Anti-Corruption Law and UK Businesses

By Richard Owens and Mark Clarke

This article considers the current status of the UK’s anti-corruption laws and the important implications of the US Foreign Corrupt Practices Act for UK companies registered or trading in the US.

Corruption is a global problem. From Scotland Yard’s ongoing “cash for peerages” investigation to the recent arrests in Brussels, corruption, in its many guises, is never far from the headlines. Yet despite this, the UK’s anti-corruption laws are in disarray: just a week after the Serious Fraud Office (SFO) Director, Robert Wardle, called for reform of the UK’s anti-corruption laws, the Home Office announced, on 5 March 2007, that the Government had, for the second time, abandoned its 2003 draft Corruption Bill.

The Government has, instead, asked the Law Commission to undertake a “thorough review” of the UK’s anti-corruption laws. It is envisaged that this review process will take around 18 months to complete. This means that the UK’s anti-corruption laws will remain, at least for the foreseeable future, in their existing disparate and outdated form, comprising a combination of common law and three Acts, which originated in the 19th century and remained largely unchanged until 2002 (when they were amended by the Anti-terrorism, Crime and Security Act 2001 (the 2001 Act) in order to give them extra-territorial reach).

The Existing Anti-Corruption Laws in the UK

The generally accepted definition of the common law offence of bribery is:

“… the receiving or offering of any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity.” (Russell on Crime, 12th Ed. 1964, p. 381).

Pursuant to section 108(1) of the 2001 Act, it is immaterial for the purposes of common law bribery if the functions of the person who receives or is offered a reward have no connection with the UK or are carried out in a country or territory outside the UK.

Section 1 of the Public Bodies Corrupt Practices Act 1889 (the 1889 Act) makes the bribery of any member, officer or servant of a public body a criminal offence. In particular, the 1889 Act prohibits the giving or receiving of:

“… any gift, loan, fee, reward, or advantage whatever as an inducement to, or reward for, or otherwise on account of any member, officer, or servant of a public body … doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body as aforesaid is concerned…”

The term “public body” includes:

“any … body which has power to act under and for the purposes of any Act relating to local government, or … to administer money raised by rates in pursuance of any public general Act, and includes any body which exists in a country or territory outside the United Kingdom and is equivalent to any body described above.”
• Arbitration, anti-suit injunctions and the Brussels Regulation. In West Tankers Inc v Ras Riunione Adriatica di Sicurtà SpA & Ors (February 2007), the House of Lords considered whether a court of a Member State could grant an injunction against a person bound by an arbitration agreement to restrain him from commencing or prosecuting proceedings in breach of the agreement in a court of another Member State that had jurisdiction to entertain the proceedings under the Brussels Regulation. As the answer was “not obvious” and was of “very considerable practical importance”, the House of Lords elected to refer the question to the European Court of Justice for determination. However, in its opinion on the matter, the House of Lords considered both English and European authorities and concluded that it was consistent with the Brussels Regulation for a court of a Member State to restrain a person from commencing or continuing proceedings in a court of another Member State on the basis that such proceedings were in breach of an arbitration agreement.

• Extent of Norwich Pharmacal jurisdiction. Two recent cases, Yuri Nikitin & Others v Richards Butler LLP & Others (February 2007) and Campaign Against Arms Trade v BAE Systems Plc (February 2007), have addressed the nature and extent of the Court’s jurisdiction to grant an order for disclosure under the principles established in Norwich Pharmacal v Customs & Excise Commissioners (1973). The basis on which a Norwich Pharmacal order can be granted are: (1) a wrong must have been carried out or arguably carried out by an ultimate wrongdoer; (2) there must be a need for an order to enable action to be brought against the ultimate wrongdoer; and (3) the person against whom the order is sought must be mixed up in the wrongdoing so as to have facilitated it and be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued (see Mitsui & Co Ltd v Nexen Petroleum UK Ltd (2005)).

The issue in Nikitin was whether the information sought satisfied the second of the above principles. The purpose of a Norwich Pharmacal Order was to enable an applicant to take action that could not otherwise effectively be taken. However, the judge held that the applicants had sufficient evidence to bring any necessary proceedings. The judge confirmed the narrow scope of the relief, saying: “I do not think this relief is intended to enable a victim of unlawful conduct to fine tune a pleading or identify every person of whatever standing who may have committed an unlawful act…”Norwich Pharmacal relief is the third [behind standard disclosure and third party disclosure under CPR 31.16] and last port of call restricted in its application”.

