

Insights into the latest trends and developments in financial case law: key takeaways for regulated firms

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Selected Topics

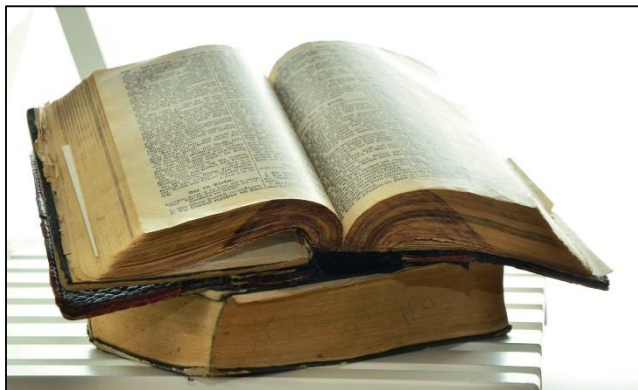
- I. The legal value of electronic signatures – Between legislative enthusiasm and judicial realism
- II. Managing the impact of the lapse of mandatory record keeping periods – The dos and don'ts derived from case law
- III. Nominee structures – What they are and why it is important to clearly define them
- IV. Catch 22 – Duty to cooperate with the regulator vs. Criminal law liability risk

The legal value of electronic signatures

Between legislative enthusiasm and judicial realism

I. The legal value of electronic signatures (1)

The theory



3 categories of e-signatures

- Simple e-signature
- Advanced e-signature
- **Qualified e-signature**

Definition

- “Data in electronic form which is attached to or logically associated with other data in electronic form and which is used by a signatory to sign” (Art. 3 (10) eIDAS Regulation)
- “Any electronic tool identifying the **signatory** and capturing its **intent to approve** a document” (scholars; case law)

Principles

- Principle of **equivalence**
- Principle of **non-discrimination**

I. The legal value of electronic signatures (2)

The practice



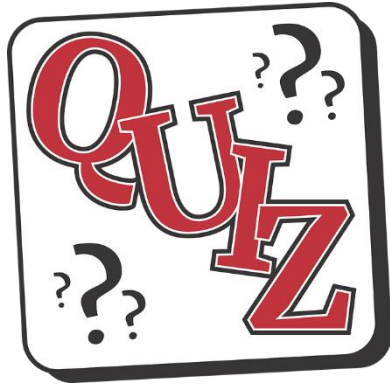
Confirmation of the legal effects and value in evidence of qualified e-signatures



Heavy burden to prove the legal effects and value in evidence of other types of e-signatures



I. The legal value of electronic signatures (3)



What about the legal value of scanned signatures?

Qualify as e-signatures



Do not qualify as e-signatures



Managing the impact of the lapse of mandatory record keeping periods

The dos and don'ts derived from case law



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II. Managing the impact of the lapse of mandatory record keeping periods (1)

Important

The principles

■ You:

- ❖ Are **required to provide your clients** or their heirs with the documents relating to their accounts of the last 10 years
- ❖ After 10 years, you have **no obligation to destroy** the documents
- ❖ **Can argue** that you no longer keep documents of more than 10 years

! documents you have kept !

■ Your clients:

- ❖ Have the right to **request a copy of documents of the last 10 years**
- ❖ After 10 years, your clients are not entitled to **force you to provide** a copy of the documents that you have kept

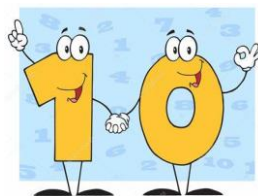
! documents you have kept !

II. Managing the impact of the lapse of mandatory record keeping periods (2)

Statutory record keeping duties are not to be confused with the **statutory limitation period**



Do not throw everything away after 10 years !



- Article 189 of the Commercial Code
- Claim for liability: a 10 years statutory limitation period applies but the **starting point of the statutory limitation period will differ depending on the circumstances**



II. Managing the impact of the lapse of mandatory record keeping periods (3)

Limitation period

You have the burden of proof

- Article 1315 of the Civil Code
- You must prove the starting point of the limitation period



- **Example:**

- Account opening in 1980
- Request of the heir in 2010
- No trace of any account in the records of the bank during the last 10 years!



