COMMODITIES BULLETIN
FEBRUARY 2024

Welcome to the first edition of HFW's Commodities bulletin in 2024, with some signposts for the year ahead.

These are challenging times for our commodities clients and we begin this edition with an article from London Associate Shelby McGreachan and me, offering some key legal and contractual pointers for traders trying to navigate a route through in the face of restricted access to the Suez and Panama Canals. Another challenge is cyber fraud and in our second piece, Hong Kong Senior Associate Edward Beeley offers some encouragement from the Hong Kong Courts in relation to asset tracing following an email scam. From Hong Kong, we move to Paris and then back to London to cover some new legal developments. Paris Partner Vincent Benezech reports on legislation expected to be introduced in France this year to facilitate the use of electronic trading documents under French law. London Partner Barry Vitou closes this edition with a reminder about the impact on our clients of the new Economic Crime and Corporate Transparency Act. This came into force in the UK on 26 December 2023 and in his article, Barry encourages clients to consider whether their D&O insurance is adequate in light of the changes it has introduced.

Team news and information about where you can meet us next is on the back page. Thank you for reading this edition and we hope it is helpful to your business.

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FEELING THE SQUEEZE – WITH TRADING ROUTES UNDER PRESSURE, SOME KEY CONTRACTUAL CONSIDERATIONS FOR COMMODITIES TRADERS

For very different reasons, two of the world's most important waterways, connecting oceans and continents, are under pressure. In this article, we offer some key legal and contractual pointers for commodities traders trying to navigate a route through these challenging times.

Challenge 1: Red Sea/Suez Canal

Since November 2023, Iran-backed Houthis have been targeting and attacking vessels passing through the strait of Bab al-Mandab, which leads up to the Suez Canal.

The attacks have significantly disrupted the shipping industry. The obvious alternative is to re-route around the Cape of Good Hope. However this is not without its challenges, given that it adds both time and cost to each journey, as well as an increase in freight costs and carbon emissions for each cargo.

Challenge 2: Panama Canal

At the same time, there are delays in navigating the Panama Canal caused by drought. The authorities have taken drastic action to protect water supplies and avoid vessel groundings. Currently, only 24 vessels are permitted to transit the Panama Canal each day. The restrictions are expected to remain until the start of the next wet season, at the end of April.

An alternative option is to use the Panama Canal Railway but this has limited capacity. Some shipping lines are paying large sums in auctions to jump the queue to transit the Canal, or are exploring alternative routes. As with the Suez Canal however, those alternatives are problematic, slower and more costly.

What are the main legal implications for commodities traders?

For commodities traders affected by these challenges there are a number of risks, including delay, rising costs, missed delivery windows, end buyers refusing to accept delivery of goods arriving late and perishable cargo spoiling on longer journeys.

There are many considerations in relation to shipping contracts, in particular charterparties and bills of lading, including because of the recent judgment in The Polar.[1] Look out for our upcoming briefing on this to find out more. In this article, however, we focus on trading contracts.

Proactively considering the legal options and practical solutions available can help to minimise the impact on your business.

What can you do?

Start by identifying which of your trading contracts are most vulnerable to the impact of the delays and rank these in order of priority to your business, so that you know where to focus your resources.

Consider whether renegotiation would help. If so, record any changes to existing contracts carefully in writing. Ensure that you have checked other relevant terms of the contract, including no waiver, entire agreement and no oral modification clauses.

Review your priority contracts with a particular eye to some key clauses so that you understand where you, and your counterparty, are most at risk and what contractual protections you both have:

Incoterms – particularly in relation to Red Sea transit, which party bears the risk of loss of the goods?

Quality – if your goods are at risk of deterioration as a result of delay (particularly in warm/moist climates), who bears that risk and how is quality assessed?

Insolvency – if you believe a counterparty to be at risk of insolvency as a result of delays or increased freight rates, what are your options – and what would be the best outcome for you? Does your contract contain an early termination clause

which could be triggered by an insolvency? Do you have security that can be called upon, or the right to require that security be provided?