In CAAT, it was held that it remained a fundamental requirement of the exercise of the discretion that the person against whom disclosure was sought had been shown to be more than a mere bystander or witness. Once the court was satisfied that the Respondent was “mixed up in the wrongdoing so as to facilitate the wrong”, notwithstanding the fact that it was an innocent third party, where the Court considered that the disclosure sought was both necessary and proportionate, a Norwich Pharmacal Order would be granted.

• Developments in law on mistake. The Court of Appeal in Kyle Bay Limited t/a Astons Nightclub v Underwriters Subscribing to Policy No. 019057/08/01 (February 2007) addressed the apparent inconsistency in the case law on common law mistake between the judgment in The Great Peace (2002) and Associated Japanese Bank v Credit du Nord (1988). In Associated Japanese Bank, Stein J held that a contract could be vitiated for common mistake where, inter alia, as a result of the mistake “the subject matter of the contract [was] essentially and radically different from the subject matter which the parties believed to exist”. The judgment of Stein J was cited with approval by the Master of the Rolls, Lord Phillips of Worth Matravers, in The Great Peace. However, Lord Phillips then went on to provide that a fundamental element necessary to vitiate a contract for common mistake was “impossibility of performance”. The Court of Appeal in Kyle Bay considered that the two approaches amounted to much the same thing, but that in the instant case, the test of whether the mistake rendered the subject matter of the contract “essentially and radically different” should be applied.

• Developments in fight against VAT fraud. In Total Network SL v Commissioners of Customs & Excise (January 2007), the Court of Appeal considered whether Customs had a cause of action against Total in unlawful means conspiracy. Customs’ claim arose out of a series of VAT carousel frauds in which mobile phones were exported, VAT-free, from Spain by Total to a company in the United Kingdom. The phones were then passed through a contrived business chain in the United Kingdom (for which VAT was applicable), before being re-exported, VAT-free, to Total in Spain. Two of the companies in the business chain failed to account for VAT to Customs. The Court of Appeal held that, in order to succeed in a claim for unlawful means conspiracy, Customs had to establish that the unlawful means was actionable by it against at least one of the conspirators, which, on the facts, it was not. The Court of Appeal reached this conclusion reluctantly, on the basis that they were bound by a previous Court of Appeal authority on the point.

• Updates to Civil Procedure Rules. On 6 April 2007, the 44th Update to the Civil Procedure Rules came into force. The update includes a comprehensive rewriting of Part 36 and its associated Practice Direction, which deals with offers to settle and payments into court. The most significant change is the removal of the requirement that, where a defendant wishes to make an offer to settle pursuant to Part 36, he must make a payment of that sum into court. From 6 April 2007, the requirement to make payments into court will no longer apply and all references to “Part 36 Payments” are to be removed. Additional amendments include the manner in which the parties’ costs are dealt with on acceptance of Part 36 offers to settle.
This definition was extended by section 4 of the Prevention of Corruption Act 1916 (the 1916 Act) to include:

“local and public authorities of all descriptions (including authorities existing in a country or territory outside the United Kingdom).”

Section 1 of the Prevention of Corruption Act 1906 (the 1906 Act) made bribery of or by an agent of a government an offence. In particular, the 1906 Act prohibits an agent from obtaining, and any person from giving an agent “… consideration as an inducement or reward for doing … any act in relation to his principal’s affairs.” It is immaterial if either the principal’s affairs or the agent’s functions have no connection with the UK or if these functions are conducted in a country or territory outside the UK.

Whilst there are no prescribed penalties for the common law offence of bribery, the maximum statutory penalty for bribery is imprisonment for a term not exceeding seven years and/or a fine with no upper limit.

International Agreements

In the period since the Law Commission first published its proposals for reform in 1997, the UK has ratified two important international agreements, although progress has been slow in relation to domestic legislation.

First, the UK signed the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials (the OECD Convention) on 17 December 1997. The UK ratified the OECD Convention on 14 December 1998 and it came into force on 15 February 1999. In total, there are now 36 signatories to the OECD Convention.

