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New York International Chapter News

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of the New York State Bar Association

Message from the Chair

Carl-Olof Bouveng

At the time this was written, many of us were about to pack our suitcases to go to Sydney for our Annual Seasonal Meeting. The Section has never travelled further. It is a stretch for us to not only engage with lawyers on the other side of the globe, but to actually organize a meeting there. Notwithstanding the geographical distance, we have been able to put in place a tremendous program and to attract a large number of long distance travelers from New York and many of our chapters. This is telling for the International Section's ambition to interact with lawyers all over the globe and to get a flavor for the legal culture in the most disparate and distant places. There are many reasons for this being an important task of the Section.

In this message, I will discuss why I find programs of this kind, and for that matter other work of the Section, to be of great value and importance to me as a person—and hopefully also to many others. In addition, I believe this is furthering the greater good because it improves the chances of advancing the rule of law and human rights, as well as the climate for international trade and other international exchanges. I would like to elaborate somewhat on globalization, intra-cultural understanding and learning, rule of law, and the need to educate about—or possibly promote—New York law.

I would like to start with globalization. It continues! During the financial crisis there has been much discussion

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about how free trade may be hampered by a need for nation states to look after their own finances and solve their own problems. We have also seen a trend away from multilateral treaties and consensus among global leaders. This has lately been evident, for example, at the UN Climate Change Conference in Copenhagen and in the world's financial leaders' failure to agree on how to contain disputes over the value and appreciation of currencies. However, it remains a fact that all nations are more dependent on each other than ever and it is hard to see why this development will not continue. Even if politicians are unable to reach agreements, or even less any consensus, business continues to globalize. For example in my area of mergers and acquisitions, there is an increasing trend towards cross-border acquisitions and investments. This kind of trend will challenge lawyers to understand not only the micro-world in which we live and practice on a daily basis, but also to understand other parts of the world which undoubtedly affect our lives. This understanding may be gained in several ways but I submit that the only way to truly learn to understand other legal traditions, cultures, religions and heritages is to actually and physically meet people who live and breathe them.

The Section's Seasonal Meeting is also important to the promotion of the rule of law and human rights. To effectively seek to further the rule of law, one must understand the particular issues a country is facing, and sometimes, one must accept that small steps constitute progress, e.g., in a democratization process. I think the support of lawyers with various backgrounds and broadening of perspectives may enhance and expedite the application of the rule of law or of human rights.

Finally, the Seasonal Meetings are an excellent opportunity to inform foreign lawyers engaged in international practice about New York law. As you may be aware, one of our missions is titled "New York law as an international standard." Through the years, the Section has focused on informing and educating about New York rather than actively promoting the choice of New York law in international business. There is currently a discussion within both the Section and our State Bar Association at large whether we should more actively promote New York law. A Task Force has been appointed to look at how to ensure that New York law retains its position as an international legal standard for commercial transactions in the global marketplace, and also to look at the important role that New York courts and arbitration play in resolving international business disputes. In any discussions about New York law as an international standard, I find it important to include foreign lawyers because no law could become, or maintain its position as, an international standard unless it accommodates the interest of the players in the international arena. New York law is well placed to accommodate parties' interests in international matters but there is always room for improvement and actions should be taken to ensure such improvements are made.

Having offered some arguments for the importance of our Seasonal Meetings at an overseas location, I would like to emphasize that this is just one of the Section's many ways of interacting with international lawyers and other legal cultures. I think we could do even more good in this regard and strengthen the Section if we held a more extensive program in New York in addition to both the various shorter programs we already have in New York and the Seasonal Meeting abroad. Such a program should be attractive both to lawyers in New York and to lawyers from out of state or abroad. The Section is therefore contemplating an International Law Week in New York. The planning is at an early stage but we have received positive feedback from many of you and we may be able to hold an International Law Week in May 2011.

The Section's half-day program at the Annual Meeting in New York is intended to focus on foreign laws and what New York lawyers need to think about when working with foreign counsel for the purpose of advising their clients in making investments, entering into contracts or otherwise engaging in other countries.

In addition to the major meetings mentioned above, the Section and its various Committees hold other meetings which are announced at www.nysba.org. If you have not already joined a Committee, you should take the time to join one or several Committees of your liking. You should not hesitate to contact the Committee Chair to discuss what you would like to see the Committee doing and how you may be able to contribute. Our Vice-Chairs/Committees, Michael Pisani and Glenn Fox, are also always interested in hearing any comments you may have relating to the Committees.

I myself am of course interested to hear from you at any time and about whatever it may be relating to the Section. I hope to see you at one of our meetings soon.

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Note from the Editor

Dunniela Kaufman

Putting together this edition of the *Chapter News* has been truly inspiring. Our Section, as well as the Chapters and Committees that give it life, are continuously exceeding expectations as we all strive to fulfill the Three Missions adopted by the Executive Committee in September of 2009. In my capacity as the Editor of the *Chapter News*, I have been able to experience this progress first hand. It is reflected in both the material that I receive and the enthusiasm that emanates from those that contribute. Apropos of the momentum that our Chapters and Committees are currently experiencing, and in addition to a great cross-section of articles and contributions from across the Globe, this Edition of the *Chapter News* contains a special section that is dedicated to the activities of the newly formed Committee on International Contract and Commercial Law. This Committee has taken off with a bang, fulfilling its obligations to further the Section's missions while simultaneously creating opportunities for Members to interact on both a substantive and social basis. I hope that this new Committee's activities inspire us all to take action to further our Section's missions. To that end, I look forward to hearing about your activities and encourage you to share with your colleagues by contributing to the next edition of the *Chapter News*.

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Committee Spotlight

Committee on International Contract and Commercial Law

Establishment of Committee on International Contract and Commercial Law

Greetings from the Chair

Our Committee on International Contract and Commercial Law is a new committee of the New York State Bar Association International Section (NYSBA International). The Committee was established based on the Executive Committee's September 15, 2009 resolution that also set up NYSBA International's Long-term Missions (Three Missions). As such, this Committee was entrusted to help NYSBA International be a custodian of New York law as an international standard (the First Mission). While the responsibility to promote the First Mission is borne by all the committees of NYSBA International, and also by International Chapters, because of the importance of contract and commercial laws in cross-border economic activities, our Committee is expected to play a critically important role in this respect.

To put it another way, our Committee's mission is to promote NYSBA's role as a custodian of New York law in the age of globalization. We cannot stress too much the important role cross-border transactional laws play as a medium to connect private parties worldwide in their ever increasing global economic activities. Globalization brings people together and we are witnessing a nascent global community in which people share the same consumer goods, same services, same information and even the same common culture. We witnessed one such example last summer at the World Cup in South Africa and especially the final game, including the pre-game celebration show featuring an international rock star, Shakira, which was instantaneously watched by billions of people all over the globe. At the same time, we have witnessed the negative side of globalization, such as the rapid spread of the global financial crisis in the fall of 2008, which remains fresh in our memory.

This increased interconnectedness necessarily increases the number and complexity of legal transactions and we must now work together to ensure the smooth working of cross-border commercial laws across the world. International economic relationships have become more complex, moving well beyond the traditional cross-border shipment of goods. As a result, we must deal with complex cross-border legal issues that arise from the interaction between New York contracts and local laws, including the enforcement of such contracts in a foreign jurisdiction.

We are aware that New York is the preferred jurisdiction for choice-of-law clauses in many different types of international contracts, covering a broad range of cross-border business transactions all around the world. We must, therefore, appreciate the fact that many in the global business community have trust in New York law. However, it is our responsibility to ensure that the global business community's expectations are fulfilled. Our Committee's focus includes private international law and conflict of laws, such as the applicable law and choice of forum issues, all of which affect the ultimate satisfaction of contracts and the predictability of economic bargains.

At the macro level, ensuring a good quality cross-border legal framework promotes a higher level of economic activity and growth, as well as job creation and prosperity all across the world, not just in New York. Therefore our pursuit of the First Mission has a broad ramification on the future of globalization and the integration of the 21st Century global economy.

For this reason, our Committee is also entrusted to work on issues related to the Third Mission of NYSBA International: to monitor the development of international law in the United Nations system, especially in the area of cross-border transactional law. In this regard, we note that the subject matters that we deal with have a close resemblance to the jurisdiction of the United Nations Commission on International Trade Law (UNCITRAL), and therefore we pay special attention to UNCITRAL's agenda development as discussed below.

Our activities will also assist with NYSBA International's additional priority of strengthening ties with International Chapters, especially those Chapters that were newly created under the Executive Committee's new global strategy to increase our connection with the emerging economies.

Our Committee's activities focus on a number of priority areas with respect to two major constituencies: educating our own New York lawyers, and, at the same time increasing our outreach to a broader world to accomplish our mission of serving the general public.

For the former objective, we will focus on developing reference materials and CLE programs to serve NYSBA members. For instance, we are currently developing an interactive database on New York contract law issues in various types of cross-border contracts ("Checklist Project"). In the future, resources permitting, we wish to work on more advanced projects such as writing newsletters and e-treatises on selected in-depth issues, including updates of New York international contract related case laws.

For the latter purpose, we will need to develop relationships with other committees of NYSBA International, other Sections of NYSBA, external bar associations including foreign bar associations in the major trading partners

of the U.S., domestic and foreign legislatures and international organizations. In addition, developing relationships with academia will also be important. To pursue these efforts, we strive to deepen our understanding in the subject matters of the relevant fields and, eventually, we hope to come to a point where we will be able to offer specific proposals to make cross-border transactions less expensive dispute resolution faster and more affordable. We believe that these activities are consistent with the traditions of NYSBA and other bar associations all across America that have promoted legal reforms over the past century.

As part of our long-term agenda, in July 2010, we decided to start a preliminary study on microfinancing. This move was partly inspired by UNCITRAL's resolution to start a preliminary study on microfinancing in the same month. As explained below, we understand that microfinancing has the potential to change the global economy in a profound way. Amongst other things, microfinancing will expand the reach of the mainstream global capitalist system, and, as a result, extend the reach of New York law principles to new horizons. This movement is closely connected to the broad global priorities and initiatives being pursued by important global organizations, such as the United Nations and G-20, which are focusing on global peace and stability through sustainable global growth, including Millennium Development Goals, as well as more specific goals such as the global financial regulations handled by the Financial Stability Board (FSB) and Basel Committee. Our Committee hopes to work on this topic with a broad coalition of committees and organizations. We believe our involvement in microfinancing-related issues will directly and indirectly help achieve NYSBA International's First and Third Missions and strengthen our ties with International Chapters in the emerging economies and least developed countries.

Reflecting our broad and truly global mission, our Committee has attracted strong interest from lawyers located outside the U.S. and especially from the Latin American region. Based on the nature of our task, the presence of international practitioners from different legal traditions is especially welcome because New York law cannot operate in a vacuum, without consideration of other legal traditions. For our success, it is critical for us to understand the interaction of different legal systems in the real world and the complex nature of the relationship between the legal norms and various socio-economic factors in any given country. To understand the dynamics of the development of, and harmonization of, legal norms in the process of global economic integration, some knowledge of comparative law, legal history and legal philosophy is useful. But above all, we are recruiting strongly motivated lawyers and law student members from all around the world who want to make a difference in the direction of the development of New York law and the global legal system in this ever-changing, exciting 21st Century global economy.

If you are interested in getting involved, please contact Chair Albert Bloomsbury at alabloom@mac.com.

Albert L. Bloomsbury
alabloom@mac.com.

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Checklist Project

As previously described, the Committee has committed to working on the development of an interactive database for NYSBA members on New York contract law related issues for major types of cross-border contracts (Checklist Project). This project aims to provide a handy reference tool for members when they draft a New York law contract for different types of cross-border transactions. Its focus is to offer general, practical guidance, including cautions for traps for the unwary. The Committee also plans to develop e-treatises for selected types of contracts, which will deal with in-depth issues.

After a few months of preparatory discussions, in July 2010, our Committee agreed to the basic structure of the Checklist and started a Pilot Project for cross-border sale of goods contracts. Our long-term plan is to create a separate Checklist for each major type of cross-border contract (e.g., cross-border sale of goods, services, loans, licensing, arbitration, investment, etc.). Each Checklist will be made up of the following three Segments: (1) brief discussions on selected basic New York contract law issues; (2) interaction of a New York cross-border contract with U.S. domestic mandatory law requirements; and (3) impact of foreign mandatory law rules of selected countries on such cross-border contracts. For Segment 1, a standard list of questions, ranging from the contract negotiation and considerations to the warranties, discharge of contract and enforcement issues, was determined before starting the Pilot Project. This will enable us to use the same overall format for different Checklists across the board.

We chose the cross-border sale of goods contract for the Pilot Project as this is the most basic type of contract supporting global trade, and because in this area, the UN Convention on Contracts for the International Sale of Goods (CISG) affects New York law. This latter factor has gained importance as globalization increases its speed, shifting economic power more toward the emerging markets. The CISG is the most successful international trade law convention. It has been adopted by the United Nations Commission on International Trade Law (UNCITRAL), and is now ratified by over 70 countries. Further, its acceptance is increasing day by day in international trade, partly due to China's embrace of the CISG as its domestic law. The United States ratified the CISG over two decades ago. Through the Supremacy Clause of the U.S. Constitution, the CISG has been a part of New York law since this time. When a contract designates New York law as the applicable law where the CISG is otherwise applicable, this designation signifies the designation of the

CISG-affected New York contract law, except for the case where the choice-of-law designation explicitly opts out of the CISG. For this reason, the Checklist Pilot Project will develop a parallel analysis for both the CISG-affected New York law and non-CISG New York contract law (New York UCC-based rules).

Approximately 15 members of our Committee are working on the Checklist Project. Many of them are from Latin American countries, and for this reason, the first Segment 3 of the Pilot Project will deal with the conflict with Brazilian mandatory rules. To develop Segment 3 further, we are recruiting volunteers who can work on legal issues for other jurisdictions, and we will need more collaboration with International Chapters in different countries. The Committee plans to build on the experience of the Checklist Project to launch more advanced projects in the future, including CLE programs, developing common agendas with various International Chapters, working with external parties (e.g., International Bar Association (IBA)), and developing committee-sponsored programs for future Seasonal Meetings.

If you are interested in getting involved with the Checklist Project, please contact the Project Leader, José Cobena at jose.cobena@gmail.com or Albert Bloomsbury at alabloom@mac.com.

