

Ex parte relief in corporate litigation: Overview of the latest case law

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Introduction

- What is interim relief?
 - Articles 932 and 933 of the NCCP
- Examples of interim relief in corporate litigation
 - Suspension of corporate decisions
 - Provisional managers / ad hoc administrators
 - Provisional receiverships
 - Orders to perform or refrain
 - Suspension of share pledge enforcements
 - etc.
- *Ex parte* interim relief
 - Article 66 of the NCCP

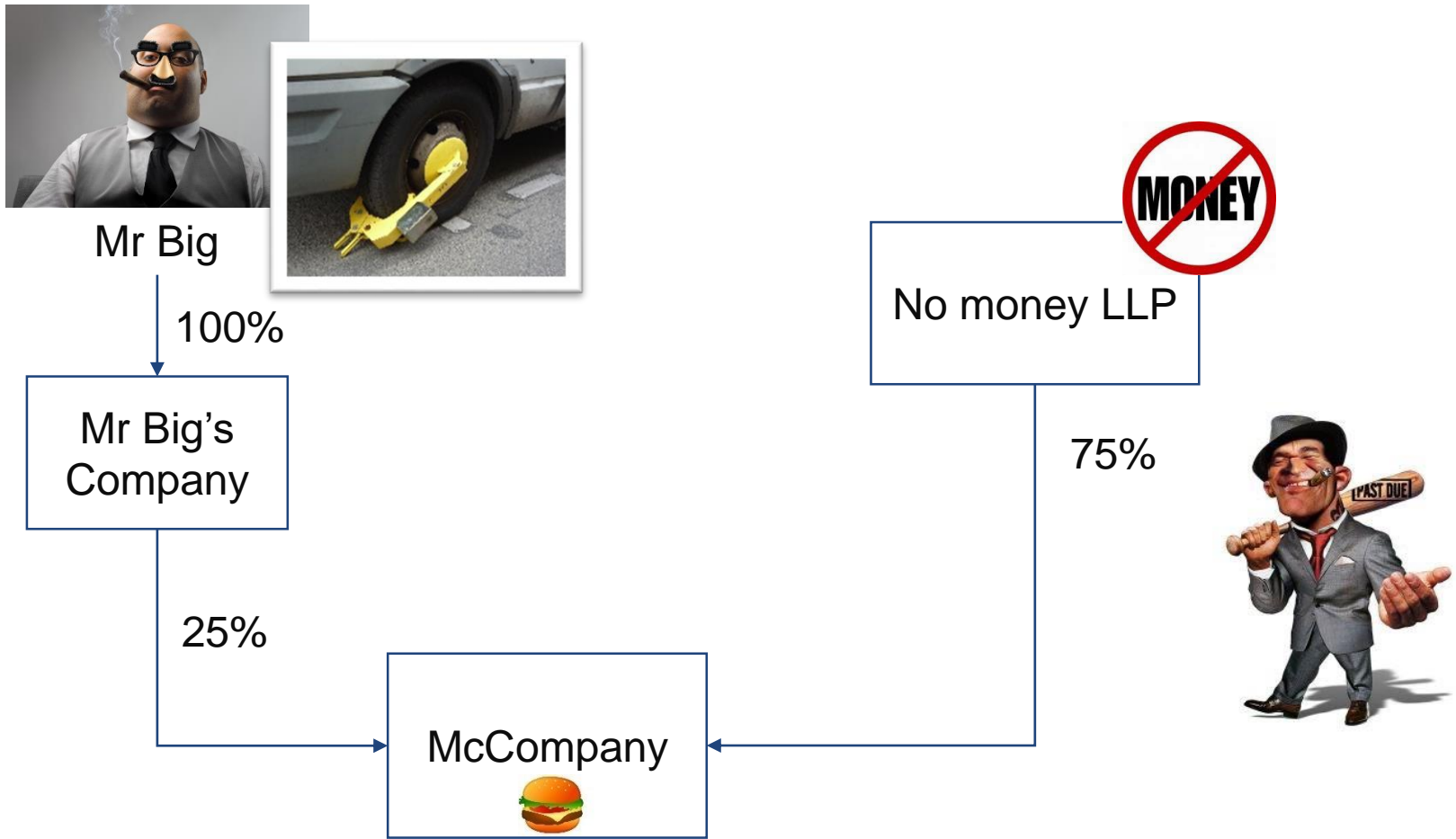
Agenda

- Obtaining *ex parte* interim relief
- Challenging *ex parte* interim relief
- Procedural nooks and crannies

