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IBA2016 18–23 SEPTEMBER WASHINGTON DC

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This newsletter is intended to provide general information regarding recent developments in the region of North America. The views expressed in this publication are those of the contributors, and not necessarily those of the International Bar Association.

The Forum's 2016 conferences

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We take great pleasure in announcing that 2015 was a year of great success for the North American Regional Forum and it appears that the year ahead will be full of exciting challenges for all of us.

We are also very excited to welcome Hansel T Pham as Co-Chair. Hansel is partner in White & Case's international arbitration and litigation groups in Washington, DC and we are sure that he will provide a significant input to the Forum. We also extend a special welcome to our new officers and members of the committee. We urge all our members to familiarise themselves with our officers at www.int-bar.org/Officers/Index.cfm?unit=185_0_0_1_0 and reach out to us with ideas and contributions.

We look forward to welcoming you at the IBA Annual Conference 2016, which will take place in Washington, DC on 18–23 September, and hopefully to see you at any of the conferences that the Forum will either be supporting or presenting:

- **IBA Annual Litigation Forum 2016 Conference**
  27–29 April, San Francisco
  Topics include high value technology disputes and the use of litigation as a dispute resolution mechanism in key Asian jurisdictions.

- **The Future is Here: Insights and Experiences from Today's Law Firm Innovators**
  3 May, New York City
  This conference will explore innovation and new approaches that are in use in law firms. Attendees will have an opportunity to learn from and engage with panellists who have led the way in legal sector innovation.

- **2nd Annual Investing in Africa Conference: Opportunities for Business and the Lawyers Who Counsel Them**
  29 June – 1 July, London
  This conference will cover matters of such as Africa's investment trends, and how they will affect commercial enterprises and their lawyers, as well as risk mitigation and recent deals in sectors of rapid growth and in mature sectors.

- **3rd Annual Corporate Governance Conference**
  2–4 November, Miami
  Topics include corporate governance issues for foreign subsidiaries and recent trends: controlling shareholders, interested financial advisors and exposure and cyber security – how to limit breaches and exposure.

For further information about North American Regional Forum conferences please visit: www.ibanet.org/Regional_Fora/Regional_Fora/North_American_Reg_Forum/conferences.aspx

We look forward to meeting many of you during the year ahead.

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IBA North America office spearheads conference on human rights in North Korea

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Until recently, no country has evaded scrutiny of its human rights record more effectively than North Korea. This lack of scrutiny was attributable in part to the deliberate policies of leading powers, including the US, which focused almost exclusively on the elimination of North Korea's nuclear weapons programme. This 'security first' approach was not without its merits at the time it was first devised. With over two decades of experience, however, it is now evident that de-emphasising human rights in the hopes of achieving security-related goals did little if anything to thwart the North Korean regime. After all, it was under the 'security first' approach that North Korea advanced its nuclear and ballistic missile programme, joining only eight other countries that possess nuclear capabilities. Now, many have begun to push for a more multi-dimensional approach to North Korea, one that emphasises the basic human rights of nearly 25 million North Koreans, roughly 80,000 to 120,000 of whom live in gulags (labour camps).

This relatively recent shift has been bolstered by the landmark report issued in 2014 by the United Nations Commission of Inquiry on the Human Rights in the Democratic People's Republic of North Korea (COI), released one year after Ban Ki Moon appointed Hon Michael Kirby, a former Justice of Australia's Supreme Court and current Vice-Chair of the IBA Human Rights Institute's Council, to investigate and document the extent of North Korea's human rights abuses. The COI chronicled systematic human rights violations and crimes against humanity that have been, and continue to be, committed by North Korea's leaders as well as mid-level officials, including those who oversee North Korea's network of political prisons. The COI report made clear that the gravity and nature of these decades-long violations demand immediate attention and belated action. Among other things, the report recommended the referral of North Korean leaders to the International Criminal Court. On 27 October 2015, the IBA's North America office, together with several leading NGOs and academic institutions, convened a conference entitled: 'US Policy Toward North Korea: The Case for Instituting a More Effective, Human Rights-Centric Approach'. The goal of the conference was to provide decision-makers on Capitol Hill and in the Obama Administration, as well as the media, academics and NGOs, with the best available thinking on the value of a more human rights-centric US policy toward North Korea. The conference explored the tactics and strategies embraced by the US to date, asking tough questions such as why countries such as Burma and Zimbabwe are more heavily sanctioned by the US when the threat these countries pose is decidedly less than that posed by an already nuclearised North Korea. A secondary goal of the conference was to foster greater dialogue among civil society groups on the most effective strategies and tools for improving the human rights situation in North Korea, such as tougher sanctions currently under consideration in both the US House and Senate.

Conference speakers included US Senator Cory Gardner, South Korea's Ambassador to the US, South Korea's Ambassador for Human Rights, State Department officials such as Ambassador Robert King, and Hon Michael Kirby, whose keynote address and call to action were met with a standing ovation. Commenting on the oversubscribed conference, IBA North America Director, Michael Maya, noted:

> 'A conference on North Korean human rights in Washington, DC would have struggled to attract more than a few dozen people five years ago. The ground has shifted. In the wake of the COI report, the international community has found itself in catch-up mode. The

UN and the US Congress in particular have signalled their recognition that the human rights of North Koreans have been neglected for years – in fact, decades. What is especially interesting is the North Korean regime's rather extreme reaction to pressure mounted against them in the last year over its human rights record. The regime's sensitivity to criticism about its record, coupled with its predictable discomfort over the specter of an ICC indictment, provides the international community and human rights advocates with a new, potentially important source of leverage that did not exist under a "security-first" approach to North Korea.'

Finally, in a post-conference strategic planning session, the conference organisers identified the passage of tougher US sanctions against North Korea, including provisions dealing with human rights abuses, as the most pressing priority.

To download the Report on Human Rights in North Korea and watch a film of Michael Kirby speaking at its launch,

visit tinyurl.com/NorthKoreaReport.

Panel discussing sanctions on North Korea


Justice Michael Kirby discussing the Korean Bar Association (KBA) report on North Korea that was translated by the IBA.

North Korean defector, Kim Seong Min, discusses the use of technology in informing North Koreans

IBA North America Director, Michael Maya

US Safe Harbor programme invalidated by European Union's highest court: what it means for multinationals

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On 6 October 2015, the European Court of Justice (CJEU) invalidated the US-EU Safe Harbor framework. As the Safe Harbor framework had been in place for 15 years and counted more than 4,500 companies among its participants, this momentous decision threatens to jeopardise the continued flow of personal data from Europe to the US, and in turn could negatively affect trade between the US and the EU.