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Outreach to Brazil Chapter

Since its inception, our Committee has attracted strong interest among lawyers outside the U.S. Notably, we have seen a high level of participation of lawyers from Brazil. This has helped us to develop our agenda related to Latin America and Brazil, and simultaneously build our relationship with the Brazil Chapter.

As discussed above, we have started the Checklist Project to develop an interactive database on New York contract law issues. We owe this success to the active participation of many volunteers, especially those from Brazil. In fact, this progress would not have been possible without strong leadership from the Project Leader, José Cobena, a practitioner working in Sao Paulo. As discussed above, Segment 3 of the Checklist deals with conflicts with local country mandatory rules. We decided to start with Brazil in this respect because of the critical mass of Brazilian active members. In furtherance of expanding Segment 3, José has started to build relationships with International Chapter Chairs throughout the Latin America region.

On September 14, 2010, our Committee and the Brazil Chapter jointly organized a networking event for the Brazilian lawyers working in international practice in the Sao Paulo area. This event was held at Peixoto e Cury Advogados, a major international law firm in Sao Paulo. José Cobena spoke on behalf of both our Committee and the Brazil Chapter to address the audience on the missions and activities of NYSBA International and our Committee (Mr. Cobena's words are reproduced on p. 7 of this edition of the *Chapter News*). The event was attended by around 80 guests, most of whom are practicing attorneys working at law firms and as in-house counsel. Many of the guests showed interest in getting involved in NYSBA activities. One of the participants from Centro de Estudos das Sociedades de Advogados (CESA, or Center for Studies of Law Firms), a reputable Brazilian organization, suggested that a future collaboration between CESA and NYSBA might be beneficial for both organizations. We plan to organize similar events in the future, at least one before the end of 2010. Our Committee, also in cooperation with the Brazil Chapter, plans to organize local continuing legal education programs for Brazilian lawyers admitted in New York. All of these activities, we hope, will increase the level of participation among Brazilian practitioners in NYSBA International activities.

We believe it is important for us to focus on the cross-border legal issues related to the emerging economies, perhaps even more so than the ones with established economies, because the task of dealing with the unknowns in the new paradigm of the emerging global economic order is more challenging. Although we wish to ultimately cover the issues with all the major U.S. trading partners including both advanced and emerging economies, including all of the BRIC countries, due to our current resource limitations, it is natural, given our success thus far, that we have decided to start with Brazil and other Latin American countries. We have a special focus on the Brazil Chapter and Brazilian lawyers also because of the country's strategic importance within the global economy. With its rapid economic growth, Brazil is increasing its influence within the global economy in the second decade of the 21st Century.

We hope that through our projects, we develop a fruitful dialogue between New York lawyers trained in the common law traditions and Brazilian lawyers trained in Civil Law traditions. From that dialogue, our Committee and NYSBA International may develop a more ambitious agenda—for instance, supporting Brazil's entry into the CISG treaty to promote bilateral economic activities between the U.S. and Brazil and Brazil's closer integration into the global financial and trade systems, which would propel Brazil to a first-class nation in the global economy.

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Below please find the previously described text of the introductory speech delivered by José Cobena on behalf of the Committee on International Contract and Commercial Law at the Sao Paulo joint professional and social networking event between the Brazil Chapter and the Committee on September 14, 2010.

Introductory Speech by José Cobena

Committee on International Contract and Commercial Law

Good evening! On behalf of the International Section of the New York State Bar Association and the Committee on International Contract and Commercial Law, I would like to thank you for attending this event and Peixoto e Cury Advogados for kindly supporting it. We are very happy to have the opportunity to speak to you about our Association and its committees.

The Association is a non-governmental voluntary organization of practicing lawyers in the State of New York and lawyers throughout the world who want to have a relationship with the legal communities and institutions of New York. The International Section of the NYSBA is dedicated to the international practice of law in all aspects of international life—commercial or for the public good—and to the support of the rule of law throughout the world. One of our commitments is to maintain New York law's quality, reputation and utility in international transactions and, in this way, to play a role of a custodian of New York law as a standard of international transactions.

Brazilian lawyers present at the reception

Guests networking

Brazilian lawyers present at the reception

The International Section has different substantive law and regional committees, comprising a network of International Chapters throughout the world in over 70 different countries, including most countries in Latin America. In areas like banking, corporate, employment, immigration or arbitration, legal practitioners find a way to strengthen their network and participate in professional activities.

José Cobena and Rafael V. V. de Carvalho, organizers of the reception

Each committee has specific goals and engages in certain activities to achieve those goals. For instance, the goals of the Committee on International Contract and Commercial Law, which I am a member of, are to (1) assist the International Section to fulfill its long-term mission as a "custodian of New York law as an international standard"; (2) provide training in drafting New York compliant documents for cross-border transactions; and (3) propose changes to New York law that would make it more reliable and effective for cross-border transactions.

Current members and those interested in getting involved contribute in various ways. For instance, you could participate in monitoring and reporting case law regarding application of New York law in the cross-border context; in coordinating studies and projects regarding the relationships between New York contract and commercial law and the law of other jurisdic-

Members of the hosting firm (Peixoto e Cury Advogados)

Guests arriving at the reception

tions; in supporting CLE programs; in contributing content to the publications of the International Law Section and New York State Bar Association, etc.

Just to give you a specific example of a project developed by a substantive committee, I am leading an effort to create a quick reference guide on international sale of goods. It is going to be a comparative overview of the rules of the New York UCC and CISG governing every major aspect of a contract for sale of goods.

José Ricardo Martins, partner of Peixoto e Cury Advogados, welcoming the guests

The International Section benefits from the active participation of its members and collaborators. There are many ways in which you can contribute to the NYSBA, so please let us know if you have any questions on how to get involved. I will be very happy to discuss with you the role and responsibilities of the various committees and their members. Please feel free to address any topic while we enjoy the food and drinks.

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Outreach to Latin American Chapters on CISG Issues

The CISG is not only an integral part of New York law, it is also integral to many other jurisdictions. Hence, it is a common element between the law of New York and that of more than 70 different countries all over the world, ranging from the developing countries with modest participation in global trade, to major U.S. trade partners like Germany, Japan, Russia and China, not to mention neighboring countries like Mexico and Canada.

We understand that being a custodian of New York law as a standard for international transactions as stated in the First Mission requires focusing on the CISG as an important standard itself. As a matter of fact, the CISG has been adopted by a total of 76 countries, which represent roughly 90% of all international trade in value. While the CISG may not be the law governing all of these sales transactions, it has widespread application outside the U.S., hence one may wonder whether the U.S., particularly New York, is wasting time by not becoming more aware and fond of this relatively new global standard.

With regard to NYSBA International's Second Mission (safeguarding enforcement of arbitration awards under the New York Convention), it is worth a note that the CISG has strong ties with international arbitration, since by its nature it is the law of international sales contracts which have, in the ordinary course of business, an arbitration clause. More than that, the CISG commonly covers transactions where a choice of law has not been made, which means that many small and mid-value arbitrations (which can be numerous) in international sales tend to be CISG arbitrations.

Furthermore, the CISG is not only a UN treaty, it is one of the most successful ones. It is therefore directly related to NYSBA International's Third Mission. And since the CISG is part of New York law, we have here a particular situation in which the First and the Third Missions intermingle.

Here is also where two important actions of our Committee come together: CLE programs and outreach to NYSBA International Chapters, both new and old, but particularly new. This is because, while in some countries in the Eest, like Germany, France and Italy, or China in the East, the CISG is already a well-known instrument, both in the U.S. and Latin America there is still much room for improvement before knowledge of the CISG, both inside and outside academia and the courts, reaches a sufficient level. There are, for instance, not many reported cases on the CISG in New York courts or Latin American counterparts. And there is no doubt that New York as well as Latin American lawyers deserve a much more focused education on the CISG, with a view to its practical application in the cross-border sale of goods.

Therefore, studying the issues regarding the application of the CISG as an important part of the law of international sales in the age of globalization, as well as promoting its adoption by emerging economies in cooperation with International Chapters in Latin America and all around the world and achieving greater acquaintance of New York lawyers with the CISG, all lie within the scope of our Committee's activities. We are considering the possibility of sponsoring a program at the 2011 Seasonal Meeting in Panama to promote these goals.

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Microfinancing Preliminary Study—A Long-Term Project

Microfinancing is becoming a world phenomenon. Following the lead of International Section leaders and other committees, among our other endeavors, our Committee aspires to embrace the cutting edge subject of microfinance. To that end, we have started a preliminary study to understand how our Committee can offer

meaningful contributions as we believe that our participation in this sphere serves the long-term missions of the Section.

Microfinancing is expected to lift a large portion of the Third World's low-income populations out of poverty, allowing them to integrate into the mainstream global capitalist system. New York law should serve as a global standard for cross-border contracts and transactions in this area as microfinancing is becoming increasingly integrated into the global flow of capital and mainstream global capitalism. Microfinance is the quintessential project in the sense that it aims to bring the solution to the grave and complex global problem of poverty through the innovative use of an old financing tool that once alienated the very people that it now serves.

Due to its increasing importance and historical background, we are conscious that our Committee must work with a broad coalition of various stakeholders. We will reach out to other committees and International Chapters within the International Section, as well as external stakeholders within NYSBA and around the world, ranging from human rights advocates, sociologists and anthropologists to banking and business lawyers and small business supporters, as well as those who represent the interest of the donors and funders and, of course, the recipients of the funds within the global microfinancing infrastructure.

Microfinance is the provision of financial and banking services to low-income communities not (yet) served by the conventional financial industry. The contemporary movement began 34 years ago with the remarkable tale of an economist Muhammad Yunus who unwittingly launched the breaking of barriers between the "banked" and the "unbanked" when he made a $27.00 personal loan to a group of 42 Bangladeshi women to purchase the bamboo that they needed to make stools. The women repaid the money with interest, and their business became very successful. This movement has continued to develop until reaching a tipping point in recent years. Traditionally focused in areas such as Bangladesh, India, and Latin America, microlenders have made huge strides into the poorest parts of Africa and South Asia. Eastern Europe and the Middle East are currently picking up speed.

The United Nations designated 2005 the International Year of Microcredit to raise global awareness of the importance of this movement. In 2006, Mr. Yunus and the groundbreaking microcredit bank he founded, Grameen Bank, were awarded the Nobel Peace Prize. In 2009, the UN Secretary General appointed the Netherlands' Princess Maxima, a former Wall Street banker, as Special Advocate of Inclusive Finance (another name for microfinance), and in July 2010, UNCITRAL adopted a resolution to start studying the international trade law issues of microfinance. On the home front, even the United States is embracing domestic microfunding as a mechanism to bring previously excluded communities into the world of commerce, and law schools are beginning to incorporate related programs and clinics.

Historically, microfinancing has been predominantly funded by donations. As microfinancing grew, the major source of funding has inevitably shifted to private investors and lenders. Microfinance Institutions, or MFIs, have broadened their services to include other products such as bank deposits, insurance, and money transfer services. We now sit on the cusp of an industry being "commercialized." Even in Muslim communities that observe the Islamic prohibition on interest, Islamic financing techniques are being incorporated into the microfinancing concept, and that promotes the growth of microfinance in these communities.

To further accelerate the growth of microfinancing, the establishment of a stable investment environment for international investors is critical and a smooth and reliable contract and regulatory system for microfinance is imperative. Sound contract law and property law are the foundation of economic relationships and economic growth across the globe. This allows varied and sophisticated bargains that actualize a more efficient market and qualify a larger number of individuals, small enterprises, and even previously excluded countries to become active participants in global markets. Today's microfinance involves numerous stakeholders, running from funders, accelerators, investors, banks, lenders, and borrowers (who send money back upstream by becoming depositors), and their legal and economic relations across the borders are complex. New York's legal community has a strong interest in stepping up in this dynamic environment, striving to maintain New York law as the preferred governing law for the commercial relations comprising microfinance. Intelligible, rational, yet flexible laws and contractual frameworks that abet and sustain the worldwide flow of money are imperative to the health and success of this industry and of these burgeoning enterprises around the world.

Our Committee could accomplish various goals: we may identify technical issues in the laws of the microfinance recipient country that are inconsistent with the norm of the global financial community led by New York law; or we could deal with the complex interaction of multiple jurisdictions' contract, regulatory and debtor-creditor laws as well as the conflicts-of-law jurisprudence at the level of MFIs. On a related front, we may handle the cross-border enforceability, transparency, and priority of security interests, which are integral to a dependable system. When dealing with these issues, we will factor in cultural and other important socio-economic considerations and the indigenous legal traditions that are critical to local population. We will also consider the UN's ethical and practical concerns of charities and similar non-profit MFIs "going public" (IPO) with a large profit from the perspective of investment and commercial laws.

In sum, we will strive to contribute to the creation of sound and durable legal models and frameworks that promote the success of microenterprise around the world by mobilizing the New York legal community's expertise in the global capital markets to bring the light of prosperity and sustainable growth to the large swathe of population of the Third World. Our Committee is uniquely positioned to help blaze the trail.

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Development of International Trade Law at UNCITRAL

Another one of our Committee's roles is to assist NYSBA International in promoting the development of international law through the United Nations (UN) and other international organizations in the areas of cross-border contract and commercial law related areas. The United Nations Commission on International Trade Law (UNCITRAL), created in 1966, is the UN commission that deals with this area of law. UNCITRAL has developed Conventions (international treaties), Model Laws, and Legislative Guides in the area of international trade law to harmonize laws and promote international transactions. One of the most successful international conventions of UNCITRAL is the United Nations Convention on Contracts for the International Sale of Goods (CISG), which was adopted in 1980. As noted, the United States, among 76 nations, already ratified the CISG. During its most recent Session in the summer of 2010, UNCITRAL adopted, among others, a new UNCITRAL Arbitration Rule and UNCITRAL Legislative Guide on Secured Transactions Supplement on Security Rights in Intellectual Property. Both texts deal with important private international law issues (both deal with the critically important role of the applicable law in the arbitration agreement and secured lending agreement respectively). Because of UNCITRAL's central role within the UN System to promote the development of multilateral international trade law conventions and guidance on cross-border contracts and commercial laws, our Committee has strong interest in the development of UNICTRAL agendas.