A key function of the OECD Convention is requiring each signatory to adopt the necessary national legislation to criminalise the bribery of foreign public officials. Additionally, signatories must establish corporate liability for overseas bribery and must interpret territorial jurisdiction as widely as possible so as to establish both national jurisdiction and extra-territorial jurisdiction over their nationals for offences committed abroad. As mentioned above, the 2001 Act extended the scope of the UK’s domestic legislation in order to meet the requirements of the OECD Convention.

Second, on 9 December 2003, the UK signed the United Nations Convention Against Corruption (UNCAC). UNCAC is the first global anti-corruption instrument designed to fight corruption in both the public and private sectors. It now has 140 signatories and has been ratified in 88 countries (UNCAC was ratified in the UK on 9 February 2006).

UNCAC focuses on four key areas:

• the prevention of corruption in both the public and private sectors;
• the criminalisation of corruption in both the public and private sectors;
• international co-operation to improve cross-border law enforcement (for example, by extradition of offenders and the introduction of less formal co-operation in cross-border investigations); and
• asset recovery (signatories must establish mechanisms including civil and criminal recovery procedures, whereby assets can be traced, frozen, seized and returned).


Despite the UK’s ratification of these international agreements, its domestic anti-corruption regime remains disjointed and outdated. In particular, its emphasis on the concept of principal and agent is less relevant in the 21st century than it was when the relevant Acts came into force and this emphasis fetters the ability of the SFO to bring successful prosecutions. Further, the existing law focuses on imprecise state-of-mind concepts such as deception rather than the alleged offender’s actions.

It is clear that the Government accepts that the regime requires consolidation and updating, and recognises that in order to improve its record in corruption prosecutions, the powers of the SFO need to be reformed and enhanced. However, until these reforms take place, UK companies and their officers would be ill-advised to ignore either domestic or international anti-corruption laws and, in particular, it is now more critical than ever for UK companies to understand the broad reach and potential pitfalls of the US Foreign Corrupt Practices Act (the FCPA).
The FCPA
First enacted into law in the US in 1977, the FCPA was significantly amended in 1998 after the US ratified the OECD Convention. Recent years have witnessed a significant increase in enforcement activity by US authorities. Indeed, in February 2007, three Vetco International subsidiaries (two of which were UK companies) were fined $26 million for FCPA violations. Over the past seven years, foreign businesses have been forced to pay nearly $100 million in fines, penalties and disgorgement of profits to settle FCPA matters brought by US authorities.

The jurisdictional provisions of the FCPA reach beyond the US in a number of ways. First, the FCPA expressly applies to all companies with securities which are registered in the US or which trade on a US exchange. Moreover, the FCPA applies to any “officer, director, employee, or agent … or any stockholder … acting on behalf of” such a company. Thus any UK company with US-listed securities (as well as its officers, directors, employees and agents) are subject to the FCPA. Second, the FCPA applies to any foreign person or company acting “while in the territory of the United States” and makes it a crime to “make use of the [US] mails or any means or instrumentality of [US] interstate commerce” in a corrupt manner in furtherance of a scheme to bribe a foreign official. This provision has been broadly interpreted to apply to any act that occurs within US territory, including, for example, an e-mail to the US or a wire transfer through a US bank. In our global economy, the combination of these provisions brings the vast majority of UK companies within the broad sweep of the FCPA’s prohibitions on bribery.

The FCPA prohibits the payment or offer of payment, of “anything of value” to a foreign government official, party, or candidate, for the purpose of obtaining or retaining business or for securing any other “improper advantage.” It is important to note the following:

- companies are potentially liable for the actions of employees, subsidiaries, third-parties and intermediaries;
- anything of value can trigger liability – even if the amount is minimal or the payment is customary in the country (for example, this might include charitable contributions, if clearly made solely to induce action by an official);
- US prosecutors contend that actual knowledge is not required – conscious disregard or deliberate ignorance can establish that conduct is “knowing”; and
- any person acting in an official capacity may qualify as a foreign official.

The FCPA also requires any publicly traded company to have an adequate system of internal accounting controls.

. . . UK businesses cannot afford to ignore the implications of the FCPA and . . . a robust compliance programme, tailored to both industry and country specific risks, is essential.

