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# Reportage

## Arbitration in the EU under threat?

In the case of arbitration agreements, the UK courts have for many years used anti-suit injunctions to restrain proceedings brought in breach of such agreements. In commercial contracts parties often agree to use arbitration to settle any disputes. When a dispute arises, a party may well try to frustrate this process by bringing litigation. Anti-suit injunctions are a valuable tool, as they promote legal certainty and reduce the possibility of conflict between the arbitration award and the judgment of a national court. They also enable the EU to compete effectively with international arbitration centres. Following a ruling of the European Court of Justice (ECJ) on 10 February, however, anti-suit injunctions in the case of arbitration agreements are under threat.

How did this all start? Well, by way of background, a West Tanker vessel collided with a jetty in Italy. The agreement with the charter party provided that disputes would be settled by arbitration in London. Proceedings were raised in Italy and West Tankers then sought an anti-suit injunction in London on the grounds that the proceedings were contrary to the arbitration agreement.

The ECJ ruled that the EU rules on jurisdiction in civil and commercial matters (Regulation 44/2001 on jurisdiction, recognition and enforcement - "Brussels I") preclude a court of a Member State from making an order restraining a person from legal proceedings in another Member State because of an arbitration agreement. The ECJ reasoned that Brussels I does not authorise the jurisdiction of a court of a Member State to be reviewed by a court in another Member State. Obstructing the court of another Member State in deciding whether Brussels I is applicable would undermine the trust between the Member States' legal systems on which Brussels I is based.

Consequently, the UK courts, and indeed other Member States, will no longer be able to use tools such as anti-suit injunctions to restrain legal proceedings brought in other Member States in breach of arbitration agreements.

Without anti-suit injunctions, arbitration agreements could be severely hampered. A party that wishes to prolong or obstruct matters will have a clear incentive to rush to court in a Member State with lengthy proceedings. Moreover, there is concern that this ruling will undermine the position of the UK, and in particular London, as an arbitration seat of choice. Because of its clear legal framework and world-class experts in the field, however, legal professionals are hopeful that London will not lose out to other international arbitration centres where anti-suit injunctions are still available.

Moreover, a review of Brussels I is in sight. The European Commission is set to report on its operation and to launch a public consultation on its review next month. The European Parliament held a hearing on this issue in January. The review is expected to consider abolishing the need for intermediate proceedings to enforce judgments abroad (exequatur). It is also expected to consider redressing problems that have been detected in the application of Brussels I. Following the consultation a draft Regulation is scheduled to be introduced by the end of this year.



#### **WEBLINKS**

- **Judgment of the European Court of Justice in Allianz SpA v West Tankers Inc. (C-185/07)**

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## **LEGAL PROFESSIONAL PRIVILEGE**

### **Application to intervene refused in Akzo Nobel**

The European Court of Justice informed the Law Society of England and Wales in February that its application to intervene in the Akzo Nobel case had been turned down. All other organisations seeking leave to intervene were also refused. The appeal against a 2007 judgment of the Court of First Instance concerns legal professional privilege (LPP) and specifically whether this extends to legal advice given by in-house lawyers during EU anti-trust investigations. The Court has found previously that LPP should not extend to lawyers working within the company they are advising, as they are not considered independent. The Society sought to

support Akzo Nobel's challenge in order to ensure that the advice of all regulated lawyers in Europe should be afforded the same treatment.



## [WEBLINKS](#)

- [Judgment of the Court of First Instance in Akzo Nobel Chemicals and Akcros Chemicals v Commission \(T-125/03\)](#)

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## **FREEDOM OF ESTABLISHMENT**

### **Portugal and the Netherlands taken to task over notaries**

The European Commission has spent a number of years tackling national governments in those jurisdictions where only home nationals can exercise the profession of notary. According to it, this nationality requirement is contrary to the freedom of establishment and is not justified under exemptions for activities connected with the exercise of official authority. The Commission launched infringement proceedings against a number of countries last year including Belgium, Germany, France, Luxembourg and Austria. Portugal and the Netherlands have until now escaped this action. Although Portugal adopted legislation in 1997 to remove the nationality requirement, this fails to remove it entirely. The Netherlands in turn prepared a draft law removing the requirement in 2007 but has since failed to adopt it. In response the Commission brought legal proceedings against the Netherlands before the European Court of Justice on 29 January and issued Portugal with a reasoned opinion on 19 February.

