideration is the credibility of the company's own investigation leading to the self-disclosure. Companies contemplating self-disclosure must be very careful at the outset not to taint the credibility of their own investigation. Pitfalls include framing the scope of the investigation too narrowly, ignoring evidence ("red flags") of additional corrupt behaviour in the course of the investigation as a ploy to avoid being cursed with knowledge, making biased decisions on where to look for evidence, or allowing someone implicated in the corrupt behaviour to be involved in the conduct of the investigation.

To avoid these traps, internal investigations are typically conducted at the direction of the company's audit committee or an ad hoc committee comprised of independent members of the board of directors. Further advantages can be gained by hiring an experienced independent law firm to conduct the investigation. Unlike the company's usual corporate counsel, an independent law firm cannot be easily criticized for currying favour with company directors or managers in the conduct of the investigation. Also, because lawyers are conducting the investigation, privilege can be established over their findings generated in the course of the investigation allowing its protection from discovery and search warrants, unless and until the privilege is waived by the company.

Checks and balances

As alluded to above, it is important to be aware that while the RCMP encourages self-disclosing and cooperation, in the background, it will conduct a parallel investigation to verify that what is being disclosed is the whole truth. Staff Sgt. Donovan Fisher of Calgary's financial integrity team (formerly the IACU) revealed that this was indeed the RCMP's practice in the *Griffiths* self-disclosure:

> "We had to ensure that they weren't just giving us one or two obvious things and hoping we'll just focus on that so that they could slide in anything else they've done under the radar… On self-disclosures, we still try to conduct a fairly complete investigation on our own to ensure we've got the whole story."[70]

Companies will not get second chances from the RCMP to be forthright in self-disclosure. When contemplating self-disclosure of a CFPOA violation, companies should fiercely protect the integrity of their investigation so that if a self-disclosure is being made, it is on the basis of an internal investigation that is beyond reproach.

Summary

In most cases, self-disclosing a CFPOA violation is not an easy decision to make. It is a leap of faith into the uncertain future of carrying on business with the stigma of a criminal

conviction and no chance of turning back. Upon discovering a violation, directors and officers must carefully survey the landscape they face and make a decision in the best interests of the company.

Whether or not it is strategically sound to self-disclose a CFPOA violation will depend on, at a minimum, an analysis of the considerations reviewed in this article. It is important that companies understand the six considerations reviewed in this article; determine which considerations should carry the most weight; and assess how considerations can impact each other. From a company's perspective, key questions will arise from such considerations: Will we receive meaningful recognition for reporting and cooperating? Are there favourable facts suggesting that the RCMP might not charge the company or the PPSC might decline to prosecute the company? How widely known is the conduct? Are we going to face anti-corruption due diligence from a future business partner? Is the RCMP already suspicious of us or our industry? Will self-disclosing help maintain our reputation of openness? How will a criminal conviction affect our ability to carry on business? Are we jeopardizing a key relationship or the company's most important asset? How strong is the evidence and where is it located? What is an internal investigation going to cost and how long will it take? Where do we find the expertise to conduct a proper internal investigation? How and when do we notify the RCMP?

These questions often have complex answers, but after their analysis, it is not uncommon for companies to find one overriding consideration that carries the day. No matter what the decision on self-disclosing is, every company that discovers a CFPOA violation would be wise to immediately cease any ongoing corrupt behaviour, undertake a thorough analysis of what went wrong, and fully remediate the circumstances that led to the commission of the offence in order to prevent future occurrences.

**Sean Murphy is an associate in Gowlings' Calgary office, practising international anti-bribery law. Sean regularly advises clients on all issues related to Canada's Corruption of Foreign Public Officials Act ("CFPOA") and other foreign corruption matters. The views expressed in this article are of the author only, and often based on the author's experience in handling CFPOA cases; they should not be treated as legal advice. E-mail: Sean.Murphy@gowlings.com.*

Endnotes

[1] S.C. 1998, c. 34.

[2] Recent amendments to the CFPOA have addressed criticism of Canada's traditional territorial-based jurisdiction over CFPOA offences by adding nationality-based jurisdiction. Territorial-based jurisdiction was widely criticized by the OECD and others as limiting effective enforcement due to the notion that most cases of Canadians bribing foreign officials centre around conduct occurring outside Canada (i.e., it can be difficult, if not impossible, to link the bribery offence to Canadian territory). The amendments deem acts of Canadian citizens, permanent residents, corporations, societies, firms or partnerships on a worldwide basis to be acts within Canada for the purposes of the CFPOA (See *ibid.* at s. 5(1)). Canada may also take territorial jurisdiction over CFPOA offences where there is a "real and substantial link" between a CFPOA offence and Canada (See *R. v. Libman*, [1985] 2 S.C.R. 178).

[3] *Supra* note 1, s. 3.

[4] *Ibid.*, s. 4. Some specific examples of accounting practices that would be caught under the CFPOA's books and records provisions include setting up an off-the-books account to hide a bribe, using fake vendor invoices to fund such an account, or describing a bribe in a company's books and records as a consulting fee.

[5] Organization for Economic Cooperation and Development, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 18 December, 1997, 37 I.L.M. 1.

[6] The IACUs have since been reorganized into Calgary's financial integrity unit and the Sensitive and International Investigations Section of the RCMP in Ottawa's National Division.

[7] This compares to 22 reported active investigations in the 2011 and 34 reported active investigations in 2012. See: Foreign Affairs, Trade and Development Canada, *Fourteenth Annual Report to Parliament: Implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and the Enforcement of the Corruption of Foreign Public Officials Act (September 2012 - August 2013)*, online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-14.aspx?lang=eng>.

[8] *R. v. Watts*, [2005] A.J. No. 568 (Alta. Q.B.) [*Hydro Kleen*].

[9] *R. v. Niko Resources Ltd.*, [2012] A.W.L.D. 4565 (Alta. Q.B.) [*Niko*].

[10] *R. v. Griffiths Energy International*, [2013] A.J. No. 412 [*Griffiths*].

[11] *R. v. Karigar*, 2014 ONSC 3093 [*Karigar*].

[12] The charged individuals associated with SNC-Lavalin include Mohammad Ismail (former Director, International Projects), Ramesh Shah (former Vice-President of the International Division), Kevin Wallace (former Vice-President, Energy and Industrial), Zulfiquar Ali Bhuiyan (a Bangladeshi and Canadian Citizen and businessman) and Abul Hasan Chowdhury (former Interior Minister of Bangladesh as well as a former Minister of State of Bangladesh). The charged individuals associated with Cryptometrics include Robert Barra (former Chief Executive Officer), Dario Berini (former Chief Operating Officer) and Shailesh Govindia (former agent). Each has been charged under Section 3(1) of the CFPOA, and none of the allegations against these individuals have yet been proven in a Canadian court.

[13] 15 U.S.C. § 78dd-1, et seq.

[14] During the five year period covering 2002 to 2006, there were an average of only 2.8 aggregate (DOJ and SEC) corporate enforcement actions brought in the U.S. per year. This contrasts to an average of 14 cases per year during the following five year period covering 2007 to 2011. Corporate enforcement actions decreased in 2012 and 2013 with 12 and 9 cases respectively during those years. See: Shearman & Sterling LLP, "Recent Trends and Patterns in the Enforcement of

the Foreign Corrupt Practices Act" *FCPA Digest* (January 2014), online: Shearman & Sterling LLP <http://www.shearman.com/~/media/Files/Services/FCPA/2014/FCPADigestTPFCPA010614.pdf>

[15] Sarah Marberg, "Promises of Leniency: Whether Companies Should Self-Disclose Violations of the Foreign Corrupt Practices Act" (2012) 45 Vand. J. Transnat'l L. 557 at 575.

[16] Stephen J. Choi & Kevin E. Davis, "Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act" (2013) NYU Law and Economics Research Paper No. 12-15, NYU School of Law.

[17] R.S.C. 1985, c. C-34.

[18] R.S.C. 1985, c. C-46, s. 735(1).

[19] U.S.S.G. §8C2.5.

[20] *Supra* note 18, s. 718.

[21] *Ibid*., s. 718.2.

[22] *Ibid*., s. 718.21.

[23] The benefit given to the Ambassador's wife also included the opportunity to purchase founders' shares in Griffiths, but this benefit was not quantified during the course of the proceedings.

[24] *R. v. Griffiths Energy International*, Action No.: 130057425Q1, Transcript of proceedings taken in the Court of Queen's Bench of Alberta, Calgary Courts Centre, Calgary, January 22, 2013 at 15.

[25] *Ibid*. at 18.

[26] *Ibid*. at 19.

[27] *R. v. Griffiths Energy International*, Action No.: 130057425Q1, Transcript of proceedings taken in the Court of Queen's Bench of Alberta, Calgary Courts Centre, Calgary, January 25, 2013 at 2.

[28] *Ibid*. at 3.

[29] The PPSC is Canada's federal prosecution authority responsible for the prosecution of CFPOA cases.

[30] *Supra* note 27 at 3.

[31] Nordion Inc., Q2 *Nordion Interim Report/MD&A*, (June 2, 2014) at 7, and Nordion Inc., *Fiscal 2013 Annual Report*, (January 8, 2014) at 73.

[32] Attorney General of Canada, *Public Prosecution Service of Canada Deskbook* (2014) at s. 3.3(5.10): online, PPSC <http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/d-g-eng.pdf>.

[33] In cases that involve an anonymous internal whistleblower, some whistleblower reporting systems allow for two-way communication with the whistleblower while allowing them to remain anonymous, for example, by posting and responding to messages in an online reporting system that does not identify the whistleblower.

[34] A civil search warrant grated in exceptional circumstances that allows the plaintiff to attend the defendant's location unannounced and without warning to search for and seize evidence that is at risk of being hidden or destroyed.

[35] *Supra* note 8 at paras. 73-4.

[36] *Supra* note 9 at paras. 38-45.

[37] *R. v. Karigar*, 2013 ONSC 5199 at para. 15.

[38] The World Bank Group, "World Bank Statement on Padma Bridge" (June 29, 2012 press release no. 2012/545/EXT), online: The World Bank Group <http://www.worldbank.org/en/news/press-release/2012/06/29/world-bank-statement-padma-bridge>.

[39] MLATs are a formal channel through which Canada can request legal assistance from a foreign state to commence an investigation and seek evidence that is located in that foreign jurisdiction.

[40] SNC-Lavalin, *2011 Financial Report* (March 25, 2012) at 81.

[41] Dave Seglins, "SNC-Lavalin International used secret code for 'bribery' payments" *CBC News* (15 May 2013), online: CBC News <http://www.cbc.ca/news/canada/snc-lavalin-international-used-secret-code-for-bribery-payments-1.1386670>.

[42] *R v Karigar, supra* note 37.

[43] Pub. L. No. 111-203, § 922(a), 124 Stat 1841 (2010).

[44] Law Society of Alberta, *Code of Conduct,* Version 2013_V2, r. 2.02(11).

[45] In possible but unusual circumstances, a self-disclosing company could also go to trial and end up with a guilty or not guilty verdict.

[46] The Illinois State Board of Investment is a public pension asset manager for the state of Illinois. See: Craig Karmin and Paulo Trevisani, "Brookfield Faces Bribery Charges in Brazil" *The Wall Street Journal* (5 February 2013), online: The Wall Street Journal <http://online.wsj.com/news/articles/SB10001424127887323807004578286104086711588>.

[47] PWGSC, Standard Acquisition Clauses and Conditions (SACC) Manual (ID 2003, effective 25 September, 2014) at Section 01(9)(g) and 01(10), online: PWGSC <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/1/2003/19>.

[48] The World Bank Group, "World Bank Debars SNC-Lavalin Inc. and its Affiliates for 10 years" (April 17, 2013 press release no. 2013/337/INT), online: The World Bank Group < http://www.worldbank.org/en/news/press-release/2013/04/17/world-bank-debars-snc-lavalin-inc-and-its-affiliates-for-ten-years>.

[49] See PWGSC, Policy Notification 107U1 (effective 1 March 2014), online: PWGSC < https://buyandsell.gc.ca/policy-and-guidelines/policy-notifications/PN-107U1>, and PWGSC, Integrity Framework (2014), online: PWGSC < http://www.tpsgc-pwgsc.gc.ca/ci-if/ci-if-eng.html>.

[50] Barrie McKenna, "HP faces 10-year ban as Canadian government's technology supplier" Globe and Mail (14 September 2014), online: Globe and Mail < http://www.theglobeandmail.com/technology/hp-faces-10-year-ban-as-canadian-governments-technology-supplier/article20774807/>.

[51] *Supra* note 51.

[52] *Ibid*., s. 3.3(6).

[53] United States Attorney General, *United States Attorneys' Manual* (USAM) (1997): online, Department of Justice < http://www.justice.gov/usao/eousa/foia_reading_room/usam/>.

[54] *Supra* note 51, s. 3.3(5.10).

[55] *Supra* note 37 at paras. 5-6.

[56] In the U.S., there are multiple examples of parent corporations being held liable for their foreign subsidiary's FCPA violations with varying degrees of involvement in the offence. For an analysis of the implications of this trend, see Philip Urofsky, "The Ralph Lauren FCPA Case: Are There Any Limits to Parent Corporation Liability?" (2013) 45 SRLR 835: online, Shearman & Sterling LLP / BNA <http://www.shearman.com/en/newsinsights/publications/2013/06/the-ralph-lauren-fcpa-case-are-there-any-limits-__>.

[57] *Supra* note 20, s. 462.3(1).

[58] *Ibid*., s. 2.

[59] SNC-Lavalin Group Inc., *Annual Information Form, Year Ended December 31, 2013* (March 6, 2014) at 24.

[60] Mallory Procunier, "A little payment here, a little gift there" *Gazette* (National Communications Services Directorate of the Royal Canadian Mounted Police, Vol. 75, No. 3, 2013), online: RCMP <http://www.rcmp-grc.gc.ca/gazette/vol75no3/cover-dossier/corruption-eng.htm>.

[61] *Supra* note 42 at para. 29.

[62] *Supra* note 20, s. 22.2.

[63] *Ibid*., s. 2.

[64] This scenario has not yet arisen in the CFPOA context in Canada, however, in the U.S., in relation to the FCPA case against Garth Peterson, former managing director for Morgan Stanley's real estate business in China, the DOJ publicly declined to bring any enforcement action against Morgan Stanley, stating: "After considering all the available facts and circumstances, including that Morgan Stanley constructed and maintained a system of internal controls, which provided reasonable assurances that its employees were not bribing government officials, the Department of Justice declined to bring any enforcement action against Morgan Stanley related to Peterson's conduct. The company

voluntarily disclosed this matter and has cooperated throughout the department's investigation." (see United States Department of Justice Office of Public Affairs, "Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA" (April 25, 2012)). Given the criteria for corporate criminal liability in Canada under Section 22.2 of the *Criminal Code*, in a similar fact situation, a similar approach is likely to be taken in Canada.

[65] *Supra* note 60.

[66] *Supra* note 51, s. 5.8(3.1).

[67] *Ibid*., s. 5.8(3.2).

[68] *Ibid*.

[69] *Ibid*., s. 2.3(3.2).

[70] *Supra* note 65.

Case Commentary / Commentaire d'arrêt

The Ezokola Decision

David Matas*

Refugee protection suffers a tension between generous standards and strict application.[1] The 1951 United Nations Convention relating to the Status of Refugees was limited to events having occurred before January 1, 1951[2] and, as an option, events having occurred in Europe.[3] The population to whom it offered protection was limited to essentially two groups, those who fled the Communism of Eastern and Central Europe and those who fled Nazi persecution.

By the time the Convention entered into force, the Nazi persecution was well over. The Convention nevertheless provided protection to those who had compelling reasons arising out of past persecution not to avail themselves of the protection of their country of nationality.[4] This provision granted refugee protection to those who had fled Nazi persecution even though that persecution had ceased.

The Protocol to the Convention of 1967, which removed the 1951 date limitation, also responded to events in Eastern Europe. The Soviet crackdown in Hungary in 1956 prompted the drafting of the 1967 Protocol. The subsequent Soviet repression in Czechoslovakia in 1968 encouraged its ratification. The states parties realized that the protection they meant to give to those fleeing Communist persecution in Eastern and Central Europe, by being limited to events prior to January 1, 1951, was not complete.