The penalties for violations of the FCPA’s anti-bribery provisions are severe. For criminal violations, companies may be fined the greater of $2 million per violation or twice the gain earned on any business obtained through conduct that violated the FCPA. In addition to similar criminal fines, individuals can be imprisoned for up to five years. For civil violations, penalties of $10,000 per violation may be imposed on both companies and individuals. Moreover, in recent years, the US Securities and Exchange Commission (SEC) has insisted that companies disgorge all profits earned through conduct that violated the FCPA. As a result, companies have paid tens of millions of dollars to resolve FCPA matters.

In the US, the SEC has civil enforcement authority in matters involving public companies, while the Department of Justice prosecutes criminal cases. Factors which may influence government authorities in exercising their discretion to take action against a company include blatant wilfulness, actors at the highest level of the company, falsification of records, or a determination that there has been perjury or obstruction in the course of an investigation. Other indicators – for example recidivism or lack of internal controls – may also influence the penalty sought by civil and criminal authorities.

Conclusion
The UK has a woeful record for prosecutions for foreign bribery and corruption. According to data from Transparency International, the corruption watchdog, the UK has not brought a single successful prosecution for bribery of foreign officials and it has only conducted four serious investigations since the OECD Convention was brought into effect by the 2001 Act. However, after a period of inaction, the UK’s European neighbours are beginning to take a more active interest in eradicating corruption (which is listed in Article 29 of the Treaty on European Union as a means of achieving the objective of creating a European area of freedom, security and justice). It therefore seems inevitable that the UK will have to raise its game in this regard and it can only be a matter of time before the regulators come under pressure to make an example out of someone. Further, in light of international agreements such as the OECD Convention and UNCAC, it seems likely that there will ultimately be a convergence of world standards with respect to combating corruption.
Recovery of Staff Costs as Damages

By John Hull and Alex Merrison

When a party has suffered loss as a result of a tort committed by another party, it will usually incur management and staff costs in seeking to remedy or mitigate that loss. Until now, the case law on whether these costs can be recovered from the other party as damages has been inconclusive. However, a recent Court of Appeal case has clarified the position. It also gave useful guidance as to how to maximise the prospects of recovering such costs as damages.

Background

In Aerospace Publishing Ltd and another v Thames Water Utilities (January 2007), the Court of Appeal set out the circumstances in which staff costs incurred as a consequence of a tort might be recovered from the tortfeasor.

The facts of the case are straightforward. In 2001, the claimants, both publishing companies, brought a claim against the defendant in respect of loss and damage they had suffered when one of the defendant’s mains water pipes burst, flooding the basement of the claimants’ premises.

The defendant admitted liability for the flooding but disputed whether certain heads of damage could be recovered. In particular, the defendant objected to the staff costs arising from the claimants’ need to divert seven of their employees from their normal duties over a period of weeks, months and years, and to retain two ex-employees, on a freelance basis, to counter and mitigate the impact of the flood.

The claimants sought to recover their staff costs on the basis that had their employees not been engaged in salvaging the materials affected by the flood, they would have been pursuing their normal duties, thereby generating income for the claimants. The defendant’s position was that this must be strictly proved by the claimants and could not simply be inferred. The defendant argued that such costs were irrecoverable as damages because they would have been incurred by the claimants irrespective of the flood.

The Court of Appeal’s Approach

The Court of Appeal agreed with the first instance judge that the employment costs of staff may be recoverable as damages. In reaching this conclusion, Wilson LJ considered the relevant authorities and set out a number of propositions which the claimants would first need to establish:

1) the claimants must prove, by evidence that it is reasonable to adduce, that the staff were diverted, and the extent to which they were diverted. Absent that evidence, a claimant is at risk of its claim failing;

2) the claimants must establish that the diversion of staff caused significant disruption to their business; and

3) if the claimants can establish that their staff had been diverted as a consequence of the tortious act and that the diversion caused significant disruption to the business, the Court can reasonably infer (subject to the defendant establishing otherwise) that, had they not been diverted, staff would have been applied to activities which would have, directly or indirectly, contributed to increased revenue for the claimants in an amount at least equal to the costs of employing them during that time.

In the present case, the Court of Appeal held that there had been an extensive diversion of staff and substantial disruption to the claimants’ business. The Court could therefore infer that such staff had been diverted from revenue-generating activities and,
Continued from Page 5 — Recovery of Staff Costs as Damages

accordingly, their costs had been correctly included within the damages.