UNCITRAL is constituted by 60 UN member states, which are elected for a six-year term from the entire UN member states. Half of its members (30 states) are elected every three years. The United States is a current member whose term expires in 2016. UNCITRAL allows participation of other UN member states as observers. In addition, UN-related international organizations (such as the IMF and World Bank), multinational organizations (such as the European Union), and invited non-governmental organizations (NGOs) are allowed to participate in UNCITRAL procedures, both at plenary meetings and Working Group sessions. By tradition, UNCITRAL's resolutions are made based on consensus. Voting is only used as a last resort; in reality, during its existence for over 40 years, no substantive issues were ever put to a vote. For this reason, the skill of the chairperson to encourage delegates to find a common ground is extremely important for the successful conclusion of a UNCITRAL process.

The UNCITRAL consensus-based resolution procedure provides unique opportunities for the observers (NGOs, non-member states, etc.) to provide useful input, especially on technical issues, to the UNCITRAL process. Generally, UNCITRAL's agenda development process starts from a resolution to adopt a new topic as a future agenda, and requesting the UNCITRAL Secretariat to hold a public hearing or colloquium to collect information. For example, the 43rd UNCTIRAL Session adopted a resolution to start a study on microfinance issues. The Secretariat then prepares a report for the next UNCITRAL plenary session based on the result of a colloquium. A UNCITRAL plenary session then discusses whether the issue is mature enough to be assigned to a Working Group for the drafting task. A Working Group meets twice a year to develop the text of a convention or other form of UNCITRAL text. It can take years before the Working Group reaches a consensus on draft text that is ready for discussion at the plenary session. Because of this process, it is critical that the stakeholders (member states, NGO observers, etc.) get involved in the discussion at the earliest possible time in order to influence the course of events.

UNCITRAL's annual plenary meetings are held alternately between New York City and Vienna. The length of the meeting is two to three weeks. There are currently 6 Working Groups and each is assigned a different task. For instance, Working Group VI started to handle a new security interest agenda in the fall of 2010. The Working Groups meet twice a year, one week each, one in Vienna and one in New York. UNCITRAL's Secretariat has a permanent office in Vienna.

Currently, some bar associations, such as the American Bar Association, International Bar Association and New York City Bar, are among the NGOs that are invited to participate in UNCITRAL meetings. Various prestigious industry organizations are also invited to UNCITRAL. New York State Bar Association (NYSBA) is currently in the process of applying for status as a UN-accredited NGO, and once it is approved, we will then make a best effort to be invited to UNCITRAL sessions so that the delegates from NYSBA can directly participate in the dialogue at UNCITRAL which relate to critical issues for the development of international law.

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* * *

Of International Interest

Third-Party Funding[1]

I. Introduction

We lawyers are an odd lot: When we are busy, we focus exclusively and obsessively on our work and on our clients, bursting with the self-confidence and self-importance inspired by our excessive workload, which we deem to be unmistakable and objective proof of our unequalled professional merit. When we are not busy, we fritter away our time (secretly doubting that its hourly units are really as precious as we hold them out to be during our busy periods). Wallowing in the despair inspired by our decreased workload, we are convinced that this serves as unmistakable and compelling evidence of our extreme professional ineptitude. In both cases, our heads spend more time ostrich-like in the sand than they should.

A consequence of this perverse situation is that we are often blind to important changes in the world in which we and (especially) our clients live and work. Changes which in many cases provide opportunities for our clients (and thus ourselves) to live and work better.

One such change is the rise of third-party funding of litigation[2] or TPF. TPF involves the funding of litigation by specialized legal funding companies who are neither parties to the dispute nor closely connected with it. TPF providers' sole interest in and connection with the dispute is the "mercenary" or capitalistic aim of making a profit. TPF providers are accordingly differentiable from others who may fund, to some extent, litigation in which they have an interest of another nature, including lawyers, unions, consumer organizations, insurers, legal aid groups, political or other interest groups. TPF is an intriguing and powerful innovation or "product"[3] which may be of material assistance to clients in a broad range of disputes, particularly in international arbitrations (carried out, as they are, with a significant, if not total, degree of independence from the constraints of national judicial systems). Unfortunately, TPF has escaped the attention of the great majority of "head-in-the-sand" practitioners (including, but for a chance encounter at a recent conference, the author).[4]

In the expectation that the topic is similarly new to the vast majority of readers of this journal, this article aims to provide a basic understanding of the TPF concept in the area of international arbitration.

II. Third-Party Funding—An Alternative to "The Good Old Hourly Rate"[5]

TPF substantially increases the traditionally available options for financing the cost of litigation, these being:

- paying the standard hourly rate of the lawyers involved, as well as all other costs (expert's fees, court (or arbitral) costs, travel and related costs, etc.) incurred in the matter[6]; and
- entering into, so long as permitted by applicable law and/or professional regulation and accepted by local practice, contingency or conditional fee arrangements,[7] where a portion of the risk of the result is shifted to and borne by the lawyer.[8]

It hardly needs stating that clients are more and more reluctant to agree to pay hourly rates without some manner of cap or collar to keep them within predictable budgetary parameters (any general counsel facing a potential contentious matter and not sharing these concerns is heartily encouraged to read no further and call the author without delay). Similarly, it hardly needs stating that lawyers, especially litigators, remain reluctant to agree to such caps or collars since the trajectory, longevity and demands of any matter, especially a contentious matter, are inherently unpredictable and the number of variables that could upset the most finely crafted budgetary prediction render the exercise a mere "shot in the dark."

Where permitted and accepted in the marketplace, contingency or conditional fee arrangements are partial solutions to the problem, at least in respect to legal fees. But such arrangements only go so far, and in any event do not address the other items of cost referred to above, e.g., the level of arbitrators´ fees in an international arbitration, which on occasion can approach counsel's own fees. Very few lawyers are prepared to "finance" (more than on a rather limited basis) their clients' business or litigation needs: this is simply not our business and involves risks which we generally do not want (and, more importantly, do not need) to take.

Moreover, in some respects, conditional and contingency fee arrangements can actually exacerbate the problem: for example, in current English practice (possibly to be changed as a result of the report referred to below), success fees in permitted conditional fee arrangements are payable by the losing party as part of costs, thus increasing the exposure faced by the litigant. "After the event" (or ATE) insurance premiums, contracted to cover an eventual cost award, are similarly absorbed by the loser in current English practice.

It is precisely here that TPF enters the scene, offering a product which provides a "third way" or option of satisfying a client's litigation cost concerns: a TPF provider enters into an arrangement with the client (referred to in industry jargon as "the funded party") pursuant to which the funder agrees to cover all the client's costs of the case (including, in those jurisdictions—the very large majority other than the U.S.—in which costs follow the event and thus the winner's costs tend to be absorbed at least in part by the loser). In return, the funder is entitled to a share of the upside calculated either as a percentage (typically 25-50%) of the effective proceeds of the litigation, or as a

multiple of the funding provided, or the greater of the two as may be agreed.

This "third way" actually increases the available options by much more than 50%, since the options are not mutually exclusive. Instead, they can be "mixed and matched," creating "a smorgasbord of funding options"[9] [in the words of Michael Napier, Q.C., former president the Law Society of England and Wales].

III. An Abbreviated History of TPF and an Even More Abbreviated Global Snapshot of the Issue Today

A Page of History

Legislation and case law in common law jurisdictions have traditionally prohibited—for public policy reasons relating to the maintenance of credibility and integrity of the civil justice system—what would today be considered TPF by virtue of the doctrines of "maintenance" and "champerty," terms which most common law students will likely have heard in their studies and recognize as some sort of outdated medieval tort or crime, but which very few will be able to define or explain with any degree of precision.

Essentially, "maintenance" involves the stirring-up of litigation by providing funding (or what corporation laws might refer to broadly as "financial assistance") to assist a party to a dispute without the provider's holding a corresponding and valid interest in its outcome. "Champerty" is the form of maintenance in which the funder is entitled to a share of the proceeds should the funded party prevail.

Over the course of recent decades, the statutory and case law prohibitions of maintenance and champerty have, however, been substantially relaxed in many jurisdictions and outright repealed in others as antiquated relics of a bygone era, reflecting antiquated societal conceptions of litigation. To a certain, perhaps very significant, extent the modern-day relaxation or repeal of these medieval prohibitions reflects an increasing awareness that litigation (i.e., ready access to the courts to defend legal interests and obtain redress for violations thereof) is—while not necessarily and universally "good"—at least not necessarily and universally "evil."[10]

Today, the concepts of maintenance and champerty are generally of relevance in the TPF area only to limit the extent to which a non-interested party, like the funder, exercises control of the conduct of the litigation. In England, champerty was de-criminalized in 1967. In many U.S. states and Australian territories, the prohibitions have similarly been repealed by statute or significantly relaxed by case law.

The result has been the development, in these countries in particular, of a market and an industry—first perhaps, a "cottage" industry but rapidly becoming something much more significant, solid and sophisticated—with a material number of players (including publicly listed companies) offering litigation funding and even a number of entities acting as brokers between funders and parties in need of funding.[11]

The Apparent Global Trend Line Today

While not without certain criticism or hesitation, recent promulgations, recommendations, court decisions and legal scholarship in the following three jurisdictions have, in broad terms, and not without minimizing some of the differences in underlying legal rules and practices (such as those addressing contingency and conditional fees and those involving responsibility for costs) been generally favorable to (or at least, not hostile or patently unfavorable to) TPF.

In England, the seminal document is a voluminous government-commissioned report entitled "Review of Civil Litigation Costs," finalized in December 2009 and released in January 2010 by Lord Justice Jackson (the "Report"). The Report devoted a full chapter to the issue of TPF.[12]

The Report cites five reasons to support its view that TPF is, in principle, beneficial and worthy of support. Due to the significance of the Report and the respect it is likely to be accorded beyond England, these reasons are set out in full as follows:

(i.) Third party funding provides an additional means of funding litigation and, for some parties, the only means of funding litigation. Thus third party funding promotes access to justice.

(ii.) Although a successful claimant with third party funding forgoes a percentage of his damages, it is better for him to recover a substantial part of his damages than to recover nothing at all.

(iii.) The use of third party funding (unlike the use of conditional fee agreements (CFA's) does not impose additional financial burdens upon opposing parties.

(iv.) Third party funding will become even more important as a means of financing litigation if success fees under CFA's become irrecoverable [from the losing party, as L.J. Jackson advocates; author's note].

(v.) Third party funding tends to filter out unmeritorious cases, because funders will not take on the risk of such cases. This benefits opposing parties.

Interestingly, in what Continental jurists may find a "typically British" approach to the issue, L.J. Jackson advocates that the "nascent" stage of TPF in England makes premature any formal, statutory regulation of the area. Instead, and until the institution is more widely used, he considers a voluntary or self-regulatory code, to which

litigation funders would subscribe both necessary and appropriate.

In this regard the Report reviewed and commented on the then-existing draft voluntary code that had been developed by the incipient U.K. Association of Litigation Funders. His principal comments were to "substantially tighten" the draft code's capital adequacy requirements so as to better protect the client from financial problems of the funder, and to precisely define the circumstance under which a funder is entitled to withdraw or terminate funding arrangements. In light of his comments, the code was re-worked (although the funder's ability to "walk" out of the arrangement was not amended) and is expected to be published for general use early in 2011.[13]

In short, the report, the code and the general ebullition in the English market are reflective of a "nascent" but confident industry with sufficiently firm roots planted in the relevant gardens to augur well for continued growth and market acceptance over the years to come.

In the U.S., perhaps the leading contribution to the discussion on TPF to date and the best indicator of the generally favorable but pragmatic view prevailing in the U.S. is the 2010 paper, prepared by Steven Garber for the think tank the RAND Corporation, entitled "Alternative Litigation Financing in the United States: Issues, Knowns and Unknowns."[14]

Citing what he refers to as the "massive uncertainties" about recent and future effects of TPF on U.S. litigation, he echoes, to a certain extent, L.J. Jackson in counseling against broad regulation and what he refers to as "one-size-fits-all" policy prescriptions. He also expresses concern about uncritical acceptance of ethical arguments, and counsels wariness about the relevance of the evolution and effects of TPF in other countries on its evolution and effects in the U.S. In so doing, he stresses the importance of national institutional features and legal rules and their effect on the scope of, and prospects for, TPF in a particular jurisdiction. The U.K. and Australia reflect materially differing institutional features and legal rules compared to the U.S., he notes, including (as mentioned) the prohibition of counsel working under pure contingency arrangements, the existence of cost-sharing rules requiring or permitting the loser to pay the winner's legal costs (such costs including in current English practice, as noted above, both the "success" fee earned in a conditional fee arrangement and the cost of ATE insurance premiums), the absence (unlike in the U.S., where such are available in a broad range of cases) of punitive damages, or the relative inexistence of the jury in civil cases (whereas in the U.S., the jury remains the predominant fact-finder in civil litigation).

There are significant contrary views in the U.S. Perhaps the leading "naysayer" is the U.S. Chamber of Commerce, as expressed in a paper published in 2009. Authored by three Skadden Arps attorneys and entitled "Selling Lawsuits, Buying Trouble," the paper reflects a far less measured, and far less sanguine, position on TPF than the Rand paper. It begins as follows:

> Third-party litigation financing is a growing phenomenon in the United States, and it has received much attention of late from both proponents and critics, including practicing lawyers, academics, jurists, and policy-makers. Although third-party funding is not widespread, it is playing an increasingly visible—and potentially harmful- role in U.S. litigation. If such funding becomes more prevalent, it will pose substantial risks of litigation abuse. This is particularly true in the context of class or mass actions, which are already very vulnerable to abuses.
>
> The root problem with third-party litigation financing is that it introduces a stranger to the attorney-client relationship whose sole interest is a financial one. The stranger wants to protect its investment, and its interest lies in maximizing its return on that investment, not in vindicating a plaintiff's rights. Put simply: the stranger's motive is to pursue investment that will generate returns whether or not the claims underlying those returns lack merit. The stranger, like a law firm, is a repeat player in the lawsuit-financing game. But unlike a law firm, the stranger does not have a privileged, fiduciary relationship with the plaintiff. Eventually, then, the stranger's presence will require a relaxation of the rules governing attorney professional responsibility, compensation, and the attorney-client privilege to accommodate these new realities. This relaxation threatens to chip away at—and eventually eradicate—critical safeguards against lawsuit abuse.