Notification – follow these carefully. Failure to comply with notice provisions can jeopardise the success of claims or defences to non-performance.

Force majeure (FM) – Does your contract contain an FM clause? If not, FM is not an available option. If so, consider whether you (or your counterparty) might be able, or likely, to trigger it. Put your position under scrutiny. Depending on the precise terms of the FM clause, you will typically have to show all of the following:

- a FM event has occurred which was beyond your control.
- it has prevented, hindered or delayed your performance of the contract.
- you have taken all reasonable steps to avoid or mitigate the event or its consequences.

It is worth noting that a case on FM is about to come before the UK Supreme Court. In *RTI v MUR*, the Supreme Court will decide whether, where a contractual FM clause contains a proviso requiring the affected party to exercise reasonable endeavours to overcome the FM, the proviso can require the affected party to agree to accept a non-contractual performance.

If you think FM applies, follow the requirements of your FM clause exactly. For example,

- Is there a time limit for claiming FM?
- What should your FM notice contain and where/how should it be sent?
- Do you have to serve evidence?
- Do you have to serve notice when the FM event ends?

If it has become more expensive – or even uneconomic – to perform the contract, that is unlikely to constitute FM.

Other considerations

Mitigation/Documentation – If there is a risk of a dispute arising, have in mind that you must be able to evidence your loss, or the circumstances of your claim (or a counterparty's claim against you). Keep good, contemporaneous records as you may find it difficult to track back after the event.

You may have an express obligation to mitigate your loss in some circumstances. Document decisions and steps taken to mitigate the impact of the situation on your business or contract.

Frustration - The English law doctrine of frustration provides a remedy in which a party is excused from all future contractual obligations where all of the following elements apply:

1. an event has occurred which was not considered by the parties when they decided to enter into the contract.
2. that event is important enough to be considered as affecting an obligation which is at the heart of the contract.
3. it has become illegal or impossible for the parties to perform that obligation (or if the parties were to perform it then it would be profoundly different from what was contracted for).
4. the inability to perform the obligation is through no fault of the parties.

At present, it seems unlikely that all of these elements could be met.

HFW is able to advise in more detail on any of the issues raised in this story.

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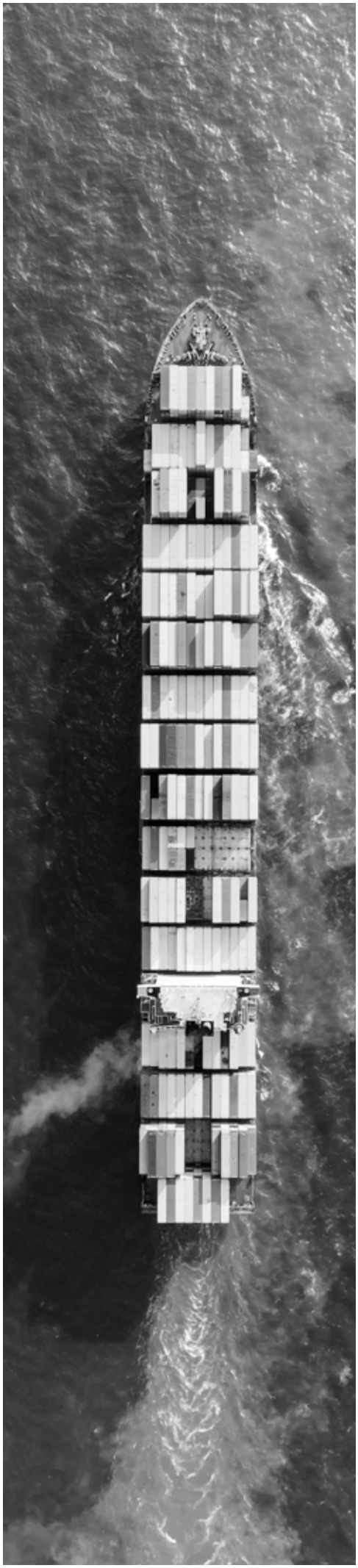
Footnotes:

1. Herculito Maritime Ltd and others (Respondents) v Gunvor International BV and others (Appellants) (supremecourt.uk)



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IN VINO VERITAS[1] OR 酒後吐真言 – FRAUD AND ASSET RECOVERY IN HONG KONG

Fraud is an ongoing threat to businesses worldwide. But when a party claims innocently to have received the proceeds of crime, how should the Court decide who to believe? A recent case in Hong Kong involving a self-proclaimed wine merchant and a US$64 million email fraud provides some sobering guidance.

Background

Impersonating a high-level executive is a popular technique in online fraud and in *Toyota Boshoku Europe N.V. v Kingsville (HK) Enterprises Ltd*[2], the victim's financial general manager was persuaded by "the CEO" that a secret and urgent acquisition was on foot. As a result, approximately HK$500 million (around US$64 million) was paid out to various recipient companies on fraudulent instructions.

Stealing the money is no good if you can't keep it, and the *Kingsville* fraudsters chose a popular technique to cover their tracks: dissipating the stolen money as fast and as widely as possible, by a rapid series of bank transfers from the "first layer" recipients outwards and down to multiple second, third and further layers. For the victim, the race is then on to trace the stolen funds and obtain court orders preventing further transfers of the money so that recovery actions can be brought to a successful conclusion.

The proceedings

Acting quickly, the victim had obtained interlocutory proprietary and *Mareva* (freezing) injunctions, plus disclosure orders, against 48 assorted intermediate-level defendants. The victim then pursued the stolen funds further, including into the hands of Hong Kong Shun Yuen Import & Export Limited ("**Shun Yuen**"). Shun Yuen was a "third layer" recipient and had received a total of US$274,986.08 (the "**Funds**"). Shun Yuen sought to resist the victim's application to continue an ex parte (without notice) injunction obtained against it.

Lower-level recipients are by nature distant from the underlying fraud and will often raise two defences:

1. ***Bona fide* recipient:** The money was received as part of a transaction conducted in the course of the recipient's usual business (in Shun Yuen's case, allegedly as the proceeds of its wholesale trade of wine).
2. **Change of position:** The recipient has so changed its position that it would be inequitable in all the circumstances to force it to make restitution (in Shun Yuen's case, allegedly because it had applied the Funds in part-payment for outstanding wine purchases).

The outcome

Information obtained using its disclosure orders meant that the victim could show that the Funds received by Shun Yuen were directly traceable to two higher-level recipients. With the money demonstrably the proceeds of fraud, the question for the Court was whether either of the two defences could be made out. This required an examination of Shun Yuen's justification for receiving the Funds, i.e. its supposed wine wholesale business.

Bona fide recipient?

The Court did not accept that Shun Yuen was carrying on a *bona fide* wine trading business. Disagreeable tasting notes included that:

- Shun Yuen had produced only 21 pages of documents to substantiate its claim to engage in wholesale general trading. None related to the period when the stolen money was received and some showed signs of having been altered or redacted.
- Shun Yuen claimed it maintained no logs or other chronological records of incoming wine orders, had not submitted any records of its stock and did not keep any records of its customers.
- The invoices against which the Funds were supposedly received named a purchaser

but lacked any address or contact information, gave bank account details but omitted any payment terms, and did not specify the vintages ordered.

- Shun Yuen had no website or other internet footprint and did not advertise – so how did its alleged customer know what was available to purchase?
- Shun Yuen claimed to be carrying on a wholesale frozen meat business in addition to wine trading but its premises leases revealed no refrigeration equipment and in any event, even a legitimate frozen goods operation would not explain the irregularities around its alleged wine business.

Change of position?