Obtaining *ex parte* interim relief

Summary Court order, n°2020TALREFO/00242 (docket n°TAL-2020-05460) dated 26 May 2021

A recent case law example



Article 66 of the New Code of Civil Procedure

"Lorsque la loi permet ou la nécessité commande qu'une mesure soit ordonnée à l'insu d'une partie, celle-ci dispose d'un recours approprié contre la décision qui lui fait grief "

English translation:

*Where **the law permits** **OR** **necessity dictates** that a measure be ordered without the knowledge of a party, this party shall have an appropriate recourse against the decision that adversely affects him or her*

Where the law permits...

- Example: authorisation for a third party attachment

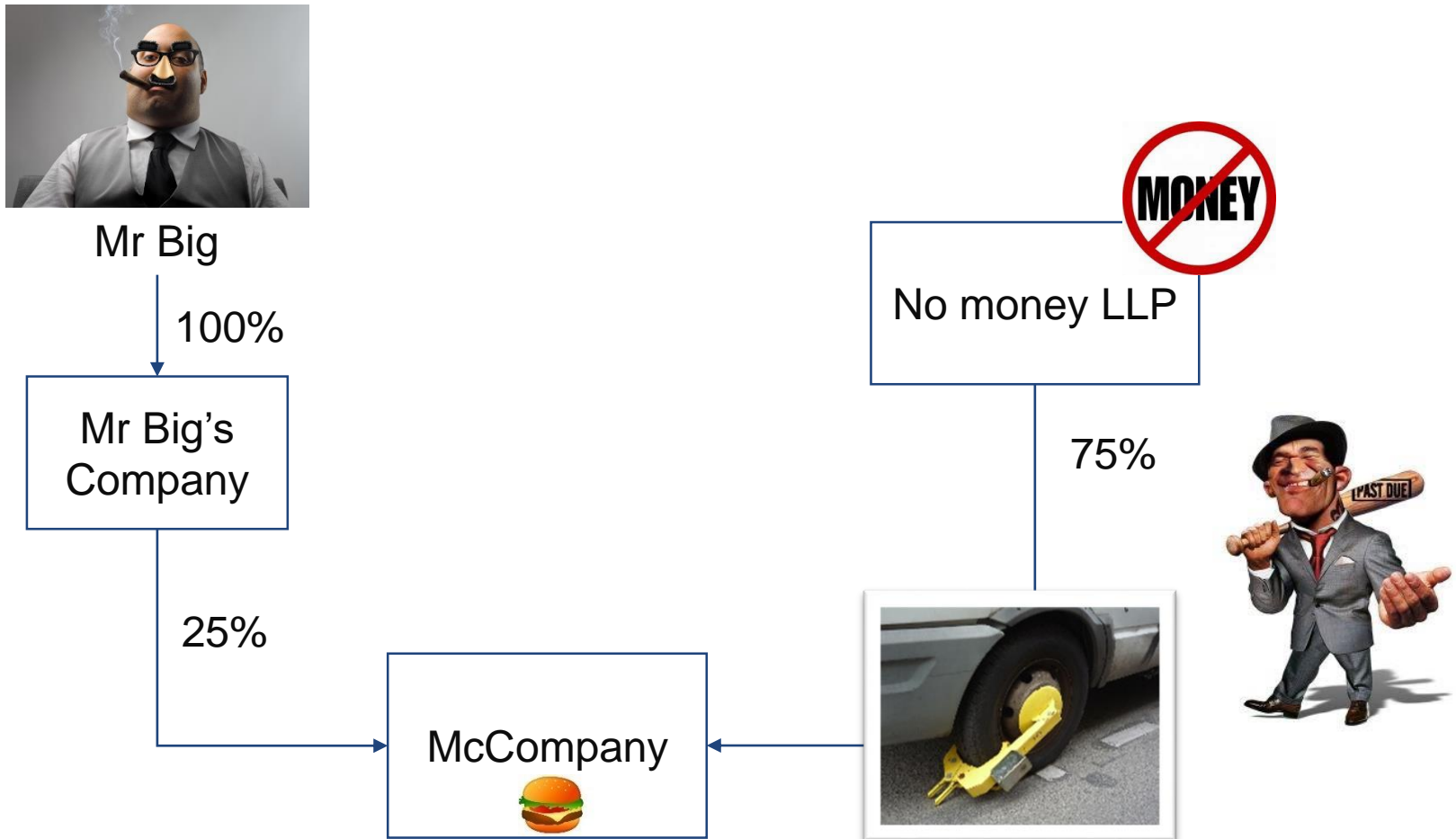
Where necessity dictates...