Not surprisingly, the Chamber of Commerce article concludes by advocating the outright prohibition of TPF in the U.S., or "at the very least," its ban in the context of aggregate or class litigation (where its attractiveness is perhaps most obvious).

The contrast between—on the one hand—the generally favorable, albeit qualified and pragmatic, view of the Rand think tank paper, which appears on the basis of the materials that the author has been able to access, to be shared in general terms with the majority of those American scholars and observers as well as of bar associations and leaders who have taken positions on the matter, and—on the other—the contrarian views expressed in the Chamber of Commerce paper can be usefully viewed un-

der the (over-simplified but not for that reason essentially inaccurate) prism which splits the U.S. legal profession into two hostile camps, the "plaintiff's (or "trial lawyers') bar" and the "defense bar" (comprising corporates and their counsel). Paralleling, to some extent, certain residual dichotomies concerning the views on the current relevance and applicability of maintenance and champerty, these two schools can be characterized as diverging on the question of the fault-lines of access to justice (favored by the "plaintiff's bar") and avoiding frivolous litigation of the "defense bar." Another, more simple, explanation for the divergence in views is that the Chamber of Commerce focuses its criticism of TPF on class actions, a particularly troublesome (and particularly American) matter, whereas the Rand paper is broader in scope. A still simpler explanation (without going so far as to name political party inclinations) would be to associate the former school of thought to left-leaning liberal lawyers and the latter to right-leaning conservative lawyers.

In any event, all indications are that despite the views of the Chamber of Commerce, TPF is here to stay in the U.S. Inevitably, given both the huge size and the specific nature of the U.S. litigation market—with its high stakes, higher costs and (as mentioned above) its class actions, punitive damages and jury trials for civil matters—the U.S. is viewed as the "mother lode" or "El Dorado" of the industry, where literally billions of dollars are at stake on a systemic basis. This scenario creates appetizing possibilities for packaging and marketing attractive litigation claim-based investment portfolios.

In Australia, TPF has a longer history than in England or the U.S. This country is generally considered to have a particularly relaxed approach to the issue, with clear and solid judicial support for the concept on grounds of increasing or facilitating access to justice. A recent and somewhat controversial High Court case held that even a funding arrangement in which the funders both initiated and controlled the litigation was not invalid on public policy grounds. With this decision, Australia stakes its claim as the most TPF-favorable jurisdiction on the globe, and certainly of the three referred to in this article (in England and generally in the U.S., where the lawyer owes a dual duty—both to client and to the Court—allowing the funder to take control of a claim would almost certainly run afoul of the prevailing rules, whether cast in terms of champerty, ethical rules, or otherwise).

IV. TPF in Practice

As is understandable in any relatively new, small and essentially unregulated market, and despite the growing amount of interest generated by the topic (and by the funders themselves, which is equally understandable), relatively few facts and figures are available as to the extent to which, and the types, sizes and general nature of the matters in which, TPF has been and is being used. Nonetheless, ample useful information as to the actual mechanics or operations of TPF is available on the web pages of most of the significant players in the industry.[15]

Of particular interest are the criteria established for the "vetting" of a case under consideration for possible funding (or, to call a spade a spade, "investment"), being: (i) enforceability, in terms of capacity of the defendant/respondent to pay an eventual judgment/award and the location and nature of its assets in the event that it fails to pay voluntarily; (ii) merits, in terms of liability but also of value—typically certain minimum thresholds are required before a funder will dedicate the resources necessary to evaluate a claim for possible funding—and the expected time frame for concluding the case, i.e., realizing the value; (iii) expected costs, including adverse costs to the extent that cost-shifting may be involved; and (iv) the experience and capacity of the legal team running the case.[16]

The "due diligence" on the merits of the case is of course essential, and typically involves confidential review by a panel of independent experts so as to filter out cases that are not likely to prevail. In this regard, it is noteworthy (and, of course, no coincidence) that not only are the founders or principals of most of the leading TPF providers actually seasoned litigators and often former partners of blue chip law firms, but they have retained eminent counsel to sit on their boards or advisory/evaluation committees. This would seem to kill two birds with one stone, i.e., use top legal talent to most effectively separate the wheat from the chaff in the cases considered for funding, and, arguably, to co-opt leading lights in the profession so as to strengthen the perception of, and case for, TPF in general.

As should be immediately apparent to counsel, the things that the funder looks for as set out herein—save of course, the final consideration, as to which counsel has no doubt—are precisely what we lawyers look at (or should look at) when we take on a contentious matter, particularly when we consider downside protection for the client by means of a conditional or similar fee arrangement involving an hourly rate discount compensated by an uplift in the event of a favorable result.

Anecdotal evidence suggests that funders tend to accept only about 10 percent of the cases presented to them, and logic suggests that the cases presented are generally viewed by the presenter (typically counsel) as of above-average merit. A funder's acceptance of a case comes only after its own rigorous, expensive (reportedly involving expenses of some $100,000) and time-consuming (reportedly involving a 2-3 month due diligence) vetting process. This process is presumably more strict and "independent" than the similar process effected by counsel, who on the one hand may have pre-existing relations or familiarity with the dispute or with the client generally so as to "color" his evaluation and who, in general, simply cannot afford to accept only one case of ten that come through the door. A favorable funding decision is thus a shot in the arm for the

funded party and its counsel (whose confidence would not be boosted if an "all-star cast" of evaluators viewed your case so solid as to be willing to "buy into" it?) and a very strong message to the other party as to the limited merits of its case. From this perspective, the vetting process would indeed seem, as TPF defenders assert, to "level the playing field" and achieve the socially salutary effect of helping to bring meritorious cases to justice while filtering out meritless cases.

The potential size and the special financial characteristics of the TPF market make it of great interest to investors.

As to size, the figures are staggering: according to public filings made in 2008 by two of the leading publicly traded litigation funders, annual litigation revenues for the largest 200 U.S. law firms alone approached $30 billion in that year, while overall U.S. litigation spending approached $80 billion.[17] As stated by a co-founder of a San Francisco-based litigation funder, "litigation is a multibillion dollar industry for which there is almost no private capital…[which is] unique and odd. Most major industries in the U.S., from manufacturing to high-end services, have a lot of private and/or public investment dollars in them."[18]

As to the nature of the investment and its particular appeal to investors, large-scale litigation—viewed as a financial investment or product, through the eyes of a hedge fund manager or investment banker and not the eyes of a lawyer, in a process said to "bring the discipline of the capital markets to the legal market"[19]—is an asset class of potentially enormous size and with certain uniquely attractive qualities (wholly untied to interest rates, employment levels, the stock market or any other inherently unstable, purely economic or economic policy matter) which, properly structured and managed ("sliced and diced," in the pejorative expression applied to sophisticated mortgage-related investments to which the principal responsibility for the recent global economic crisis has been ascribed) can be the basis for a fund to offer a novel and attractive product to its investors.

V. TPF and International Arbitration

TPF funders may be particularly interested in the potential of international commercial arbitrations and parties in such disputes may be particularly interested in the opportunities for the cost-hedging provided by TPF.

Very little appears to have been written specifically on this issue. A short multi-jurisdictional overview published in 2008 by the on-line Global Arbitration Review and entitled "Case Notes on Third Party Funding" reflects a general consensus that there was insufficient practice and precedent with TPF generally and TPF in the arbitration context in particular to permit clear predictions as to the future of TRP in the arbitration context. The participating authors then proceeded to venture predictions, which were frequently inconsistent.

By way of example, the authors of the Australian overview observed that it would be reasonable in their view "to expect that the Australian courts will treat funding of arbitrations in substantially the same manner as funding of litigation."[20] The authors of the French overview, on the other hand, after noting the risk that litigation funding could, in certain circumstances, become subject to prohibition in France on public policy grounds, observed that they did not "foresee, however, any risk of the validity of third-party arrangements in international arbitrations being seriously called into question."[21]

A concise and incisive approach to the issue by Prof. Doug Jones in a 2008 presentation to a leading London-based solicitors firm[22] identifies a number of convincing reasons suggesting that arbitration will be a fertile field for TPF activity. These include:

- the large sums often at stake in arbitrations; the relative speed of resolution of arbitrations; and relative certainty of the calendar for decision;
- the increased certainty (or at least, decreased uncertainty) of decisions due to the arbitrators' presumed experience, both generally and in the area of the dispute in particular;
- the existence of the New York Convention as providing a much more fluid and reliable system for international enforcement of arbitral awards as compared to the less attractive and less effective available means of international enforcement of judicial decisions;
- the possibility (uncertain as of this date in the jurisdictions under review) that to the extent that the restrictions or prohibitions on maintenance and champerty discussed above continue to have material bearing on the issue of TPF, that they may be nonetheless considered to have little or no bearing on arbitral disputes due to the inapplicability of the public policy/protection of the national system of civil justice basis for the prohibitions found in the court litigation context in the consensual private world of arbitration; and
- the fact that any disputes between the funder and the funded party would not typically be arbitrable and thus would not interfere with or delay the arbitration as they might in a litigation with more "global" jurisdiction over the parties and the process than in an arbitration.

As this enumeration makes clear, there are a large number of factors—above and beyond the fact that arbitration is a paying exercise and experienced arbitrators and large arbitrations generate a high level of arbitrators'

fees which a court litigation, of course, would not share—inducing young and growing TPF providers to exhibit a particular interest in arbitration opportunities.

VI. Conclusion

TPF is here to stay.

Will TPF become an attractive and frequently used option in international arbitrations? Place your bets…but only after taking your head out of the sand.

Endnotes

1. The author is indebted to a number of leaders of the TPF industry and of the profession for their assistance in providing him with most of the documentation on which this article is based. Thanks are particularly in order to Susan Dunn, co-founder of Harbour Litigation Funding Ltd, Christopher Bogart, Chief Executive of Burford Capital Limited, Prof. Doug Jones of Clayton Utz, Prof. Laurel Terry of Penn State Dickinson School of Law, John Gosling of Addleshaw Goddard and Peter Rees Q.C. of Debevoise & Plimpton.
2. The term "litigation," except where specifically referring to court proceedings, is used in this article in the broad sense of contentious matters generally, including arbitration.
3. The economic genesis and function of TPF bear similarities to all types of financial products and markets, from the swap (off-loading certain economic or financial risks, e.g., interest rate risks, to entities better able and more desirous of bearing them) to sale-and-leaseback transactions (up-loading speculative or residual-value risk of assets such as real estate or commercial aircraft from the operators who use them to provide their services to entities more interested and more able to shoulder such risks): all cases of Adam Smith-like capitalism in action. Not surprisingly, given the nature of the product, all, or virtually all, of the founders and principals of the leading TPF providers today are former (and very experienced) big-firm litigators, rightfully referred to in the September 2010 issue of The ABA Journal as comprising "a new class of lawyer-entrepreneurs."
4. A principal of one of the leading TPF providers focussing its energies on the U.S. market was quoted in the June 8, 2010 issue of The New York Law Journal as saying, "The industry's biggest enemy is unawareness, [a]nd most of the lawyers in the U.S. are unaware of it."
5. The expression is used by Susan Dunn in "*Paying for Litigation—A "New" Option*," Butterworth's Journal of International Banking and Financial Law, May 2007. The summary of available options for paying the costs of litigation set out in the text immediately below paraphrases the introductory portion of the Butterworth's article.
6. As consumers, many of us tend to use a rule of thumb in our private lives with respect, say, to contractors remodelling or building our homes or offices which assumes (at least for budgeting and planning purposes) that the job will take twice as long and cost twice as much as initially contemplated; oftentimes, even this 100% margin of prudence proves to be insufficient. Few litigators (or non-litigators, for that matter, although the point is particularly apt in the litigation context) will deny—at least in private—that a prudent client should probably apply a similar rule of thumb.
7. In general terms, contingency or "pure" contingency fees are no win–no pay arrangements in which counsel receives, as a "success" fee, a contractually agreed percentage of the damages awarded (or agreed in a settlement), i.e., if the matter is concluded favourably to the client, but receives nothing otherwise. A conditional fee typically is an arrangement where counsel offers a discount or "haircut" on hourly rates with the chance to recoup and multiply the discounted amount in the event of a favourable outcome. At the risk of over-generalizing, "pure" contingency fees are generally impermissible in the principal jurisdictions (other than the U.S.), but conditional fee arrangements are generally permitted. In the U.K., a conditional fee arrangement is valid only if the fees ultimately charged, including the uplift, do not exceed twice the lawyer's benchmark or "rack" hourly rates.
8. TPF is typically available to defendants/respondents as well as to plaintiffs/claimants, limiting and quantifying the risk of losing by, e.g., defendant's/respondent's agreeing to pay up-front to the funder a certain percentage of the amount claimed, in return for the funder indemnifying the defendant/respondent for all costs incurred and the ultimate amount of damages awarded or agreed. Nonetheless, as with contingency and conditional fee arrangements, TPF is much more commonly seen on the plaintiff/claimant side, so for simplicity of exposition, this article will in general address the matter from their point of view.
9. In B. Rigby, "*Behind You All the Way*," The In-House Lawyer, November 2008.
10. A fascinating analytical view of the history of the genesis and evolution of common law rules involving investing in lawsuits and the assignment of claims is found in Prof. Anthony J. Sebok's "*The Inauthentic Claim*" (unpublished). The piece is a thorough de-bunking of the arguments typically used to restrict or prohibit TPF and the assignment of claims, arguments which the author views as based on an antiquated view that "all litigation is evil," and in which he concludes, citing a 1936 observation by Max Radin in "*Maintenance by Champerty*," 24 Cal. L. Rev. 48 (1936) that "There is no necessary and inevitable connection between improper litigation on the one hand and the acquisition by a third party of an interest in a litigated case on the other."
11. A partial list of TPF providers (most of which focus their businesses only on this market) includes Juridica Capital Management Ltd., Burford Capital, Future Settlement Funding, Allianz Litigation Funding, Harbour Litigation Funding, Claims Funding International plc, Juris Capital, Arca Capital Partners, Omni Bridgway and even an arm of Credit Suisse Group; a leading litigation funding broker is The Judge.
12. Both the final report and the preliminary report (released for comment in May 2009) are available at http://www.judiciary.gov.uk/about_judiciary/cost-review/reports.htm.
13. The final version is available at http://www.civil.justicecouncil.gov.uk/files/TPF_consultation_paper_(23.7.10).
14. A product of the Rand Institute for Civil Justice Law, Finance and Capital Markets Program, the paper is available at http://www.Rand.org/icj/programs/law-finance/about/.
15. See Harbour Litigation Funding's webpage (available at http://www.harbour/litigationfunding.com.
16. Captioned from Harbour Litigation Funding's webpage, as cited in note in 15. **What do we look for in a case?** We look for 4 key elements in a claim. All 4 of these must be satisfied if we are to consider the matter for funding. The demand for our funding is always very high and therefore we must decide which cases best satisfy our criteria, which are: **Creditworthy Defendant:** Does the defendant have the ability to satisfy the claim—what is its asset position and where are those assets located? **Good Legal Merits:** What are the legal merits of the claim? Merits means not only a strong case on liability but a clear comprehensible basis for the value of the claim. In addition we will want to know how long it is likely to take for the matter to come to trial or final hearing. The more developed a case is, the better. Written advice on these issues from your legal representative is desirable as it will expedite our evaluation process. **Proportionate Costs:** How much will the claim cost to run? This includes all own side legal and experts' costs and estimated adverse costs through to trial or final hearing. An estimate provided by the legal advisor will be required in order to consider a case for funding. While we do not insist that your advisor works on a conditional fee basis, we will look at a case

more favourably if the advisors are prepared to take some risk on their fees because it helps to demonstrate their confidence in the merits of your case. **Experienced Legal Team:** Is the advisor running the claim someone with demonstrable experience in the area of law to which the claim relates? We only fund cases where the representative has such experience.