The Convention and Protocol granted protection to millions of people. The Government of Canada enacted the self exiled class through regulation. Persons in this class did not have to prove they fell within the Convention refugee definition.

Refugee procedure, treatment of refugees, and access to determination procedures are constantly changing. In general terms, the devices that are used to avoid the commitment to refugee protection in principle are denying fairness in refugee determination, preventing access to determination procedures, and applying an overly narrow interpretation of the refugee definition to real numbers of refugees in practice.

The unwillingness to protect refugees, though widespread, is not uniform. There are also those who support refugee protection in deed as well as word. There has developed a tug of war, a back and forth, between the humanitarian and the restrictive. As the restrictive close one door, the never ending plight of refugees prompts the opening of another.

The Refugee Convention defines refugees in broad terms that leaves considerable scope for interpretation and has no mechanism to sort out varying interpretations. The Convention is an early treaty, drafted shortly after World War II, and does not have the enforcement mechanisms later treaties developed.

There is no requirement by states parties to report compliance under the Convention. There is no expert committee established under the Convention authorized to publish

L'arrêt *Ezokola*

*David Matas**

Le décalage entre la volonté politique de protéger les réfugiés et l'obligation légale du gouvernement de le faire s'est de nouveau manifesté lors de la récente décision de la Cour suprême dans l'affaire *Ezokola c. Canada*. Cette affaire portait sur l'application de la clause 1F(c) de la Convention sur les réfugiés, qui permet au Canada d'exclure les réfugiés qui ont commis certains actes criminels internationaux.

Dans l'arrêt *Ezokola*, la question était de savoir quel niveau de participation à ces crimes internationaux entraîne l'interdiction pour un demandeur d'asile d'entrer au Canada. La Cour d'appel fédérale avait conclu que l'appartenance de M. Ezokola au gouvernement du Congo, à titre de chef de mission permanent à l'ONU, était suffisante pour établir sa complicité dans les crimes du régime et, par conséquent, interdire son entrée.

La Cour suprême a rejeté l'approche de la Cour fédérale et appliqué un critère de « contribution significative ». La Cour a conclu que la simple appartenance était insuffisante pour interdire un demandeur et qu'un certain degré de participation aux crimes était nécessaire. Il faut ainsi procéder à une évaluation de la taille et de la nature de l'organisation, des fonctions et du rang du demandeur, de la durée de son appartenance à l'organisation, de la façon dont le demandeur a été recruté et ses possibilités de quitter l'organisation.

comments on state compliance with the Convention. There is no petition mechanism, not even an optional petition mechanism, to allow individuals to make complaints of violation of the Convention.

While there is the possibility of interstate complaints to the International Court of Justice,[5] that provision is a dead letter because no state has an interest in making such a complaint. Those who suffer from the misapplication of the Refugee Convention are individuals, not states.

There is as well, an institution, the Office of the United Nations High Commissioner for Refugees, whose task is, according to its statute, to provide protection to refugees falling within the competence of the Office.[6] The definition of those to whom the competence of the Office extends is similar to the Refugee Convention definition.

The Office though is a hybrid institution, providing services to refugees as well as protection; it is a humanitarian as well as a human rights institution. As a humanitarian institution, it needs the cooperation of governments as well as funding from them. Issuing adverse rulings against governments, which are overly strict in the interpretation of refugee protection, undercuts the cooperation with these governments that the Office needs. So it is not done.

The Office does issue analyses of situations in countries refugees have fled to and, as well, provides detailed, elaborate expositions of the meaning of various components of the Refugee Convention. It will, moreover, behind closed doors, take up individual cases with government officials. That is, though, as far as the Office will go.

The Convention against Torture, which prohibits removal to torture,[7] is a more modern instrument, adopted in 1984, and has more modern enforcement mechanisms. It has an expert committee,[8] a compulsory reporting mechanism,[9] and an optional petition mechanism.[10] The expert committee can find a state party in violation of the Convention for removing someone to torture and can issue interim requests for stays of removal pending determination of petitions. However, not every feared persecution is torture.

For feared persecution that is not torture, refugee claimants are, for the most part, left to the tender mercies of signatory states. Sometimes states are neither tender nor merciful.

In this struggle over the breadth of refugee protection, the Federal Court of Appeal has historically worn the black hats and the Supreme Court of Canada the white. The Federal Court of Appeal had ruled that oral hearings are not necessary for credibility determinations in refugee claims;[11] the Supreme Court of Canada ruled that they are.[12]

The Federal Court of Appeal had decided that the involvement of the State is *sine qua non* for a successful refugee claim.[13] Mere inability of the state to protect from a non-state agent of persecution was, according to the Court, insufficient to justify a claim. The Supreme Court of Canada ruled that a person can be a refugee from a non-state agent of persecution from whom the state was unable to offer protection.[14]

The Federal Court of Canada had decided that any matter which any UN agency considered to be a serious problem fell within the exclusion clause 1F(a), which deals with acts contrary to the purposes and principles of the United Nations.[15] The Supreme Court held the contrary, that the act either had to be identified by the UN itself to be contrary to its purposes and principles or was a serious, sustained and systemic violation of fundamental human rights.[16]

**David Matas est avocat spécialisé en droit de l'immigration et des réfugiés qui exerce à Winnipeg au Manitoba (Canada). Il est ancien président de la Section du droit constitutionnel et international de l'Association du Barreau canadien. Courriel : dmatas@mts.net*

The Federal Court of Appeal had ruled that the Immigration Appeal Division of the Immigration and Refugee Board could not consider refugee protection matters on humanitarian appeals of permanent residents facing deportation.[17] The Supreme Court of Canada ruled the contrary.[18]

More or less any component of the Refugee Convention definition or procedure can be distorted to deny protection to large numbers of refugees. The exclusion clauses are no less immune from this distortion than other components of the refugee definition. The distortions here, as elsewhere, become subject to the tug of war between the generous and the miserly.

One would have thought that exclusion clause 1F(a) which excludes from protection those who have "committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes" would be pretty straightforward. We would look to the instruments and

the international criminal jurisprudence to see how these crimes would be defined.

Yet, in the hands of the would be protection deniers, nothing is straightforward. The devil lies in the standard of proof. In the Refugee Convention, that standard is "serious reasons for considering." The heading for exclusion clause 1F states: "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that."

For those who wanted to use the exclusion clause 1F(a) to exclude from refugee protection as large a number of persons as possible, more or less any association with war crimes or crimes against humanity became serious reasons for considering complicity in war crimes and crimes against humanity. The touchstone became the test for complicity.

In Canada, that became a very loose, broad and easy to apply test, articulated by the Federal Court of Appeal in *Ramirez* to be one of "personal and knowing participation" in the crime.[19] This personal and knowing participation in practice meant personal and knowing association. Anyone who had any connection whatsoever with the criminals was considered complicit in the crime.

The *Ramirez* test was effectively transformed into one based on whether an individual was a member of a group whose members have committed international crimes.[20] It was who you were associated with, rather than what you did, which all too often became the basis for exclusion.[21]

The facts in the case of *Ezokola* were a good example of the problem of the overbreadth of the articulation in *Ramirez*.[22] Rachidi Ezokola led the Permanent Mission of the Democratic Republic of Congo at the United Nations in New York. In January 2008, he resigned that post, came to Canada, and made a refugee protection claim.

The Refugee Protection Division of the Immigration and Refugee Board excluded him from refugee protection under Refugee Convention exclusion clause 1F(a).[23] The Division considered him complicit in the crimes of humanity of the regime of Joseph Kabila, because of the position he held in that regime. Even though there was no evidence of his having made a significant contribution to any of its crimes, that decision was overturned by the Federal Court.[24] The Minister appealed to the Federal Court of Appeal.

The Federal Court of Appeal held that a senior official may, by remaining in his position without protest and continuing to defend the interests of his government while being aware of the crimes committed by this government, demonstrate personal and knowing participation in these crimes and be complicit with the government in their commission.[25] The Court nonetheless ruled that the Board had erred in law by using the test of awareness rather than participation and sent the case back to the Board.

In light of the fact that the test the Court of Appeal expected the Board to use was so damning, Ezokola appealed to the Supreme Court of Canada on the issue of the test to be used. The Supreme Court of Canada ruled against the legal test for exclusion under Article 1F(a) the Court of Appeal articulated, of knowing participation, and replaced it instead with a test of significant contribution.

The Supreme Court of Canada in *Ezokola* contrasted the two tests, writing:

> "As we shall see, a broad range of international authorities converge towards the adoption of a 'significant contribution test'.
>
> [9] This contribution based approach to complicity replaces the personal and knowing participation test developed by the Federal Court of Appeal in *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306. In our view, the personal and knowing participation test has, in some cases, been overextended to capture individuals on the basis of complicity by association. A change to the test is therefore necessary to bring Canadian law in line with international criminal law, the humanitarian purposes of the Refugee Convention, and fundamental criminal law principles."

The Supreme Court of Canada in *Ezokola* set out a list of factors to serve as a guide in assessing whether an individual has voluntarily made a significant and knowing contribution to a crime or criminal purpose, blending together the analysis of knowledge and contribution. The factors the Court identifies[26] are:

(i) The size and nature of the organization. About this factor, the Supreme Court of Canada in *Ezokola* wrote[27]:

> "If the organization is multifaceted or heterogeneous, i.e. one that performs both legitimate and criminal acts, the link between the contribution and the criminal

purpose will be more tenuous. In contrast, where the group is identified as one with a limited and brutal purpose, the link between the contribution and the criminal purpose will be easier to establish."

(ii) The part of the organization with which the refugee claimant was most directly concerned. About this factor, the Supreme Court of Canada in *Ezokola* wrote[28]:

"This factor may be relevant if particular parts of the organization were known to be involved with the crime or criminal purpose. For example, where only one part of the organization in question was involved in the crime or criminal purpose, a claimant's exclusive affiliation with another part(s) of the organization may serve to exonerate him or her for the purpose of art. 1F(a)."

(iii) The refugee claimant's duties and activities within the organization. About this factor, the Supreme Court of Canada in *Ezokola* wrote[29]:

"The Board should consider the link between the duties and activities of a claimant, and the crimes and criminal purposes of the organization."

(iv) The refugee claimant's position or rank in the organization. About this factor, the Supreme Court of Canada in *Ezokola* wrote[30]:

"A high ranking individual in an organization may be more likely to have knowledge of that organization's crime or criminal purpose. In some cases, a high rank or rapid ascent through the ranks of an organization could evidence strong support of the organization's criminal purpose."

(v) The length of time the refugee claimant was in the organization. About this factor, the Supreme Court of Canada in *Ezokola* wrote[31]:

"It may be easier to establish complicity where an individual has been involved with the organization for a longer period of time. This would increase the chance that the individual had knowledge of the organization's crime or criminal purpose."

(vi) The method by which the refugee claimant was recruited and the refugee claimant's opportunity to leave the organization.

The Supreme Court of Canada in *Ezokola* wrote[32]:

"even for groups with a limited and brutal purpose, the individual's conduct and role within the organization must still be carefully assessed, on an individualized basis, to determine whether the contribution was voluntarily made and had a significant impact on the crime or criminal purpose of the group."

**David Matas is an immigration and refugee lawyer practising in Winnipeg, Manitoba, Canada. He is a former chair of the constitutional and international law section of the Canadian Bar Association. E-mail: dmatas@mts.net*

Endnotes

[1] See David Matas & Ilana Simon *Closing the Doors: The Failure of Refugee Protection* (Summerhill Press, 1989) and David Matas "Credibility of Refugee Claimants" (1994) 21 Immigration Law Reporter (2nd) 134.
[2] *Convention Relating to the Status of Refugees*, 28 July 1951, UNTS 189 at 137, art. 1A(2) (the *Convention*).
[3] *Ibid*., art. 1B(1).
[4] *Ibid*., art. 1C(5).
[5] *Ibid*., art. 38.
[6] *Ibid*., art. 1.
[7] *Ibid*., art. 3.
[8] *Ibid*., art. 17.
[9] *Ibid*., art. 19.
[10] *Ibid*., art. 22.
[11] *Saraos v. Minister of Employment and Immigration*, [1982] 1 FC 304.
[12] *Singh v. Minister of Employment and Immigration*, [1985] 1 SCR 177.
[13] *Canada (Attorney General) v. Ward*, [1990] 2 FC 667.
[14] [1993] 2 SCR 689.
[15] *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1996] 2 FC 49.
[16] *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982.
[17] *Chieu v. Canada (Minister of Citizenship and Immigration)*, [1999] 1 FC 605.
[18] *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3.
[19] *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306.
[20] Zambelli, Pia. "Problematic Trends in the Analysis of State Protection and Article 1F(a) Exclusion in Canadian Refugee Law" (2011), 23 Int'l. J. Refugee L. 273.
[21] Asha Kaushal and Catherine Dauvergne, "The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions ," (2011) 23:1 Int J Refugee Law 54 at 79.
[22] *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40 (*Ezokola SCC*).
[23] 2009 CanLII 89027 (CA IRB); 2009 CanLII 89027.
[24] *Ezokola v. Canada (Citizenship and Immigration)*, 2010 FC 662.
[25] *Canada (Citizenship and Immigration) v. Ekanza Ezokola,* 2011 FCA 224 at para. 72.
[26] *Ezokola SCC, supra* note 23 at para. 91.
[27] *Ibid*., at para. 94.
[28] *Ibid*., at para. 95.
[29] *Ibid*., at para. 96.
[30] *Ibid*., at para. 97.
[31] *Ibid*., at para. 98.
[32] *Ibid*., at para. 94.

The modest career of the *Justice for Victims of Terrorism Act*

*Monique Poingracic-Speier**

In March 2012, the *Justice for Victims of Terrorism Act*, S.C. 2012, c. 1 (*JVTA*) and related amendments to the *State Immunity Act*, R.S.C. 1985, c. S-18 (*SIA*) came into force. The 2012 enactments aim to deter terrorism by allowing victims of the crime to take legal action against its perpetrators and state supporters.[1] This note provides an overview of the litigation initiated pursuant to the legislation.

The legislation: a primer

Section 4(1) of the *JVTA* confirms a civil cause of action for damages caused by terrorism. For the purposes of the legislation, "terrorism" is defined as an act or omission, on or after January 1, 1985, that constitutes an offence punishable under the Part II.1 of the *Criminal Code*, R.S.C. 1986, c. C-46, or an act or omission committed abroad that, had it been committed in Canada, would have been punishable under Part II.1 of the *Criminal Code*.[2] Part II.1 of the Criminal Code includes offences related to the commission and financing of terrorism, and to terrorist hoaxes.

The plaintiff in an action pursuant to s. 4(1) of the *JVTA* must be a person who has suffered loss or damage due to terrorism. The court will have jurisdiction over the action if the plaintiff is a Canadian citizen or permanent resident, or there is a real and substantial connection between Canada and the action.[3]

The defendant in an action under s. 4(1) of the *JVTA* can be: a person; an "entity" designated by regulation that has knowingly carried out, attempted to carry out, participated in, or facilitated terrorist activity, or an entity that has knowingly acted on behalf of, at the direction of or in association with such an entity;[4] and a state listed as a state supporter of terrorism, pursuant to s. 6.1 of the *SIA*.[5]

Section 4(5) provides for the recognition of a foreign judgment in favour of a victim of terrorism, provided the judgment meets Canadian recognition criteria and, if against a state, is against a state that has lost immunity in Canada for its support of terrorism.[6]

The *JVTA*, and the companion amendments in the *SIA*, contain legal innovations. For example, s. 4(2) of the *JVTA* does not require that an action under s. 4(1) have a real and substantial connection to Canada, if the plaintiff is a Canadian or permanent resident of Canada. Further, s. 4(2.1) of the *JVTA* creates a presumption in favour of the plaintiff: if it is shown that a listed entity committed a terrorist act and the defendant committed certain acts or omissions enumerated in Part II.1 of the *Criminal Code* to benefit or in relation to the listed entity, then the defendant is presumed to have committed the act or omission that caused the plaintiff's loss or damage. Section 4(3) defers the limitation or prescription period governing a claim under s. 4(1) until the coming into force of the *JVTA*, and suspends it during a period in which the plaintiff is incapable of beginning the action by reason of physical, mental or psychological

La modeste carrière de la *Loi sur la justice pour les victimes d'actes de terrorisme*

Monique Poingracic-Speier*

La *Loi sur la justice pour les victimes d'actes de terrorisme* vise à confirmer une cause d'action civile pour les dommages causés par le terrorisme et à faciliter l'exécution des jugements dans les autres pays en faveur des victimes du terrorisme. Depuis son adoption en mars 2012, elle a donné lieu à quatre demandes importantes.