Shun Yuen's "change of position" defence left a similarly bad taste. The Court found that Shun Yuen had done no more than make a payment in the ordinary course of business: its liability for the wine purchases had already arisen before it received the Funds, and it therefore could not show that as a result of receiving the Funds, it had engaged in some extraordinary expenditure.

Accordingly, the injunction was continued; sour grapes for Shun Yuen.

Conclusion

Kingsville is important because it demonstrates that the Court will not look at the *bona fide* and change of position defences, which are commonly pleaded in fraud cases (often unconvincingly and, as with Shun Yuen, narrowly and with limited supporting documentation), in isolation.

Instead, it will scrutinise the evidence holistically and critically, both in terms of the existence of a legitimate business and the specific transaction(s) relied upon. As *Kingsville* shows, the Hong Kong Court will robustly interrogate parties involved in fraud, however peripherally, and will grant and continue proprietary and *Mareva* injunctions to assist the victims of fraud to preserve and recover assets. We can all raise a glass to that.

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Footnotes:

1. *In wine, there is truth*
2. [2023] HKCFI 1393

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ELECTRONIC TRADE DOCUMENTS: NEW FRENCH LEGISLATION PROPOSED FOR 2024

A draft bill (the "Draft Bill"), designed to enable the full recognition of electronic transferable documents ("ETD") under French law, is expected to be introduced to the legislative process in France in 2024.

This development comes in the context of a global recognition of the need to digitalise international trade. In 2017, UNCITRAL adopted a model law on Electronic Transferable Records (the "UNCITRAL model law") which offers a template for states to adapt their laws on the use of ETD. Several states have already done so, including Singapore in 2021 and most recently, the United Kingdom where the Electronic Trade Documents Act came into force in September 2023. Read our briefings on this **here**, **here** and **here**.

At present, French law does not recognise the evidential value and effects of ETD because the evidence, claim to performance and transfer of the rights incorporated in a transferable document is attached to possession over the original by the holder. This reflects the position in a number of jurisdictions around the world, hence the need for a model law to assist with the necessary change.

The Draft Bill

The Draft Bill formed part of the Report for *Speeding up the Digitalisation of Trade Finance*, published on 29 June 2023 and produced at the request of French Ministers. The Report's main recommendations revolve around the need to change French law. The Draft Bill proposes:

- a definition of ETD
- provisions for the recognition of the electronic form of transferable documents
- provisions for the recognition of the functional equivalence between ETD and paper-based transferable documents

Transferable document - definition

French law does not currently provide a definition for a transferable document. The Draft Bill proposes a single and universal definition, without distinction based on the medium, whether paper or electronic.

It defines a transferable document as a written document that represents an asset or a right and gives its holder the right to claim the performance of the obligation specified therein and to transfer that right. This definition differs from the UNCITRAL model law, which only defines ETD by reference to the information in the document and the existence of a reliable method to identify it, render it capable of control and retain its integrity.

The Draft Bill also gives a non-exhaustive list of example transferable documents (including bills of exchange, promissory notes, warrants, bills of lading, order-based insurance policies and assignments of business receivables) and specifies documents which are excluded from the application of the Draft Bill (including financial securities and contracts, bank and postal cheques, electronic money).

Recognition of ETD

French law already provides a technical and legal framework for the recognition and authentication of electronic documents and signatures and so for this, the Draft Bill refers to existing provisions in the French Civil Code, articles 1366 and 1367.

Functional equivalence: transfer, presentation and modification of ETD

The Draft Bill aims to achieve functional equivalence between ETD and paper-based transferable documents, so that ETD have the same effects as paper-based transferable documents and the holder of an ETD has equivalent rights to the holder of a paper-based transferable document, provided that the conditions set out in the Draft Bill are fulfilled.

The existing provisions in the French Civil Code are not comprehensive enough to cover the transfer, presentation, and modification of ETD. The Draft Bill therefore makes an explicit distinction between the conditions for the establishment of ETD and the conditions for their transfer, presentation and modification. The latter require a specific reliable method to be established.