However, the Court of Appeal did not award as damages the claimants’ freelance costs of their ex-employees. The evidence presented to the Court suggested that the ex-employees were primarily engaged in the preparation of the claimants’ legal case and, therefore, their costs were treated as costs in the action to be assessed, rather than damages. Thus the Court drew an important distinction between staff costs expended on remediying or mitigating the cause of the claim, which are recoverable as damages, and those relating to bringing the claim, which are not.

Conclusions and Practical Guidance

The case provides helpful guidelines to assist parties that have incurred staff costs as the result of a tortious act to recover those costs as damages from the other party.

A party that has suffered loss as a result of a tort committed by another party, and which will incur management and staff costs in remediying or mitigating that loss, should ensure that proper records are kept, fully documenting the actual time spent, the identity of the relevant employees and, ideally, the tasks undertaken. Parties should always ensure that employees of appropriate qualification and experience are deployed, being mindful of the duty to mitigate loss.

Yet, whilst the case has provided necessary clarification of the issues, some uncertainties remain. The requirement of the claimant to show that the business suffered ‘significant disruption’ as a result of the diversion of staff means that a party should be careful to document, if possible, any such disruption. Clearly, this will vary from business to business and specific guidance should be sought at an early stage.

The Fraud Act 2006 – An Analysis

By Neil Blake

On 15 January 2007, the Fraud Act 2006 (the Act) came into force. The Act is the culmination of a number of years of consultation and discussion and broadly follows the recommendations of the Law Commission in its report on the law of fraud published in 2002. This article examines some of the key features of the Act.

Introduction

In its 2002 report, the Law Commission found that the law of fraud (comprising various offences under the Theft Acts 1968 and 1978 as amended by the Theft (Amendment) Act 1996) was inadequate to deal with the full range of conduct that could properly be regarded as fraudulent, consisting of numerous overlapping statutory offences and the diffuse common law offence of conspiracy to defraud, which was frequently used as a ‘catch-all’ where statute was found wanting.

It should be noted from the outset that, notwithstanding a recommendation by the Law Commission to the contrary, the common law offence of conspiracy to defraud has not been abolished.

The New Fraud Offences

The Act creates a new statutory fraud offence which can be committed in three ways: by false representation, by failing to disclose information and by abuse of position.

- A person is guilty of fraud by false representation under section 2 of the Act if he dishonestly makes a false representation and intends when making the representation to make a gain for himself or another or to cause loss to another or to expose another to the risk of loss.
- Liability for fraud by failing to disclose information arises under section 3 of the Act if a person dishonestly fails to disclose to another person information which he is under a legal duty to disclose and intends, by failing to disclose the information, to make a gain for himself or another or to cause loss to another or expose another to the risk of loss.
- Fraud by abuse of position under section 4 of the Act is committed if a person, who occupies a position in which he is expected to safeguard or
not to act against the financial interests of another person, dishonestly abuses that position and intends by such abuse of that position to make a gain for himself or another or to cause loss to another or to expose another to the risk of a loss.

There is a common element of dishonesty in these offences, which requires the prosecution to show (following the test set out in R v Ghosh (1982)) that: (1) the defendant’s behaviour would be regarded as dishonest by the ordinary standards of reasonable and honest people; and (2) the defendant was aware that his conduct would be regarded as dishonest by reasonable and honest people.

The key difference from the old law (and arguably a welcome simplification) is that dishonesty and fraudulent intent (that is the intention to make a gain for oneself or another or to cause loss to another or to expose another to the risk of a loss) are now sufficient to be guilty of fraud. The deception offences under the old law needed something to be obtained before they were complete and were therefore vulnerable to technical defences relating to causation and the form of what was obtained.

**Other Offences**

The Act creates a number of other offences directed at fraudulent behaviour that was difficult to prosecute under the old law. Section 6 of the Act creates the offence of having in one’s possession or under one’s control any article for the use in the course of or in connection with any fraud. Section 7 makes it an offence to make or supply such an article. These sections are particularly directed at computer programmes (which are expressly brought within the definition of “article” by section 8 of the Act) used to facilitate “phishing” scams and other forms of cybercrime. They also remove a key problem under the old law of “going equipped,” which caught only those who were not at their place of abode when in possession of the relevant article.