Moreover, the CJEU's reasoning – particularly its wariness of the US government's surveillance practices, as revealed by Edward Snowden – inspired data protection authorities in Europe to question the validity of the surviving methods used to legitimise data transfers, thereby foreshadowing additional shake-ups in this area of the law. In this article, we analyse the CJEU's decision and its fallout as well as how companies should proceed in this new uncertainty.

What is Safe Harbor?

The European Union Data Protection Directive prohibits the transfer of personal data to a country outside the European Economic Area (EEA) unless that country has 'adequate' data protection laws in place. While a number of non-EEA counties – such as Argentina, Canada, Israel and Switzerland – have been deemed to provide 'adequate' data protection legislation, US data protection laws remain inadequate – at least, in the eyes of EU decision-makers.

This 'inadequacy' determination means that those entities who wish to transfer personal data (including personal data related to the entity's EU employees) from the EEA to the US have to jump through more hoops to ensure that the transfer is legal under the Directive. Although data could be transferred legally between the EEA and an 'inadequate' jurisdiction like the US via model contractual clauses (so-called because they have been approved as a means of ensuring adequate security for data transfers) or binding corporate rules (by which multinational companies pledge to uphold EEA-level data security standards), the sheer volume of trade and communication between the US and Europe – and the corresponding data flows – necessitated an even more efficient legal mechanism.

Enter the Safe Harbor framework, which was designed to facilitate data transfers specifically between the EEA and the US. American companies could self-certify that they complied with the Safe Harbor framework, which essentially amounted to their public attestation that they complied with certain European privacy and data security standards. Once a company self-certified and became part of the Safe Harbor programme, the company could legally receive exports of personal data from the EEA to the US. The Safe Harbor programme thus provided US companies a relatively easy way to comply with European privacy laws while maintaining the flow of personal data from much of Europe to the US.

How did this decision come about?

US data protection laws have been under increased European scrutiny ever since Edward Snowden revealed the extent and scope of US surveillance around the world. However, the CJEU rendered its decision invalidating the Safe Harbor programme as part of what has become known as the *Max Schrems* case. Schrems, an Austrian citizen, privacy activist and Facebook user, filed a complaint with the Irish Data Protection Commissioner, asking the Commissioner to prohibit Facebook from transferring his personal data to the US. According to

Schrems, Snowden's revelations demonstrated that the US did not adequately protect personal data from National Security Agency (NSA) surveillance activities.

The Commissioner refused to investigate the complaint, reasoning that European Commission Decision 2000/520 – which set out the Safe Harbor Privacy Principles – indicated that a US Safe Harbor company provided adequate privacy protection. Schrems then challenged the decision before Ireland's High Court. The High Court noted that several US federal agencies carried out widespread surveillance of personal data in a manner contrary to Irish privacy law, and recognised that effectively Schrems was challenging the legality of Decision 2000/520 and the Safe Harbor framework. The High Court then stayed the case while asking the CJEU to determine whether the Commissioner could investigate a claim that a particular country's data protection laws were inadequate when presented with evidence supporting that theory, even if there already was a decision (such as Decision 2000/520) holding that that country's data protection laws were adequate. In its 6 October 2015 decision, the CJEU answered that question in the affirmative, holding that:

> 'The national supervisory authorities, when hearing a claim lodged by a person concerning the protection of his rights and freedoms in regard to the processing of personal data relating to him, must be able to examine, with complete independence, whether the transfer of that data complies with the requirements laid down by the [EU Data Protection] [D]irective.'

The CJEU clarified that although the Commissioner could investigate Schrems' claim, neither the Commissioner nor the High Court could invalidate a Commission decision; only the CJEU could take that action.

The CJEU went on to analyse Decision 2000/520 and held that it was invalid. The CJEU found that the Safe Harbor programme did not adequately protect personal data from 'interference' from the US government 'founded on national security and public interest requirements'. Since EU law only permits such access to personal data where 'strictly necessary', and the court described US law as allowing for access to personal data on a more generalised basis, the CJEU found that Decision 2000/520 failed to comply with the Directive's requirements and therefore was invalid.

What is the impact of the CJEU's decision?

It was immediately was clear that the impact of this decision would be significant, given the number of businesses that used the Safe Harbor framework to legally transfer European personal data to the US. Although binding corporate rules and model contracts provide other ways for US companies to transfer data in compliance with European privacy laws, the feasibility of these alternative data export options differ from company to company based on a number of factors. Model contracts, for example, only serve as a practical solution for those transactions where a company, as opposed to an individual, is exporting data to the US, while binding corporate rules are designed to facilitate only intra-company transfers. Additionally, given that implementing numerous model contracts or binding corporate rules (as the latter must be approved by Data Protection Authorities and sometimes the former needs to be as well) is a more onerous (and generally more expensive) process than self-certifying under Safe Harbor, many smaller companies may not have the resources to take advantage of options other than Safe Harbor.

Although the Directive also allows transfers outside the EEA where the data subject has given their unambiguous consent to the transfer, this option is of limited use, as it is more difficult to obtain unambiguous consent for transfer from employees than from customers, thereby making that option less appealing for those US companies importing employee personal data from their EU affiliates.

Further complicating matters is the fact that the continued validity of model contracts and binding corporate rules was called into question soon after the CJEU's Safe Harbor decision. For example, the German data protection authority for the state of Schleswig-Holstein has questioned whether model contracts and binding corporate rules could serve as adequate means of ensuring data security given the continued existence of US surveillance practices.

Germany's Conference of Data Protection Commissions, which includes both the German federal and state data protection authorities, subsequently issued a position paper that essentially endorsed that position, and stated that the German data protection authorities would not grant any new approvals for US transfers on the basis of model contracts or binding corporate rules.

In contrast, the Article 29 Working Party indicated that model contracts and binding corporate rules do remain valid transfer mechanisms, and the European Commission subsequently issued a communication affirming the same. In sum, in the wake of the CJEU's decision, it has become increasingly apparent that the days of a single, relatively simple legal mechanism that facilitates data transfers from every corner of the EEA to the US are over, at least for the time being.