Possession and exclusive control

In French law, the transfer of a transferable document is currently governed by the general provision on possession, which applies only to physical documents.

To address this "possession" issue, the Draft Bill employs the notion of "exclusive control," in accordance with the UNCITRAL model law. The person who can claim the performance of the rights incorporated in a transferable document, modify or transfer it, is the holder, who is the person with exclusive control over it. Thus, an ETD will be transferred from one holder to another by the transfer of exclusive control over it.

However, the Draft Bill does not include a definition or set criteria for the concept of exclusive control. Instead, it follows the UNCITRAL model law in adopting the "reliable method" approach. In order for the functional equivalence of an ETD to be recognised, it must comply with specific conditions, which are as follows:

- the document shall contain the same information that is required for the paper-based transferable document.
- a "reliable method" shall be used:
  - to identify the original transferable document, excluding any copy
  - to identify the successive signatories and holders of the transferable document
  - to set up exclusive control over the transferable document
  - to identify the holder as the person having exclusive control
  - to preserve the integrity of the transferable document and show each modification to it. (A specific reference is made to Article 1366 of the French Civil Code for the assessment of integrity, the information having to be complete and unaltered.)

Next steps

The Report also recommends:

- establishing the criteria for what constitutes a reliable method in a decree
- developing these criteria on the basis of technological neutrality
- determining the parameters necessary for the preservation of an ETD's integrity, the conversion of transferable documents from one medium to another and the notice and presentation of ETD
- undertaking initiatives at European Union level, to foster recognition of ETD and increase the efficiency of international trade reform.

The Draft Bill is expected to be introduced to the legislative process in 2024. Provisions setting out the criteria for the reliable method are currently being prepared.

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FOCUS ON FRAUD: D&O COVER SHOULD BE CHECKED FOLLOWING NEW ANTI-FRAUD LAWS IN THE UK

On 26 October 2023, the long-awaited Economic Crime and Corporate Transparency Act (ECCTA) received Royal Assent.

Key changes in the ECCTA which could affect commodities clients include:

1. a new **failure to prevent fraud** offence which will come into effect later this year
2. a new law for **attributing corporate liability**.

It is important to consider these developments in the context of D&O insurance.

Failure to prevent fraud offence

The failure to prevent fraud offence is a new strict liability offence which covers the core fraud offences found in the Fraud Act 2006 (such as fraud by false representation, omission or abuse of position) and those in the Theft Act 1968 (false accounting and false statements by company directors). It also includes aiding, abetting, counselling or procuring the commission of a fraud offence. The offence will only apply to 'large organisations' where a person associated with it commits a relevant fraud offence intending to benefit (directly or indirectly) the organisation or any person or entity the associate provides services to on behalf of the organisation.

The failure to prevent fraud offence will also apply extraterritorially.

Reasonable prevention procedures

It will be a defence for the relevant organisation if it can show that it had in place reasonable prevention procedures, or if it can show it was not reasonable to expect the organisation to have prevention procedures in place.

The offence will not come into force until guidance has been published by the Ministry of Justice on what constitutes reasonable prevention procedures; this is expected soon.

We recommend all businesses prepare to revisit existing anti-fraud measures in the wake of this new law. Insurers will likely seek information as to an insured's procedures in this area when considering the risk in relation to D&O/management liability policies.

Attributing corporate liability for misconduct of senior managers

The expansion of corporate criminal liability under the ECCTA for certain economic crimes perpetrated by senior executives came into force on 26 December 2023.

This new law fundamentally lowers the bar for prosecuting authorities to secure convictions against companies for economic crimes. Under Section 196 of the ECCTA, where a senior manager acting within the actual or apparent scope of their authority commits a relevant offence, the organisation will also be found guilty of the offence.

Accordingly, the conduct of senior managers will increasingly be a focus for law enforcement and there is likely to be pressure for law enforcement agencies to use the new law after years of complaining that they don't have it.