Ces quatre demandes portaient toutes sur des actes terroristes iraniens présumés. La Cour supérieure de l'Ontario s'est prononcée sur ces questions pour la première fois en mars 2014, dans *Edward Tracy et al. v. The Iranian Ministry of Information and Security* (les demandeurs des trois autres causes avaient accepté d'ajourner leur demande jusqu'à la résolution de l'affaire *Tracy*). La Cour a conclu en l'espèce que les fonds détenus au Canada au nom de l'ambassade d'Iran pouvaient être saisis et que certaines propriétés à Ottawa et à Toronto pouvaient être vendues pour satisfaire les jugements rendus contre l'Iran en vertu de la Loi. Bien que la saisie des comptes bancaires et des actifs ne satisfera qu'une petite partie des quatre jugements, ils fournissent une orientation initiale pour les prochains recours des victimes du terrorisme.

* *M^e Monique Pongracic-Speier est associée au cabinet Ethos Law Group LLP, à Vancouver. Elle est avocate plaideuse et s'intéresse particulièrement aux droits de la personne et au droit public. Ancienne présidente de la*

condition, or because the plaintiff is unable to ascertain the identity of the defendant(s).[7]

The most remarkable provisions of the 2012 enactments are those limiting state immunity. Pursuant to s. 6.1 of the *SIA*, the Governor in Council may list a state as a supporter of terrorism if "satisfied that there are reasonable grounds to believe that the foreign state supported or supports terrorism."[8] A listed state loses immunity in proceedings against it for its support of terrorism.[9]

In September 2012, Iran and Syria were listed as state supporters of terrorism.[10] The listing of Iran, in particular, has given rise to four actions under the *JVTA*.

The cases

Three cases against Iran have sought to recognize U.S. judgments in favour of victims of terrorism, pursuant to s. 4(5) of the *JVTA*. In addition, one case was brought under s. 4(1) in 2013. The limited assets available in Canada to satisfy prospective judgments fostered cooperation between the various plaintiffs. By 2014, the plaintiffs had reportedly agreed to a division of proceeds.[11]

(a) *Bennett Estate:*

The first reported case under the *JVTA* was brought by the Estate of Marla Bennett. Ms. Bennett was an American student who died in a Hamas bombing in Jerusalem in 2002. Following Ms. Bennett's death, her Estate sued Iran and the Iranian Ministry of Information and Security under the *Foreign Sovereign Immunities Act*, 28 U.S.C. §1605, for material support of Hamas's terrorist activities.[12] In 2007, the Estate obtained judgment for US$12,904,548 from the District Court for the District of Columbia. However, it encountered problems enforcing the judgment against Iranian assets in the United States.[13] In 2012, the Estate brought an action in Ontario to recognize the U.S. judgment.

In October 2012, the Ontario Superior Court of Justice granted a temporary *ex parte Mareva* injunction in respect of real properties and bank accounts held by Iran or by entities believed to be *alter egos* for, or subject to ultimate controlled by, Iran.[14] These included entities called the Mobin Foundation and Farhangeiran Inc. The *Mareva* injunction was later extended indefinitely, and corollary relief was granted to confirm the identity of certain bank account holders.[15]

The Attorney General of Canada was granted intervener standing in *Bennett Estate*. In 2013, the Attorney General applied to partly set aside the *Mareva* injunction to release from its reach assets certified as diplomatic property pursuant to the *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41. In support of the application, the Attorney General argued that the Estate had failed to make full and frank disclosure of material facts in 2012. The Court agreed and varied the injunction.[16] The Court found that the Estate had failed to disclose that writs of attachment it had obtained over Iranian diplomatic property in the United States were quashed by the U.S. Court of Appeals. Also, the Estate had failed to draw to the attention of the Court or mischaracterized a Federal Court of Appeal decision concluding that some matters addressed by the *Vienna Convention on Diplomatic Relations*,[17] but not incorporated into the *Foreign Missions and International Organizations Act*, may fall within the Crown prerogative over the conduct of foreign relations so as to deprive Canadian courts of review jurisdiction.[18]

Section du droit international de l'Association du Barreau canadien et coprésidente du Comité des droits de la personne et des communautés de la Section, Me Monique Pongracic-Speier est l'auteure du chapitre sur le droit international de l'évaluation annuelle du droit et de la pratique du droit (Annual Review of Law and Practice) de 2013 de la Continuing Legal Education Society de la Colombie-Britannique.

Although served with the *Mareva* injunction and the notice of claim, Iran did not apply to set aside or vary the injunction. It eventually entered a defence in the recognition proceedings. A motion in September 2013 to recognize the U.S. judgment was adjourned, as events in the other cases under the *JVTA* advanced.

(b) *Sherri Wise's Case*

Dr. Sherri Wise is the first person to file a claim for damages under s. 4(1) of the *JVTA*. Dr. Wise is a Canadian dentist who was injured when Hamas bombed a pedestrian mall in Jerusalem in 1997. Dr. Wise was in Israel volunteering with a charitable organisation when the bombing occurred.

In September 2013, Dr. Wise filed proceedings against Iran and the Iranian Ministry of Information and Security in the B.C. Supreme Court. The gist of the claim is that Iran and

the Iranian Ministry of Information and Security provided routine and systemic support, including financing, to Hamas, and knowingly participated in, contributed to, and facilitated Hamas's activities.[19]

Although served with the notice of civil claim in October 2013, as of the writing of this note, the defendants had not entered a defence.

In late 2013, the Ontario Court of Appeal granted Dr. Wise intervener standing in *Bennett Estate*, on the grounds that she has a contingent interest in the subject matter of the action and may be adversely affected by recognition of the Bennett Estate's U.S. judgment.[20] The Court found that Dr. Wise would have a useful contribution to make to the litigation because she planned to argue that the Estate's action was time-barred, and, in any event, the Estate's award is so significant that, if it were recognized and enforced in Canada, there would be no funds remaining to satisfy Canadian judgments. The Court found that since the interpretation of the *JVTA* is a matter of first instance, Dr. Wise's perspective on these issues would be useful.[21]

(c) *Steen and Jacobsen v. Islamic Republic of Iran*

Mssrs. Steen and Jacobsen were among numerous Americans kidnapped by Hezbollah at the direction of Iran, during the Lebanese hostage crisis of the 1980s and early 1990s. They were held for ransom in Beirut in "unspeakably inhumane and brutal conditions,"[22] before they were eventually released.

Mr. Steen and his wife, and Mr. Jacobsen's children and sister, sued Iran in the U.S. District Court for Columbia, and obtained substantial judgments in 2003 and 2006.[23] The judgments were not satisfied in the U.S., so, in 2010, the plaintiffs sought to have them recognized and enforced in Ontario. Hoping to rely on s.5 of the SIA, which provides, "A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state," the plaintiffs argued that the kidnaps for ransom were "commercial activity." The plaintiffs also argued that Iran had forfeited its entitlement to sovereign immunity in Canada because the kidnapping and captivity of Mssrs. Steen and Jacobsen violated *jus cogens* norms against torture and terrorism. The Ontario Superior Court dismissed the claims in 2011,[24] and the Court of Appeal denied the appeal in 2013, but without prejudice to the appellants' right to seek recognition of the U.S. judgments under the *JVTA* and the *SIA*.[25] The plaintiffs have accordingly proceeded with claims under s. 4(5) of the *JVTA*.

(d) *Edward Tracy et al. v. The Iranian Ministry of Information and Security*

Hezbollah hostage Edward Tracy and the children and siblings of Hezbollah hostage Joseph Ciccipio obtained judgments against the Iranian Ministry of Information and Security, the Islamic Republic of Iran and the Iranian Revolutionary Guard Corp. in the United States District Court for the District of Columbia as victims of terrorism in 2003 and 2005.[26] In March 2013, the judgments were recognized in Nova Scotia, pursuant to s. 4(5) of the *JVTA*.[27] In May 2013, they were registered in Ontario, pursuant to the *Reciprocal Enforcement of Judgments Act*, R.S.O. 1990, c. R.5.[28] Although served with the Nova Scotia and Ontario recognition orders in August 2013, Iran did not move to set aside the orders.[29]

In January 2014, the plaintiffs applied to have the recognized judgments enforced against the Iranian defendants. The defendants did not appear on the motion.

By the time of the enforcement motion, the plaintiffs in *Bennett Estate, Wise and Steen and Jacobsen* had agreed to defer the hearing of the *Bennett Estate* and *Steen and Jacobsen* recognition actions, in favour of proceeding with the enforcement motion in the *Tracy* action.[30]

The enforcement order was granted by the Ontario Superior Court in March 2014. The Court found that the evidence adduced by the applicants "overwhelmingly" established that funds held at Canadian banks in the names of the "Embassy or Islamic Republic of Iran Higher Education Advisory" and "Embassy of Islamic Republic of Iran" were the property of Iran and were not diplomatic assets. As such, they were available to satisfy the Ontario recognition order.[31] The funds were ordered paid to the sheriff, in the manner usual in Ontario enforcement proceedings.

Further, the Court found that real properties in Ottawa and Toronto owned by the Mobin Foundation and Farhangeiran Inc. were beneficially owned by Iran and constituted non-diplomatic assets in Canada.[32] The Court specifically found that despite some suggestion that the properties were operating as cultural centres, they were not, in fact, properties of Iran with "cultural or historical value", within the meaning of s. 12(1)(d) of the *SIA*; that provision immunizes from attachment and execution

property of state supporters of terrorism that has "cultural or historical value." The Court directed the sheriff to enforce writs of seizure and sale against the two properties.[33] The real property and bank accounts are reportedly valued at $7.1 million.[34]

In a final twist to the *Tracy* proceedings, the Ontario Superior Court of Justice denied the plaintiffs' application for the costs of the enforcement motion on a substantial indemnity basis. Justice Brown commented,

> The plaintiffs are entitled to their costs, but not on a substantial indemnity basis. . . .
>
> Censure of the political conduct of foreign states properly belongs to Parliament or to the executive of Canada, not to the courts, unless such authority is granted to them. In enacting the *Justice for Victims of Terrorism Act*, S.C. 2012, c. 1, Parliament did not provide for the award of elevated costs in cases involving the enforcement of judgments against foreign states which engage in or support terrorism, such as Iran. In my view, judicial cost awards should not be designed to express approval or disapproval of the non-litigation conduct of a foreign state on the international stage or domestically where Parliament has not directed the courts to take such conduct into consideration in making costs awards.[35]

The costs award probably closes the first chapter of litigation under the *JVTA*. If execution proceedings realise the estimated value of Iran's non-diplomatic real property in Ontario, then just over $7 million will be available to satisfy existing awards of approximately US$472 million and Dr. Wise's asserted but unquantified damages. Whether the legislation will provide an economically effective remedy for victims of terrorism in the future will depend on which countries may be listed as state supporters of terrorism when the list under s. 6.1 of the *SIA* is reviewed, the extent of their exigible assets in Canada, and the cost of proceeding.

**Monique Pongracic-Speier is a partner with the Ethos Law Group LLP in Vancouver. She is a litigator and has a special interest in human rights and public law. Monique is Past Chair of the Canadian Bar Association's International Law Section and past co-chair of its committee on the rights of persons and communities. Monique is the author of the International Law chapter in the British Columbia Continuing Legal Education Society's Annual Review of Law and Practice, 2013.*

Endnotes

[1] *Justice for Victims of Terrorism Act*, S.C 2012, c.1, s. 3 [*JVTA*]. The *JVTA* was enacted pursuant to Bill C-10, the *Safe Streets and Communities Act*, S.C. 2012, c. 1, s. 2, which more or less replicated an earlier bill, Bill S-7, *An Act to deter terrorism, and to amend the State Immunity Act*, which was introduced in the Senate in April 2010, but did not become law prior to the dissolution of Parliament in March 2011. Bill S-7 was among several Bills put before Parliament in 2010 that aimed to create human rights exceptions to the immunity afforded to states under the *State Immunity Act*. See, generally, Antonin Pribetic, "Adjudicating International Human Rights Claims in Canada" (2011), 8 *Canadian International Lawyer* 117 at 130.

[2] *Ibid*, s. 4(1).

[3] *Ibid*, ss. 4(1) and (2).

[4] See *Ibid*, s. 4(1)(a) and *Criminal Code*, ss. 83.01 and 83.05.

[5] *Ibid*, s. 4(1).

[6] *Ibid*, s. 4(5).

[7] One may question whether all of the *JVTA*'s provisions are within federal competence. That issue will not be pursued in this note.

[8] *State Immunity Act*, R.S.C. 1985, c. 5-18, s. 6.1(2) [*SIA*].

[9] *SIA*, s. 6.1(1). However, s. 12(1) of the *SIA* still limits the property of a state supporter of terrorism that is liable to attachment and execution; property that is of "cultural or historical value" is immune from attachment.

[10] *Order establishing a list of foreign state supporters of Terrorism*, SOR/2012-170. Pursuant to s. 6.1(7) of the *SIA*, the list will be up for review in September 2014.

[11] "Iran to forfeit $7 million in assets for 'supporting terrorism'", CBC News, (March 20, 2014) online: http://www.cbc.ca/news/canada/iran-to-forfeit-7m-in-canadian-assets-for-supporting-terrorism-1.2580632.

[12] The *Foreign Sovereign Immunities Act* was amended in 1996 to permit U.S. victims of terrorism to sue designated states for perpetration of or complicity in terrorist acts. A 2008 research paper prepared for the United States Congress reported that U.S. courts had awarded victims of terrorism more than $18 billion in damages, but that few judgment creditors had collected. See Jennifer K. Elsea, "Suits Against Terrorist States by Victims of Terrorism", Congressional Research Service, updated to May 1, 2008, online: http://fpc.state.gov/documents/organization/105175.pdf at CRS-2.

[13] *Bennett Estate v. Islamic Republic of Iran*, 2012 ONSC 5886 at paras. 4 and 8 – 14 [Tracy].

[14] *Ibid*. See also *Edward Tracy v. The Iranian Ministry of information and Security*, 2014 ONSC 1696 at para. 4 [Tracy]. Section 11(3) of the *SIA* lifts state immunity from injunction proceedings in respect of state supporters of terrorism and their agencies.

[15] *Bennett Estate v. Islamic Republic of Iran*, 2013 ONSC 6832 at paras. 20 and 21.

[16] *Ibid* at para. 45.

[17] 18 April 1961, 500 U.N.T.S. 95.

[18] The decision at issue was *Copello v. Canada (Minister of Foreign Affairs)*, 2003 FCA 295. *Copello* considered Art. 9 of the *Vienna Convention*, which permits a receiving state to declare a diplomatic staff person at a mission *persona non grata* and to expel him or her. In *Bennett Estate*, it was Art. 45 of the *Vienna Convention* that was at issue. Art. 45 provides, *inter alia*, that if diplomatic relations are broken off between two states, the receiving state must respect and protect the premises of the mission, together with its property and archives. Canada suspended diplomatic relations with Iran in 2012.

[19] *Sherri Wise v. Islamic Republic of Iran and Iranian Ministry of Information and Security*, B.C. Supreme Court Action No. S137186, Vancouver Registry.

[20] *Bennett Estate v. Iran (Islamic Republic of)*, 2013 ONCA 623 at para. 15.

[21] *Ibid*. at para. 17.
[22] *Steen et al. v. Islamic Republic of Iran et al.*, 2011 ONSC 6464 at para. 1.
[23] The Steens were awarded US$342,750,000; the Jacobsen plaintiffs had judgment for US$6.4 million. *Steen et al. v. Islamic Republic of Iran et al*. 2013 ONCA 30 at paras. 2 to 4.
[24] *Steen et al. v. Islamic Republic of Iran et al*., 2011 ONSC 6464.
[25] *Steen et al. v. Islamic Republic of Iran et al.*, *supra* note 23 at para. 43.
[26] The judgments in the two cases were for US$18,509.000 and US$91 million, respectively; see *Tracy v. Islamic Republic of Iran*, Case No. 0-2517 (D.D.C., Aug. 2, 2003) and *Cicippio-Puleo v. Islamic Republic of Iran*, Case No. 01-01496 (D.D.C. 2005).
[27] *Tracy, supra* note 14 at para. 2. There are no reported reasons for the Nova Scotia order.
[28] *Ibid*.
[29] *Ibid* at para. 13.
[30] *Ibid* at para. 8.
[31] *Ibid*. at paras. 14 to 17.
[32] *Ibid*. at para. 26.
[33] *Ibid*. at para. 29.
[34] "Iran to forfeit $7 million in assets for 'supporting terrorism'", *supra* note 11.
[35] *Edward Tracy v. The Iranian Ministry of Information and Security*, 2014 ONSC 3236 at paras. 4 – 5.