Fortunately, there are some signs that this upheaval may not last much longer, as the EU Commissioner responsible for data protection recently stated that the EU and US may be able to negotiate a solution to the data transfer question by January 2016. Until then, however, companies should re-evaluate their data transfer practices to ensure that they are no longer relying on Safe Harbor certification to effectuate transfers. Additionally, they should reassess their relationships with third party vendors to whom they have transferred personal information subject to one or both parties' participation in the Safe Harbor programme.

Canadian IP litigation procedure: federal and provincial case management reforms for streamlining litigation with different results

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Introduction

In Canada, litigants seeking to enforce their intellectual property (IP) rights have a choice of forum in initiating their claims.[1] In practice, litigants can initiate claims in the Federal Court, or in a superior court in one of Canada's ten provinces that include both common and civil law jurisdictions. Choice of forum is a consideration as the relief available may differ by jurisdiction.[2]

New procedural reforms are changing the way IP litigation is carried out in Canada. The Federal Court introduced a number of new procedural measures applicable to complex litigation in a notice (Federal Court Notice).[3] These follow similar amendments to the Ontario Rules of Civil Procedure (Ontario Rules) that came into effect in 2010 and 2015.[4] In Quebec, a new Code of Civil Procedure (New CCP) is reforming all procedure before the courts in that province.[5]

These reforms aim to streamline and achieve proportionality in litigation.[6] They do so by introducing changes that include: (1) greater case management; (2) simplified document and oral discovery; and (3) limits on expert witnesses.

Under the new Federal Court reform and in Ontario, parties retain control of the discovery process, as well as choice and independence of experts. However, under the Quebec reforms, parties will have a greater burden to justify the need for discovery and independent experts. The Quebec courts also have additional authority to limit discovery and impose joint experts.

Counsel considering complex IP claims in Canada, such as patent claims, should be aware of these reforms because differences in their application will impact both litigation strategy and cost.

The following is a review of the procedural changes introduced in the Federal Court and Ontario, the impending changes in Quebec, and a discussion of the possible advantages of pursuing complex IP litigation in each.

Canada – Federal Court

The Federal Court Notice comprises ten recommendations from a working group of

judges and prothonotaries, in consultation with the Bar. While the aim is to streamline proceedings, parties still retain control in managing their case, including discovery and experts.

Case management

Earlier and increased case management will be imposed, which includes more conferences, and earlier implementation of discovery plans and pre-trial timetables.[7]

While this recommendation results in increased court involvement in pre-litigation preparation, the accent is on ensuring timely resolution of interlocutory matters and progress towards a fixed trial date. The onus on the parties is to prepare, but the parties remain masters of their litigation strategy.

Discovery

To achieve proportionality, a number of recommendations place limits on documentary and oral discovery.

Documentary discovery is limited by scheduling early conferences to manage discovery including:[8]

- scheduling of examinations;
- exchange of discovery plans;
- identification of representatives and their knowledge and expertise; and
- the scope of inquiry and document production.

Oral discovery is limited in days by the number of weeks of trial. A one week long trial will be limited to one day of discovery per party, while a one to two week trial will be limited to two days per party, a three to four week trial will be limited to three days per party, and five weeks or more will be limited to four days per party.[9]

Imposing discovery limits can curtail the parties' ability to explore issues and may result in a premature focusing on the issues. However, under these recommendations the parties still retain their ability to control their own discovery plans.

Experts

Two recommendations are aimed at reducing inefficiency, inconsistency and redundancy in expert reports. First, the limit of five experts per party in the Federal Courts Rules and under the Canada Evidence Act will be strictly enforced.[10] Second, the Court will encourage the parties to seek agreement on issues of science and technology, and may also require the parties to jointly or separately provide science and technology primers prior to trial.[11]

Despite these limits, the parties retain the ability to select witnesses and present their version of facts.

Ontario – Superior Court of Justice

Changes to the Ontario Rules came into effect on 1 January 2015 that introduced greater case management authority.[12] These reforms follow a major reform in 2010 which introduced the current rules for discovery and expert reports.[13]

Some minor differences exist between the Ontario Rules and the Federal Court Notice for case management, experts and discovery. However, as in the Federal Court, under the Ontario Rules, parties remain masters of their litigation strategy by retaining control in the case management and discovery process, as well as in selection of experts.

Case management

As in the Federal Court, in Ontario, it is possible to designate a proceeding as a case-managed proceeding as soon as the proceeding is filed.[14]

As of 1 January 2015, the Ontario Rules give greater involvement to the Court to ensure all hearings proceed in an orderly and efficient manner.[15] Pre-trial conferences became mandatory for all actions that must be attended by both the parties personally and their counsel.[16] Before the conference, parties must prepare and file their own pre-trial conference brief stating the issues and parties' positions, names witnesses, and sets out the steps and timelines required.[17] At the conference the judge or master must consider a number of matters including:[18]

- simplification of issues;
- advisability of court appointed experts; and/or
- number of expert witnesses and dates of service of reports.

The Court can also order conferences at any time to identify contested and non-contested issues, explore resolution methods, establish a timeline and secure agreement on a schedule of events or review and amend existing timelines.[19]

Discovery

Under the 2010 reforms, parties are held

to the principle of proportionality in all aspects of discovery, are required to prepare joint discovery plans, and are subject to new discovery limits.[20]

Joint discovery plans are required where the parties intend to gather evidence by discovery of documents, oral or written examination, and inspection of property.[21] Proportionality requires the Court to consider whether an order to produce a document or answer a question would be prejudicial, result in unjustified cost or excessive volume, or would unduly interfere with the progress of the action [22]

Production of documents is narrowed and limited to only those documents relevant to the issue.[23] The total length of oral examinations is limited to seven hours of examinations, regardless of the number of persons to be examined, unless the parties consent otherwise, or with leave of the Court.[24]

Experts

The 2010 reforms introduced similar requirements for expert reports as the Federal Court. Experts have an overriding duty to assist the Court, and the requirements on the content are similar.[25] Also, the Court can order experts to identify areas of agreement or disagreement.[26]

Under the reforms, earlier deadlines for service of expert reports on opposing parties were imposed, either 60 or 90 days before the pre-trial conference.[27]

Unlike the Federal Court, the Ontario Rules do not mention any explicit limitations on the number of expert witnesses, however under the Evidence Act in Ontario, the number of experts is limited to three.[28]

Quebec – Superior Court

The New CCP overhauls court procedure in Quebec and comes into force in January 2016. Like the Federal Court Notice, the New CCP has the same purpose of achieving proportionality in litigation and also give the courts greater authority over case management, discovery and experts.[29] But under the New CCP the courts now have added authority to limit discovery and impose joint experts. Practitioners are already examining the impact these reforms could have on IP litigation.[30]

Case management

For complex litigation, the Court can designate a proceeding as specially managed as soon as the application is filed is now possible under the New CCP.[31]

However, all matters are subject to new rules under the New CCP for case management. Among them are obligations on the parties to establish a case protocol that must be filed with the court, and greater court authority to impose case management measures that includes the authority to review and modify the case protocol.[32]

The case protocol must be established jointly through cooperation of the parties. The topics to be addressed include the necessity of oral and documentary discovery, but also must address the need for experts, justification for not seeking joint expert opinion, and whether the defence will be oral or written.[33]

Discovery

Limits on discovery are introduced through new obligations on the parties and new powers to the court.