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## **ANTI-MONEY LAUNDERING**

### **France and Poland hauled before Court**

The third Money Laundering Directive was due to be implemented into national law by 15 December 2007. This builds on existing EU legislation and incorporates into EU law the June 2003 revision of the Forty Recommendations of the Financial Action Task Force. The Directive extends due diligence measures to beneficial owners and requires enhanced due diligence to be undertaken in certain circumstances. According to the European Commission, France and Poland failed to meet the deadline for implementation. It has brought infringement proceedings against them before the European Court of Justice.



## [WEBLINKS](#)

- [Directive 2005/60 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing \("third Money Laundering Directive"\)](#)
- [Financial Action Task Force – The Forty Recommendations](#)



## Law Societies' News

### SRA consults on conflict and confidentiality rules

The Solicitors Regulation Authority for England and Wales (SRA) is consulting on proposed changes to the Solicitors' Code of Conduct rules on conflicts of interest, and duties of confidentiality and disclosure. The proposals under discussion would extend significantly the circumstances in which a firm could act with a sophisticated client's consent where there is a conflict of interests. For example, it would allow separate teams within a firm, with the use of information barriers, to act for different parties in a negotiating situation. Similar proposals relate to the circumstances in which an information barrier can be used to allow a firm to accept new instructions, without requiring the consent of the client whose information is being protected. The SRA is keen to receive views from other jurisdictions, particularly in Europe and the United States. The consultation closes on 31 March 2009.



#### WEBLINKS

- [Conflict and confidentiality rules – proposed amendments](#)

### Law Society of Scotland coordinates survey of the judiciary and legal profession

On 2 February, the Judicial Appointments Board for Scotland, working together with the Faculty of Advocates and the Law Society of Scotland, embarked on a major survey of the judiciary and legal profession in Scotland. The survey aims to establish the current make-up of the eligible population for judicial appointments and how this might change in the next few years. The study will also seek to examine whether there are any actual or perceived barriers which could be inhibiting eligible candidates from applying to become sheriffs or judges. The Law Society of Scotland's President, Richard Henderson, has encouraged all its members to respond to the survey. The closing date for receipt of completed questionnaires is 13 March 2009.



#### WEBLINKS

- [Law Society of Scotland Press Release](#)
- [Research Questionnaire](#)

## Competition practitioner network launched

The Law Society of England and Wales has recently launched a new special interest group for competition practitioners. Previously known as the Law Society's European Group, the mission of this network is to promote discussion of competition law issues and to promote closer links and candid engagement between the profession and officials in the relevant institutions. Led by a committee of specialist practitioners, including experts from leading law firms, agency officials and in-house counsel from major corporations, the group will keep members informed and up-to-date with relevant developments. For more information or an application form please e-mail: [competition@lawsociety.org.uk](mailto:competition@lawsociety.org.uk).



### [WEBLINKS](#)

- [Competition Special Interest Group](#)

## UK trainee solicitors visit the European Court of Justice

On 11 February, a group of UK Brussels-based trainee solicitors from several of the country's leading law firms visited the European Court of Justice in Luxembourg. The visit, which had been organised by the Law Societies Joint Brussels Office, offered the opportunity to observe the operation of the Court first-hand and included a number of informative talks on the inner-workings of the Court of Justice and the Court of First Instance. The group also had the privilege of enjoying lunch with Judge Forwood and a number of key Court officials.

## Scottish solicitors assist with legal reform in Malawi

Two Scottish solicitors have volunteered their services to work with various legal organisations in Malawi. Dorothy Latimer and John Watt QC will spend two months in the African Republic on an initial scoping visit. The Challenges Worldwide (CWW) led initiative is supported by the Scottish Government's International Development Fund. It will seek to determine priority areas of work with the potential to deliver a broader and structured programme of legal support to a range of relevant organisations in the Malawian Justice sector.