A 'senior manager' is an individual who plays a significant role in the making of decisions about how the whole or substantial part of the activities of the body corporate or partnership are to be managed or organised, or who actually manages or organises the whole or a substantial part of those activities.

Implications for D&O insurance

There is an increased risk of claims, both against individual senior managers and against the corporate entity itself (ie claims that the failure to prevent fraud offence has been committed by the entity or that criminal liability should be attributed to it due the commission of a specified crime by a senior manager).

In light of the new ECCTA, it will be key to check the extent of cover under D&O and/or management liability insurance policy wordings in order to determine whether cover remains appropriate. It must be considered whether

all those individuals who fall within the definition of "senior managers" are covered, and if the level of policy coverage available remains appropriate. Although D&O insurance will commonly exclude claims arising from fraud or dishonesty, defence or investigation costs cover may be provided until there is a final judgment or admission. Clearly, this will depend on the exact policy wording and circumstances.

It will also need to be considered how any cover provided in respect of the entity itself responds to the ECCTA. The prevention of fraud offence involves a form of strict liability and it will need to be considered carefully how any exclusions and/or the illegality principle would apply to the question of cover in such circumstances.

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EVENTS & TEAM NEWS

Where you can meet the team next

- We look forward to hosting our Young Professionals Networking Event at our London offices on **Thursday 15th February 2024**. We will be joined by guest speaker, multiple gold medallist, world record holder, and esteemed broadcaster Colin Jackson CBE, who will also be taking questions from attendees. Please **click here** if you would like to register.
- Kevin Warburton is speaking at the Unravelling Corporate Fraud Conference in Perth, Australia and online on **Thursday 22nd February 2024**.
- Sarah Hunt and Michael Buisset will be hosting a Trading and shipping seminar series on **Tuesday 27th February** and **Thursday 21st March 2024**. Please contact our events team if this something you would be interested in attending: **events@hfw.com**.

For more information on upcoming HFW events, **click here.**

Other Team News

- We are offering a new anti-fraud package product to help you assess your vulnerability to fraud and combat it. Please **click here** for more information on how our team can support you.
- We have continued to strengthen our sanctions and regulatory investigations offering with the hire of Partner **David Savage** in London. Read David and Daniel Martin's latest briefing on sanctions **here** to find out what's in store for 2024 in Russian sanctions.
- We are also delighted to welcome Partner Ruth Dawes to our Sydney office. Ruth has significant expertise advising clients on all aspects of environmental and planning law, with a particular focus on major projects, sustainability, climate change, and renewable energy.
- The second edition of our LNG bulletin was published in December 2023. Please **click here** to read it.
- Adam Richardson wrote an article on phishing scams in soft commodities contracts for the December 2023 edition of GAFTAWorld. Read more **here**.
- Peter Zaman and team at the Singapore office published another carbon credit update on 11 December 2023. Please **click here** to read it.
- To read the latest edition of our Sustainability Quarterly magazine, **click here.**
- Our Annual Disputes Digest, featuring our 2023 global HFW LITIGATION and International Arbitration publications, handily collated in one place is available **here.**
- We are pleased to announce HFW has been selected for inclusion in GAR 2024.
- We are delighted to have been featured in **The Legal 500 (Legalease)'s** 2024 APAC Green Guide, which recognises the top law firms and practitioners advising clients on sustainability, climate change and ESG. Congratulations to Partners Peter Zaman and Jo Garland who were named in the guide.
- HFW has also maintained its Band 1 ranking for Climate Change law in the 2024 edition of Chambers Asia-Pacific.
- Congratulations to HFW Partner Rick Brown, who has once again been recognised by Who's Who Legal in the 'Global Elite' for asset recovery.
- Senior Associate Edward Beeley from our Hong Kong office has received a 40 Under 40 award. **Click here** to find out more. You can read Edward's latest article in this edition.

HFW has over 600 lawyers working in offices across the Americas, Europe, the Middle East and Asia Pacific. For further information about our commodities capabilities, please visit hfw.com/Commodities.