17. "*Third-Party Investors Offer New Funding Sources for Major Commercial Lawsuits,*" BNA Daily Report for Executives, March 5, 2010.
18. B. Rose, "*Law: The Investment*," ABA Journal, September 2010, quoting Mike Guthrie of Corax Capital Partners.
19. *Id.*
20. 3 GAR 1, 2008.
21. *Id.*
22. Prof. Doug Jones, "*Third-Party Funding of Arbitration,*" presented at S. J. Berwin's forum on Hot Topics in International Arbitration" held on September 22, 2008.

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The Hague Convention on Choice of Court Agreements

Lawyers drafting international contracts may soon have a new option for dispute-resolution clauses. The Hague Convention on Choice of Court Agreements requires signatories' courts to provide more favorable treatment to foreign courts' judgments, thus making dispute resolution by litigation an attractive alternative to international arbitration.

The Problem

Litigants that obtain a judgment in a domestic court over a foreign party often encounter difficulty enforcing such judgments. If the foreign entity lacks assets in the judgment country, the victorious litigant has little choice but to pursue assets in foreign jurisdictions through foreign courts. Unfortunately, many countries' courts are reluctant to recognize and enforce foreign judgments. This problem often affects U.S.-based litigants, as the principle of international comity—important in the U.S. legal system—is often a one-way street. There is currently no international treaty in force obligating courts to recognize or enforce foreign judgments.

Moreover, even when parties to an international contract choose a particular country's court for adjudication of disputes, foreign courts do not always respect that choice. For example, a Canadian appellate court recently considered the effect of a forum-selection clause in a contract involving a Texas company and an Ontario company in *Matrix Integrated Solutions Limited v. Radiant Hospitality Systems Ltd.*[1] The clause designated Texas courts but when a dispute arose out of the relationship, the Ontario company sued in Ontario. The Court of Appeal for Ontario held that the circumstances of the dispute did not implicate the forum-selection clause and compelled the Texas company to litigate in Ontario.

Because of these difficulties, international arbitration is often the mechanism of choice for international dispute resolution. It is especially attractive because most countries are bound by the New York Convention to uphold and enforce the decisions of arbitration panels, wherever constituted. But arbitration also has its disadvantages. International arbitration panels are costly, parties choosing arbitration are limited in their ability to conduct discovery, and they essentially surrender their rights to appeal a panel's decision.

The Convention Provides a Solution

The Hague Convention on Choice of Court Agreements is an international treaty that, when in force, will require courts to respect parties' intentions regarding adjudication of transnational disputes and to enforce judgments of foreign courts. It was adopted by the member states of the Hague Conference on Private International Law in 2005. Presently only Mexico has fully acceded to the Convention. The U.S. signed the Convention in January 2009. It awaits Senate ratification. The European Commission signed on behalf of its twenty-seven member states in April 2009, though the Convention must still be ratified on their behalf.[2] Canada, Argentina and Australia are also favorably inclined to accession.[3]

The Convention will apply to disputes arising from international contracts regarding civil or commercial matters that contain exclusive choice-of-court agreements.[4] ("Choice-of-court agreement," as used in the Convention, is analogous to "forum selection clause" as commonly used in the U.S. and Canada.) It will not apply to litigation between non-contracting parties (i.e., tort claims), or to litigation arising between parties of the same nationality. The Convention will apply only to business-to-business contracts—it specifically excludes litigation arising from consumer and employment contracts.[5] It also excludes several types of litigation such as antitrust, personal injury, and family law issues.[6] Intellectual property litigation, except as to copyright, is also excluded.[7]

Fundamentally, where litigation arises between parties to an international contract containing an exclusive choice-of-court clause (and the parties' home countries have adopted the Convention), the Convention will do three things. It will: (1) prohibit the designated court from declining jurisdiction;[8] (2) prohibit non-designated courts from exercising jurisdiction;[9] and (3) require all signatory states to recognize and enforce judgments resulting from the choice-of-court agreement.[10]

The Convention's Effects

The Convention will improve recognition and enforcement of foreign judgments, in part by encouraging use of choice-of-court agreements. For example, assuming the U.S. ratifies the Convention, if a U.S. company contracts with a Mexican company for the sale of component parts, and the parties agree to a choice-of-court clause exclusively designating courts of a specified U.S. state or federal district for any litigation that may arise from their contractual relationship, the Convention will apply. Thus, if the Mexican company sued in Mexico for breach of contract, the Mexican court would be obligated to decline jurisdiction in favor of the designated U.S. jurisdiction.[11] This outcome would not only uphold the original negotiated intent of the parties, it would also avoid the problem of parallel litigation.

Returning to the Matrix Integrated case discussed above, if the Convention had been fully acceded to by the respective parties' countries at the time, the result would likely have been different. This is because where the Convention applies, its scope is broad, thus prohibiting courts from applying the forum selection clause narrowly, as the Matrix Integrated court did. The Convention applies to any dispute arising from the parties' "legal relationship,"[12] regardless of how the plaintiff characterizes the action.[13]

Assume now that the U.S. company in our above example obtains a judgment against the Mexican company and attempts to enforce the judgment against the company's assets in Mexico. Courts of countries party to the Convention not designated by the litigants in their contract would be generally prohibited from reviewing the merits of a judgment handed down by the designated court and bound by the designated court's findings of fact[14] (the Convention even provides a form document confirming the issuance of a judgment rendered in one country's courts for use in another's.)[15]

As mentioned, the Convention excludes consumer contracts. However, this exclusion is not clear-cut. The Convention's definition of "consumer" depends on the use to which a product is placed, not the product itself. A consumer is a natural person procuring goods or services for personal, family, or household use.[16] Thus, a sales contract relating to a product would not implicate the Convention if the purchaser fits that definition, whereas the same product, purchased for business use, would implicate the Convention. A contract for components purchased by a manufacturer would not be exempt from the Convention. Similarly, if the contract governed the purchase of consumer end products by a retailer, the Convention would apply.

To illustrate, assume a U.S. company sells software over the Internet with a so-called "click-on" contract designating a specific U.S. jurisdiction for disputes. If a Canadian purchaser sues in Canada, whether the Canadian court would be obligated under the Convention to decline jurisdiction would depend on the product's intended use. This is because the Convention does not distinguish between negotiated and non-negotiated contracts, so the fact that the parties did not negotiate the clause would not control (this differs from domestic consumer "click-on" contracts where many U.S. courts have held non-negotiated forum selection clauses or mandatory arbitration clauses to be invalid). If the Canadian purchaser of the software is a private citizen contemplating home use, the Convention would not obligate the Canadian court to decline jurisdiction. If the purchaser is an individual professional or sole practitioner intending to use the software in, say, a dentist's office, then the Convention would apply and the Canadian court would be required to decline jurisdiction.[17]

Some exceptions should be noted. A non-designated court may refuse to decline jurisdiction if it determines that enforcing the contract's choice-of-court agreement would lead to a "manifest injustice" or contravene its country's public policy.[18] In addition, courts would not be required to enforce judgments or parts of judgments for anything but compensatory damages.[19] A party obtaining punitive damages in a U.S. court against a foreign defendant, therefore, is unlikely to receive any assistance in obtaining such damages from the courts in a foreign country where the defendant has assets.

It should also be noted that under the Convention, a court will be prevented from dismissing a case on the basis of forum non conveniens if doing so overrides the contractual choice of that court by parties to an international contract.[20]

Conclusion

The Hague Convention on Choice of Court Agreements represents a significant step toward the streamlining of international litigation. Presuming that the Convention gains widespread acceptance, litigation will become an acceptable alternative to arbitration for companies contracting across borders.

Lawyers considering forum selection clauses as an alternative to international arbitration should keep apprised of the progress of ratification in the U.S. and other countries' accession to the Convention.

The Convention's text and the status of countries' ratification/accession are available at http://www.hcch.net/index_en.php?act=conventions.text&cid=98.

Endnotes

1. 2009 ONCA 593.
2. http://www.hcch.net/index_en.php?act=conventions.status&cid=98.
3. Outline: Hague Choice of Court Convention, available at http://www.hcch.net/upload/outline37e.pdf.

4. Convention on Choice of Court Agreements ("CCCA"), Art. 1; full text available at http://www.hcch.net/index_en.php?act=conventions.pdf&cid=98.
5. CCCA Art. 2(1).
6. CCCA Art. 2.
7. CCCA Art. 2(2)(n)-(o).
8. CCCA Art. 5(2).
9. CCCA Art. 6.
10. CCCA Art. 8(1).
11. CCCA Art. 6.
12. CCCA Art. 3(a) (emphasis added).
13. In *Matrix Integrated*, the court deemed the dispute to arise not from the contract but from a breach of a fiduciary duty, and thus held the contract and its forum-selection clause constituted only "background" to the litigation.
14. CCCA Art. 8(2).
15. Available at http://www.hcch.net/upload/form37e.pdf.
16. CCCA Art. 2(1).
17. *Id.*
18. CCCA Art. 6(c).
19. CCCA Art. 11(1).
20. CCCA Art. 5(2); Outline, *supra* note 3.

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Human Rights Protection in the Americas: The IACtHR

The Inter-American system for the protection of human rights is found in the American Declaration of the Rights and Duties of Man (Bogotá, Colombia, 1948)[1] (the "Declaration") and the American Convention on Human Rights (San Jose, Costa Rica, 1969),[2] which entered into force in 1978 (the "Convention"). Both are products of the Organization of American States (OAS) and its Charter[3] signed in Bogotá, in 1948. Under the OAS Charter all member states are bound by the provisions of the American Declaration.

The pillars of the OAS human rights system, providing recourse to people in the Americas who have suffered violations of their rights by the state, are the Inter-American Commission on Human Rights (the "Commission"),[4] found in Chapter VII of the Convention, and the Inter-American Court of Human Rights (IACtHR),[5] found in Chapter VIII of the Convention.

The Declaration shares a common background with the United Nations' Universal Declaration of Human Rights (1948), which it pre-dates by some three months. Both are responses to the events of the Second World War and give meaning to the references to human rights in both the OAS and UN Charters.[6]

Unlike the 47 members of the Council of Europe, where there is an obligation to ratify the European Convention on Human Rights (1950) upon becoming a Council member, there is no such obligation within the OAS.[7] Thus, 10 of the 35 member states of the OAS, including the United States, Canada and Cuba, are not Convention parties.[8] Those not parties to the Convention are not bound by edicts and Regulations of the Commission or the jurisdiction of the IACtHR.[9] Pursuant to the Statute of the Commission, the Commission shall nevertheless receive and act on petitions concerning human rights violations committed by member states of the OAS which are not parties to the Convention.[10]

As noted, the United States, while a signatory to the Convention, has not ratified or acceded to it and has not recognized the jurisdiction of the IACtHR. The Obama administration, unlike past administrations, has shown a willingness to enter into human rights agreements, such as its first treaty, the International Convention on the Rights of Persons with Disabilities, for which it has created a State Department post to oversee its implementation.[11] The administration has also recently backed a UN doctrine calling for collective military action to halt genocide.[12]

OAS

The OAS is made up of 35 member states, being the nations of North, Central and South America as well as the Caribbean.[13] While the Government of Cuba is formally a member state, it was suspended from participation in 1962. In June, 2009, the OAS revoked Cuba's suspension on condition that Cuba abides by the OAS Charter, including democratic principles.[14] On July 5, 2009, the OAS suspended Honduras because of the June 28 coup d'ètat that expelled President José Manuel Zelaya from office.[15]

As is true with other international bodies,[16] nations from other parts of the world participate as permanent observers so they can follow the issues which are pertinent to the Americas.

The headquarters of the OAS is in Washington, D.C. It's two principal political bodies are the General Assembly, consisting of the hemisphere's ministers of foreign affairs, which meets in regular session once a year, and the Permanent Council, made up of ambassadors appointed by the member states.[17] The OAS General Secretariat, headed by Secretary General José Miguel Insulza, carries out the programs and policies set by the political bodies. There are four specialized secretariats which further coordinate OAS policies.