Parties must address the procedure and time limit for pre-trial document discovery and disclosure in their case protocol. They must also explain the necessity of pre-trial examination of witnesses, their anticipated number and length.[34]

Parties must also adhere to new time limitations for oral examinations. No examination can last more than five hours unless, during the course of the examination, the parties agree to a two-hour extension. Leave of the Court is required for an examination longer than seven hours.[35]

The Court has significant new authority to determine procedures and limits for disclosure of documents, whether pre-trial examinations are required, as well as their term and length.[36]

Experts

Several reforms are introduced that give the Court the authority to limit expert evidence.

The parties are limited to no more than one expert per area or matter of expertise, must justify in their case protocol the reasons why the parties will not seek joint expert opinion, and identify the nature of the opinion sought.[37]

The Court has significant authority to assess the usefulness of expert opinion, and the merits of the reasons why the parties are not using joint experts.[38]

Further, the Court also has the authority to impose joint evidence, appoint its own expert

with investigative powers.[39] Once the report has been filed, the Court can seek clarification by ordering experts to meet and file additional reports within a prescribed time.[40]

Some practitioners have begun to ask how these far-reaching powers would apply to IP matters. For example, how would joint or court-appointed experts, or court-ordered additional reports apply to patent claims where parties each bear the burden of proving their own facts that are in dispute.[41]

Conclusion

These reforms signal a trend in Canada to streamline litigation. Increased case management, discovery and expert limits should reduce time to trial and contain litigation costs. As a result, Canada remains attractive for counsel seeking an efficient and cost-effective jurisdiction to initiate their IP claims. However, different advantages exist in each jurisdiction, owing to differences in the application of each streamlining reform. Counsel should consider these differences when choosing which forum to advance their claim in.

Federal Court advantages

The Federal Court will likely remain the preferred court for IP litigation. A fully bilingual court means trial and appellate cases can be heard in French, English or both.[42] The volume of IP litigation means the Federal Court is experienced and efficient in hearing from sophisticated and novice litigants alike.

The reforms that leave the parties as masters of their own discovery and experts has two advantages. Sophisticated litigants involved in high stakes IP litigation may continue to prefer the Federal Court for the flexibility they have to organise their cases. Novice litigants can also be assured that the Federal Court is efficient, while the discovery and expert reforms will allow some cost containment.

Ontario advantages

The Ontario Rules have some features that may make Ontario an advantageous forum for some sophisticated and novice IP litigants alike. Both may appreciate the reforms that require the parties themselves to play an active role in case management.

Sophisticated litigants may appreciate a forum where limits to discovery are strict enough to contain costs, but flexible enough to be set aside upon agreement of the parties.

Quebec advantages

The New CCP reforms in Quebec that grant greater authority to the courts to limit procedure and evidence could also have advantages for some IP litigants.

Novice IP litigants with small claims may appreciate the cost effectiveness of a forum where expert evidence and discovery can be significantly reduced. Moreover, in sophisticated IP claims, where procedure can become a part of the litigation strategy, the Quebec reforms that allow for early judicial determination on procedural matters, can have the advantage of containing costs and allowing the parties to focus their litigation preparation.

Notes

* IP Litigation Lawyers practising in the Ottawa office of Gowlings. The team practises in French and English, before the Federal Courts, and provincial courts, and includes members licensed to practise in Ontario and Quebec. The authors wish to thank Justin Smith for excellent critical review and editorial assistance.

1 See for example, Patent Act, RSC 1985, C P-4, s 54; Trade-marks Act, RSC 1985, c T-13, s 52-53.3; Copyright Act, RSC 1985, c C-42, s 41.24.

2 For example, a judgment in Federal Court is enforceable across Canada (see s 56 of the Federal Courts Act, RSC 1985, c F-7). Also, a perception exists that interlocutory injunctions are more readily available in provincial court than in Federal Court. See also: Jean Sébastien Brière, 'Les outils à la portée du plaideur pour un meilleur accès à la justice en matière de propriété intellectuelle' (2015) 406: *Développements récent en droit de la propriété intellectuelle* 369 at 372–74. Rules related to prejudgment interest and costs may also differ.

3 Federal Court, 'Notice to the Parties and the Profession – Case Management: Increased proportionality in Complex Litigation before the Federal Court', 24 June 2015 [Federal Court Notice].

4 O Reg 438/08; O Reg 394/09; O Reg 170/14.

5 Code of Civil Procedure, SQ 2014, c1, comes into force January 2016 [New CCP].

6 Federal Court Notice, n2 above at paras 2 and 3; New CCP Art 18; O Reg 438/08; O Reg 394/09; O Reg 170/14

7 Federal Court Notice, n2 above, Recommendation 1.

8 *Ibid,* Recommendation 4.

9 *Ibid,* Recommendation 5.

10 *Ibid,* Recommendation 8.

11 *Ibid,* Recommendation 8 & 9.

12 'What's New? Changes to the Rules of Civil Procedure and Forms in effect January 1, 2015', online: Attorney General of Ontario at www.attorneygeneral.jus.gov.on.ca/english/courts/update_Civil_Procedure_Jan01_2015.pdf.

13 'What's New? Changes to the Rules of Civil Procedure', online: Attorney General of Ontario at www.attorneygeneral.jus.gov.on.ca/english/courts/civil/changes_to_rules_of_civil_procedure.php.