- **How will you manage to evidence that the limitation period has expired?**

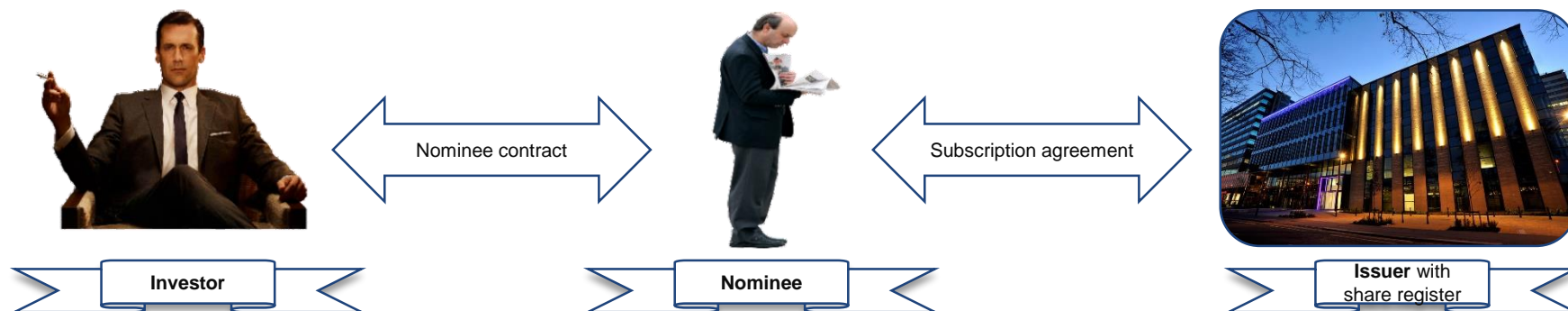
- Reduce the burden of proof
- Selective conservation of archives after 10 years
- Shorten the duration of the limitation period in your GTC

Nominee structures

What they are and why it is important to clearly define them

III. Nominee structures (1)

■ What is a nominee?