- But when does necessity justify *ex parte* relief?

In 3 scenarios:

- an element of surprise is crucial
- it is impossible to identify the parties against whom the measure is needed
- it is extremely urgent

When is *ex parte* relief extremely urgent?



Any other requirements for *ex parte* relief?

- Don't forget the general requirements applicable to the requested relief
- Example: receivership

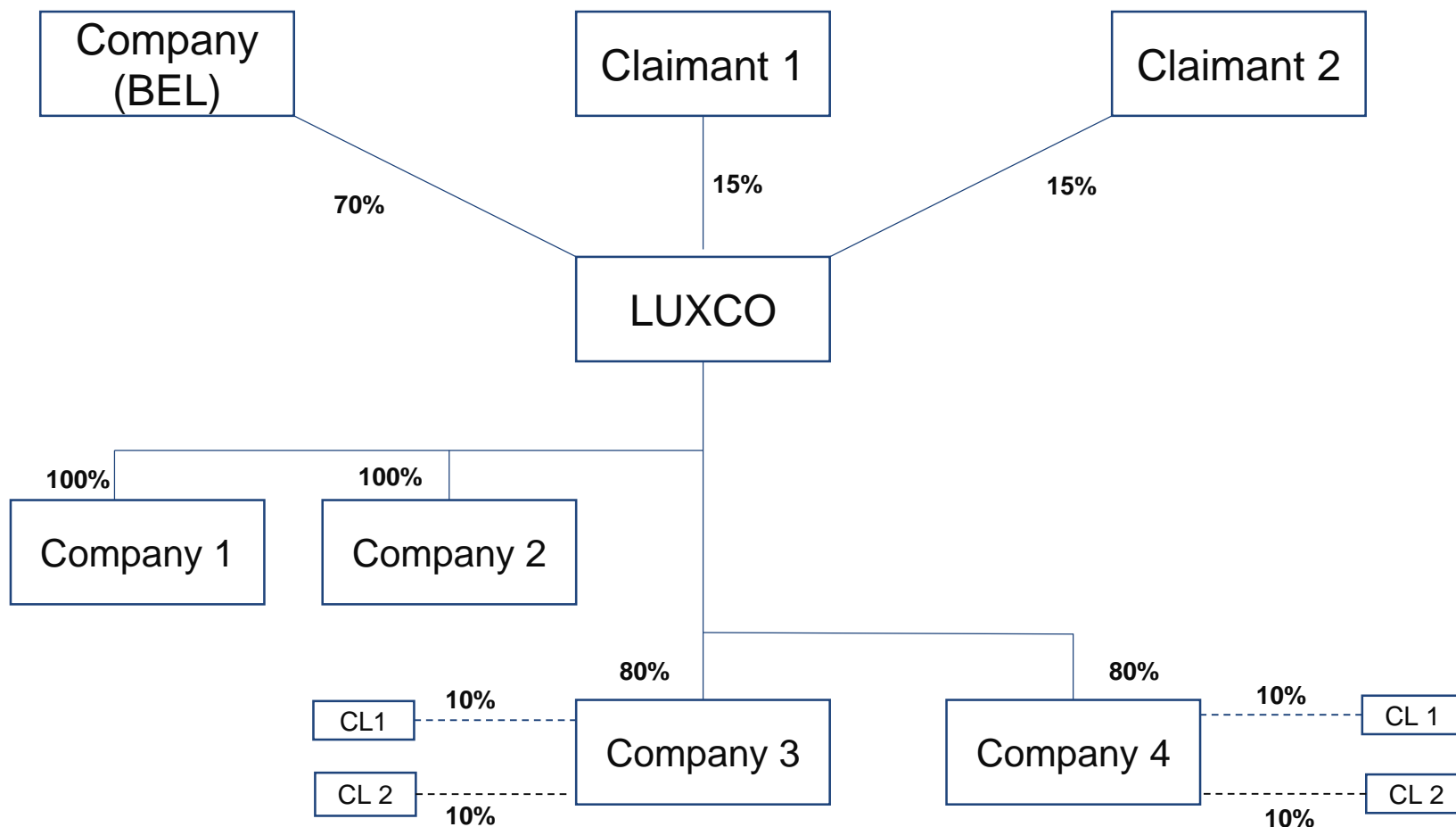
Challenging *ex parte* interim relief

Summary Court order, n°2020TALREFO/00216 (docket n°TAL-2020-03848) dated 5 June 2021

Procedure for opposing *ex parte* relief (withdrawal summons)

- ≠ appeal
- opens an adversarial debate
- The burden of proof remains on the original applicant

A recent case law example



A recent case law example

- indirect minority shareholders have acted on the basis of Article 66 NCCP to request the appointment of an ad hoc administrator
- appointment of an ad hoc administrator granted by order of the president of the District Court