14 Rules of Civil Procedure, RRO 1990, Reg 194, r 77.02(1), 77.05(2) & 77.05(4) [Ontario Rules]. See also: 'Consolidated Practice Direction Concerning the Commercial List', online: Ontario Superior Court of Justice at www.ontariocourts.ca/scj/practice/practice-directions/toronto/commercial/#Part_II_Matters_

Eligible_for_the_Commercial_List.
15 Ontario Rules, n14 above, r 50.01.
16 *Ibid*, r 50.02 & 50.05.
17 *Ibid*, r 50.04.
18 *Ibid*, r *r* 50.06.
19 *Ibid*, r 50.13.
20 *Ibid*, r 29.1, 29.2, 30 & 31.
21 *Ibid*, r 29.1.03.
22 *Ibid*, r 29.2.03(2).
23 *Ibid*, r *30.02(1)*.
24 *Ibid*, r 31.05.01.
25 *Ibid*, r 4.1.01 & 53.03(2.1); Federal Court Rules, SOR/98-106, r 52.2; and Schedule – Code of Conduct for Expert Witnesses.
26 Ontario Rules, n14 above, r 50.07(1).
27 *Ibid*, r 53.03.
28 *Ibid*, r 50.06(8); Evidence Act, RSO 1990, cE23, s12.
29 'The New Code of Civil Procedure', online: Justice Québec at www.justice.gouv.qc.ca/english/themes/ncpc/index-a.htm#thenewcode.
30 Alexandra Steele, 'L'expertise en propriété intellectuelle devant le nouveau *Code de procédure civile*' (2015) 406: *Développements récent en droit de la propriété intellectuelle* 51 at 51; Jean Sébastien Brière, 'Les outils à la portée du plaideur pour un meilleur accès à la justice en matière de propriété intellectuelle' (2015) 406: *Développements récent en droit de la propriété intellectuelle* 369 at 399 & 417.
31 New CCP, n5 above, Art 157; Code of Civil Procedure, CQLR, c C-25, Art 151.11 to 151.13 [Old CCP].
32 New CCP, n5 above, Art 148 to 159; Old CCP n31 above, Art 151.6, 151.7, and 151.8.
33 New CCP, n5 above, Art 148 al 2 para (3)(4) and (5) and Art 149.
34 *Ibid*, Art 148 al 2 para (3) and (6).
35 *Ibid*, Art 229 al 2.
36 *Ibid*, Art 158 (1) and (3).
37 *Ibid*, Art 148 al 2 para (4); Art 232 al 2.
38 *Ibid*, Art 158 al (2).
39 *Ibid*, Art 158 al (2), Art 234 and Art 236.
40 *Ibid*, Art 240.
41 Alexandra Steele, 'L'expertise en propriété intellectuelle devant le nouveau *Code de procédure civile*' (2015) 406: *Développements récent en droit de la propriété intellectuelle* 51 at 54 & 83.

Legitimising displaced persons residing in the US – an international law perspective on DAPA

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Introduction

The issue surrounding immigration plagues a North American Union because of the national security implications for allowing the natural progression of this economic evolution.[1] Applying the concepts of international law and human rights in order to validate a population of displaced persons residing in the US ('ethical territoriality')[2] is perhaps a remedy; but, is especially controversial in the US primarily due to historical controversies surrounding cultural and rule of law disparities. This paper proposes the legitimacy of the Mexican-American migrant, applying the principles of customary law and practice; but, perhaps, it will do just as well to inform many that migration is the global reality of human dynamics, and in North America is largely due to economic inequities and the fundamental right to simply choose your own destiny. Displaced persons (as opposed to migrant populations) are the result of ineffective and outdated law. In fact, the Obama administration's executive order (DAPA), staying the deportation of approximately four million human beings living in the shadows of ineffective law in the US, is not as controversial as some may purport, is constructed from constitutional and domestic law, and is actually evidence of interdependence.[3] There must be an emphasis placed on consensus building [and] on increasing participation of all stakeholders,… there is a clear [human] rights component associated with the World Bank's Comprehensive Development Framework (CDF) that has made 'freedom' the paramount consideration of development.[4]

Customary law and practice

The US Constitution delegated to Congress the power to 'establish a uniform Rule of Naturalization'.[5] Further, any state law that purports to modify the terms of a resident's immigration status is presumptively in

violation of the Supremacy Clause and preempted by federal immigration law.[42] Meanwhile, section 744, the most current and applicable immigration reform bill, is seemingly in 'contrast' to HR 1417, HR 1772, HR 2131, HR 1773, and HR 2278,[7] leaving us at DAPA and the reason that the Obama administration found it necessary to take executive action despite triggering controversy in federal court.

When this case escalates, a distinction should be made between prior Supreme Court cases and the DAPA initiative in that, DACA was successfully implemented. Also, the Supreme Court's history surrounding citizenship rights largely revolves around suffrage issues, which the Supreme Court has ruled can be a state practice.[8] The tragedy of this is that depending on the state, one may be able to vote[9] and be subject to the draft[10] but still be facing the possibility of deportation. Also, undocumented workers paid US$11.84bn in state and local taxes in 2012.[11]

An international perspective reveals that Mexico could likely represent this group in a WTO court, arguing for rights to work, furthering the interests of the DAPA initiative by triggering NAFTA and the dispute mechanisms put in place by the three member nations. Standing by Mexico in an investment court may be sought through traditional kinship arguments and the fact that migrants tend to send their earnings home to Mexican residents benefiting the Mexican economy; however, should an international declaration be sought, outside of the US court system, the most likely court where this group could be represented and heard is in front of the International Court of Justice (ICJ) seeking a human rights initiative. Arguing ICJ standing is not within the scope of this article. However, this being said, it is important to note the ICJ and its holding in the *Asylum* cases wherein the court seems to acknowledge the realities of democracy and difficulty in passing legal reforms.[12]

The ICJ held that 'silence by a government was actually an objection to regional customary law and practice',[13] may be an argument contrary to an evolutionary interpretation of NAFTA, and is further supported by other US court cases such as *American Baptist Churches v Meese* holding that 'even if the practice of granting …refuge to persons… had ripened into a norm of customary international law, Congress had specifically rejected that norm.'[14] However, Article 38 of the ICJ Statute identifies 'international custom' as evidence of general practice accepted as law.[15] The 'general practice' refers to the practice of states and must in turn be undertaken by [nations] as a binding legal obligation.[16] The Foreign Relations Restatement of the Law of the US, Third, draws a distinction between general and special custom.[17] 'Special' customary law arises from a 'regional' or 'special' grouping that in turn gives rise to regional customary law as binding on states of a particular region.[18] Drawing on the *Asylum* cases, however, it notes that the state alleged to be bound must have 'accepted or acquiesced in the custom as a matter of legal obligation not merely for reasons of political expediency.'[19]