Practice Notes / La practique en bref

Asymmetric Clauses: A Risk Worth Taking?

*Christina Porretta & Vanja Ginic**

Introduction

Asymmetric dispute resolution clauses are frequently included in commercial contracts. An "asymmetric arbitration clause" is an agreement in which one party has the option to choose whether a dispute should be resolved by litigation or by arbitration, but the other party has no such choice. Similarly, an "asymmetric jurisdiction clause" binds one party to a particular jurisdiction in order to resolve its dispute but permits the other to commence proceedings in any competent court. These clauses provide flexibility to the beneficiary of the clause to select the dispute resolution method and/or jurisdiction most appropriate to the case at bar. For example, the inclusion of an asymmetric clause would allow the beneficiary the ability to choose where, and how, the dispute should be resolved, leaving the other party to the contract with no choice.

Asymmetric clauses are often incorporated into contracts where one party has a superior bargaining position, and can therefore insist upon having a unilateral option clause to resolve disputes. Such clauses are commonly used in financing contracts and provide the creditor, usually a bank, with the option to litigate in multiple jurisdictions where the debtor has assets in order to ensure that the judgment will be enforceable.[1] An example of this type of clause is as follows:

> This Clause is for the benefit of the Lender only. As a result the Lender shall not be prevented from taking proceedings related to a Dispute in any other courts in any jurisdiction. To the extent allowed by law the Lender may take concurrent proceedings in any number of jurisdictions.[2]

Courts that have upheld such clauses in commercial contracts have done so on the basis that it is open to sophisticated parties to agree on whatever clauses they want to include in the contract, subject to any legislative direction otherwise. Canadian courts have yet to deal specifically with the validity of asymmetric clauses; however, a decision of the Supreme Court of Canada suggests that they will be valid, absent legislative intervention precluding enforcement.[3]

Outside of Canada, despite the traditional inclusion of this type of clause in commercial contracts, recent developments in continental Europe have threatened their viability. Courts in Russia, Bulgaria, and France have expressed concern that asymmetric dispute resolution clauses create a fundamental inequality between the parties that cannot be justified, and have struck down such clauses as unconscionable, rendering them unenforceable.[4] Such results have made the inclusion of asymmetric clauses in business contracts highly problematic. For example, where a party successfully challenges an asymmetric clause to arbitrate, the original clause beneficiary will no longer be able to unilaterally choose in what jurisdiction to litigate or arbitrate the dispute. Rather, it will be forced to resolve any dispute through the otherwise competent court, whether or not a judgment from that

Les clauses asymétriques : un risque qu'il vaut la peine de prendre?

Christina Porretta et Vanja Ginic

Les clauses asymétriques de règlement des différends, qui permettent à une partie de choisir si un différend doit être réglé par un tribunal ou par un arbitre, mais n'offrent pas le même choix à l'autre partie, sont souvent incluses dans les contrats commerciaux. Pourtant, malgré un récent jugement de la Haute Cour britannique qui approuve leur utilisation, il y a lieu de se demander si ces clauses représentent un risque qu'il vaut la peine de prendre, à la suite des décisions récentes rendues en France, en Russie et en Bulgarie, qui ont conclu qu'elles sont inadmissibles.

Pour se prémunir contre ce risque, les entreprises auraient intérêt à ne pas recourir aux clauses asymétriques et choisir l'arbitrage, plutôt que l'action en justice, comme seul mécanisme de règlement des différends ou limiter le litige à un seul ressort où un jugement à l'encontre des biens d'un débiteur est plus probable. Pour les contrats en vigueur, les parties devraient les modifier et, si elles ne le peuvent pas, comprendre qu'un tribunal peut décider de retrancher les clauses asymétriques ou d'ordonner l'exécution partielle de ces dernières.

* *Christina Porretta détient un baccalauréat en droit (LL.B.) de l'Université de Windsor (2005) et une maîtrise en droit (LL.M.) de l'Osgoode Hall Law School (2010). Elle est associée principale*

court could ever be enforced in the jurisdiction where the debtor's assets are located. At the enforcement stage, if a court determines that the asymmetric clause is invalid, the award is likely to be unenforceable, rendering the entire proceedings a waste of time and resources (and could potentially give rise to limitation issues if a new claim needs to be started).

Accordingly, including asymmetric clauses in commercial contracts runs the risk of catastrophe in certain jurisdictions. This article will address recent decisions from the courts in France, Russia, and Bulgaria, and will include a discussion of recommended strategies that can be used to avoid the dangers of non-enforcement.

Jurisdictions Invalidating Unilateral Clauses

France

Most recently, the French Supreme Court (*Cour de Cassation*) refused to enforce an asymmetric jurisdiction clause in a consumer contract in *Mme X v. Banque Privée Edmond de Rothschild*.[5] Under the contract, Mme X was required to bring her claim before the courts of Luxembourg, while the bank could choose between the Luxembourg courts or any other competent court. The *Cour de Cassation* held that the clause was invalid on two grounds: (1) it was potestative in nature[6] and, (2) it violated Article 23 of the Brussels Regulation.[7] In this context, the clause was found to be potestative because the place of litigation depended on the bank's choice of forum, which Mme X had no control over. With respect to Article 23 of the Brussels Regulation, the French court interpreted it to expressly require symmetry for the validity of a choice of jurisdiction clause, even though such language is not expressly stated in the Regulation.

While the decision of the *Cour de Cassation* has stirred up criticism, it demonstrates the risk associated with providing for asymmetric clauses to arbitrate or litigate in business contracts. First, it is unclear in *Rothschild* whether the principle of potestation should apply to jurisdiction clauses, particularly because it is controversial that the right to choose a forum qualifies as a condition. Some critics maintain that potestation has no place where the discretionary power stems from an agreement between the parties and its exercise is limited to an a priori set of agreed upon criteria, as is the case with jurisdiction clauses.[8]

Second, it is difficult to reconcile the French Court's ruling with the language of Article 23. Before the *Rothschild* decision, it was widely held that Article 23 of the Brussels Regulation required EU Member States' courts to give effect to such clauses.[9] To the contrary, the *Cour de Cassation* held that unilateral clauses violated the Article 23 requirement that a choice of forum clause must be "exclusive." However, Article 23 only requires exclusive jurisdiction "unless the parties have agreed otherwise." Arguably, this language could suggest that a non-exclusive forum clause complies with Article 23 where there is evidence that the parties have agreed to such a clause. Indeed, the Italian Supreme Court reached this conclusion in a 2012 decision involving a similar asymmetric clause.[10]

Russia

Similarly, the Russian Supreme Court refused to enforce an asymmetric jurisdiction clause in *Resolution 1831/12*, a case involving a commercial contract between the Russian Telephone Company (RTC) and Sony Ericsson.[11] The agreement between RTC and Sony Ericsson contained an asymmetric clause entitling Sony Ericsson to submit its claim to either the International Chamber of Commerce (ICC) or the courts. RTC was entitled to submit its claim only to the ICC. RTC proceeded to litigate by filing a claim in a Russian court and Sony Ericsson requested the court to decline to consider RTC's claim due to the unilateral arbitration clause previously agreed to by the parties.

The Supreme *Arbitrazh* Court held that asymmetric jurisdiction clauses are invalid because they create a procedural inequality between the parties by jeopardizing their rights to a fair trial and an equal opportunity to be heard. Instead of voiding the clause

chez Dentons Canada LLP à Toronto (Ontario). Son travail consiste à fournir des avis motivés et des conseils stratégiques au sujet des questions peu ordinaires ou complexes qui surviennent en matière de relations commerciales et internationales et qui risquent d'être litigieuses ou provoquer des poursuites en justice. Courriel : christina.porretta@dentons.com

Vanja Ginic poursuit ses études en vue d'obtenir le grade Juris Doctor (J.D.) (jusqu'en 2015) à l'Université d'Ottawa et fait un stage d'été en droit chez Dentons Canada LLP à Toronto (Ontario). Elle s'intéresse particulièrement au droit de l'arbitrage international et au domaine du droit des sociétés/ droit commercial. Courriel : vanja.ginic@dentons.com

entirely, the court cured the defect by extending the option to choose between arbitration and litigation to both parties.[12]

The Russian Court's reasoning is peculiar in that it relies on decisions from the European Court of Human Rights and the Russian Constitutional Court to justify protecting procedural rights in a commercial contract. Those decisions dealt primarily with the rights of natural citizens and the government's responsibility to provide legal aid and procedural rights in criminal trials. Given the different context, it seems odd that the Court would extend the same reasoning to a contract between two commercial parties. This is especially curious given the Court's support for asymmetric clauses in a different case just a few years earlier.[13]

However, recent proposed amendments to the domestic law governing arbitration in Russia may resolve the confusion caused by these conflicting decisions. The draft laws published by the Ministry of Justice earlier this year expressly allow asymmetric clauses that designate an option between arbitration and litigation. If this draft law is implemented, it will eliminate all effects of the *Sony Ericsson* decision in this regard.

Bulgaria

The Bulgarian Supreme Court has applied a similar reasoning to that in *Rothschild* when it set aside an arbitral award and invalidated a unilateral jurisdiction clause in a loan contract pursuant to which an award was made.[14] The court held that the clause violated the rules of morality and good faith under the *Bulgarian Obligations and Contracts Act*.[15] It also found the clause to create a potestative right, which is only statutorily available in Bulgaria and therefore cannot be created by contract. Although this domestic decision relies specifically on Bulgarian law, it will be relevant to parties whose contracts are subject to Bulgarian law, either because it is the governing law or because that is where enforcement is sought.

Implications

Even though the French decision in *Rothschild* has been criticized, and there is a degree of uncertainty with the *Sony Ericsson* case given the pending amendments, it would appear premature to consider this jurisprudence as reflecting the final word on asymmetric clauses in those jurisdictions. This is especially true given the English High Court's confirmation just last year in *Mauritius Commercial Bank Ltd. v. Hestia Holdings* that asymmetric dispute resolution clauses are valid and enforceable under English law.[16] However, parties to contracts that contain asymmetric dispute resolution clauses need to be aware of the risk that, on the most strict interpretation, such clauses might be considered invalid, and thus, unenforceable in certain jurisdictions. Accordingly, these recent decisions highlight the need to exercise caution if including dispute resolution and/or jurisdiction clauses in business/consumer contracts that confer unilateral rights. The following are practical recommendations that may be followed in order to minimize the risks associated with asymmetric dispute resolution clauses.

1. Prevention for Future Contracts

Prevention is often the best way to ensure that a business' interest is protected. A conservative strategy is to eliminate the asymmetric clause entirely, at which point the drafter has two options. One option is to choose arbitration over litigation as a dispute resolution mechanism. Including an arbitration clause allows parties to achieve the goal of asymmetric clauses without actually having to rely on them. Under the New York Convention, for example, arbitration agreements and arbitral awards are readily enforceable all over the world and are subject to very limited grounds of review. This means that the same award, issued in favour of the creditor, will be enforceable in every jurisdiction in which the debtor's assets are located, provided that these are New York Convention states. However, one risk associated with arbitration is that if the creditor's claim involves insolvency or bankruptcy issues, it will not be arbitrable in most jurisdictions. By contrast, court awards are enforceable in the jurisdiction of the court that granted the award only. In most other jurisdictions, a new trial would be required before an award can be made and then enforced. Also, in numerous jurisdictions, it could take upwards of ten years or more for a court award to be made, during which time the debtor could dispose of and hide its assets.

The second option is to subject the dispute to a single jurisdiction, whose judgment is most likely to be enforceable where the debtor's assets are located. While this detracts from the goal of asymmetric clauses, it would protect the parties' choice of forum and avoid gap-filling by private international law rules, which would ensure that the creditor can enforce the debtor's obligation in any jurisdiction.

Finally, draft the arbitration and litigation aspect of the asymmetric clause as separate clauses, ensuring that each of them is capable of operating independently in case they need to be severed.

2. Remedies for Contracts already in Existence

For contracts that are already in existence that contain an asymmetric dispute resolution clause, the parties may consider amending the contract in order to reformulate such a clause. On the most conventional approach, the amendments would involve turning the asymmetric clause into a symmetric one.

In the event that the contract is not amended, and a party decides to challenge the asymmetric clause, it is useful to know the types of remedies that courts could order should the clause be rendered unenforceable. In the worst case scenario, a court might choose to invalidate the clause entirely. This would eliminate the choice of forum clause from the contract and the applicable rules of private international law would apply to determine the appropriate forum for the claim.

Alternatively, there is a possibility that the court may choose to sever the offending provision or to partially enforce the clause.[17] This option is preferred because it offers the security of the forum that was deliberately chosen by the parties. An argument appealing to party autonomy could be made in this instance to persuade the court that by including a choice of forum clause the parties clearly intended to give one party more control over the forum.

Unfortunately, regardless of which remedy is ordered by the court, the fact remains that the utility of the asymmetric clause is negated.

Conclusion

Accordingly, before inserting an asymmetric dispute resolution clause into a commercial contract, it is prudent to ensure that such clause does not violate any applicable laws in the relevant jurisdiction. The benefits of this type of clause should be weighed against the costs and risks associated with the option. In addition, in order to avoid any confusion and consequent unnecessary delay and expense, the clause should clearly spell out when and how the option may be exercised and the consequences to the beneficiary of exercising the option. However, given the uncertainties faced in several jurisdictions, it might be prudent to simply avoid including asymmetric dispute resolution clauses in commercial contracts altogether.

**Christina Porretta, LL.B., University of Windsor (2005); LL.M. Osgoode Hall Law School (2010) is a senior associate at Dentons Canada LLP in Toronto, Ontario. Her practice consists of providing reasoned opinions and strategic advice regarding novel or complex issues arising in commercial and international relations and potentially litigious/and or litigation matters. E-mail: christina.porretta@dentons.com*

Vanja Ginic, University of Ottawa (J.D. exp. 2015) is a summer law student at Dentons Canada LLP in Toronto, Ontario. Her interests include international arbitration and general corporate/commercial law. E-mail: vanja.ginic@dentons.com

Endnotes

[1] The inherent inequality of unilateral clauses is justified by the commercial reality of a creditors' exposure to risk. By minimizing the risk that a debtor's obligations will be unenforceable, banks are more likely to provide financing more readily and at lower cost: see Fentiman, "Universal Jurisdiction Agreements in Europe" (2013) 72:1 Cambridge L. J. 24-27.

[2] See *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd and Sujana Universal Industries Limited*, [2013] EWHC 1328 at para 10, Clause 24.1(c) [*Mauritius*].

[3] See *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 SCR 531.

[4] See below, next part.

[5] Cass civ 1re, 26 September 2012, (2012) *Mme X v Banque Privée Edmond de Rothschild Europe* No 983, online: http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/983_26_24187.html [*Rothschild*].

[6] A clause is potestative when its outcome depends on a condition that is entirely within the control of one party but not the other.

[7] EC, *Brussels Regulation*, [2002] OJ L44/2002, Art 23("If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise").

[8] Deyan Draguiev, "Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability" (2014) 31 J Int'l Arb 19 at 35 [*Draguiev*].

[9] See e.g., the decision of the English High Court in *Mauritius*, supra note 2, which noted that prior to *Rothschild*, it was widely believed that Article 23 of the Brussels Regulation required EU Member States' courts to give effect to such clauses (*Mauritius*, at 34). In *Mauritius*, the English High Court upheld the asymmetric jurisdiction clause between a creditor and debtor, recognizing the commercial purpose served by such clauses; specifically, their role in increasing the availability of credit by reducing the risk and cost associated with financing.

[10] See Supreme Court, Italy, 11 April 2012, *Grinka In Liquidazione v Intesa San Paolo, Simest, HSBC, Case No. 5705*.