Other offences include the participation in fraudulent business carried on by a sole trader under section 9 of the Act and the obtaining of services dishonestly under section 11 of the Act.

**Implications of the Act**

The Act has wide ranging implications, the most important of which are addressed below. Other implications of the Act, such as changes to the rules as regards privilege against self-incrimination and an impact on the obligations of company directors to disclose price-sensitive information under, for example, the Listing Rules and Disclosure Rules, are beyond the scope of this article.

**Proceeds of Crime Act 2002 (POCA)**

For those working in the regulated sector, the interaction between the Act and POCA could have far-reaching consequences. Section 330 of POCA creates criminal liability for individuals who, in the course of carrying on business in the regulated sector, know or suspect, or have reasonable grounds for knowing or suspecting, that another person is engaged in money laundering and who fail to make the required disclosure regarding such knowledge or suspicion. Under POCA, “money laundering” comprises offences of concealment, acquisition and assisting the retention of “criminal property”. “Criminal property” means, for the purposes of these offences, property of all forms which constitutes or represents in whole or in part, directly or indirectly, a person’s benefit from criminal conduct.

In the context of the Act, any benefit derived from the new fraud offence could fall within the definition of criminal property in POCA. In the case of fraud by false representation, this could mean that sums advanced under loans could qualify as criminal property, if, for example, an individual misrepresented his income, or a corporate borrower misrepresented its solvency, in order to obtain the loan. Moreover, if a borrower became aware of circumstances subsequent to the advance of funds which would entitle the lender to terminate the loan under the relevant agreement and failed to disclose such circumstances, he may be guilty of fraud by failure to disclose and the funds retained in his possession that would otherwise be repayable may thereby become criminal proceeds within the meaning of POCA. Under the Act it is now much easier for loan funds to fall into the definition of “criminal property”.

**Insider Dealing and Market Abuse**

The offences of insider dealing under Part V of Criminal Justice Act 1993 (CJA) and of market abuse under Part VIII of Financial Services and Markets Act 2000 (FSMA) may also fall within the offence of fraud by abuse of position under section 4 of the Act (a charge which may, in some circumstances, now be preferred by prosecutors for the absence of statutory defences and given that it is applicable to both insider dealing and market abuse).

Section 397 of FSMA creates criminal liability for misleading statements and practices in relation to investment activity, although section 397 also contains a number of statutory defences. It may be that, in the future, acts that would have hitherto been prosecuted under section 397 will instead be prosecuted under the Act where more limited defences are available.

**Further Legislation**

The Government’s reform of the law of fraud has been accompanied by various proposed procedural changes with a view to facilitating the successful prosecution of fraudulent acts. Section 43 of the CJA seeks to enable serious and complex fraud trials to be conducted by a judge sitting alone without a jury. This provision has proven extremely controversial and has yet to be brought into force.
Tavoulareas v Tsavliris & Others: Welcome Guidance on Recognition of Judgments

By John Hull and Mark Clarke

In the recently reported judgment Tavoulareas v Tsavliris & Others (December 2006), the English Court of Appeal considered the question of whether a Greek judgment should be recognised for the purpose of enforcement by the English courts.

In analysing one of the important exceptions to the automatic recognition of European Union (EU) judgments, the Court of Appeal carefully considered the concepts of “service” and “appearance” and determined that, in the absence of effective service and appearance, an English court was entitled to find that it was not bound to recognise the Greek judgment. The judgment provides helpful guidance to practitioners as to how to avoid falling foul of the relevant EU regulations.

Recognition and Enforcement: The Regulatory Framework

Three separate regimes govern the recognition and enforcement of judgments in EU member states:

• The Brussels Convention of 27 September 1968 (as amended by various accession conventions);
• The Lugano Convention of 16 September 1988; and
• Council Regulation No. 44/2001 on jurisdiction and the recognition of judgments in civil and commercial matters (the Judgments Regulation).

In practice, the Judgments Regulation is likely to be the most commonly encountered regime for the recognition and enforcement of European judgments.

The principal aim of Chapter III of the Judgments Regulation is to promote the “free movement of judgments” between member states. Recital 16 in the preamble to the Judgments Regulation explains the reasoning behind this aim: “Mutual trust in the administration of justice in the Community justifies judgments given in a member state being recognised automatically without the need for any procedure, except in cases of dispute.”