- Majority shareholders applied for the withdrawal of the ex parte order

Standing of an indirect minority shareholder?

- of an affiliated company may not request the appointment of a provisional administrator in the company of which he is the "indirect" shareholder

however,

- if there is a risk that the majority shareholders will not act to protect the rights of the company and the minority shareholders, the minority shareholders, whether **direct** or **indirect**, have legal standing to act to ensure the interests of the companies that are part of the group

Marginal intervention in the company's affairs

Principle:

- a judge should generally not intervene in the functioning of the company → this role is reserved for the corporate bodies

Exception :

- urgency of the situation
- certain, imminent and irreversible damage

In this case:

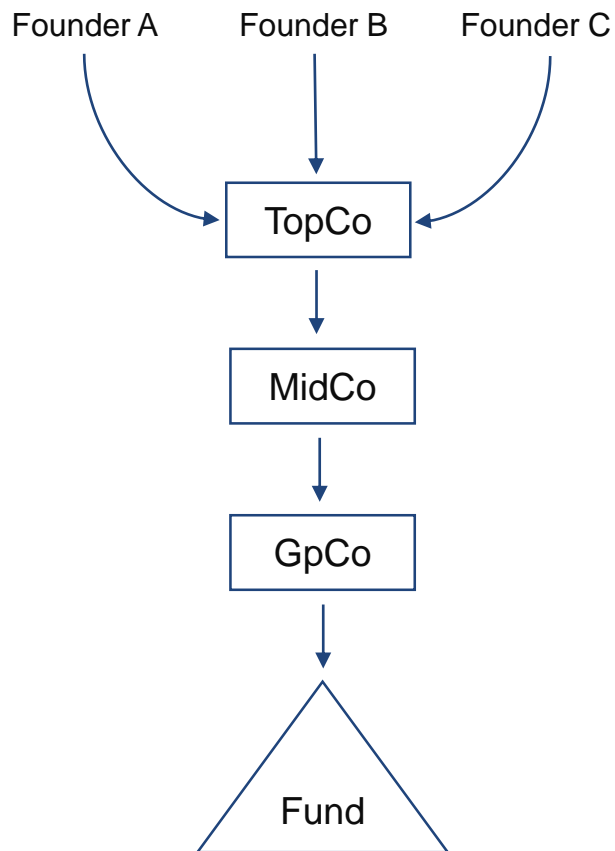
- in matters of ex parte relief, it is even more important to respect this principle

And all those nooks and crannies...