Therefore, the question is whether Mexico is a special case and the US should thus acquiesce according to human rights initiatives. The answer is that Mexico is indeed a special case. It is the second largest trading partner with the US and NAFTA has been the inspiration for migration for many Mexican immigrants. Indeed, special status was afforded during and after the Second World War when the US and Mexico negotiated a Mexico-specific temporary worker programme known as the Bracero programme, and although abandoned following the September 2001 terrorist attacks, Mexican President Vicente Fox and US President George W Bush reached agreement on a bilateral framework for Comprehensive Immigration Reform (CIR).[20] Lastly, human rights is binding law: 'everything human rights is Constitutional'.[21]

Conclusion

The DAPA initiative, legitimising a large number of undocumented, displaced persons residing in the US from Mexico would not be a detriment in that these humans reside here and over time have naturalised and become part of the community. Conditions within the US would improve because this population could work, free from fear of deportation, and become part of the economy. Further, the large number of undocumented workers residing within the US is a historic anomaly. Mexico has become a developing nation with more trade agreements than any other country, even China. As Mexico advances economically and ensures jobs for its workers, migration has and will continue to ease. 'The culture of democracy permits a hopeful closing thought: through the acts of memory, empathy, and imagination… history can be remade for new purposes in a new time.'[22]

42 For example, see *Eurocopter v Bell Helicopter Textron Canada Limitée*, 2013 FC d13; *Bell Helicopter Textron Canada Limitée v Eurocopter*, 2013 FCA 219.

Notes

1 Pearson states that 'cultural distances between the US and Mexico have narrowed or disappeared'. (Robert A Pastor, *The North American Idea: A Vision of a Continental Future* (Oxford University Press, 2011) Loc 1370). However, an illustrative article in *The Economist* describes how the integration process between the US and Mexico is ongoing but possibly complete in the southwest. Source US Census Bureau. ('Border Jumping, *Old Mexico Lives on*', www.economist.com, 1 February 2014). Despite cultural disparities, the European Union (EU) has evolved successfully and includes the right to travel between member states.

2 Linda Bosniak, 'Being Here: *Ethical Territoriality and the Rights of Immigrants*' (July 2007) 8 Theoretical Inquiries L 389.

3 Section 744, 'a comprehensive immigration reform bill that includes additional funding for border security, legalization for certain unauthorized immigrants, and changes to the temporary and permanent immigration systems in contrast and contradiction to house committees (HR 1417, HR 1772, HR 2131, HR 1773, and HR 2278) who have taken up a series of discrete immigration measures' (Clare Ribando Seelke, *Mexico's Pena Nieto Administration: Priorities and Key Issues in U.S.-Mexican Relations* (2013) loc 22). See also CRS Report R43097 and Peter Zeihan, *The Accidental Super Power, The Next Generation of American Preeminence and the Coming Global Disorder.*

4 David M Trubek, *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press, 2006) 11. The World Bank's development fund is used here in the analysis to link economic prosperity to the freedom to travel and to substantiate the proposed North American Regional Development Fund as legitimate and the next phase under NAFTA. See generally: Stephen Zamora, 'A Proposed North American Regional Development Fund: The Next Phase of North American Integration Under NAFTA' (2008) 40 Loy U Chi L J 93.

5 US Const Art I, s 8, cl 4.

6 Jamin B Raskin, 1429.

7 Clare Ribando Seelke, *Mexico's Pena Nieto Administration: Priorities and Key Issues in U.S.-Mexican Relations* (Congressional Research Service, 15 August 2013) loc 22.

8 Jamin Raskin, 1417, quoting *Dred Scott v Sanford*, 60 US 393, 405 (1856).

9 *Ibid.*

10 *Ibid*, 1413.

11 Matthew Gardner, Sebastian Johnson, and Meg Wiehe, *Undocumented Immigrants' State & Local Tax Contributions* (The Institute on Taxation & Economic Policy, April 2015). No taxation without representation is an argument from as far back as the American Revolution. Jamin Raskin at 1444.

12 *Columbia v Peru, The Asylum Case*, International Court of Justice (1950).

13 *Ibid.*

14 *American Baptist Churches In the USA v Edwin Meese III*, 712 F Supp 756 (N D Cal) (1989).

15 Martinez-Fraga and Reetz, 113.

16 *Ibid.*

17 *Ibid.*

18 *Ibid*, at 115.

19 *Ibid.*

20 Clare Ribando Seelke, *Mexico's Pena Nieto Administration*, CRS Report 42917, loc 323.

21 Clarence Carson, *A Basic History of the United States, Vol 3, The Sections and the Civil War 1826–1877*, quoting Charles Sumner.

22 Jamin B Raskin, 'Legal Aliens, Local Citizens: The Historical Constitutional and Theoretical Meanings of Alien Suffrage' (1993) 141 U Pa L Rev 1391, 1470.

Is your company's executive protection programme appropriate for today's risk environment?

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The risk environment for companies and executives has changed in a way that is more likely to produce conflicts of interest between them. With enforcement agencies under pressure to successfully prosecute corporate wrongdoing, companies are increasingly conducting internal investigations of suspected wrongdoing in anticipation of reporting the conduct to authorities to head off a more formal inquiry. Companies that cooperate with authorities in this way may receive credit for that cooperation – possibly avoiding indictment or lessening the amounts of fines or penalties imposed. US authorities have made it clear that such credit will only be given when companies fully cooperate including turning over all information about all individuals involved in or responsible for the misconduct at issue.[1]

This combination of authorities' emphasis on the pursuit of the individual wrongdoers and companies' serving as investigators of suspected wrongdoing by their own personnel is not contemplated in many executive protection programmes. The result for both the company and executives can be that protections do not operate as assumed or intended in the event a problem arises.

What's an executive protection programme?

Here, the term refers to the two broad categories of protections that companies typically provide to their directors and officers against civil and criminal risks that they may face as a result of acting in their professional capacities for the company. The first protection is a promise from the company to indemnify the individuals, or advance costs to them, for such risks to the extent the company is legally permitted to do so. The second is directors and officers liability insurance ('D&O insurance'). Depending on the type of policies purchased, D&O insurance serves to protect the executives in situations where the company is not legally permitted or is financially unable to indemnify (or advance costs to) them. The insurance may also provide cover to the company for the amounts that it indemnifies or advances to individuals.[2]

How does this change in the risk environment impact the effectiveness of executive protection programmes?