Accordingly, pursuant to the Judgments Regulation, once a judgment has been made in the court of one member state, the circumstances in which a court of another member state may refuse to recognise it are extremely limited.

The key provisions in the Judgments Regulation concerning the recognition and enforcement of judgments are as follows.

• Article 33: a judgment given in a member state shall be recognised in the other member states without any special procedure being required.
• Article 38: a judgment given in a member state and enforceable in that state shall be enforced in the UK when, on the application of an interested party, it has been registered for enforcement in the UK.
Article 34 provides the following exceptions to the principle of automatic recognition:

1) if such recognition is manifestly contrary to public policy in the member state in which recognition is sought;

2) where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;

3) if it is irreconcilable with a judgment given in a dispute between the same parties in the member state in which recognition is sought; and

4) if it is irreconcilable with an earlier judgment given in another member state or in a third state involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the member state addressed.

In Tavoulareas v Tsavliris, the Court of Appeal was concerned with the second of these exceptions.

**Factual Background**

The dispute arose from a casualty suffered by the Atlas Pride, a bulk oil and ore carrier, which partially disabled the vessel in 1991. The claimant, Mr. Tavoulareas, the ship’s owner, and the defendants, the Tsavliris interests (a salvage group), reached an agreement pursuant to which Mr. Tavoulareas advanced monies to Tsavliris against an undertaking that repayments would be made out of any salvage award. In 1993, a salvage award of $7 million (£3.57 million) was made. In 2001, Mr. Tavoulareas issued proceedings in England to recover the monies he had advanced for salvage services rendered. The next day, prior to service of the English proceedings, Tsavliris commenced proceedings in Greece for a declaration that they were not liable to make any payment to Mr. Tavoulareas in relation to the Atlas Pride.

The documents initiating the Greek proceedings were not formally served on Mr. Tavoulareas (they were sent to an incorrect address) and the proceedings only came to the notice of Mr. Tavoulareas through exhibits to a witness statement served in the English proceedings. Nevertheless, in late 2004, the Greek court heard the Greek proceedings in the absence of Mr. Tavoulareas and made a declaration that Tsavliris had no liability to him. In August 2004, Mr. Tavoulareas issued a second set of proceedings against another of the Tsavliris interests. Tsavliris applied for declarations in both sets of English proceedings that the Greek judgment was recognised under article 33 of the Judgments Regulation. The judge in the court of first instance refused the application. Tsavliris appealed.

**The Appeal**

Tsavliris sought to rely on article 33 of the Judgments Regulation and argued that phrases such as “default of appearance” and “service with the document which instituted proceedings or with an equivalent document” in article 34(2) should be given a meaning which leans heavily in favour of recognition of judgments. The Court of Appeal agreed that “service” and “appearance” are both legal concepts that should be given legal meaning and, therefore, considered each concept in turn.

**Service**

Tsavliris emphasised that the need expressed in the Judgments Regulation for a defendant to have the relevant document in time for him to prepare his defence and in a form to which he could satisfactorily respond, and submitted that, so long as Mr. Tavoulareas had been notified of the Greek proceedings in a time and manner that enabled him to defend the claim if he wanted to, he could not claim that he had not been formally served. The Court of Appeal rejected this argument and stated that notification of the proceedings was not sufficient. It determined that the concept of “service” in the Judgments Regulation should be consonant with the concept of “service” in Council regulation 1348/2000 on service in the member states of judicial and extra-judicial documents in civil and commercial matters (the Service Regulation); otherwise there would be a serious mismatch between the respective provisions for seizure (of the court) in the Service Regulation and judgment recognition in the Judgments Regulation.