The OAS has a special emphasis on fighting terrorism, taking action against land mines, and defending the rights of women and indigenous peoples.[18]

The Commission

The Commission, as a principal organ of the OAS, promotes the observance and protection of human rights[19] and has jurisdiction over petitions from individuals, which includes NGOs, alleging violations by their governments of rights enumerated in the Declaration.[20] The Statute of the Commission was formally approved by the General Assembly of the OAS in October, 1979.[21]

The Commission, headed by a Chairman, convenes in ordinary and special sessions several times a year and is headquartered in Washington, D.C. (as is the OAS). It is comprised of seven members, who act independently without representing any particular country and who are elected by the General Assembly of the OAS. Pursuant to Articles 6 and 8 of the Commission Statute, members of the Commission are elected for a term of four years, may be reelected once, and may hold no other jobs or positions. Pursuant to Article 17, an absolute majority of the members of the Commission constitutes a quorum for most matters. The Commission has an Executive Secretariat which carries out the tasks of, and provides legal and administrative support to, the Commission.[22]

The Commission is well aware of the human rights challenges facing the hemisphere and member states. It has particularly focused on the relationship between citizen security and human rights. Threats to security facing inhabitants of the region include terrorism, drugs, human trafficking, gang violence and common crime.[23] In addition, principal concerns of the Commission are high malnutrition rates, insufficient access to health and education, inadequate standards of living, a weak rule of law, the inadequate power of the judiciary and persistent impunity in the face of serious human rights violations.[24] Pursuant to Article 42 of the Convention, state parties are to prepare and transmit to the Commission a copy of reports and studies on the issue of human rights in their country on an annual basis so the Commission may watch over the promotion of such rights.

The Commission is presently processing more than 800 individual cases,[25] meaning the submission of briefs and the holding of hearings where required. As noted, any person, group of persons, or NGO may present a petition to the Commission alleging violations of rights protected by the Convention and/or the Declaration.

The petition may be presented in any of the four official languages of the OAS, Spanish, French, English and Portuguese. The Commission applies the Convention to process cases brought against member states who are parties to the Convention, and applies the Declaration to those members who are not parties to the Convention.[26] As is true with other international courts,[27] the petitions presented to the Commission must show that the victim has exhausted all means of remedying the situation domestically, including undue delay.[28]

Articles 46 and 47 of the Convention set forth additional admissibility standards, noting among others, that petitions will be considered inadmissible if they are "manifestly groundless," do not state facts that establish a violation of the Convention, or present an issue presently before another international body.

After a petition is filed alleging a human rights violation, the Commission attempts to settle the dispute, failing which, the Commission may recommend specific measures to be taken by the member state. If a state does not follow the recommendation, the Commission may publish one or more reports or take the case to the IACtHR, assuming the state involved has accepted the Court's jurisdiction.[29] Pursuant to Article 19 of the Commission Statute, the Commission is given the authority to request the Court to take such provisional measures as it considers appropriate in serious and urgent cases, but it also may make such requests of a member state in its own right.

The majority of member states that have ratified the Convention have accepted the jurisdiction of the IACtHR.[30]

The Commission may conduct an on-site visit to a country, by invitation, to analyze and report on the status of human rights, which it did in Bolivia in November 2006. It also examines human rights issues in specific contexts and has created rapporteurships to focus on these areas, such as the rights of indigenous peoples, rights of women, of the child, of persons deprived of liberty, of migrant workers and against racial discrimination.[31]

The Commission is very busy, having conducted 93 hearings and processed 1,376 cases in 2008.[32]

The Commission may act on alleged human rights violations committed by a member state of the OAS such as the United States. All members of the OAS accept the principles of the Declaration. Three cases before the Commission in 2008 were of interest to the United States.[33]

One case (PM 240/07 Orlando Cordia Hall) concerned a prisoner in the United States who was given the death penalty and who alleged, inter alia, racial bias in the application of the death penalty. The Commission asked the United States to refrain from executing the death sentence until it could issue its decision.

Another (PM 149/08 Boniface Nyamanhindi) concerned a national of Zimbabwe who was being held in a detention facility by the Immigration and Customs Enforcement Agency. He claimed that if deported he would be subject to torture and cruel treatment because of his membership in an opposition party. The Commission asked the United States to prevent this irreparable harm from occurring.

The third case (PM 211/08 Djamel Ameziane) involved a man detained in Kandahar, Afghanistan, in January 2007 and taken to Guantánamo. He claimed he was tortured and subject to cruel, inhumane and degrading treatment and was in danger of being deported to his native country, Algeria, where he might suffer the same fate. The Commission asked the United States to immediately take measures to stop any such treatment while he was in its custody and to make certain he was not deported to a country where he might be subject to torture and mistreatment.

In all three cases the Commission has advised it continues to monitor the situation. The Commission has not reported any reaction by the United States.

The IACtHR

Unlike other international courts where petitions are presented to the court in the first instance, only petitions presented by the Commission or a state party are considered by the IACtHR.[34] Pursuant to Articles 48-51 and 61 of the Convention, individual citizens of an OAS member state who believe their rights have been violated must first lodge a complaint with the Commission and have that body rule on the admissibility of the claim.

If the claim is ruled admissible, then as previously noted, the Commission first tries to enter into a friendly settlement with the offending state. If that is unsuccessful, it may recommend specific measures to be taken by the state. If further rebuffed, the Commission may publish reports on the dispute. The further act of presentation of the case to the Court may thus be considered a measure of last resort.

The decision on whether a case should be submitted to the Court is determined on the basis of what is in the best interest of human rights.[35] In addition to hearing cases, hereafter described, the Court may exercise its advisory jurisdiction to interpret the Convention and other human rights treaties in effect in the hemisphere.[36]

The Court is based in the City of San José, Costa Rica, with its main purpose to enforce and interpret the provisions of the Convention. It has an adjudicatory function, hearing and ruling on the specific cases of human rights violations referred to it by the Commission. Pursuant to Article 67 of the Convention, its decisions are final.

Its advisory function, set forth in Article 64 of the Convention, consists of issuing opinions on matters of legal interpretation, with respect to the Convention or other human rights treaties, brought to its attention by member states or other OAS bodies.

Judges

The Court consists of seven judges from member states of the OAS elected to six-year terms by the OAS General Assembly.[37] Five judges constitute a quorum for purposes of deliberation and decisions of the court are made by a majority vote of the judges present.[38] Hearings are public, except in extraordinary circumstances.[39] Judges may be reelected for an additional six-year period.[40] No state may have two judges serving on the Court at any one time. While Commissioners of the Commission must recuse themselves from hearing a case involving their home countries, judges need not do so.[41] In fact, under Article 55 of the Convention, a state party appearing as a defendant which does not have one of its nationals on the Court may appoint an ad hoc judge to serve on the bench hearing the case.[42]

The first election of judges took place May 22, 1979, and the IACtHR convened for the first time on June 29, 1979. There is a President of the Court and a Vice-President chosen from among the judges. Professor Thomas Buergenthal of the United States served as a judge from 1979-1991, was President of the Court, and is the co-author of a seminal work on the Court.[43] He is presently the American judge on the International Court of Justice (World Court), even though the United States has not agreed to be bound by ICJ decisions.

Decisions

Through June 17, 2008 there have been 147 decisions of the Court.[44] Nine new cases were presented since that date, being one each concerning Mexico, Honduras, Guatémala, Colombia, and Barbados, with two each from Peru and Venezuela.[45] There were 17 cases in process as of the end of 2008.[46] There were, in addition, 40 provisional measures in force.[47]

Article 63(2) of the Convention provides that in cases of extreme gravity and urgency and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.

Provisional measures during the period in question include requiring that a state protect a petitioner and his family from intimidation and aggression; to protect the lives and integrity of prison inmates; to avoid execution of prisoners until their claims can be adjudicated; to protect the lives of witnesses testifying against a member state; and to protect the freedom of expression of human rights defenders, and the like.[48]

As is true of many of the reports of the Commission, the Court's decisions[49] are comprehensive, factually and legally, discuss most every nuance of the issues presented and are thus quite lengthy. Set forth below, by way of conclusion to this short article, is a brief summary of some of the issues recently presented to the Court and the Court's decision.

In all these cases the Commission submitted applications against member states after favorable determinations of admissibility, tried unsuccessfully to reach a friendly settlement, and published one or more reports on the merits. Then, because of a lack of substantive progress by the member state involved in complying with the Commission's findings and recommendations, the matter was sent to the IACtHR for determination. In each case, delegates and representatives of all parties presented briefs and arguments to, and conducted hearings, before the Court.

Perozo et al. v. Venezuela, Judgment of January 28, 2009 (118 pages) concerned the allegations of 44 individuals, who were reporters, technical staff, employees, executives and shareholders of Globovisión, an opposition television station. They claimed that during October 2001 through August 2005, there were statements made and actions taken by state agents and private persons of harassment and physical and verbal assault which were serious hindrances to broadcasting. Investigations and criminal proceedings were alleged to be initiated without any cause.

The Commission in its application noted that Globovisión was one of four private Venezuelan 24-hour television channels identified as active participants in such upheavals as the April 2002 coup d'état and the general strike of December 2002; that it was not the only station affected by the turmoil; that the situation was very complex during the years in question; and that Venezuela did activate the required judicial mechanisms to conduct investigations to determine the respective responsibilities.

The Court determined that while attacks did occur, most of the actions and damages alleged were committed by non-identified third parties and there was little, if any, link between the state's behavior and the alleged damages. Moreover, provisional measures had been previously ordered in 2004 in favor of the alleged victims and that protective measures were ordered by domestic courts.

Nevertheless, Venezuela was found responsible for not complying with Convention principles *to ensure* the right to freely seek, receive and impart information under Article 1 (1) [as distinct from Article 13 (3)] and the right to humane treatment of a number of named individuals. It was not established that Venezuela violated rights to equal protection, or the Article 13 (3) right to receive and impart information. While the representatives of the alleged victims sought pecuniary and non-pecuniary damages of almost a million U.S. dollars, the Court did not grant such relief.

As a sanction the Court noted that while the judgment is itself a form of redress (a typical finding of the IACtHR), Venezuela had to conduct the necessary investigations and criminal proceedings to determine who is responsible, apply the appropriate sanctions, publish the instant judgment in a newspaper of wide national circulation, and pay, within one year, the approximate sum of U.S. $10,000 as reimbursement of costs and expenses. The Court advised it would monitor full compliance of the judgment and only terminate the case when the terms had been completely carried out by Venezuela. The latter had to submit a report on compliance within one year.

In *Valle Jaramillo et al. v. Colombia*, Judgment of November 27, 2008 (73 pages), the Commission alleged that almost nine years previously, armed men entered the office of Jesus Maria Valle Jaramillo, a human rights defender, took hostages, and murdered Mr. Valle. A co-worker had to go into exile because of the threats. The Commission further alleged that the crimes were perpetrated by members of paramilitary forces, in connivance with the Army, that the state was responsible for the alleged extrajudicial murder, the detention and cruel treatment of the victims, and the total lack of an investigation and punishment of those responsible.

Colombia filed a partial acknowledgment of its responsibility and had previously awarded approximately U.S. $ 845,000 through a domestic action.

The Court found violations of Convention principles of the right to life, personal liberty and integrity, the right to humane treatment, the right to judicial protection and the right to freedom of movement. It ordered additional sums to be paid to the victims by Colombia totaling approximately U.S. $215,000 together with approximately U.S. $70,000 in costs and expenses to be paid within one year of the date of the judgment.

In addition Colombia was required to further investigate, publish certain paragraphs of the decision in a newspaper with widespread circulation, organize a public act to acknowledge its international responsibility at a University, provide psychiatric care as required by the victims and provide an educational grant to study or train for a profession for certain victims.

Finally, in *Tiu Tojin v. Guatemala*, Judgment of November 26, 2008 (45 pages) the facts referred to the alleged forced disappearance of Maria Tiu Tojin and her daughter Josefa, occurring in August 1990, while in the hands of officers of the Guatemalan army along with members of the Civil Self-Defense Patrols. No investigation had been conducted into this alleged abuse by the military forces against the Mayan indigenous people. Guatemala acknowledged the facts and its responsibility but those responsible had not been brought to justice.

The Court found numerous violations of the Convention with respect to both victims and family members, as well as a violation of the Inter-American Convention on Forced Disappearance of Persons, of which Guatemala is also a state party. Guatemala was ordered to immediately investigate the facts and prosecute and punish those responsible, search for the location of the bodies of Maria and her daughter Josefa, publish certain paragraphs of the decision, broadcast certain photographs on the radio

in both Spanish and the Mayan language, reimburse the additional sum of $9,500 in costs and expenses for present and future domestic trial proceedings, and submit a report on the measures it has adopted to comply with the judgment. The Court noted that Guatemala had already paid to the next of kin the sum of two million quetzales (or approximately U.S. $241,700).

The Court further noted that the forced disappearance of persons cannot ever be classified as a political crime to which amnesty could be granted. Guatemala has such a law with respect to political crimes as part of its national reconciliation endeavor, but did not attempt to apply amnesty in this case. The Court strongly reiterated that forced disappearance constitutes a crime against humanity and even genocide, which can never be forgiven or compromised.

Endnotes

1. For the text of the American Declaration of the Rights and Duties of Man: http://www.cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm.
2. For the American Convention on Human Rights and its two Protocols, the Protocol of San Salvador (11/17/88) and the Protocol to Abolish the Death Penalty (6/8/90) (neither signed by United States), http://www.cidh.oas.org/Basicos/English/Basic3.American%20Convention.htm.
3. For the OAS Charter and its four Protocols: http://www.oas.org/juridico/English/charter.html. The OAS home page is http://www.oas.org/.
4. For the Statute of the Inter-American Commission on Human Rights: http://www.cidh.oas.org/Basicos/English/Basic17.Statute%20of%20the%20Commission.htm. For the Rules of Procedure of the Commission: www.cidh.oas.org/.../Basic18.Rules%20Commission.html.
5. For the Statute of the Inter-American Court of Human Rights: http://www.cidh.oas.org/Basicos/English/Basic19.Statute%20of%20the%20IA%20Court.htm. For the Rules of Procedure of the Court: www1.umn.edu/humanrts/oasinstr/zoas7ctr.htm. Generally see Basic Documents Pertaining to Human Rights in the Inter-American System, with signatories and current status ratifications http://www.cidh.oas.org/Basicos/English/Basic.TOC.htm.
6. David J. Harris and Stephen Livingstone, eds, *The Inter-American System of Human Rights*, Clarendon Press, Oxford, 1998 (through 1997), at 4. For other publications on the Convention and Court see n. 43 supra.
7. Id.
8. See n. 2 supra.
9. N. 6 supra. And see Article 44 of the Rules of Procedure of the Commission by linking to Basic Documents at n. 5 supra.
10. Article 20 of the Commission Statute. See n. 4 supra.
11. W.S.J., July 31, 2009, at A13.
12. W.S.J., July 30, 2009, at A11. Secretary of State Hillary Rodham Clinton has stated publicly that she regretted the U.S. was not a party to the International Criminal Court. *International Justice in the News*, International Center for Ethics, Justice and Public Life, September 2009 at 3. See also Russell G. Murphy, *Executing The Death Penalty: International Law Influences on United States Supreme Court Decision-Making in Capital Punishment Cases*, 32 Suffolk Transnational Law Review 599 (Summer 2009). The White House has also nominated Stephen Rapp, well-known in the international criminal law area, to be ambassador at large for war crimes issues. He will coordinate responses to international courts and tribunals and to violations anywhere in the world of human rights law. The N.Y. Times International, July 9, 2009, at A6.
13. See n. 3 supra. For frequently asked questions go to http://www.oas.org/documents/eng/faq.ask.