American legal commentators have been vocal as to the myriad potential issues that company cooperation with enforcement authorities raises for innocent executives who may be subject to such internal investigations.[3] These issues are wide-ranging and touch on several areas of law, including:

- The extent of the attorney-client privilege that attaches to the executive's statements during the investigation, the company's ability to waive that privilege without the executive's consent, and the scope of the warning that the company's attorney must provide to the executive in order to maintain that ability.
- Whether an executive responding to questioning in this relatively informal setting is equipped to assess the potential implications of his or her statements without legal advice, specifically the implications of a waiver of their Fifth Amendment rights with respect to statements made during the interview.
- Whether asserting Fifth Amendment rights will be considered a refusal to cooperate with the investigation and may serve as a basis for termination of employment and commensurate loss of salary and benefits.
- Whether the executives have an enforceable right to compel the company to advance funds to finance their legal expenses in relation to the investigation, and if so, whether that right is conditioned on the provision a declaration of good faith belief about their conduct (even where doing so would be a waiver the executives' Fifth Amendment rights with regard to those statements).
- Whether the executives' legal costs in relation to an internal investigation are recoverable from D&O insurance and whether executives can functionally comply with the terms and conditions of those policies.

To what extent will the company and executives have protection under their D&O insurance programme for the executive's legal costs in connection with the internal investigation?

The extent of cover available, if any, will depend on the exact terms and conditions of the D&O insurance policies that the company has purchased, but most provide no, or only limited, coverage for internal investigations.

Some policies cover internal investigations triggered by certain specified events – such as a request from an enforcement authority following the company self-reporting or a demand by a shareholder that the company bring suit against the executives. However, this 'pre-investigation' or 'pre-inquiry' cover will not normally respond at the point that the investigation is still purely internal and prior to any interaction with enforcement authorities. This cover may be sub limited (US$250,000 is typical) and, to the extent that the cover benefits the company, it may be subject to a sizeable deductible, or retention, paid by the company. Policies have evolved in this area over recent years and vary widely, so it is worth looking closely at the extent of cover available from different insurers.

If the company purchases dedicated personal asset protection for individuals ('Side A' D&O insurance), again, the offerings vary considerably but, significantly, cover is now available for an executive's legal costs during a purely internal investigation to the extent that his or her company does not advance those costs. Policy terms also contemplate the constraints of executives potentially subject to criminal liability when submitting defence expenses or entering into an agreement to resolve potential criminal charges.

Conclusion

Executive protection programmes are deceptively complex. It is worth taking some time and effort to ensure that they will work as intended with regard to the emerging risks at both the parent company than at the subsidiary level. Savvy companies will carefully look at these issues before a situation arises and adjust their programmes accordingly.

Notes

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1 In September 2015, US Deputy Attorney-General Sally Yates issued guidelines to all federal prosecutions, which emphasises the US government's commitment to holding individuals accountable and to make clear that only companies that *fully* cooperate with authorities will receive credit for their cooperation; *US Department of Justice Memorandum regarding Individual Accountability for Corporate Wrongdoing* (9 September 2015).

2 Although beyond the scope of the discussion here, D&O insurance may also provide cover for the corporate entity for securities' claims brought by a shareholder of the group.

3 See James D Wing, 'Corporate Internal Investigations, The Fifth Amendment, and Advancement of Defence Costs – A Special Report' (January 2015) 52(2) The John Lined Letter; and James D Wing and Andrew Oringer, 'Discipline Involving Multiple Disciplines – Protecting Innocent Executives in the Age of "Cooperation"' (Fall 2015) 70 The Business Lawyer. Note that these commentators are specifically concerned with innocent individuals as opposed to individuals engaged in deliberate wrongdoing. As noted by these commentators, common situations of concern for innocent executives include: (1) being falsely accused by a whistleblower or subordinate; (2) having participated in a longstanding customary conduct that is later attacked as illegal; and (3) having criticised conduct and then been persuaded to withdraw those criticisms based on advice from counsel.

A buyer's guide to representation and warranty insurance

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The middle market has recently seen a substantial increase in the presence of representation and warranty insurance (R&W insurance) in M&A transactions. R&W insurance can be a valuable tool to overcome hurdles in finalising a deal, reducing a buyer's risk in acquiring a business, adding value to a buyer's offer in a competitive setting and reducing a seller's risk of paying post-closing indemnification claims. While R&W insurance can be obtained by either the buyer or the seller, buyers more commonly obtain the R&W insurance policy. This article takes a buyer through the process of determining whether R&W insurance is appropriate for its transaction and the steps a buyer will take to obtain the insurance.

First, we will describe R&W insurance generally and discuss how it can be used to add value to a transaction. Then, we will identify which buyers may particularly benefit from R&W insurance. Next, we will discuss the features of R&W insurance policies. Finally, we will explain the process for obtaining R&W insurance.

R&W insurance considerations

R&W insurance is designed to protect the policy-holder from losses resulting from breaches of representations and warranties contained in a purchase agreement for the sale or acquisition of a business. In a typical transaction, the seller indemnifies the buyer for losses resulting from breaches of the representation and warranties, subject to highly negotiated caps, thresholds and baskets. The seller will often agree that a portion of the purchase price will be held in escrow or held back by the buyer to secure its obligation for indemnification. Agreeing to the specific amount of caps and thresholds, the amount placed in escrow or held back, and the survival of the seller's obligations can be a substantial challenge to the parties proceeding with the deal.

Indemnification, escrows and holdbacks may offer insufficient protection to a buyer for significant breaches. The seller may require a substantial threshold before any indemnification obligation is triggered, or the indemnification claims could be subject to a low cap. The seller may also agree to indemnify the buyer for losses for a brief survival period following closing of the transaction.

Further, the buyer's sole remedy for indemnification after the escrow or holdback is exhausted is to bring a claim against the seller. At this stage, the buyer is relying on the creditworthiness of the seller to pay the claim. In some cases, such as acquisitions from a public company or the acquisition of a distressed business, seeking indemnification in excess of the escrow may be practically impossible. Additionally, a claim for indemnification can require time-consuming and costly arbitration or litigation. Even if an indemnification claim is successful, collecting on the judgment may be difficult.

R&W insurance may replace or supplement the seller's indemnification obligations and further protect the buyer from breaches. With a buyer's policy, the buyer files a claim with the insurance provider once the insurance policy's deductible is met. As regular, repeat players in the market, R&W insurance providers are uniquely incentivised to honour claims and develop positive reputations in the deal-making community.