[11] *Resolution No. 1831/12*, (19 June 2012) Supreme Arbitrazh Court of the Russian

Federation [*Sony Ericsson*], online: http://www.arbitrations.ru/userfiles/file/Case%20Law/Enforcement/Sony_Ericsson_Russian_Telephone_Company_Supreme_Court%20eng.pdf [*Resolution 1831/12*].

[12] For a more detailed summary of the case, see Moshennikov and Guseva, "Supreme *Arbitrazh* Court Rejects Alternative (Asymmetric) Arbitral Clauses" (2012) 9 Can Int'l Law 48.

[13] See Federal Arbitrazh Court, Russia, 28 December 2009, *Red Burn Capital v ZAO Factoring Company Eurocommerz (Case No.A40-59745/09-63-478)*. At issue in *Red Burn* was the validity of an asymmetric clause in a credit agreement, which entitled the creditor to choose between arbitration and litigation. The Russian Supreme Court enforced the asymmetric clause, taking into account that the creditor's rights in the agreement were proportionate to the risk associated with financing. The creditor's exposure to risk of non-payment justified the asymmetric clause.

[14] Cass civ 2nd Comm, 2 September 2011, (2011) *Judgment No. 71*, *(Case No. 1193/2010)*. The loan contract was concluded by two private individuals and included a unilateral clause giving the creditor an option to arbitrate under the Bulgarian Chamber of Commerce and Industry and the right to litigate in state courts, while binding the debtor to arbitration.

[15] *Obligations and Contracts Act*, (No. 275/22.11.1950), online: http://archive.bild.net/legislation/docs/4/civil9.html.

[16] *Supra* note 2 at para 42.

[17] *Draguiev, supra* note 8 at 43.

Pointers And Tips When Negotiating Contracts With Chinese Companies

*By Caroline Berube**

China is a country with a rich culture dating back thousands of years. When negotiating contracts with Chinese companies, we should not only pay attention to Chinese laws, but also take note of Chinese culture, environment, and language barriers.

This article summarizes the pointers and tips to keep in mind when negotiating contracts with Chinese companies, namely: company searches and credit checks, undertaking other due diligence, use of contracts, and authorized signatories.

A. Company Searches and Credit Checks – Crucial!

Company searches and credit checks have become more and more common in recent times, not only for foreign companies wishing to conduct business with a Chinese company, but also for Chinese companies wishing to conduct business or establish connections with each other.

The basic information (e.g. the name, address, date of establishment, business scope, etc.) of a duly registered Chinese company is generally open for public search (but only available in Chinese characters) by the following means:

1. On-site search at the registry of the local Administration of Industry and Commerce ("AIC"); and
2. Online search via the official website of the local AIC. However, the AIC's of certain minor cities do not provide online search facilities.

Detailed information (e.g. shareholder structure, history of company changes, financial information, etc.) of a duly registered Chinese company can be generally obtained by an on-site search at the local AIC, on condition that the individual requiring information provides certain documents required by the AIC. Note that such information is easily available because each company (locally or foreign owned) incorporated in China must comply with laws and regulations and submit on a monthly/quarterly basis financial statements to the authorities. Documents required by AIC vary in different cities, but usually include the following:

1. The ID card or business license of the individual requesting the information; and
2. A power of attorney authorizing the individual to proceed with the search.

Service companies/agents can also provide company searches in China, and thus can provide detailed information, including financial information, about any Chinese company without the individual requesting the information needing to provide the above-mentioned documents. However, note that the Chinese government takes a dim view of persons breaching data privacy these days and in recent times, has adopted new measures in this area.

For example, selling or illegally providing individual information or illegally obtaining information on an individual is a crime with a potential

Savoir négocier un contrat avec une entreprise chinoise

Caroline Bérubé*

Négocier un contrat avec une entreprise chinoise exige une attention particulière aux barrières culturelles et linguistiques. Il existe néanmoins des mesures que les entreprises canadiennes peuvent prendre pour s'assurer du bon déroulement de ces négociations. Les entreprises canadiennes devraient toujours effectuer des recherches et des vérifications de solvabilité sur les entreprises chinoises avec lesquelles elles font affaire. On peut généralement obtenir des informations détaillées auprès du bureau local de l'Administration de l'Industrie et du Commerce. Les entreprises effectuant une vérification préalable doivent cependant être sensibles au fait que certaines composantes courantes en Occident de la vérification préalable, comme l'examen des documents sur place, peuvent être perçues comme offensantes. Si possible, ces entreprises devraient utiliser d'autres méthodes. Par ailleurs, les contrats chinois sont en général beaucoup plus courts que les contrats occidentaux et misent davantage sur la bonne foi. Les entreprises devraient donc préparer des contrats courts et éviter les formules fortes susceptibles d'être considérées comme inéquitables.

Certains problèmes de langue peuvent également survenir. Il faut toujours faire appel à des traducteurs indépendants spécialisés en droit. En outre, les entreprises devraient exiger la primauté de la version en langue anglaise du contrat et de la loi canadienne. D'autres considérations incluent le

sentence of imprisonment of up to three (3) years plus a fine.

B. Due Diligence

Although due diligence has been seen as being more important in the last decade, due diligence on target companies is still less common in China than in the Western world.

HJM conducted due diligence on a Beijing company in early 2013. Our investigation showed that this company was well organized; the officers of the company were cooperating during the due diligence exercise and the company records were easily available. However, the officers mentioned that it was the first time they heard about and experienced a due diligence process.

For a majority of Chinese companies, cultural sensitivities play a part. Company personnel feel offended if a team of lawyers or other professionals come to their office, scrutinize their documentation and interview their staff with dozens of questions, despite the due diligence team acting professionally and cordially.

Therefore, when conducting due diligence in China, certain aspects which may be perceived to be "offensive" by the target company may be best eliminated from the process (depending on the circumstances). For example, reviewing documentation, such as certificates on-site and interviewing the employees of the target company could be substituted by doing a neutral credit check, interviewing long-standing counter-parties of the target company (should they be willing to co-operate), and other means that would not directly cause conflict.

C. Contract

Practical pointers regarding the contract with Chinese counterparts are listed below. They focus on the importance of brevity and simplicity, avoidance of "strong" wording, use of competent translators, tips for choices in governing language and governing law, and avoidance of other common pitfalls.

1. Keep it short and simple

Western standard contracts are usually quite lengthy and thorough. They are drafted from a highly risk averse standpoint, with the aim that no 'loophole' is left open which may expose the contracting party to risk. However, Chinese businesses rely on good faith and value relationship with each other, commonly called "guangxi" in China, much more than the preciseness of contracts.

HJM has experienced many negotiations with Chinese companies in different fields and industries. Chinese companies prefer entertainment with their counter-party in order to obtain more knowledge about the counter-party and pay less attention to contract clauses. If the parties have established trust, the contract may only be one (1) to two (2) pages long. It is worth noting that some Chinese companies may not even review the contract before signing it.

HJM once negotiated a contract more than thirty (30) page long for a Beijing company, which was drafted for our client. We spent two full days in a meeting in Beijing, where we explained the clauses of the contract providing further clarification about the contract to the Chinese counterparty. Explanations, differences of opinion and revisions went back and forth between our client and the Chinese company for more than a year - and the contract has not been finalized to date. All parties were exhausted by the length of the negotiation. A long and 'thorough' contract therefore may have a detrimental effect on a Chinese company's interest in conducting business with a foreign company as it may impact the development of their "friendship".

Therefore, we suggest providing Chinese companies with contracts between five (5) and ten (10) pages which only state the necessary clauses, i.e. the terms and conditions of the transaction, the rights and obligations of each party, how the contract can be terminated, the consequences of a breach, payment terms, and dispute resolution and language conflict.

2. Be fair and avoid "strong" wording

Chinese companies are sensitive and frustrated by some unconditional wordings such as "any", "all" and

fait que seul le représentant légal de l'entreprise chinoise peut engager celle-ci et que le sceau officiel de l'entreprise doit être utilisé.

** Caroline Bérubé, B.C.L. et LL.B. (Université McGill), est associée directrice chez HJM Asia Law & Co. Basée en Asie depuis 15 ans, elle a représenté des sociétés et des banques internationales dans des opérations transfrontalières de financement garanti par des actifs et de fusions-acquisitions dans la région Asie-Pacifique. Elle est également une arbitre agréée par le Centre d'arbitrage sino-européen (CEAC). Courriel : cberube@hjmasialaw.com.*

"in no event", even though the actual meaning of the whole sentence in context is fair. Chinese companies consider such wordings to be "against" them, particularly if the contract has been drafted in a 'one sided' manner.

A disproportionate balance of rights and obligations was an issue when we negotiated with the above-mentioned Beijing company. Explaining that the true meaning of these phrases was not as ominous as they perceived was a time consuming exercise.

Therefore, simple statements should be used in place of wording which may be viewed as being too strong. This does not mean that we recommend a party to agree to a contract template in obvious favor of the contract provider; merely that a simple balanced contract would save time spent on negotiations as well as costs.

3. Use a good translator with a legal background (as opposed to a young grad with only a technical/commercial background)

Recently, HJM reviewed the Chinese translation of a contract between our U.S. client and a Shenzhen company, which was translated by the Shenzhen company. In the contract, the translation of some of the clauses in Chinese was completely different to the English meaning, which may have exposed our client to risk. These translation issues were particularly relevant, given that the contract provided that the Chinese version of the contract prevailed. Our client had to be informed about the discrepancy in the meaning as they had to agree and fully understand their rights and obligations before committing to the Chinese party.

Hence, we strongly suggest that you that do not request the Chinese counter-party to translate the contracts. A reliable neutral translator or an international law firm providing Chinese translation service is a better option.

4. Does the English version or the Chinese version prevail?

Some contracts such as a joint venture contract/employment agreement must by Chinese law be in Chinese though an English version exists. In such cases, only the Chinese version prevails.

HJM usually recommends our clients to have their contracts translated into Chinese and English to make sure the parties fully understand their rights and obligations. Furthermore, we advise our clients to explicitly state in the contract that the English version prevails in case of dispute.

However, again, the decision depends on the bargaining power each party has – most Chinese counterparts do not feel comfortable having the English version prevailing even if they are the one who appointed the translator for the English version and such version has been notarized by a Chinese notary.

5. Can Canadian laws be the governing law of your contracts?

Most contracts (saved for example for employment agreement, joint venture agreement, etc.) can be governed by foreign laws according to Chinese laws and regulations. However, parties may still opt for Chinese law as governing law in their contract as Chinese parties are usually very reluctant to have foreign law as the governing law. This discussion will be driven by the bargaining power of each party. One advantage to have Chinese laws as governing law is that in case of dispute, Chinese judges and arbitrators will be able to handle the case more efficiently than if the contract was governed by foreign law. Risks are reduced.

Hence, HJM usually suggest that Chinese law governs the contract as it is more efficient in the event of dispute, especially if the dispute is handled by Chinese courts or arbitration commissions.

D. Other Pitfalls

Pitfalls that lawyers and companies from common law jurisdictions often fail to consider have to do with which person at the Chinese company the contract should be negotiated with, and who should sign it in order for it to be an enforceable contract.

1. With whom should you negotiate your contract?

When negotiating a contract in China, you should be sure you discuss with a representative of the Chinese company that he/she is authorized in writing with the company seal affixed on the authorization/power of attorney to bargain and make decisions on behalf of the company. Otherwise, in the event that the person does not have the proper authorization, the company may deny the contract and/or any terms the "representative" has offered and/or accepted.

Only the ***legal representative*** of a Chinese company can legally bind a Chinese company.

Please note it may be offensive if you directly ask the representative about his/her authorization at the first meeting. You could obtain

some information by asking for his/her name card and through general conversation. After the meeting you could investigate the information provided further.

A few options are:

A. Asking your Chinese counterparty for a copy of the business licence of the company (the Chinese characters for business licence are "营业执照") and the business licence should state the registered capital of the company, the shareholder, the duration of their business licence and the name of their legal representative;

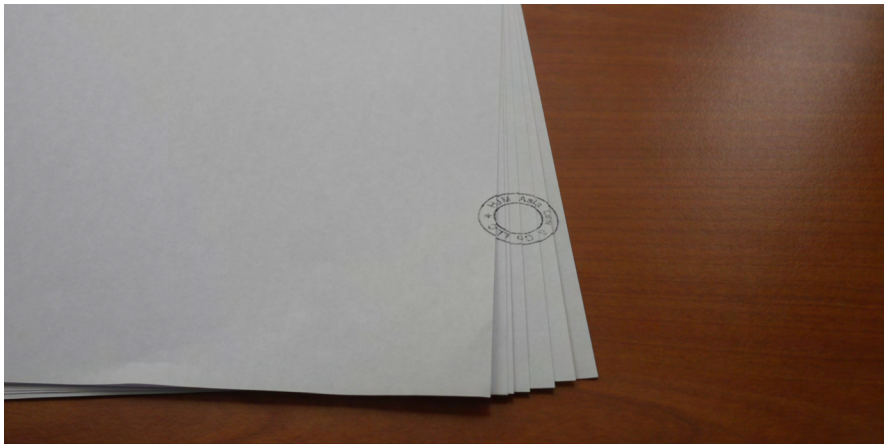
B. Requesting a review of the authorization is considered fair and reasonable when the negotiation is near conclusion; and

C. Starting a company/credit search on the company which will state the name of the shareholders, directors, legal representative and capital/business scope/financial statements, etc.

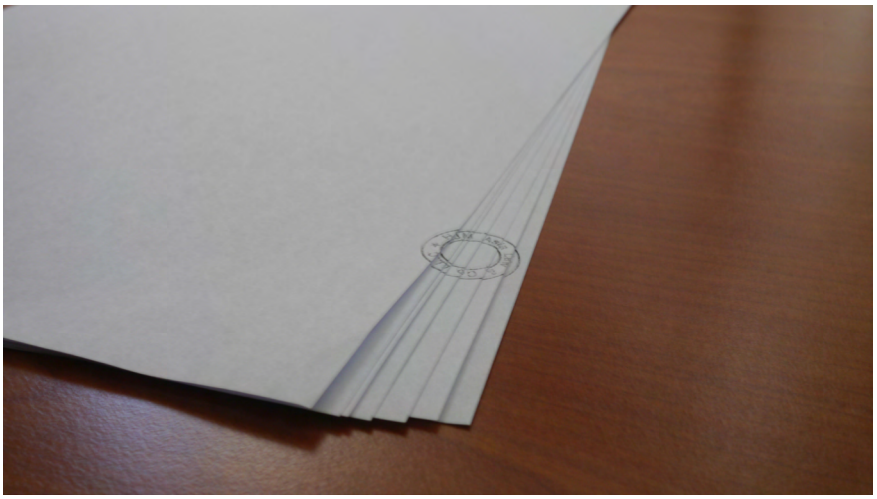
The legal representative is key in China and should be the one you are dealing with.

2. Who should sign the contract and which forms should your contract have?

a. *Blanks*: make sure you do not leave blanks when you sign or affix a seal on the contract. Anyone could add information, which may expose you to substantial risks. The trend in China is to affix the company seal on the edge of each page, so when all the pages are put together, the full seal can be viewed. The following photos demonstrate how this is done.



Samples of a company seal on the edge of each page



b. *Signature and seal*: all Chinese companies have five (5) seals: an official company seal, a contract seal, a legal representative seal, a financial seal and a fapiao seal.

The seals are registered with the relevant authorities. Either the official seal or company seal of the Chinese company must be affixed in order to legally and contractually bind the company. Alternatively, signatures of the legal representative or the authorized person are also sufficient to make a contract legally binding without the above seals being affixed.

However, as best practice, we suggest that contracts be affixed with company/contract seals or affixed with both seals and an authorized signature, rather than only signed.

c. *Electronic contracts*: contracts duly agreed via emails, fax and other electronic methods are valid according to Chinese laws. However, there needs to be sufficient evidence to demonstrate that the sender/recipient of such an electronic contract is the contracting Chinese company or the authorized person (in case the Chinese company contests the existence and validity of the contract).

The name card, company website, promotional material and any other written materials that assist

to demonstrate that the company's or the authorized person's email address or fax number is identical to that of the sender/recipient of the electronic contract are useful in such circumstances.

Nevertheless, HJM still suggests that a printed original contract executed by both parties should be exchanged after the contract is agreed via electronic method to avoid any issues.