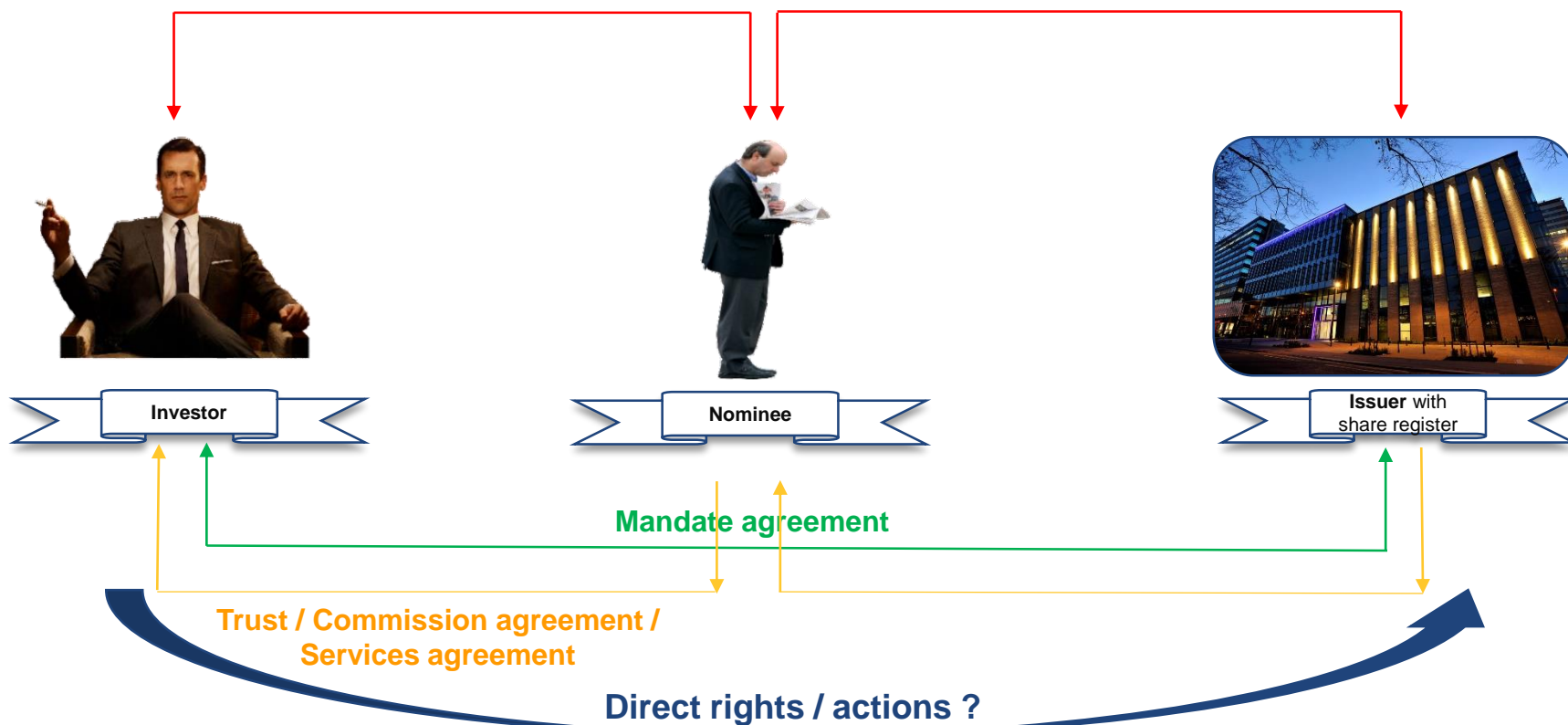


- A person who holds shares – in whatever form - on behalf of another person
- A well-accepted concept in Luxembourg business practice, without, however, being formally recognized as a legal concept under Luxembourg law