Buyers that should consider R&W insurance

Generally, R&W insurance is best suited for transactions valued at a minimum of US$20m. Premiums on policies for deals below this amount may be cost prohibitive for the buyer.

Buyers in the following scenarios should especially consider R&W insurance as method of adding value to their transaction:

- *Auction sales*
  Buyers bidding to acquire a business in an auction can add value to their bid and make the bid more appealing to the seller by offering to obtain R&W insurance. The presence of the policy substantially minimises the seller's risk, allows the sellers to take more money 'off the table' at closing, and can make the overall offer more attractive.
- *Negotiate a lower purchase price*
  In non-competitive settings, buyers may be able to negotiate a lower purchase price by offering to obtain R&W insurance, which will reduce the seller's risk in the transaction. Buyers seeking to use R&W insurance as a way to lower the purchase price should raise this early in the negotiating process.
- *Finalising deals*
  Buyers and sellers may have significant trouble in agreeing on the terms of the indemnity, the cap, the threshold, the amount and terms of the escrow or holdback and the survival period for each representation and warranty. R&W insurance shifts a portion of the risk to the insurer, and therefore, allows the parties to more easily bridge the gap in this major negotiating road block.
- *Reduce disputes with management*
  In transactions in which the sellers are also the managers of the target and remain with the target following closing, indemnification claims can create conflicts between the buyer and the sellers who continue to operate the business. The indemnification claim can also distract the management sellers from their main focus of running the business. The presence of R&W insurance permits the buyer to seek indemnification in the event of a loss without creating a conflict with the managers of the ongoing business.
- *Uncertain or unavailable protection*
  Many sellers are unable or unwilling to provide complete indemnification protection. For example, public company transactions typically do not include escrow accounts to secure indemnification claims. In the sale of distressed business, the seller may not have sufficient funds to pay indemnity claims. Further, certain sellers may be difficult to locate or collect from. R&W insurance can provide the buyer with greatly expanded options for indemnification protections and substantially increase the likelihood of collection.

The R&W insurance policy

The terms of the representation and warranty policy can be tailored to the terms of the individual transaction. Like most insurance policies, the R&W insurance policy will have a deductible, a cap, insured losses and exclusions.

The insurer wants to ensure that the seller retains some liability for losses resulting from breaches of the representations and warranties, and therefore is incentivised to fully negotiate the terms of the purchase agreement and fully disclose any exceptions to the representations and warranties. Deductibles typically range from one to three per cent of the total consideration. The deductible is generally matched to the amount of the escrow or holdback so that the buyer does not have a 'gap' in coverage. The buyer should carefully compare the type of claims covered by the policy to those in the purchase agreement.

The cap for the policy can be greater, lesser or equal to the cap for indemnification in the purchase agreement. R&W insurance can

allow the buyer to have greater coverage than the seller would otherwise offer by increasing the cap and/or lowering the threshold. However, the insurance premium will increase along with the insurer's potential exposure.

The specific 'loss' covered by the policy should be structured to mirror the purchase agreement. The insurance provider will therefore cover any losses the seller would be required to cover under the purchase agreement, except for certain specifically excluded items.

R&W insurance policies may not protect against all losses related to the representations and warranties. R&W insurance policies will only insure against unknown claims – any claim related to a matter identified on a schedule, or otherwise known to the buyer, will be excluded. Buyers should also carefully review the terms of the R&W insurance policy when sellers are 'rolling over' equity into the buyer. In this case, the knowledge of the sellers should not prevent the buyer from collecting against the policy because a roll-over seller was aware of a breach.

Further, some insurers are unwilling, or unable, to insure certain representations and warranties, such as environmental, tax or intellectual property. A separate policy may be obtained for those specific representations and warranties. The buyer should discuss whether the insurance provider will be able to cover each of the representations and warranties early in the process.

Finally, R&W insurance policies do not protect against all losses associated with a purchase agreement. The policies are aptly named, and therefore, only insure against breaches of representations and warranties. Breaches of covenants are excluded. Similarly, amounts payable in connection with various purchase price adjustments or earn-outs are excluded. Consequential damages, fines and penalties may also be excluded.

How to obtain R&W insurance

Once the buyer has decided that R&W insurance is the right choice for its transaction, the buyer can contact an insurance broker or insurance provider. Obtaining R&W insurance can take weeks from start to finish; therefore, the buyer should contact the broker or insurer early in the deal cycle. The process has continued to speed up as the market matures.

Insurance carriers that offer R&W insurance have highly specialised divisions that offer the coverage. When selecting among insurance carriers, the buyer should consider the experience of the carrier in dealing with similar transactions, the ability of the carrier to deal with any time pressures, and the carrier's history of paying claims.

Like all insurance, the premium for R&W insurance will vary based on many factors, including: the size of the transaction, the level of risk involved, the deductible and the cap. Premiums typically range from two to five per cent of the limit of liability.

The carrier will typically provide a price and coverage quote within a few days of being contacted by the buyer. The carrier will also provide a list of due diligence requests. Often, the buyer can provide the carrier with access to the data room for the deal to address the due diligence requests. Insurers generally require an upfront, non-refundable fee to cover their costs during underwriting process. The fee can range from US$10,000 to US$50,000.

The time to complete due diligence will vary depending on the size and complexity of the deal, but most carriers can arrange for diligence to be completed in approximately a week for most transactions. Whether or not the buyer decides to purchase the insurance, this additional diligence review can be of value to the buyer, because it provides an additional set of eyes on the transaction and the associated risks. After due diligence is complete, the carrier will provide the buyer with a draft of the insurance policy. At this point, the buyer can review the policy and its coverage, compare the policy to the purchase agreement, and evaluate the costs and benefits of obtaining the policy to determine if it will purchase R&W insurance.

Conclusion

Buyers should carefully consider whether R&W insurance would be valuable to its transaction. R&W Insurance has proven to add value to M&A deals where the buyer is in a competitive setting, is seeking to negotiate a lower purchase price, needs to bridge the gap with the seller on finalising indemnification terms, wants to reduce the risk for management disputes and seeks additional assurance that it could recover an indemnification claim in the event of a loss from a breach of a representation.

Buyers must carefully review the terms of the insurance policy to ensure that the policy provides the appropriate protections. Once the buyer determines that R&W insurance is right for its transaction, the buyer should contact an experienced R&W insurance broker or carrier to discuss the specifics of their situation.