**Default of Appearance**

Tsavliris accepted that, in both a literal and a colloquial sense, the Greek judgment was given in default of appearance but submitted that, in the context of article 34(2) of the Judgments Regulation, default of appearance was only a bar to recognition if a defendant “was not given the opportunity to defend himself at the hearing by being notified of the proceedings”. The Court of Appeal considered that “appearance” could have two meanings. Firstly, if a defendant decides to defend a claim, then, once he has lodged with the court a formal document confirming so, he would, in most legal systems, be said to have “appeared”. Secondly, once proceedings come before a court for a hearing, a defendant will have to choose whether to be present in court. If he chooses to be present, he will, on any view, have “appeared.” Mr. Tavoulareas did not “appear” in either meaning of the word.
A Practical Guide to Resolving Disputes With Contractual Counterparties in Relation to Tax Covenants and Warranties, and/or HMRC

By Daniel Friel and Alex Cole

UK tax controversies fall into two main categories: disputes with HM Revenue and Customs (HMRC), or disputes (pertaining to tax) with a contractual counterparty. Typically, disputes with HMRC concern whether a particular tax charge is due. Disputes with a contractual counterparty normally proceed on the basis that a tax charge is due, and deal with liability for that charge.

Latham & Watkins acts for clients involved in both types of dispute.

Tax Covenant/Warranty Disputes

The most common type of tax dispute relating to contractual counterparties relates to disputes over tax covenant/indemnity and warranty claims. Tax covenants and warranties are usually put in place when a private company is being sold. The idea is that the seller is responsible for tax arising prior to the sale date, the buyer for all that which arises subsequently. The covenant/warranties ensure that this is the case by expressly allocating responsibility for various potential tax liabilities between the parties. Most disputes involve the seller denying that it is responsible for tax which the buyer is claiming, as the buyer’s obligations under the covenant are usually less extensive (it runs the company going forward and is hence in a position to regulate its affairs).

Covenant disputes largely turn on construction of the terms of the covenant itself rather than any factual background, as it is usually the receipt of a tax demand from HMRC (or the local tax authority) that triggers a claim under the covenant, rather than whether or not the tax is properly due (rarely an issue disputed between the parties).

Important points to bear in mind:

- **Limitation period for claims under the tax covenant/warranties.** These can vary according to the type of tax involved. Usually the period corresponds to the period in which HMRC can raise an enquiry in respect of the relevant tax.

- **Time limits for notification of claims between parties** (for example, within x days of receipt...
It is important that tax counsel is involved at the earliest stage when the possibility arises of any claim under specialist tax covenant/warranties.

The important step is the initial submission of communications to HMRC setting out the detailed analysis of the tax position and the rationale behind the proposed treatment. Again, the earlier that specialist tax counsel is involved, the greater the ability to ensure that the dispute is handled in a manner which does not prejudice a relationship with HMRC. Preservation of this relationship is often a primary concern. Early involvement increases the chances of achieving a positive result on both fronts.

Latham & Watkins’ tax group works closely with clients on tax controversy matters. Our early involvement will ensure that potential contractual/tax liabilities are limited insofar as possible.

It is important that tax counsel is involved at the earliest stage when the possibility arises of any claim under specialist tax covenant/warranties, in order to allow an accurate view to be taken of the potential exposure and the viability of any claim.

**HMRC Disputes**

Disputes with HMRC usually arise when a taxpayer’s view on the interpretation of tax legislation differs from that of HMRC, either in relation to transactions already entered into and reflected in the taxpayer’s tax return(s), or in relation to prospective transactions where the taxpayer seeks advance confirmation that its view of the tax treatment is correct. Disputes relating to filed tax returns typically arise some time after the transaction(s) which are being queried, given the time limits for filing tax returns. Hence it is important quickly to obtain an accurate picture of the disputed transactions so as to be able to respond to HMRC on a well-informed basis. Sometimes disputes arise through taxpayer filing errors.

Disputes relating to advance rulings arise where HMRC disagrees with the proposed tax treatment of a matter. Such disputes typically take the form of an appeal against HMRC’s initial determination. The resources and personnel that HMRC allocate to a particular dispute will depend upon how seriously HMRC perceives the point as a possible source of revenue leakage.

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Aimee-Jane joined the Latham & Watkins London Litigation Department as an associate in February 2007, having trained and qualified at another City firm. She was educated at Worcester College, Oxford University, Jesus College, Cambridge University and at BPP Law School.

Aimee-Jane’s previous experience includes litigation in both the High Court and Court of Appeal and international arbitration. She has advised on both public and private international law matters. She was recently involved in obtaining an anti-suit injunction when proceedings were initiated against a client in Turkey that substantively overlapped an ongoing arbitration.

Aimee-Jane spent six months working in the legal department of the human rights organisation, Liberty, and continues to work as a volunteer on their telephone advice line.

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