***Ex parte* relief in corporate litigation: Procedural issues**

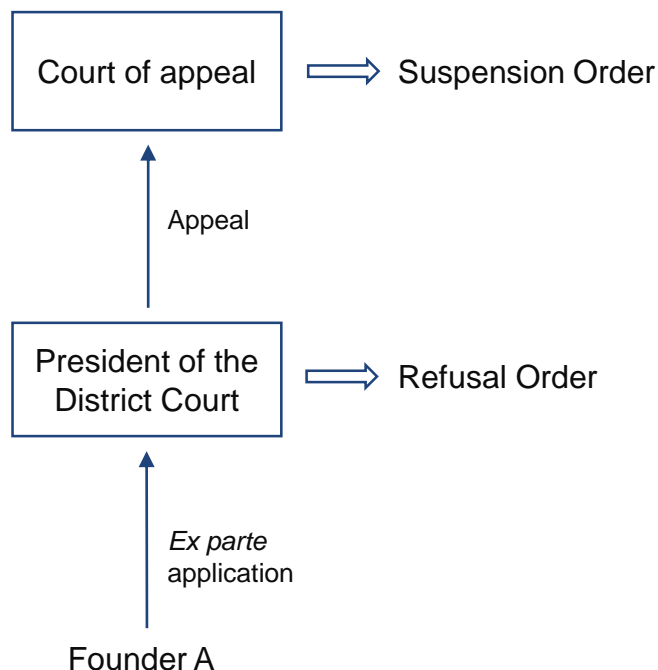
- **If an *ex parte* application is rejected by the President of the District Court, are there any legal remedies?**
 - *Ex parte* appeal with the Court of appeal

Background to the dispute



- Dispute between three founders and sponsors of a private equity fund
- The board of directors of TopCo suspends the voting rights of Founder A in TopCo (“**Decision A**”)
- Founders B and C remove an independent manager in TopCo without the consent of Founder A (“**Decision B**”)
- Founder A challenges these corporate decisions

Judicial Proceedings – *Ex parte* relief

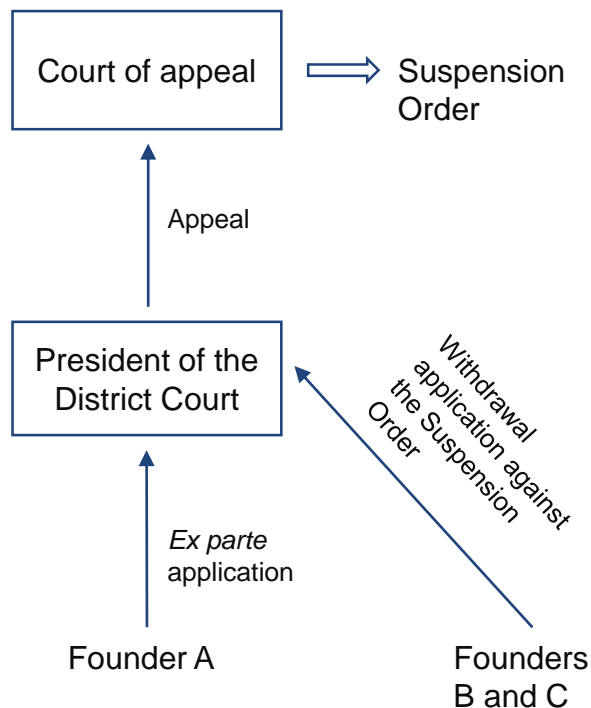


- Founder A files an *ex parte* application with the President of the District Court to request the suspension of Decisions A and B
- The President of the District Court rejects Founder A's *ex parte* application ("**Refusal Order**").
- Founder A files an *ex parte* appeal (with the Court of appeal) against the Refusal Order.
- The Court of appeal reverses the Refusal Order and suspends Decisions A and B ("**Suspension Order**").

***Ex parte* relief in corporate litigation: Procedural issues**

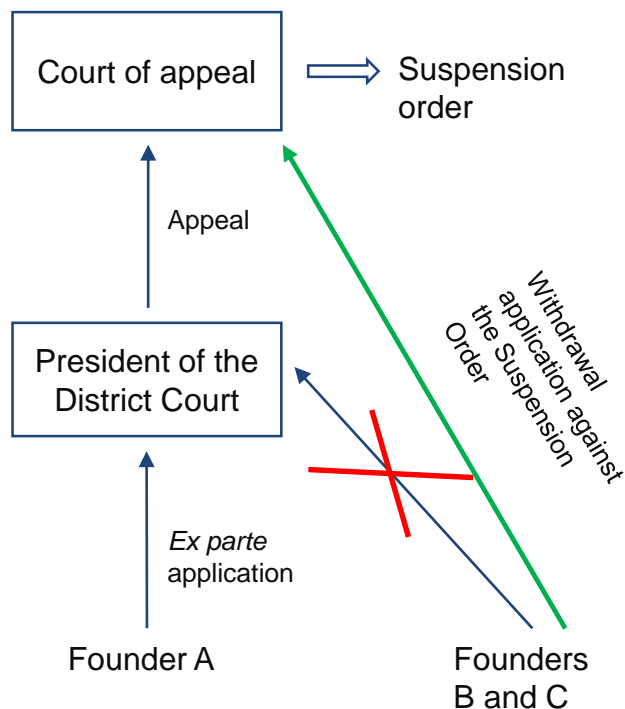
- **Which Court has jurisdiction to deal with an application for the withdrawal of an *ex parte* order of the Court of appeal?**
 - Summary Court order, n°2021TALREFO/00266 (docket n°TAL-2021-03509) – dated 26 May 2021