    For key OAS issues see http://www.oas.org/key_issue/eng/KeyIssue_Detail.asp?kis_sec=20.

    For OAS member states as of July 14, 2009 http://www.oas.org/documents/eng/memberstates.asp.
14. W.S.J. Aug. 1, 2009 at A12.
15. http://www.oas.org/documents/eng/memberstates.asp decided on July 4, 2009 by an extraordinary session of the OAS General Assembly. This does not alter the country's obligations as a signatory to the Convention or other inter-American Human Rights treaties ratified by Honduras.
16. See key OAS issues cite at n. 13 as of July 14, 2009. Also true of the International Court of Justice (World Court), the International Criminal Court and the European Court of Human Rights.
17. Id.
18. http://oas.org/key_issues/eng/KeyIssue_Detail.asp?kis_sec=10 And see also sec=11, sec = 12, and sec=13.
19. The Commission is found in Article 106 of the Charter of the OAS. For the Charter see n. 3 supra. For more on the Commission see n. 22 infra and n. 4 supra.
20. Harris and Livingstone, n. 6 at 36.
21. For the Statute of the IACHR see n. 4 supra.
22. See as of 7/14/09 http://www.cidh.oas.org/what.htm. Articles 2 through 7 of the Commission Statute concern Commissioners and Article 21 the Secretariat.
23. See http://www.oas.org/key_issues/eng/KeyIssue_Detail.asp?kis_sec=2 as of July 14, 2009, at 1.
24. Id.
25. See n. 22 supra at 3.
26. Id. See Article 20 of the Commission Statute concerning application of the American Declaration.
27. See international courts listed in n. 16 supra.
28. See n. 22 supra at 3.
29. Articles 48-51 of the Convention.
30. As of 7/14/09 (see n. 23 supra) the following countries are parties to the American Convention on Human Rights: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela.

    The following counties are subject to the Inter-American Court's compulsory jurisdiction: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela.
31. See IACHR 2009 Annual Report at http://www.cidh.oas.org/annualrep/2008eng/TOC.htm.
32. See page 4, as of 8/17/09, at http://www.cidh.oas.org/annualrep/2008eng/Chap3.c.eng.htm and page 1 at http://www.cidh.oas.org/annualrep/2008eng/Chap3.b.eng.htm.
33. See pages 8-10, as of 8/17/09, at http://www.cidh.oas.org/annualrep/2008eng/Chap3.e.eng.htm.
34. Convention, Article 61. See n. 2 supra, and see n. 29 supra. The website of the Court is http://www.corteidh.or.cr/.
35. http://www.cidh.oas.org/what.htm as of July 14, 2009 at 4.
36. Such as the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on Forced Disappearance

of Persons, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, and the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons With Disabilities all set forth at n. 5, Basic Documents.

37. Chapter VIII, Articles 52 and 54, of the Convention. See n. 2 supra and see, Daniel Terris, Cesare P.R. Romano, and Leigh Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases*, Brandeis University Press, Waltham, Mass. (2007).
38. Statute of the IACtHR at Article 23. See n. 5 supra.
39. Id. at Article 24.
40. N. 37 supra at Article 54.
41. Id. at Article 55.
42. Id.
43. Jo M. Pasqualucci and Thomas Buergenthal, *The Practice and Procedure of the Inter-American Court of Human Rights*, 2003, available at West.Thomson.com. See also Lea Bishop Shaver, *The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection?* (July 22, 2009), available at SSRN: http://ssrn.com/abstract=1437633. The article considers various suggested international reforms to improve future outcomes. And see Harris and Livingstone, n. 6 supra, and *The International Judge*, at n. 37.
44. http://www.worldlii.org/int/cases/IACHR/. See also www.corteidh.or.cr.
45. As of 8/17/09 Annual Report of IACHR 2008, http://www.cidh.oas.org/annualrep/2008eng/Chap3.d.eng.htm.
46. Id.
47. https://www.cidh.oas.org/annualrep/2008eng/TOC.htm.
48. Id.
49. http://www.corteidh.or.cr/docs/casos/articulos/seriec_190_ing1.pdf or http://www.corteidh.or.cr/docs/casos/articulos/seriec_190_ing1.doc. Go to the following link: http://www.corteidh.or.cr/. Click on: English Version . Click on "jurisprudence." Click on "Decisions and judgments." Also available at http://www.corteidh.or.cr/index.cfm?CFID=696133&CFTOKEN=50637098 as of July 14, 2009.

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United Nations Conference of States Parties to the Convention on the Rights of Persons with Disabilities

From 1-3 September, 2010, the United Nations Conference of States Parties (COSP) to the Convention on the Rights of Persons with Disabilities (CRPD) met. The COSP was held in New York where the Secretariat is based. It marked the third session as the CRPD is one of the newest specialized human rights treaties. The agenda included the election of experts to the CRPD Committee, the body established under the treaty which monitors implementation of the treaty by States Parties. Mr. Ron McCallum, an Australian national, was elected Chair for a second term. The main theme of the COSP examined Implementation of the Convention Through Advancing Inclusion of Persons with Disabilities. Two areas of concern that were discussed in detail related to inclusive education and planning for independent/community living (which included the closing of outdated institutions).

Shuaib Chalklen

Judith Heumann

The UN Special Rapporteur on Disability Rights, Mr. Shuaib Chalklen, a South African national, addressed the plenary and met with countless representatives from the NGO community as well as government during the duration of the session. He participated as a speaker in many of the official UN events as well as the parallel events organized by NGOs. Ms. Judith Heumann, Special Advisor on International Disability Rights, U.S. Dept. of State, represented the U.S. and also participated in various parallel events. The Special Advisor post is a new post created by President Obama, so much so that Ms. Heumann was appointed in June 2010.

The CRPD was drafted with the full participation of persons with various types of disabilities during the Ad Hoc meetings. In December 2006, the UN General Assembly adopted the CRPD which entered into force in May 2008. Currently there are 146 signatories and 90 parties to the treaty. While the U.S. signed it in July 2009, the administration is conducting an assessment of current domestic law on disability rights. The treaty monitoring body, the CRPD Committee of Experts, conducts its sessions in Geneva, the seat of the UN human rights mechanisms.

The COSP concluded by acknowledging that the rights and needs of disabled peoples must be given attention in the upcoming UN General Assembly Special Session relating to the 10-year Review & Appraisal of the Millennium Development Goals, the ECOSOC functional commission sessions and should be mainstreamed throughout the work of the UN system. Governments, in turn, must also take their obligations under the CRPD and other international agreements seriously and mainstream this perspective into their national laws and domestic policies.

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Legal and Investment Updates

Estoppel in France and Germany: The Introduction of Foreign Legal Features in Continental Laws of Arbitration?

Introduction

Although the doctrine of estoppel is firmly rooted in the Common law tradition, the question of whether this legal mechanism can be introduced into Civil law systems, notably through means of international arbitration, had been much debated in the last decade. In particular, recent French case law has developed and confirmed the use of estoppel as a means to prevent unfair recourse to setting-aside proceedings of international arbitral awards. As for Germany, the argument of estoppel has also been raised in connection with the setting-aside or enforcement of arbitral awards—however, it is debatable as to whether this is due to a Common law influence.

The Introduction of Estoppel in French Law: The *Golshani* and *Income* Cases

The development of estoppel in French arbitration law was highlighted in 2005 with the Golshani case. On 3 February 2010, the French Supreme Court ("Cour de cassation") rendered the "*Merial*" decision by which it again recognized and applied the principle of estoppel as a means to prevent the admissibility of dilatory application for annulment of awards. The particularity of this case lies in its being the first case in which the Supreme Court relies on the implementation and definition of estoppel.[1]

Some authors had foreseen that estoppel was slowly being introduced to French arbitration law.[2] Estoppel aims to protect the confidence of a party in a proceeding. It can be defined as a rule that forbids contradiction to the detriment of others. In other words, estoppel prevents a first party from changing its legal stand on grounds which force the second party to modify its initial line of argument to its own detriment or to the advantage of the first party.[3]

On 6 July 2005, the French Supreme Court consolidated the introduction of the notion of estoppel into French arbitration law by rendering the *Golshani* decision.[4] Mr. Golshani contested an arbitral award rendered in 1993 by which he was ordered to compensate the Iranian government. This award was declared enforceable in France. Mr. Golshani applied for its annulment on the ground that the award had been made on the basis of a void arbitration agreement. In this case, the French Supreme Court considered that the rule of estoppel was the appropriate basis for the dismissal of Mr. Golshani's claims. It further declared that Mr. Golshani's legal contentions in the annulment procedure were inconsistent with his position as claimant and his participation in the previous arbitration proceedings. The Supreme Court decided that the Court of Appeal "*has fairly decided*" that Mr. Golshani "*who has introduced the arbitration proceedings (…) and had participated without reserve for nine years to the arbitration, is inadmissible, on the ground of the estoppel rule, to sustain by means of an inconsistent legal line of argument that the arbitral tribunal would have rendered an award without an arbitration agreement or a void agreement.*"[5]

This decision was then confirmed by the *Income* case dated 6 May 2009.[6] A French company ("Jean Lion") had entered into several agreements for the sale of sugar with an Egyptian company ("the Income Company"). One of these agreements contained an arbitration clause. After a dispute arose, the Egyptian company initiated arbitration proceedings in 2001. In 2003, the French company was declared bankrupt. The arbitral award rendered in 2003 held that the French company had to compensate several monetary claims of its Egyptian partner. Before the French Court of Appeal, the liquidator applied for the annulment of the award arguing, among others, that he had not been informed of the arbitration proceedings and that the resulting award breached the principle of the stay of proceedings brought by individual creditors. The French Supreme Court rejected this line of argument. It held that the liquidator had fraudulently refrained from participating in the arbitration proceedings so that he could create a ground to dispute the award afterwards. It decided so on the ground of estoppel, which allows "*the judge of annulment to enforce fairness in the proceedings particularly to parties to arbitration.*" The Supreme Court confirmed that the liquidator's behaviour amounted to estoppel. His application for annulment was therefore inadmissible.[7]

The *Golshani* and *Income* cases recognize the principle of estoppel in French arbitration law. However, estoppel remained a foggy notion and the French Supreme Court failed to provide much clear guidance on it to lower courts. These two decisions solely held that a party which reverses its legal position in subsequent annulment proceedings could have its argument declared inadmissible because it violated procedural fairness. The *Merial* case dated 3 February 2010 completes this precedential construction by accurately defining estoppel, controlling its appropriate implementation and finally institutionalizing it.[8]

The Control of the Implementation of Estoppel in French Law: The *Merial* Case

In this case, a French company ("Merial") had entered into a contract with a German partner ("Klocke Verpackungs-Service GmbH") relating to the packaging of medical products. The contract included an arbitration

clause providing for the settlement of disputes under the auspices of the International Chamber of Commerce. Merial commenced an arbitration proceeding in the Hague. The arbitral Tribunal declared admissible Klocke's counterclaims by a procedural order. Then, it rendered a final award in 2007 which partially accepted Merial's claims but also ordered a set-off with Klocke's counterclaims. In return, Merial sought to vacate the award in France.[9]

The competent Court of Appeal of Paris ruled over the matter. Following a twofold rationale, it declared that Merial's procedural behaviour amounted to estoppel.

First, the appeal judges took heed of the fact that according to a procedural order of the tribunal dated 12 April 2006, the arbitrators had recorded that both parties had discussed the admissibility of Klocke's counterclaims at the time of issuance of the procedural order and agreed that these claims fell under the scope of the terms of reference established in 2005. Second, Merial did not dispute the procedural order after its issuance and before the signing of the minutes of the arbitral hearing dated 12 May 2006.