## Law Reform

### CRIMINAL LAW

#### Member States to settle conflicts of jurisdiction disputes

On 20 January, a proposal for a Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings was published on the initiative of the Czech Republic, Poland, Slovenia, the Slovak Republic and Sweden. It aims to reduce parallel criminal proceedings. It purports to bring more transparency and objectivity to the Member States' choice of criminal jurisdiction in situations where the facts of a case fall within the jurisdiction of two or more Member States. It does not, however, provide for the suspect or defendant to be involved in, or informed of this process. It does not provide for the suspect or defendant to challenge the process or the outcome of it and it does not even provide for judicial oversight of the proceedings. The proposal is a Czech Presidency priority and ministers are expected to reach agreement at the Justice and Home Affairs Council in June.



#### WEBLINKS

- [Proposal for a Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings](#)
- [Presidency revised text to the Proposal](#)

### CRIMINAL LAW

#### Experts examine pre-trial detention standards

The Law Societies Joint Brussels Office participated in an experts meeting on minimum standards in pre-trial detention held by the European Commission on 9 February. Academics, practitioners and representatives of national governments explored the significant differences between Member States in terms of the definition of pre-trial detention, the grounds for review of pre-trial detention and the length of pre-trial detention. They also discussed other relevant aspects, including deduction of foreign pre-trial detention, compensation for unlawful pre-trial detention and juvenile suspects. A key point of debate was the extent to which differences constitute an obstacle to the mutual trust between Member States that is necessary for mutual recognition. The need for further action at EU level was explored and the Commission is expected to publish a discussion paper on pre-trial detention for public consultation at the beginning of July 2009.

## TRANSPARENCY

### Parliament to enhance access to documents

On 17 February the European Parliament's Civil Liberties Committee adopted Michael Cashman MEP's report on the proposal for a revision of the Regulation on public access to European Parliament, Council and Commission documents. This Regulation required the EU institutions to set up public registers of the documents they receive and produce by June 2002. A failure to do this prompted the Commission to propose a revision of the Regulation in April 2008. This proposal has itself been the subject of much debate. Many critics consider it to be too narrow in scope in that it still does not oblige the institutions to keep a register of all their documents. The report has sought to make significant amendments to the proposal in terms of enlarging the definition of a 'document' and limiting the exceptions. The report is scheduled to be adopted by the plenary session in April 2009.



#### WEBLINKS

- [Proposal for a Regulation on public access to European Parliament, Council and Commission documents](#)
- [Parliament draft Report on the Proposal for a Regulation on public access to European Parliament, Council and Commission documents \(report as adopted not yet available\)](#)
- [Regulation 1049/2001 on public access to European Parliament, Council and Commission documents](#)

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## FINANCIAL SERVICES

### Review of investor compensation

The European Commission launched a call for evidence on the review of the application of the Investor-Compensation Schemes Directive on 9 February. This Directive aims to protect investors against the risk of losses in the event of an investment firm's inability to repay money or return assets held on behalf of their clients. The Commission is seeking to gather information concerning the application of the Directive and has invited all interested stakeholders to participate. On the basis of the information collected, the Commission hopes to be in a position to assess the overall effectiveness of the Directive, both in light of the current financial crisis and the fact that it has been ten years since the Directive entered into force. It is likely that there will need to be certain amendments in order to bring the Directive into line with the 2004 Directive on markets in financial instruments. The consultation closes on 8 April 2009.



#### WEBLINKS

- [Directive 97/9 on investor-compensation schemes](#)
- [Call for evidence on Investor-Compensation Schemes Directive](#)

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## COMPANY LAW

### A European equivalent for trusts?

The European Commission has recently answered those who had been calling for the creation of an EU legal form for foundations. In its consultation document published on 16 February, the Commission seeks views both on the legal and fiscal barriers that trusts and foundations currently face within the EU and the attitudes that founders and donors have towards this new concept. The study on which the Commission has based its consultation highlights the lack of recognition of trusts in some Member States as a barrier to the EU. It also enquires about the problems created by the existing tax treatment of such domestic entities. The consultation closes on 15 May 2009 and the Commission has stated that it has taken no decision as to the need for, or potential content of, a future European statute for foundations.