3. Validity of emails?

Although this consideration is not as much related to the negotiation of contracts, we mention it as we experienced it recently.

In 2013, a client relied on emails alleged to be from his Chinese counter-party requesting payment to a certain bank account for goods purchased. The client made the payment without contacting the Chinese party (by other means) for confirmation. It transpired that the email address of the Chinese party was hacked and the bank account belonged to the hacker. This resulted in substantial loss for the client in terms of goods never delivered, since the payment was not made to the right account, and loss of substantial sum of money.

HJM strongly suggests that whenever dealing with payments, you confirm with your Chinese partner the details of the bank account in at least two (2) different ways, e.g. by email, phone call, fax, face-to-face meeting, etc.

Conclusion

China is a country that values efficiency, good faith and personal relationships. There is a popular saying in China to this effect: "the friendship shall remain even though the deal is not made."

In light of the pitfalls and pointers mentioned above, those who seek to enter negotiations with Chinese companies should take all reasonable steps to protect their own interests whilst having regard to cultural sensitivities.

* *Caroline Berube, BCL and LL.B (McGill University), is the Managing Partner of HJM Asia Law & Co. LLC. Based in Asia for 15 years she has represented international corporate clients and banks in asset financing and M&A cross-border transactions in the Asia-Pacific Region. Caroline is an arbitrator approved by the Chinese European Arbitration Center (CEAC).*
Email: cberube@hjmasialaw.com

Treaties / Traités

Canada Enters into Free Trade Agreement with South Korea

*Paul M. Lalonde & Olivia Wright**

On March 11, 2014, Prime Minister Harper and President Park Geun Hye of the Republic of Korea (South Korea) announced the successful conclusion of negotiations on a new Canada-Korea Free Trade Agreement (FTA). The *Text of the Final Agreement* of the Canada-Korea FTA was tabled in Parliament on June 12, 2014.[1]

This agreement concludes almost a decade of negotiations, and marks Canada's first FTA in the Asia-Pacific market. Both the United States and the European Union have existing FTA's with South Korea. Accordingly, the stated hope of the Government of Canada is that the FTA will not only secure Canada's position in the South Korean market (projecting a 32% increase in exports to South Korea, currently Canada's seventh-largest trading partner), but also serve as a "gateway" for Canadian business and workers to the Asian-Pacific market more generally. This FTA will impact most aspects of trade between Canada and South Korea, including trade in goods and services, investment, non-tariff barriers, intellectual property and other areas of economic activity. The key provisions of the FTA that are summarized below are:

1. Agricultural Products;
2. Automobiles;
3. Other non-agricultural goods;
4. Services and investment; and
5. Government Procurement.

1. Agricultural Products

Between 2010 and 2012, Canada's annual agricultural exports to South Korea averaged $708 million, led by wheat, pork, pork offal, hides, skins and furs, refined and crude canola oil, and malt and prepared foods. Currently, Canadian exports to South Korea are subject to high agricultural tariff rates, averaging 52.7% in 2012.

Under the terms of the FTA, Canadian exporters will receive duty-free access to South Korea for 86.8% of agricultural tariff lines. These tariff eliminations will be phased in over a period of specified years, with certain agricultural products, such as wheat, rye, oats, canola, soybeans (for soy sauce and soya-cakes), and beef and pork fats receiving immediate duty-free access to South Korea. In the case of fresh/chilled and frozen pork, tariff elimination will be phased in over a period of 5 to 13 years. In the case of fresh/chilled and frozen beef cuts and some processed beef, tariff eliminations will be phased in over a 15 year period.

Response to the FTA from Canada's agricultural industry has been positive. The Canadian Federation of Agriculture, for example, described the agreement as "good news," and indicated that it expects this will provide "export-reliant commodities with new market opportunities and puts Canada on equal footing with its American and European counterparts, who have previously signed FTA's with Korea and have been

Le Canada conclut un accord de libre-échange avec la Corée du Sud

Paul M. Lalonde et Olivia Wright

Le 11 mars 2014, le Canada et la Corée du Sud ont annoncé la conclusion de l'Accord de libre-échange Canada-Corée. Il s'agit du premier accord de libre-échange du Canada dans le marché de l'Asie-Pacifique, et l'espoir déclaré du Canada est qu'il servira de « passerelle » vers d'autres marchés de l'Asie-Pacifique.

L'Accord comporte cinq éléments clés. Tout d'abord, il élimine la plupart des lignes tarifaires, fournissant dès maintenant un accès en franchise de droits pour le blé, le seigle, l'avoine, le canola, le soja, la graisse de bœuf, la graisse de porc et les pièces automobiles, et éliminera progressivement les droits de douane sur les exportations du secteur de l'aérospatiale, des produits forestiers et des navires. Le traité prévoit également que tous les services et investissements seront assujettis à l'Accord, excepté ceux figurant sur la liste des réserves. Le Canada conserve le droit d'examiner certains investissements étrangers dans le cadre de la *Loi sur Investissement Canada*; l'Accord offre en outre une protection contre le traitement discriminatoire et l'expropriation, et prévoit un mécanisme international indépendant de règlement des différends entre État et investisseur. Enfin, l'Accord accorde un accès préférentiel aux contrats d'approvisionnement des gouvernements centraux supérieurs à 100 000 $.

profiting from this access since."[2] The Canada Pork Council (CPC) has also been a strong advocate for the FTA as a means of rebuilding market share lost as a result of Canada's relative disadvantage in the Korean market. The CPC's Chair, Jean-Guy Vincent, has stated that the absence of an FTA with Korea was causing substantial and growing prejudice to the Canadian pork industry due to the tariff rates since all of Canada's key competitors in Korea already have FTAs in place.[3]

For Canada's supply-managed sectors (milk, cheese, eggs and poultry), the government has stated that the FTA grants no additional market access to South Korean exporters (i.e., no additional import quotas and no reduction of existing tariffs).

2. Automobiles

The FTA will eliminate tariffs on automobiles and automotive parts. Immediately upon entry into force, all Korean tariffs will be eliminated, including tariffs currently applicable to light vehicles (8%) and all automotive parts (3% to 8%). Current Canadian tariffs on Korean light vehicles (6.1%) and automotive parts (0% to 8.5%) will be phased out over a period of five years.

This is perhaps the most controversial part of the FTA. For example, Unifor, Canada's largest private sector union, has highlighted the significant trade imbalance in the auto sector between Canada and South Korea; Canada imports large volumes of Korean-made cars while only a small volume of Canadian-made cars are exported to South Korea (in fact, Unifor claims that the ratio of automotive imports to exports is 207 to 1).[4] The Government of Ontario has also expressed concerns about the deal and has asked the federal government to strike a task force to closely monitor the impact of the FTA, including on the auto sector. [5]

However, proponents of the FTA maintain that the benefits will outweigh the costs. For example, the agreement includes rules of origin that recognize the integrated nature of Canada's automotive industry's supply chain, which allows Canadian manufacturers to source manufacturing inputs from the United States and still benefit from the FTA when exporting vehicles or parts to South Korea.

Other notable aspects of the Agreement are "equivalency provisions," which will allow Canadian automakers preferential access to the South Korean market for cars built to key US and EU safety standards. In addition, the FTA will also establish an accelerated dispute settlement process for disputes related to motor vehicles.

3. Other Non-Agricultural Goods

The FTA will eliminate trade barriers on the export and import of other non-agricultural goods, including but not limited to industrial goods, textiles and apparel, fish and seafood products, forestry and value-added wood products. Tariff elimination will be phased in over a period of 12 years, with 90.2% of non-agricultural tariff lines on Canadian products being duty-free immediately upon the FTA coming into force.

(a) Aerospace Exports

Upon entry into force, all of Korea's tariffs on Canada's aerospace exports will be eliminated. Currently, these tariffs are as high as 8%. This comes as good news to the aerospace industry which relies heavily on the export market, and which has seen a drastic drop in exports to Korea (which feel from $180.3 million in 2011 to $35 million in 2012) following the entry into force of Korea's trade agreements with the United States and European Union. The Aerospace Industry Association of Canada (AIAC) described the agreement as "imperative to restoring a level playing field for Canadian firms in the Korean market."[6]

Si l'Accord promet de créer des opportunités importantes pour les entreprises canadiennes, il faut reconnaître que les entreprises nationales canadiennes risquent de faire face à une concurrence accrue de la région Asie-Pacifique.

* *Paul Lalonde est associé du cabinet Dentons Canada, bureau de Toronto. Il est spécialisé dans le commerce international, la lutte à la corruption et l'arbitrage international. Il est reconnu comme l'un des meilleurs spécialistes canadiens du droit des marchés publics. Courriel : paul.lalonde@dentons.com.*

Olivia Wright est avocate au cabinet Dentons Canada, bureau d'Ottawa. Elle se spécialise dans le droit du commerce international et la réglementation fédérale. Elle conseille des clients canadiens et internationaux sur des questions relatives au contrôle des exportations, aux sanctions, aux marchandises contrôlées, à la conformité, à la divulgation volontaire et à la mise en application. Courriel : olivia.wright@dentons.com.

(b) Forestry and value-added wood products

In the case of forestry and value-added wood products, tariff elimination will be more gradual. Currently, duties on these products average 2.9%, but are as high as 10%. Under the FTA, over 57% of these duties will be eliminated, with an additional 13.1% eliminated within three years. The remaining tariff lines will be eliminated within 10 years.

(c) Shipbuilding Industry

The benefits of the FTA are less clear for Canada's shipbuilding industry. Under the FTA, Canada's tariffs on ships which are as high as 25% will be phased out over a period of 3, 5 or 11 years, with 30.8% eliminated immediately upon entry into force. The industry has voiced concerns that the elimination of these tariffs will undermine the viability of Canada's shipbuilding industry in the face of exports from South Korea, a country with major shipbuilding capabilities.[7]

In addition, the FTA addresses certain non-tariff barriers. For example, Canada and Korea have committed to encourage the use of internationally-recognized standards and membership in multilateral arrangements to minimize duplicative certification and testing of products, such as medical devices. Moreover, the FTA will include provisions allowing parties to raise concerns with standards-related measures of the other party.

4. Services and Investment

Some of the features of the FTA chapters on services and investment are as follows:

(i) It adopts a "negative-list approach", which means that all services and investments will be subject to the FTA unless specifically listed as a reservation.

(ii) Canada will retain the ability to review certain foreign investments under the I*nvestment Canada Act*.

(iii) Like several other trade agreements, the FTA will provide protection against discriminatory treatment, protection from expropriation without prompt and adequate compensation, and access to independent international investor-state dispute settlement through which investors can claim compensation for damages resulting from a breach of the investment commitments by the host state.

5. Government Procurement

The FTA chapter on government procurement builds on Canadian and South Korean commitments under the WTO Agreement on Government Procurement (WTO-GPA) and revised WTO-GPA, the latter which came into force in April 2014. Under the FTA, Canadian and Korean companies will have preferential access to government procurements valued above $100,000. Notably, and unlike the Canada-EU Comprehensive Economic and Trade Agreement, the government procurement chapter of the Canada-Korea FTA will only apply to government procurements at the Federal level. It will not cover provincial, territorial or municipal government procurement.

Potential Business Opportunities

The agreement promises to create opportunities for Canadian companies exporting to, investing in or otherwise doing business abroad, and particularly in the Asia Pacific region. At the same time, Canadian domestic producers will face enhanced competition from South Korean suppliers. We would encourage companies to carefully review the terms of the FTA and follow its implementation to ensure that they are well-positioned to take advantage of any new opportunities and to face any new challenges.

While we have identified some of the key elements and most sensitive topics of the FTA, it is very difficult to make accurate predictions about which Canadian exporting industries or companies will benefit most from the conclusion of the FTA. Likewise, it is difficult to predict which Canadian industries will find it most difficult to meet the challenges of increased competition from Korean goods. Trade between two nations at any particular time is affected by many variables such as currency fluctuations, freight costs, competition from other countries, new technological developments and the general state of offer and demand for particular products. That said, companies who carefully analyze the changes in the trading environment implemented by the FTA and who are best able to factor those changes into a comprehensive competitive strategy will be best placed to benefit from the opportunities or meet the challenges created by the FTA.

* *Paul Lalonde is a partner in the Toronto office of Dentons Canada LLP. His practice focuses on international trade, anti-corruption and international arbitration and he is recognized as one of Canada's leading experts on government*

procurement law. E-mail: paul.lalonde@dentons.com

Olivia Wright is an associate in the Ottawa office of Dentons Canada LLP. Her practice focuses on international trade law and federal regulatory law. She advises Canadian and international clients on such issues as exports controls, sanctions and controlled goods issues, including compliance, voluntary disclosure and enforcement issues. E-mail: olivia.wright@dentons.com

Endnotes

[1] The Text of Final Agreement of the Canada-Korea FTA is available online: Foreign Affairs, Trade and Development Canada <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/korea-coree/toc-tdm.aspx?lang=eng> (accessed on July 22, 2014).

[2] See "Canadian-South Korea Free Trade Agreement Good for Growth of Agricultural Sector," Canadian Federation of Agriculture, online: http://www.cfa-fca.ca/media-centre/news-releases/2013/canadian-south-korea-free-trade-agreement-good-growth-agricultural-s (accessed on July 22, 2014).

[3] See "Pork Producers Welcome the Canada-South Korea Free Trade Agreement," Ontario Pork, online: http://www.ontariopork.on.ca/Communications/newsview/tabid/253/ArticleId/1642/Pork-Producers-Welcome-the-Canada-South-Korea-Free-Trade-Agreement.aspx (accessed on July 22, 2014).

[4] See "Fact Sheet on Canada-Korea Trade Negotiations," Unifor, online: <http://www.unifor.org/sites/default/files/documents/document/korea_short_fact_sheet_2014.pdf> (accessed on July 22, 2014).

[5] See "South Korea trade deal leaves Ontario auto industry vulnerable, warns Eric Hoskins," The Toronto Star, online: <http://www.thestar.com/news/canada/2014/03/11/harper_failed_to_win_safeguards_for_ontario_autos_in_korea_deal_province_warns.html> (accessed on July 22, 2014).

[6] See "Canada-South Korea Free Trade Agreement Creates Level Playing Field for Canadian Aerospace Exporters," Aerospace Industries Association of Canada, online: <http://www.aiac.ca/en/news.aspx?id=3166> (accessed on July 22, 2014).

[7] See George MacPherson "Submission of Shipyard General Workers' Federation of British Columbia," Shipyard General Workers' Federation, online: <http://bcshipyardworkers.com/news/feb11_08.html>; see also: "Tariffs and Free Trade," Shipbuilding Association of Canada, online: <http://canadianshipbuilding.com/?page_id=2504> (accessed on July 22, 2014).

Legal Developments / Développements juridiques

This section is intended to provide only summaries or highlights of selected recent legal developments from around the world. The articles do not constitute specific legal advice on the part of the authors, their law firms, or the Canadian International Lawyer journal. Readers are advised to retain competent local counsel in order to verify the applicability of the relevant legislation for their particular situations.

Cette section présente uniquement des résumés ou des points saillants de faits récents de nature juridique recueillis de par le monde. L'information publiée sous cette rubrique ne doit pas avoir valeur d'avis juridique ou être réputée remplacer les conseils détaillés portant sur une affaire individuelle. Les lecteurs sont invités à obtenir les services d'un conseiller juridique local compétent afin de vérifier si la législation pertinente trouve application.

CANADA

First Jail Sentence in Canada for International Bribery

James Klotz, Miller Thomson LLP

Dans l'affaire *R. v. Karigar*, un tribunal canadien a, pour la première fois, imposé une peine d'emprisonnement pour la violation de la *Loi sur la corruption d'agents publics étrangers* (LCAPE). M. Karigar, un citoyen canadien, a reçu une peine de trois ans pour avoir tenté de soudoyer des employés d'Air India dans le but d'obtenir un contrat pour la fourniture de technologies de reconnaissance faciale.

Cet arrêt présente deux éléments particulièrement remarquables. Tout d'abord, la Couronne n'a fourni aucune preuve que des pots de vin avaient été effectivement donnés et a réussi à obtenir une condamnation exclusivement sur la base d'une proposition de pots de vin. La Cour a constaté, citant l'article 3 de la LCAPE, que la loi ne contenait aucun critère selon lequel un pot de vin doit avoir été effectivement donné. Ensuite, la Cour s'est basée sur la jurisprudence relative à la fraude pour déterminer la peine de trois ans. La Cour a constaté la gravité de l'infraction et, malgré le fait que M. Karigar était un délinquant primaire et n'avait pas comme tel réussi son pot de vin, a imposé une peine sévère. La Cour envoie ainsi le message que les infractions à la LCAPE s'attireront de graves sanctions.