III. Nominee structures (2)

■ Nominee: one word, various legal concepts

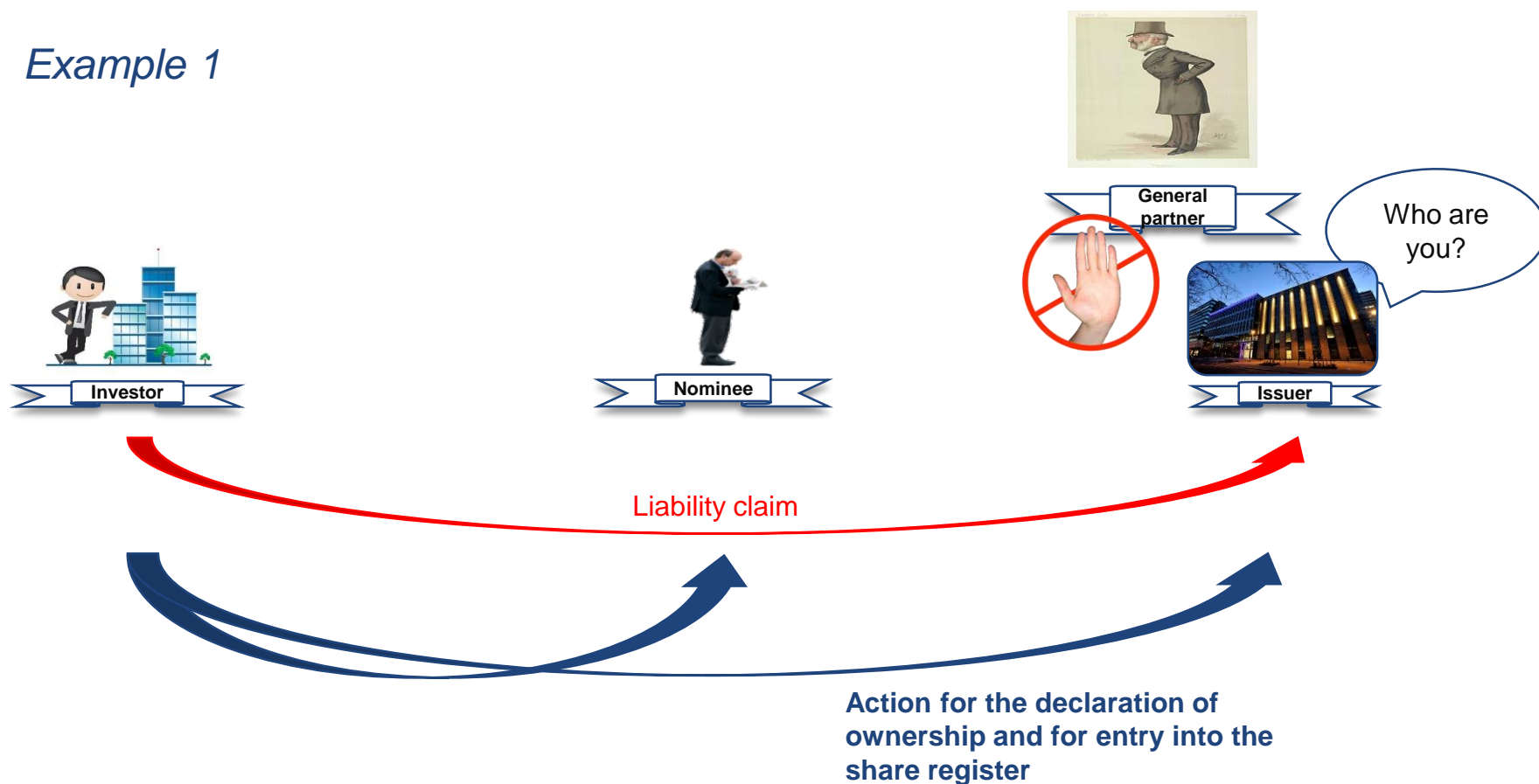
« prête-nom »