Judicial Proceedings – Application for Withdrawal



- Founders B and C apply for the withdrawal of the Suspension Order with the President of the District Court
- Founder A claims the Court of appeal has jurisdiction instead of the President of the District Court.
- Right of appeal vs. jurisdiction of the judge having handed down the *ex parte* order

Judicial Proceedings – Outcome



- The President of the District Court declared that he has no jurisdiction to deal with the withdrawal application for the following reasons:

- A withdrawal application must be brought before the same judge/court that issued the original order.
- The right to appeal has no constitutional value

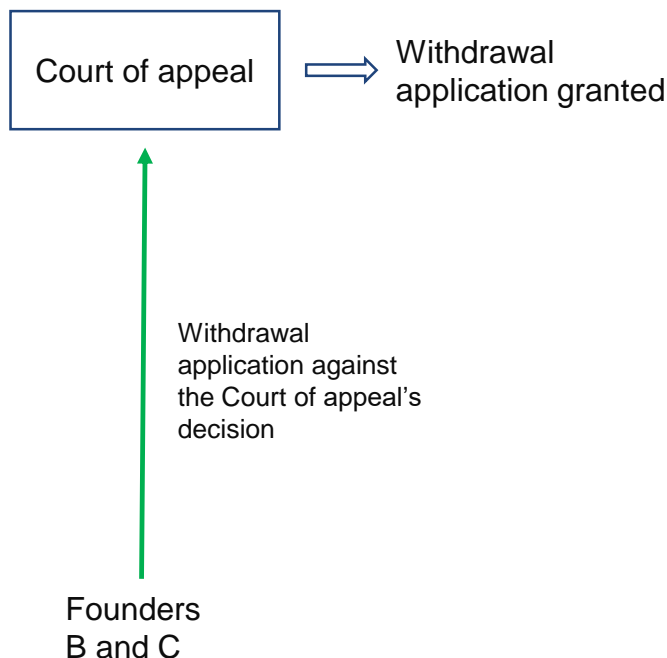
***Ex parte* relief in corporate litigation: Procedural issues**

■ If interim relief is ultimately rejected by a last instance decision, is it possible to apply again for the same relief?

- In principle not on an *ex parte* basis, but common *inter partes* proceedings remain available

- Exception: new circumstances

Judicial Proceedings – New ex parte application?

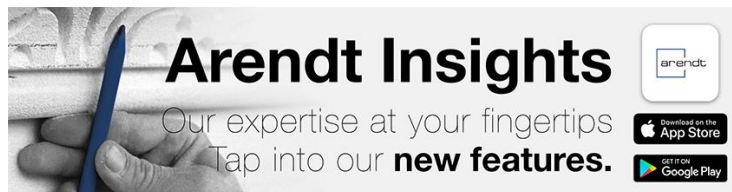
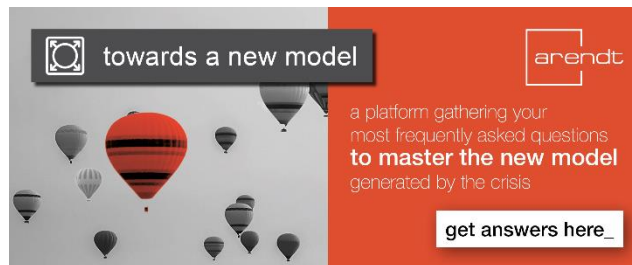


- The Court of appeal finally withdrew the Suspension Order

- Following this decision, Founders B and C removed other managers in TopCo, which made it possible to remove various managers in MidCo and in turn in GpCo (**“Subsequent Decisions”**)



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