The first high-profile criminal case against a Canadian businessman for international bribery has now ended with a conviction and significant jail sentence.

In *R. v. Karigar*[1], Mr. Karigar, a Canadian citizen, was convicted of attempting to bribe an Air India official and an Indian Cabinet Minister in connection with his efforts to secure a tender for a multi-million dollar contract to supply facial recognition technology to Air India. He was subsequently sentenced in May 2014 to three years in prison.[2] This case is notable as it is the first prosecution under the *Corruption of Foreign Public Officials Act* to proceed to trial, and the first significant jurisprudence on the interpretation of its key provisions.[3] Furthermore, this case reflects the change that the *CFPOA* effected within a very brief period of time.

The case had a number of interesting facts. Although evidence was presented that the accused intended to pay bribes to certain Air India officials, there was no evidence that the bribes were actually paid. Indeed, Karigar had a falling out with his employer (and alleged co-conspirators), which had supplied the funds intended to be used for bribes, and was sued in the U.S. by that employer for the return of the funds. Karigar responded by engaging in email correspondence with the U.S. Justice Department using the pseudonym "Buddy". He further made statements to a Canadian Trade Commissioner in India acknowledging the payment of bribes. Needless to say, any of these three ill-considered actions could have been a trigger for the resulting investigation, which otherwise may have gone undiscovered.

At trial, the primary defence was that the "Crown failed to prove the existence of an agreement or conspiracy involving Mr. Karigar, particularly a conspiracy or agreement by which a particular foreign public official agreed to accept or receive a bribe in order to influence the award of the proposed contract."[4] The Court found otherwise. The accused did not call evidence.

While much of the evidence in the case was based on emails authored by the accused, the Crown also relied on evidence admitted on the basis of the co-conspirator exception to the hearsay rule.[5] Ordinarily, the evidence of co-conspirators against an accused is not admissible unless the Court is first satisfied on all the evidence that the Crown has established beyond a reasonable doubt that the

conspiracy existed. If so, the Court then must ask whether the Crown has established, with only the evidence directly admissible against the accused, on a balance of probabilities, that the accused is a member of the conspiracy. If both of these elements are met, as the Court in Karigar found, the Court can admit the hearsay evidence of the co-conspirators in furtherance of the conspiracy.

The accused put forward two additional related unsuccessful defences. It was submitted that that the word "agrees" as it appears in s. 3(1) of the CFPOA[6] should be given its ordinary meaning so as to apply to "the agreement of two people – one to pay a bribe and one to receive said bribe."[7] The thinking goes that if the recipient does not agree to accept the bribe, then there clearly was no agreement. This argument was rejected by the Court, which noted that section 3 of the CFPOA prohibits the giving, offering or the agreement to give or offer a bribe, and thus it was unnecessary that the bribe actually be paid. The crime of conspiracy is sufficiently committed if the accused believes that a bribe is being paid to the official and that the *actus reus* of conspiracy is met. In this case, the Crown established that Karigar believed bribes had to be paid to do business in India, and he agreed, along with others, to pay bribes that he actually thought had been paid.

The second related unsuccessful defence argument was that territorial jurisdiction was not established. The defence originally raised this issue on a motion (which was commented on in this publication by the author).[8] In 2013, the CFPOA was amended by the *Fighting Foreign Corruption Act*.[9] The purpose of the amendment was primarily to respond to criticisms of the CFPOA, including the lack of "nationality jurisdiction", that is, to find jurisdiction on the basis of an accused's Canadian nationality, rather than on the previous common law test known as the "real and substantial connection" test.[10] Although the amendment eliminates the necessity of finding jurisdiction on the common law test, Karigar was charged before the amendments were made, and accordingly, the common law test needed to be satisfied. The Court found that the facts showed a real and substantial connection to Canada. As the law has since been changed, a detailed discussion of how the Court arrived at this determination is now moot (at least for CFPOA offences).

Notwithstanding that Mr. Karigar was a first time offender and that the bribe attempt was a failure, in sentencing Karigar to three years in prison, the Court looked at sentencing consistent with existing fraud jurisprudence, and sent a strong message to the business community. Judge Hackland stated "Any person who proposes to enter into a sophisticated scheme to bribe foreign public officials to promote the commercial or other interests of a Canadian business abroad must appreciate that they will face a significant sentence of incarceration in a federal penitentiary."[11] As Karigar was charged under the pre-amendment CFPOA, the maximum sentence he could have received was only five years. That maximum has since been increased by the *Fighting Foreign Corruption Act* to fourteen years.[12]

Until *Karigar*, the legal community had concerns that in the early CFPOA cases, Canadian Courts might struggle to recognize the seriousness of a CFPOA offence. To that end, the Court in *Karigar* clearly demonstrated that Canadian businesspeople can go to jail for paying bribes abroad.

James Klotz is a partner in the Business Law Group of Miller Thomson LLP in Toronto and Chair of the firm's Anti-Corruption and International Governance Group. He specializes in international corporate governance and anti-corruption and is widely respected for his deep knowledge and practical experience in the international business arena. E-mail: jmklotz@millerthomson.com.

James Klotz est associé du cabinet Miller Thomson, à Toronto, membre du groupe de droit des affaires et président du groupe de lutte contre la corruption et de gouvernance internationale. Il est spécialisé dans la gouvernance d'entreprise internationale et la lutte contre la corruption. Il est très respecté pour sa connaissance approfondie et son expérience pratique du domaine du commerce international. Courriel : jmklotz@millerthomson.com.

Endnotes

[1] 2013 ONSC 5199.

[2] 2014 ONSC 3093 [*Karigar*].

[3] SC 1998, c 34 [*CFPOA*].

[4] *Karigar, supra* note 2 at para. 4.

[5] *R v Carter*, [1982] 1 SCR 937 (As noted by the Court in *Karigar*, the test for admissibility of hearsay evidence of co-conspirators is set out by the Supreme Court of Canada in this case).

[6] *CFPOA*, *supra* note 6, s. 3(1) ("Every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official (a) as consideration for an act or omission by the official in connection with

the performance of the official's duties or functions; or (b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions").

[7] *Karigar*, *supra* note 2 at para. 22.

[8] James Klotz, "Opening Salvo: Testing Territorial Jurisdiction Under the *CFPOA* in *R. v. Karigar*" (2012) 9:1 Can Intl Lawyer 40.

[9] SC 2013, c 26.

[10] See *Libman v The Queen*, [1985] 2 SCR 178, establishes the "real and substantial connection" test for territorial jurisdiction. The Court held that for territorial jurisdiction under Canadian criminal law, there must be a "real and substantial link" between the offence and Canada. The Court established a two-stage test to determine whether the crime was committed in Canada: (1) It must take into account all relevant facts that take place in Canada that may legitimately give this country an interest in prosecuting the offence; and, (2) it must then consider whether there is anything in those facts that offends international comity. This means that a portion of the illegal activities will have to have been committed in Canada or have a real impact on Canadians.

[11] *Karigar, supra* note 2 at para 36.

[12] *Fighting Foreign Corruption Act*, supra note 9, s 3(1).

CHINA

Closing the Gap: China's Most Recent Efforts to Eliminate the Differential Treatment of Foreign-invested Enterprises

Peter Corne & Ray Liu, Dorsey & Whitney LLP

Le 17 juin 2014, la Chine a publié une Circulaire sur l'amélioration de l'examen et de la gestion de l'approbation des entreprises à participation étrangère. Cette circulaire, qui rationalise les exigences relatives au capital et aux procédures d'approbation des entreprises à participation étrangère (EPE), représente une refonte profonde et soigneusement orchestrée de la réglementation des entreprises en Chine.

Les nouvelles règles comprennent la suppression des exigences relatives à l'apport en capital initial, au choix de la monnaie et aux délais de versement des apports de capitaux. Elles permettent en effet aux investisseurs de déterminer seuls le montant des investissements, la méthode d'investissement et les délais de versement des apports de capitaux. Elles n'éliminent toutefois pas l'obligation pour les EPE de se conformer aux ratios capitaux d'emprunt/capitaux propres (qui ne s'appliquent pas aux entreprises à participation strictement nationale). Dans l'ensemble, les nouvelles exigences représentent un changement majeur du droit chinois des sociétés et permettent aux EPE de profiter de conditions plus libérales pour la création de sociétés en Chine.

On June 17, 2014, the Ministry of Justice of the People's Republic of China released *the Circular on Improving the Examination and Management of Foreign-invested Enterprise (FIEs) Approval* (the Circular), which substantially revised the approval procedures applicable to the FIEs in China.[1] The Circular abolished the requirements of the initial capital contribution ratio, the currency contribution ratio, as well as the mandatory deadlines for payments of capital contributions. Now, investors can determine, on their own, the amount of subscribed investment, the method of investment, and the deadlines for capital contribution when investing. These regulatory changes reflect the recent major amendments to China's Company Law and permit the FIEs to take advantage of the more liberal requirements for establishing companies in the PRC, some of which could only be enjoyed by domestic companies.[2] However, the FIEs are still required to comply with debt to equity ratios (which do not apply to companies with purely domestic investment) as stipulated by China's company registry - the State Administration for Industry and Commerce (SAIC).

The amended PRC Company Law, which took effect on March 1, 2014, overhauled longstanding registered capital requirements and streamlined the process of setting up companies in China. It simplified the requirements and process for establishing a company in China in ways previously unimaginable. On February 28, 2014, the SAIC annulled two regulations, which concerned the capital registration of Sino-foreign equity joint ventures and amended eight regulations governing the registration of companies, enterprises, Sino-foreign equity joint ventures, Sino-foreign cooperative joint ventures and wholly foreign invested enterprises. These changes also took effect on March 1, 2014. However, despite all this, registered capital requirements still applied to FIEs until this Circular was announced.

In conjunction with the Circular, the amended PRC Company Law effectively abolished capitalisation requirements and the initial capital contribution ratio. Now investors and/or founders can set the registered capital amount in their company's articles of association. The old mandatory requirements, which set registered capital at RMB 30,000 (US $5,000) for a limited liability company (LLCs), RMB 100,000 (US $16,400) for a one-person limited liability company (One-person LLCs) and RMB 5,000,000 (US $820,000) for a company limited by shares (CLSs), have been relegated to history for both domestic-invested companies and the FIEs.

That said, the debt to equity ratios (ratio) of foreign invested enterprises are still subject to the regulation of the *Provisional Regulations of State Administration for Industry and Commerce on the Ratio Between the Registered Capital and the Total Amount of Investment of Sino-foreign Equity Joint Ventures* (Provisional Regulation).[3] In the Provisional Regulation, the debt-equity ratio requirements of FIEs are as follows:

Total Investment (Equity plus permissible debt) USD	**Minimum Registered Capital Requirement**
Below 3 million	70% of the Invested Capital
3 million to 4.2 million	At least 2.1 million USD and no less than 50% of the Invested Capital
4.2 million to 10 million	50% of the Invested Capital
10 million to 1.25 million	At least 5 million USD and no less than 40% of the Invested Capital
10 million to 30 million	40% of the Invested Capital
30 million to 36 million	At least 12 million USD and no less than 1/3 of the Invested Capital
Above 36 million	1/3 of the Invested Capital

Under previously applicable provisions, domestic shareholders had to make their capital contributions into LLCs and CLSs within two years of establishment (five years for a limited liability investment company) and into single shareholder LLCs in one lump sum as provided for in the articles of association of the company. Again, these requirements are no longer applicable. Shareholders now have the option to set their own contribution timeline.

Under the PRC Company Law as amended in 2005, the total amount of the initial capital contributions had to be no less than 20% (for both LLCs and CLSs) and 100% (one-person LLC) of the registered capital. This much maligned requirement is now history for not only domestically-invested companies, but the FIEs as well. Under the Circular, the investors of wholly foreign owned enterprises and Sino-foreign entity joint ventures are no longer required initially to contribute 15% of foreign investors' subscribed capital and 20% of the companies' registered capital. Similarly, the amendments also lifted the restriction that shareholders had to pay at least 30% of their capital contributions in cash, with the remainder being made up of materials, goods, IP rights, and land use rights. Shareholders now have considerably more flexibility to decide upon their schedule of capital contributions as well as the ratio of currency to non-currency contributions. This applies to both domestic-invested enterprises and the FIEs.

Nevertheless, it should be noted, the PRC Company Law amendments and the Circular are applicable unless other laws, administrative regulations, or PRC State Council decisions provide otherwise. For example, for foreign-invested companies limited by shares ("FICLS"), the minimum capitalization requirement remains. According to the *Provisional Regulations of the Ministry of Foreign Trade and Economic Cooperation on Certain Issues Concerning the Establishment of Companies Limited by Shares with Foreign Investment*, FICLS are still required to have a minimum capital of 30 million RMB, with the foreign investors contributing no less than 25% of the invested capital.[4]

Meanwhile, the Chinese Ministry of Commerce is also contemplating amending the FIE laws that relate to foreign investments to reconcile them with the new PRC Company Law Amendment and this Circular.

These amendments do not merely constitute minor procedural changes; they represent a more profound and carefully orchestrated overhaul of the corporate regulations in China, coordinated by the administrative and judicial organs on both the State and local levels. We are witnessing a paradigm shift from the paid-in capital system to the subscribed capital system, from a system of on-site corporate annual inspection to a system of corporate public notification based on online annual reporting, and from a government-led market to a more market-driven business environment.

Peter Corne is managing partner of Dorsey & Whitney LLP's Shanghai Office. He specializes in the area of Chinese corporate, commercial and regulatory practice and is a leading practitioner in the fields of mergers and acquisitions, corporate restructuring, and equity and asset acquisitions of foreign-invested enterprises and State-owned enterprises. E-mail: corne.peter@dorsey.com

Ray Liu is an associate in the Shanghai office and New York office of Dorsey & Whitney LLP. While his practice

includes general corporate matters, cross-border M&A, restructuring, financial services, foreign direct investment and antitrust, he concentrates on international and commercial litigation, primarily those involving cross-border and extraterritorial disputes. E-mail: liu.ray@dorsey.com.

Peter Corne est associé directeur chez Dorsey & Whitney, bureau de Shanghai. Il se spécialise dans le droit des sociétés, le droit commercial et la réglementation en Chine et est un chef de file dans le domaine des fusions-acquisitions, de la restructuration et des acquisitions d'actions et d'actifs d'entreprises à participation étrangère et de sociétés d'État. Courriel : corne.peter@dorsey.com.

Ray Liu est avocat chez Dorsey & Whitney, bureaux de Shanghai et de New York. Bien qu'il conseille sur les questions générales touchant l'entreprise, les fusions-acquisitions transfrontalières, les restructurations, les services financiers, l'investissement direct étranger et des lois antitrust, il se spécialise dans le litige international et commercial, et en particulier les litiges transfrontaliers et extraterritoriaux. Courriel : liu.ray@dorsey.com.

Endnotes

[1] Chinese version: http://wzs.mofcom.gov.cn/article/n/201406/20140600637866.shtml. English version: none.

[2] Chinese version: http://tjtb.mofcom.gov.cn/article/y/au/201403/20140300504604.shtml. English version: none.

[3] Chinese version: http://www.mofcom.gov.cn/aarticle/b/f/200207/20020700031172.html. English version: http://english.mofcom.gov.cn/aarticle/lawsdata/chineselaw/200301/20030100064559.html.

[4] Chinese version: http://www.mofcom.gov.cn/aarticle/b/f/200207/20020700031172.html. English version: http://china.findlaw.cn/gongsifalv/gongsifalvfagui/qt/52309_2.html

EUROPEAN UNION

The LCIA Takes Control: Whether You Want It To Or Not

Jane Wessel and Gordon McAllister

Au début de 2014, la Cour d'arbitrage international de Londres (CAIL) a publié la version définitive de son projet de nouvelles règles d'arbitrage. Par ce projet, la CAIL cherche à aligner ses règles sur les meilleures pratiques actuelles et à s'assurer que l'arbitrage conserve son caractère distinctif. Ces nouvelles règles se classent sous trois rubriques : la célérité, les pouvoirs exprès du tribunal et l'éthique.