III. Nominee structures (3)

■ Why it is important to clearly define the intention of the parties

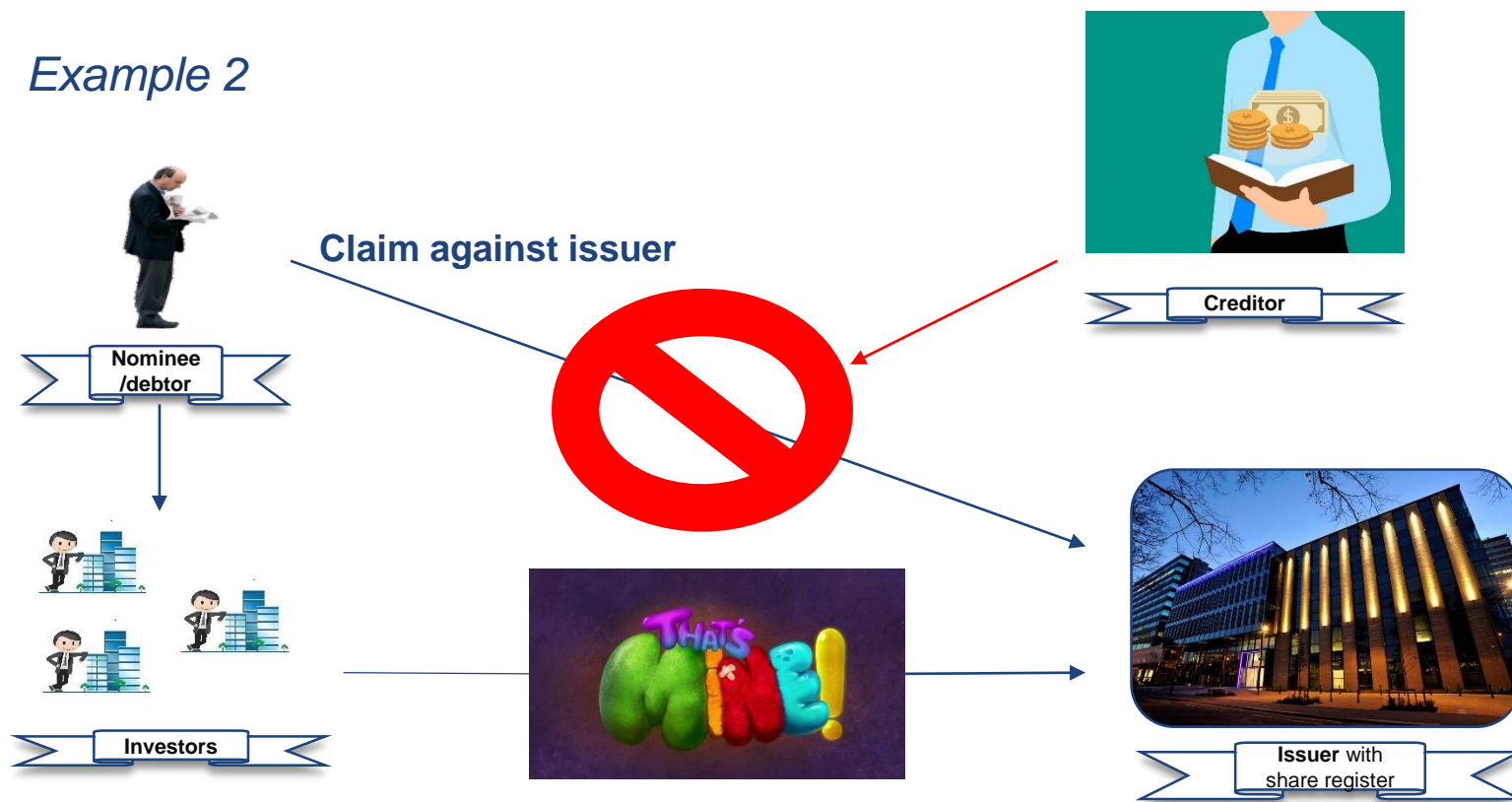
Example 1



III. Nominee structures (4)

■ Why it is important to clearly define the intention of the parties

Example 2



Catch 22

Duty to cooperate with the regulator
vs.
Criminal law liability risk

Catch 22

I. Duty to cooperate with the regulator

- Supervised entities must cooperate with the CSSF and answer, to the extent possible, all questions of the CSSF and provide to the latter all requested documents
- If they fail to do so → sanctions

SANCTIONS

Catch 22

II. Criminal law liability risk

Problem: if the regulatory matter is also linked to a possible crime and the supervised entity may be dragged into a criminal investigation

- The regulator has a legal duty to report to the Public Prosecutor all possible crimes it detects
- All the information provided to the CSSF can be seized by the investigating magistrate in the context of an investigation

Catch 22



Conflict between the sanctionable duty to cooperate and a possible criminal law liability risk

Catch 22

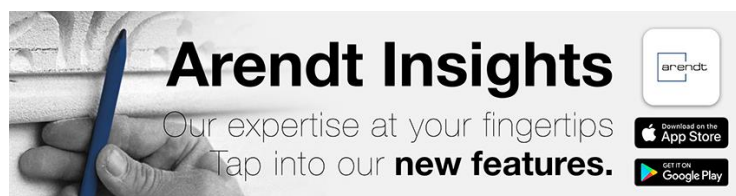
III. Nuanced case law

Can investigators, magistrates use data produced to the CSSF by a supervised entity, under perjury of penalty, in a criminal investigation/trial?

- Right not to self-incriminate
- Nuanced answer of the Court * → distinction:
 - * Decision currently under appeal
 - ☐ Documents that exist at the supervised entity irrespective of any production demands made by the CSSF
 - ☐ Documents created by the supervised entity upon request of the CSSF in the context of the regulatory investigation



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