#### WEBLINKS

- [Commission consultation on a possible Statute for a European Foundation](#)
- [Feasibility study on a European Foundation Statute](#)

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## TAXATION

### Commission facilitates electronic VAT invoicing

The European Commission proposed measures on electronic invoicing on 28 January that are intended both to alleviate certain administrative burdens from small business and to tackle tax fraud. The proposal to amend the existing VAT rules would ensure that paper and electronic invoices, and their communication, are treated equally. This means removing requirements for the use of e-signatures or electronic data interchange. The proposal contains provisions on electronic storage which would allow greater use of simplified invoicing. It also removes optional provisions that had been taken up by Member States, thus creating additional burdens for business, such as in relation to the use of summary invoices. Measures have also been proposed which are intended to help combat fraud, such as setting a single date of VAT chargeability and requiring those attempting to exercise their right to VAT deduction to hold the relevant invoice. The proposal passes to the European Parliament for a single reading before it will have to be adopted unanimously by the Member States for it to become law.



#### WEBLINKS

- [Proposal for a Directive amending Directive 2006/112 on the common system of value added tax as regards the rules on invoicing](#)
- [Communication on the technological developments in the field of e-invoicing and measures aimed at further simplifying, modernising and harmonising the VAT invoicing rules](#)

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## **Wider Choice and Better Protection: a consultation on the regulation of legal services in Scotland**

I think it is fair to say that since I took up my new role as Chief Executive of the Law Society of Scotland at the beginning of January, I have not had what you might call the gentlest of inductions. I am joining the Society at one of its most testing times and while the past six weeks have been one steep, hectic, non-stop learning curve, they have also been extremely invigorating and overall very positive.

The on-going debate on alternative business structures is the hot topic for the legal profession in Scotland and it has taken me some time to get to grips with the many different issues involved. On the one hand, these challenging economic times present an opportunity to look at increased flexibility of practice and more innovative delivery of services, not to mention the possibility of external economic investment in the profession; on the other, it is a profession which is justly proud of having maintained strict, exacting standards of service, as well as its independence from compromising influences for many years. It is therefore no wonder that the proposals outlined in the recent Scottish Government consultation have the capacity to provoke such conflicting views.

My professional background is in business development with a strong focus on the economy so it probably comes as no surprise that I am quick to see the opportunities that the proposed Legal Profession Bill could offer to a large number of our members in terms of the management of their business and their future growth and development.

That is not to discount the views of those who have expressed doubt over the perceived benefits of alternative business structures and concerns about the disruption of the status quo. However, all indications point to the fact that the restrictions on current practice will be lifted and there is nothing to be gained by overlooking the chance to strengthen the profession's position in a modernised legal services market. Since my arrival, I have been particularly encouraged by the spirit of cooperation that has been cultivated between the Society and the Scottish Government and I see it as my job to make sure that our members stand to benefit as much as possible from these proposals.

The Scottish Government's consultation paper *Wider Choice and Better Protection: a consultation on the regulation of legal services in Scotland* was published on 6 January with responses due by 3 April 2009. Draft legislation is expected by the end of June 2009. This is not just a Scottish issue however.

With the coming into force of the Legal Services Act in England and Wales, and the establishment of the Darrois Commission to review the structure and regulation of the legal profession in France last year, the debate is extending throughout Europe. Our Council will be submitting a response on behalf of the Society and the profession, but I would urge as many people as possible who have an interest to respond.



- **[Wider Choice and Better Protection: a consultation on the regulation of legal services in Scotland](#)**

## Biography



**Lorna Jack** is the Chief Executive of the Law Society of Scotland. She became a chartered accountant in 1984, before joining Scottish Enterprise. Most recently she spent six years in Boston as President Americas of Scottish Development International, part of Scottish Enterprise.

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- **Directive 2008/122 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts**
- **Proposal for a Directive on administrative cooperation in the field of taxation**
- **Proposal for a Directive concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures**
- **Mutual Recognition Study - Analysis of the future of mutual recognition in criminal matters in the EU**
- **Final Report on the Compensation of Victims of Cross-border Road Traffic Accidents in the EU: Comparison of National Practices, Analysis of Problems and Evaluation of Options for Improving the Position of Cross-border Victims (Rome II Study)**

## About us

The Law Society of England & Wales set up the Brussels office in 1991 in order to represent the interests of the solicitors' profession to EU decision-makers and to provide advice and information to solicitors on EU issues. In 1994 the Law Society of Scotland joined the office and in 2000, the Law Society of Northern Ireland joined. The office follows a wide range of EU issues which affect both how solicitors operate in practice and the advice which they give to their clients. For further details on any aspect of our work or for general enquiries, please contact us: [brussels@lawsociety.org.uk](mailto:brussels@lawsociety.org.uk)

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