Concernant la célérité, les nouvelles règles visent à préserver l'un des aspects les plus attrayants de l'arbitrage : le fait que les arbitrages soient généralement beaucoup plus rapides que les procédures judiciaires. Les nouvelles règles confèrent notamment aux tribunaux le droit d'imposer des dépens pour « non-coopération entraînant des retards déraisonnables », obligent les tribunaux à « minimiser les retards et les dépenses », et prévoient un mécanisme pour la désignation d'arbitres d'urgence. Ensuite, dans le but de faciliter le bon déroulement des arbitrages, les règles élargissent les pouvoirs exprès des tribunaux, les autorisant à modifier les délais ou à exiger des documents d'une partie, à accorder des mesures conservatoires, à nommer leurs propres experts et à consolider des arbitrages. Pour finir, les nouvelles règles introduisent pour la première fois un cadre éthique à l'intention des avocats. Ces lignes directrices vigoureuses représentent une étape importante dans l'avancement de la procédure d'arbitrage.

While many think of arbitration as a modern mechanism for resolving disputes, the reality is quite different. One of the leading arbitral institutions, the London Court of International Arbitration (LCIA), can trace its roots back over more than one hundred and thirty years. The current LCIA Arbitration Rules were introduced in 1998. Some sixteen years later, this has become increasingly problematic, as the rules reflect neither the technological changes nor, more significantly, the considerable developments in arbitral practice in the intervening period. Other institutions have responded to these developments by updating their own arbitration rules – the International Court of Arbitration in 2012 and the Singapore International Arbitration Centre in 2013 being two of the most recent examples.

In early 2014, the LCIA's Drafting Sub-Committee published a "final draft" of proposed new Arbitration Rules.[1] The Draft Rules update the existing rules, bringing them into line with current best-practice, while also including some bolder changes to ensure LCIA arbitral practice retains a distinctive edge. The LCIA opened the proposed draft rules to debate in May 2014, and it is expected that the new rules will become effective in October 2014.

The preamble to the 1998 rules provides that, where the parties have selected LCIA arbitration, the applicable rules are those in effect when the arbitration is commenced. A similar provision exists in the Draft Rules.

The key changes contained in the Draft Rules fall into three categories: (1) expediency, ensuring arbitration is

not subject to avoidable delays; (2) express powers of the tribunal, ensuring the tribunal can facilitate an effective arbitration; and (3) ethics, expressly setting out required ethical standards for counsel in arbitration proceedings. The highlights from each category are discussed below.

1. Expediency

Traditionally, one of the aspects of arbitration that appealed to parties was the speed with which the parties could expect to receive a binding decision, compared with the often slower pace of litigation in national courts. However, recent studies concerning arbitration trends demonstrate that parties to arbitration are concerned about increasing delays in commercial arbitration.[2]

To address the issue of delay, the Draft Rules clearly recognise the role of both the parties and the tribunal to ensure the expeditious conduct of the arbitration.

To discourage the parties from attempting to delay proceedings, the tribunal is expressly permitted to order costs sanctions in cases of "non-co-operation resulting in undue delay."[3] With respect to the responsibility of the tribunal to ensure expediency, prior to appointment, potential arbitrators will now have to declare themselves "ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious conduct of the arbitration."[4] In addition, once constituted, the tribunal will have a general duty to adopt procedures to avoid "delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute."[5]

Similar to other institutional rules, the Draft Rules set out a new procedure for the appointment of an emergency arbitrator, which may happen when a party requires relief prior to the arbitral panel being appointed. Typically this would be to prevent the other party from dissipating assets or destroying evidence. The Draft Rules now provide for the appointment of an emergency arbitrator in situations of "exceptional urgency," and contain an accelerated twenty-day time limit within which the arbitrator must decide a claim for emergency relief.[6]

2. Express powers

To facilitate the smooth progress of arbitration, the Draft Rules broaden the express powers of the tribunal. They mark a noticeable shift away from party autonomy towards broader tribunal powers not subject to party veto. This can be seen, for example, in the tribunal's "Additional Powers" which enable it to amend time periods or request documents from a party;[7] in the tribunal's power to award interim and conservatory measures;[8] and in the tribunal's power to appoint its own expert.[9] In each case, these powers are subject only to an obligation to consult with the parties.

The area where this shift will likely have the largest effect is in the consolidation of related arbitrations. In instances where the same parties are involved in multiple arbitrations, where only one tribunal has been appointed, that tribunal no longer requires the consent of the parties to consolidate the arbitrations.[10]

3. Ethics & Conduct

The final and most significant area of change is that to ethics and conduct. Attached to the Draft Rules is an annex setting out "General Guidelines for Parties' Legal Representatives" (the "Guidelines"). This represents the first attempt by a major arbitral institution to establish an ethical framework for counsel.

Commercial arbitration is increasingly common in international contexts. To address the wide range of ethical expectations that exist amongst different jurisdictions, the Guidelines propose a uniform ethical code. They include requirements to avoid "activities intended unfairly to obstruct the arbitration or jeopardise the finality of any award," or making "any false statement to the Arbitral Tribunal."[11]

Along with cautions or reprimands, the Draft Rules empower the tribunal to order "any other measure necessary to maintain the general duties of the Arbitral Tribunal," where the Guidelines have been breached.[12] This appears to provide the tribunal with unfettered discretion to devise sanctions for perceived ethical failings. The breadth of this discretion will doubtless be an issue of concern to all professionals appearing before LCIA tribunals.

Conclusion

The world of commercial arbitration has moved on significantly since the introduction of the 1998 LCIA Arbitration Rules. The Draft Rules represent both an attempt to keep up with these developments, and further, to shape the direction of arbitration for years to come. While the Draft

Rules respond to the parties' concerns about the speed of arbitration, they also seek to shift some of the powers away from the parties, enabling the tribunal to conduct the arbitration without being impeded by parties using guerrilla tactics to cause delay. The proposed Guidelines also represent a bold step forward.

A word of caution for parties who have already entered into an arbitration agreement that incorporates the LCIA rules, but does not specify which version of those rules will apply if the parties proceed to arbitration. While the 1998 version of the rules may have been in effect at the time the agreement was entered into, the 1998 rules will only apply to arbitrations commenced after the effective date of the Draft Rule if the agreement says so explicitly. Where arbitration is commenced after the Draft Rules come into effect without such explicit language, the pre-amble states that the amended rules will govern the arbitration. As such, the proposed changes may have a far wider effect than many parties would contemplate.

Jane Wessel is senior counsel in the Crowell & Moring's London office. Her practice focuses on international commercial arbitration, litigation, mediation, and other methods of dispute resolution. Jane is a Fellow of the Chartered Institute of Arbitrators and a CEDR Accredited Mediator. E-mail: JWessel@crowell.com

Gordon McAllister is an associate in Crowell & Moring's London office and is a member of the International Dispute Resolution and Antitrust Recovery practice groups. Gordon represents clients in both commercial and investment arbitration and his practice involves a wide variety of commercial litigation, including the pursuit of antitrust claims. E-mail: gmcallister@crowell.com

Jane Wessel est avocate principale chez Crowell & Moring, bureau de Londres. Elle se spécialise dans l'arbitrage commercial international, le litige, la médiation et les modes extrajudiciaires de règlement des différends. Elle est membre du Chartered Institute of Arbitrators et une médiatrice agréée du CEDR. Courriel : Jwessel@crowell.com.

Gordon McAllister est avocat chez Crowell & Moring, bureau de Londres, membre du groupe de la résolution des différends internationaux et du groupe du recouvrement antitrust. Il représente des clients tant en arbitrage commercial qu'en arbitrage de l'investissement. Son expérience comprend une grande diversité de litiges commerciaux, notamment dans le domaine des réclamations antitrust. Courriel : gmcallister@crowell.com

Endnotes

[1] The London Court of International Arbitration, New LCIA Rules 2014 (Revised Draft – 18/02/2014), London, UK: LCIA, online: LCIA <http://www.lcia.org//media/download.aspx?MediaId=336> (accessed on July 12, 2014) (the "Draft Rules").

[2] Queen Mary University of London 2013 International Arbitration Survey, Corporate choices in International Arbitration, Industry Perspectives, online: PWC <http://www.pwc.com/gx/en/arbitration-dispute-resolution/index.jhtml> (accessed on July 14, 2014) at 5.

[3] Draft Rules, *supra* note 1, art 28.4.

[4] *Ibid*, art 5.4.

[5] *Ibid*, art 14.4.

[6] *Ibid*, art 9.

[7] *Ibid*, art 22

[8] *Ibid*, art 25.

[9] *Ibid*, art 21.

[10] *Ibid*, art 22.1

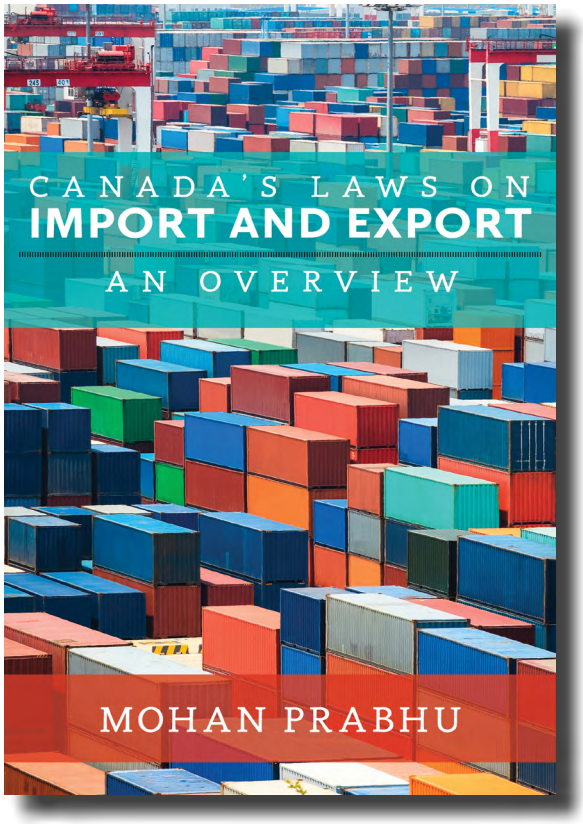
[11] *Ibid*, Annex to Draft Rules.

[12] *Ibid*, art 18.6.

Book review / Critique de livre

Mohan Prabhu: *Canada's Laws on Import and Export*

Konrad von Finckenstein



This is a very comprehensive survey of all laws affecting import and export. Among other matters, it deals with all the rules affecting imports and export. These are far more numerous than one would expect. Not only does the book deal with the expected legislation, such as the Customs Act, the Customs Tariff Act, the Special Import Measures Act and the Export and Imports Permits Act, it also covers more targeted statutes such as the Cultural Property Exports Act, the Import of Rough Diamonds Act and the Wild Animals and Plant Protection Regulation of International and Interprovincial Trade Act. In addition, other statutes that peripherally deal with imports or exports, such as the Canadian Environmental Protection Act, the Controlled Drugs and Substances Act, the Health of Animals Act and the Pest Control Products Act are also covered. In fact every statute dealing with imports or exports is covered.

In each case, Dr. Prabhu first provides a clear and concise summary of the scheme of the act, the procedures to be followed and the relief obtainable in case of dispute. This is followed by illustrative cases regarding key provisions of the act. However, rather than setting out the case itself, Dr. Prabhu again provides a concise summary of issue, arguments advanced and findings of the case in question. He makes no judgment or analysis of the cases but merely presents the informative summary.

All of these statutes are quite intricate, technical, hard to understand and apply unless one is familiar with this area of law or practices it daily. They make heavy reading, yet this book is easy to follow and will provide any reader with a good understanding of all statutory provisions affecting imports and exports.

Dr. Pranhu's book is a godsend for anyone who is first exposed to this area or needs to delve into this area in connection with an issue. It will also serve as a great resource for importers, exporters, custom brokers, trade law practitioners and regulators.

National International Law Section - Officers

Chair/Présidente
Wendy J. Wagner - Gowling Lafleur Henderson LLP
2600-160 Elgin St, PO Box 466 Stn D Ottawa, ON K1P 1C3
Tel (613) 786-0213 / Fax (613) 563-9869
wendy.wagner@gowlings.com

Vice-Chair/Vice-présidente
Noemi Gal-Or - Noemi Gal-Or Inc.
4084 West 31st Avenue, Vancouver, BC, V6S 1Y6
Tel (604) 721-9134
ngalor@noemigalorinc.com

Secretary-Treasurer/Secrétaire-trésorier
Aaron Peron Ogletree
202-20816 Eleven Mile Rd, Saint Clair Shores
MI 48081
Tel (313) 702-1166
ogletreeaaron@aol.com

Communications Officer/Agent des communications
Andrew M. Lanouette, LL.B. - Cassidy Levy Kent LLP
1470-55 Metcalfe St, Ottawa, ON, K1P 6L5
Tel (613) 368-4144 / Fax (613) 368-4171
alanouette@cassidylevy.com

Past Chair/Présidente sortante
Monique Pongracic-Speier - Ethos Law Group LLP
702 - 2695 Granville Street, Vancouver, BC, V6H 3H4
Tel (604) 569-3022 / Fax 1-866-591-0597
Monique@ethoslaw.ca

NSC Liaison/Personne ressource du CSN
Mathieu Bouchard -
Irving Mitchell Kalichman SENCRL/LLP
2 Place Alexis Nihon, 3500 boul de Maisonneuve O,
bureau 1400, Montreal, QC, H3Z 3C1
Tel (514) 935-4460 / Fax (514) 935-2999
mbouchard@imk.ca

Law Reform Liaison/
Personne ressource de la réforme du droit
Noah Arshinoff - CBA/ABC
500-865 Carling Ave Ottawa, ON K1S 5S8
Tel (613) 237-2925 x 173 / Fax (613) 237-0185
noaha@cba.org

Law Reform Liaison/
Personne ressource de la réforme du droit
Rebecca J. Bromwich - CBA/ABC
500-865 Carling Ave, Ottawa, ON, K1S 5S8
Tel (613) 237-2925 x164 / Fax (613) 237-0185
rebeccab@cba.org

Staff Liaison/Personne ressource
Jennifer McKenzie - CBA/ABC
500-865 Carling Ave, Ottawa, ON, K1S 5S8
Tel (613) 237-2925 x204 / Fax (613) 237-0185
jenniferm@cba.org

PD Lawyer/Avocate de DP
J. Clarisse Titus - CBA/ABC
500-865 Carling Ave, Ottawa, ON, K1S 5S8
Tel (613) 237-2925 x 160 / Fax (613) 237-0185
clarisset@cba.org

Branch Section Chairs
Alberta - Calgary
(International Business/Aide Internationale)
Jordan C. Hulecki - Fasken Martineau DuMoulin LLP
3400-350 7 Ave SW, Calgary, AB, T2P 3N9
Tel (403) 261-5350 / Fax (403) 261-5351
jhulecki@fasken.com

British Columbia/Colombie-Britannique
Jennifer Ann Button - Ministry of Justice-Legal Services
Branch-Constitutional & Administrative Law
6th Flr, 1001 Douglas St, PO Box 9280 Stn Prov Govt,
Victoria, BC, V8W 9J7
Tel (250) 356-8814 / Fax (250) 356-9154
jennifer.button@gov.bc.ca

British Columbia/Colombie-Britannique
Jeffrey D. Horswill - Davis LLP
2800-666 Burrard St, Vancouver, BC, V6C 2Z7
Tel (604) 643-6357 / Fax (604) 605-3792
jhorswill@davis.ca

Manitoba
Daniel E. Watts - Aikins, MacAulay & Thorvaldson LLP
Commodity Exchange Tower, 30th Flr, 360 Main St
Winnipeg, MB, R3C 4G1
Tel (204) 957-4877 / Fax (204) 957-4247
dew@aikins.com

Ontario
Orlando Ernesto Silva - BlackBerry
1875 Buckhorn Gate, Mississauga, ON, L4W 5P1
Tel (905) 629-4746 x15664
osilva@blackberry.com

Québec
René Cadieux -
Fasken Martineau DuMoulin S.E.N.C.R.L., s.r.l.
800 place Victoria, bureau 3700, CP 242 succ
Tour de la Bourse, Montréal, QC, H4Z 1E9
Tel (514) 397-7400 / Fax (514) 397-7600
rcadieux@fasken.com