However, the French Supreme Court reversed the decision of the Court of Appeal. It held that "*Merial's procedural behaviour did not constitute a change of stand, in law, likely to mislead Klocke about its intentions and therefore did not amount to an estoppel.*" Moreover, the fact that Merial did not challenge the admissibility of Klocke's counterclaims between the procedural order dated 12 April 2006 and the signing of arbitral hearing minutes "*could not, alone, be tantamount to a renunciation to plead this inadmissibility in the annulment proceedings.*" In doing so, the French Supreme Court clarified the "French" estoppel.[10]

Comments on the *Merial* Case

The peculiarity of the *Merial* case is that it institutionalizes the mechanism of estoppel.[11] By providing an—albeit short—definition for the first time and by controlling its implementation by lower courts, the French Supreme Court rendered a decision of importance. Estoppel is now an autonomous ground on which to declare an application admissible or not.[12]

The French Supreme Court can be seen as limiting the implementation of estoppel to two conditions. The first condition is that the procedural conduct of one party has to constitute a change of its legal line of arguments, which is likely to mislead the other party. In other words, this first condition is dual. It consists of an objective element, the change of a legal line of argument and also of a more subjective element, the characterization of the intention to mislead. The first element answers the question of whether the claim was founded on the same legal basis, while the second element requires that the judge assess whether a party has been mislead.[13]

The second condition is that estoppel requires the clear expression of volition. This analysis corresponds to the arguments detailed at the end of the Supreme Court's decision. The judges took heed of the fact that Merial did not challenge the admissibility of Klocke's counterclaims between the procedural order and the signing of the hearing's minutes to dismiss Merial's application. The Supreme Court considers that it cannot be drawn from this fact that Merial could be precluded from the possibility of raising this particular issue in the subsequent annulment procedure. This would constitute a drift of estoppel's interpretation and purpose. It should be recalled that this second condition affirms a precedent in which the French Supreme Court had held that "*the only circumstance that a party contradicts itself to the detriment of another party does not necessarily constitute a procedural defence.*"[14] In the Merial case, the claimant's conduct was purely passive. The judges of the Court of Appeal had merely established that the French company did not dispute the procedural order after it had been issued. This is why the French Supreme Court did not accept that such an attitude amounted to a contradictory "*change of stand.*" Silence does not preclude future actions: it reserves them.[15]

Ultimately, conduct will be tantamount to estoppel when a party adopts an irreconcilable and ambiguous legal stand misleading its opponent in subsequent proceedings. Estoppel therefore constitutes a "gate" in French arbitration law. The annulment procedure will only be declared admissible if the applicant does not radically change his legal position to the detriment of his opponent.[16]

That said, the *Merial* decision is in accordance with the French doctrine which emphasized that estoppel should not be used if it is to become a tool of inequity or legal insecurity. The non-admissibility of a claim is indeed a severe sanction depriving a party of the fundamental right of access to a judge.[17] Therefore, the ruling of the French Supreme Court should be met with approval. It achieves a fair equilibrium between limiting the number of dilatory annulment procedures which impede the final enforcement of awards and the fundamental right of access to a judge. It also follows the Anglo-Saxon roots of estoppel. English law, which lists various forms of estoppels and requires for equitable estoppel (the less exigent variation of estoppels) that the original promise be clear and univocal, excluding silence or indulgence.[18]

By determining estoppel, the French Supreme Court contributes to procedural fairness. Estoppel justifies the theoretical assumption according to which a party must act morally and cannot contradict itself to the detriment of others. The judge has to control the consistency of procedural conduct.[19] Moreover, this decision is also favourable to counsel. One has to bear in mind that this new obligation imposes on counsel the difficult job of procedural anticipation. They cannot be bound to the

impossible and must be coherent in their legal contentions and procedure.[20] This requirement should not entail a proliferation of protests and reserves in arbitration. This is why the French Supreme Court rejected the Court of Appeal's argument relating to Merial's absence of protest against the procedural order after its issuance. A one time dissent should be enough. The *Merial* case achieves a fair balance in favour of arbitration by giving the incentive to conduct a constant dialogue between the parties, their counsel and the arbitrators.[21]

Estoppel in German Arbitration Law

Two interesting decisions were rendered in Germany on estoppel in connection with German arbitration law.

On 14 September 2007, the Higher Regional Court of Karlsruhe ("Oberlandesgericht") rendered a decision incorporating estoppel as an argument in German arbitration law. A German company entered into an exclusive agent agreement with a Taiwanese partner. This agreement contained an arbitration clause, which provided that disputes should be submitted to "arbitration in Taipei." Arbitration proceedings ensued and an award was rendered in favor of the Taiwanese party on 19 July 2006 under the auspices of the Arbitration Association of the Republic of China in Taipei. The Taiwanese party subsequently sought enforcement in Germany.[22]

The German respondent introduced an action to bar the enforcement of this award in Germany. It relied on a number of arguments, all of which the Higher Regional Court of Karlsruhe rejected. It held that the respondent could have relied on these grounds in setting-aside proceedings in Taiwan but had not done so and was therefore estopped from doing so before German courts.

Interestingly, in its rationale, the Higher Regional Court of Karlsruhe noted that the German arbitration law (section 1061 of the German Code of Civil Procedure) refers to the 1958 New York Convention, which does not include an estoppel provision in its article V relating to the recognition and enforcement of awards.[23] The Court reasoned that "*the Convention does not affect national law that is more favorable to enforcement and therefore German courts remain free to apply estoppel (Präklusion) to the enforcement of foreign awards*."[24]

Subsequently, the Higher Regional Court ("Kammergericht") of Berlin on 17 April 2008 decided in a similar fashion. In this second case, a German supplier had entered into a supply contract with a Ukrainian buyer. This agreement contained an arbitration clause which provided for the settling of disputes before the International Commercial Arbitration Court of the Ukrainian Chamber of Commerce and Industry (ICAC). On 27 August 2007, an award was rendered in favor of the Ukrainian party which consequently sought its enforcement in Germany. The Higher Regional Court of Berlin found that the Ukrainian claimant had complied with the formal conditions of enforcement of German arbitration law and declared that the German defendant was estopped ("präkludiert") from challenging the award under the New York Convention because it failed to raise these arguments in due time in Ukrainian setting-aside proceedings.[25]

These two decisions affirm that the mechanism of estoppel finds its place also in German arbitration law and the New York Convention. However, it appears that the Common law notion of estoppel has less room in German arbitration law in comparison to French law. First, the framework to challenge an award in Germany and France is indeed different. According to section 1059 of the German Code of Civil Procedure, an application to German courts for the setting-aside of an award can only be made if the award was rendered in Germany. Conversely, in France, international awards can be challenged on five limited grounds listed in article 1502 of the French Code of Civil Procedure. Second, the ideas embodied in the notion of estoppel are well established under German law. The principle of "Präklusion" will "stop" a party from bringing an action that legally it could and would have had to bring before. Aside from this procedural issue, section 242 of the German Civil Code contains the idea of "*venire contra factum proprium*," prohibiting a party from acting in a contradictory manner or in bad faith. Both the procedural and the substantive aspects of estoppel are therefore already covered by existing German law principles. One will nevertheless often find references to "estoppel" in English language publications on German arbitration case law, as the concepts can be so similar that using the notion of estoppel will properly convey the idea behind the decision to the international reader.

Conclusion

The mechanism of estoppel is known and used in both France and Germany, although the legal framework and the background of these two countries to setting-aside of awards are different. It appears that both countries are inclined to use estoppel as a mechanism to guarantee procedural fairness. In Germany, courts might be guided by known juridical concepts and the additional desire to grant an effective enforcement of international awards. Thus, both countries show, on a different level, how estoppel can be used and prove one more time that Civil law countries are effective and sufficiently flexible to find suitable solutions for the handling of aspects of international arbitration proceedings in national courts. In Germany, it nevertheless seems unlikely that courts will leave the familiar terrain of German principles and start using the notion of "estoppel" as such. The situation is different in France: As for now, the entire definition and control of the implementation of estoppel in France is based on the *a contrario* interpretation of the *Merial* case. The French Supreme Court will surely have future opportunity to reconfirm this interpretation.

Endnotes

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4. Pinsolle, *supra* note 2, at 993.
5. Cass. 1e civ., July 6, 2005, Docket No. 01-15.912; Pinsolle, *supra* note 2, at 997.
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7. Xavier Delpech, *Arbitage, estoppel et faillite internationale [Arbitration, Estoppel and International Bankruptcy]* 21 Dalloz 1423 (2009).
8. Xavier Delpech, *Procédure d'arbitrage : définition de l'estoppel [Arbitral proceedings : the Definition of Estoppel]*, 8 Dalloz 448 (2010).
9. Delpech, *supra* note 8.
10. Denis Bensaude, *Chronique de jurisprudence de droit de l'arbitrage [Column of Arbitration Case Law]],* 157 Gazette du Palais 12, 14 (2010).
11. Dimitri Houtcieff, *Chronique de l'estoppel ordinaire en droit positif français [Column About Ordinary Estoppel in French Positive Law],* 23 Semaine Juridique Edition Générale 626 (2010).
12. Bensaude, *supra* note 10.
13. Jacques Béguin, *Droit de l'arbitrage [Arbitration law]*, 23 Semaine Juridique Edition Générale 644 (2010).
14. Cass. Ass. Plén., Feb. 27, 2009, Docket No. 07-19.841.
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16. Elie Kleiman, *Stop! Définition nécessaire de l'estoppel, entre faveur à l'arbitrage et droit d'accès au juge [Stop! Necessary Definition of Estoppel, Between Favor to Arbitration and the Right to Access a Judge]*, 11 Semaine Juridique Edition Générale 303 (2010).
17. Kleiman, *supra* note 16.
18. Eric Agostini, *L'estoppel et les Trois unités [Estoppel and the Three Unities Rule]*, 5 Dalloz 285 (2010).
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22. Albert Jan Van Den Berg, *Germany 114. Oberlandesgericht [Court of Appeal], Karlsruhe, 14 September 2007, 9 Sch 02/07, in* Yearbook Commercial Arbitration Volume XXXIII 541, 541-548 (Albert Jan Van Den Berg et al. eds. 2008).
23. *Cf.* Friedrich Niggemann, *Chronique de jurisprudence étrangère, Allemagne [Column on foreign case law, Germany]*, 1 Revue de l'Arbitrage 240 (2006).
24. Van Den Berg, *supra* note 22, at 541.
25. Albert Jan Van Den Berg, *Germany 119. Kammergericht [Court of Appeal], Berlin, 17 April 2008, 20 Sch 02/08, in* Yearbook Commercial Arbitration Volume XXXIV 510, 510-515 (Albert Jan Van Den Berg et al. eds. 2009).

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Introduction to the Economic Cooperation Framework Agreement

On August 17, 2010, the Legislative Yuan approved the cross-strait Economic Cooperation Framework Agreement (ECFA). Proposed in June, the ECFA is comprised of a main agreement and five annexes. The ECFA took effect on September 12, 2010.

According to "The Early Harvest List for Trade in Goods and Tariff Reduction Arrangements" (the "List"), an annex to the ECFA, traditional industries are the main beneficiary of the arrangement. Taiwan has 539 items on the List including items in the industrial category, such as petroleum products, textile products, transportation vehicles, and machinery products. In the agricultural category, items such as tea leaves, oncidium, grouper, flammulina, milkfish and thirteen other items are included. For the People's Republic of China (PRC), petroleum products, textile products, transportation vehicles and machinery products are also on the List, amounting to a total of 276 items. Concerning the services portion of the List, which can roughly be categorized as financial and non-financial, Taiwan lists 3 financial services—banking, insurance, securities and futures, and 8 non-financial services—accounting and bookkeeping, computers, natural sciences and engineering research, conferences, professional designing, films, healthcare and aircraft maintenance.

Both parties to the ECFA shall reduce tariffs on the List items to zero in no more than three reduction increments within two years of implementing the Early Harvest Plan (the "Plan"), which is expected to commence on January 1, 2011. Both parties to the ECFA still have open commitments with respect to the trade portion of the List. The Plan, aimed at normalizing trade between Taiwan and China, paves the way for further talks between the two sides on trade in goods and services, investment protection and settlement of trade disputes.

The nature of the ECFA is a regional trade agreement—that is, ECFA only applies between Taiwan and PRC. Therefore, with the advantage of the cost-effectiveness arising from zero tariffs for specific trade items as exported from Taiwan to PRC, Taiwan becomes more competitive than Japan and South Korea in the Asian market. For example, according to a report by Chung-Hua Institution for Economic Research, the average tariff of Taiwan's petroleum products exported from Taiwan to PRC is reduced from 6.17% to 0. This benefit will allow Taiwan to replace Japan and South Korea in the original market share of 38%. Similarly, the average tariff of Taiwan's machinery products exported from Taiwan to the PRC is reduced from 7.85% to 0, which will create an advantage for Taiwan to replace Japan and South Korea in the original market share of 23%. In addition, as the development of Taiwan's industry in relevant aspects becomes more prosperous, it is expected that the Economic

Growth Rate will increase 1.72% and the Unemployment Rate will decrease 2.63%. Further, the benefit of zero tariffs will attract foreign direct investment to Taiwan as a way to enter the market of PRC. In 1994, the United States, Canada and Mexico executed the North American Free Trade Agreement. Given that there is no tariff for products exported from one of these three countries to the other, many investors from foreign countries went to Mexico to set up plants in anticipation of enjoying the benefit of zero tariffs when their products were exported from Mexico to the United States. It is hoped that the ECFA will create the same effect in Taiwan.

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The UK Bribery Act 2010

The UK's new wide-ranging anti-bribery legislation, the Bribery Act 2010, passed through the House of Commons in April, received Royal Assent the same day and is now law (the "UK Act"). This new legislation has been called the "toughest enforcement standard in the world." Additionally, more and more countries are taking up the challenge of clamping down on domestic and international corruption, and continuing the trend of recent years, which has seen the U.S. step up FCPA activity to continue its role as the global corruption police. It is not an exaggeration to state that never before has there been a period of such significant activity in the pursuit of combating bribery/corruption.

Bribery Act 2010

The new UK bribery legislation is markedly different from the FCPA, which was formerly regarded by many as the high-water mark. The new legislation, replacing UK legislation that stretched back to 1889, has a number of stringent new features.

These features include:

- Increased penalties of up to 10 years in jail and unlimited fines for individuals, companies and partnerships (contrasted with five years' maximum jail term under the FCPA);
- The banning of bribes to both public and private officials;
- A new offense of failure to prevent bribery;
- A ban on facilitation payments;
- Two general offenses covering the offering, promising or giving of an advantage, as well as requesting, agreeing to receive or accepting an advantage.

The UK Act[1] applies to UK corporate entities—even if they are foreign owned—individuals who ordinarily reside in the UK, and non-UK nationals and entities if an act or omission forming part of the offense takes place within the UK.

Perhaps the most significant way in which the UK Act alters the international anti-corruption landscape is with the new offense of failure to prevent bribery.[2] This is a strict liability offense, although companies and individuals may be able to fall back on an "adequate procedures" defense. Parliament was dissolved immediately after the UK Act was passed and the new coalition government has taken time to put forth statutory detail on "adequate procedures." At the time of writing, we had only just been given statutory detail in draft form. With the consultation process on the defence still ongoing the final guidance is not expected until early in 2011.

What Are the Issues for Businesses with an Existing FCPA Policy?

Pending the final guidance, it is clear that the UK Act poses significant challenges for multi-national corporations who have hitherto followed an FCPA-focused compliance strategy. Given that the UK Act effectively reverses the burden of proof—making corporations show that they took adequate measures to prevent bribery rather than requiring the prosecution to prove that they did not—even the best anti-corruption policies must be reviewed. From reviews I have undertaken three common issues recur:

- The UK's position on hospitality is likely to be tougher than other countries. The Parliamentary debate has made it clear that corporate entertaining falls within the ambit of the UK Act whilst many FCPA-based policies permit employees to accept or offer hospitality, sometimes up to maximum financial limits. Pending UK guidance, this area is dangerous.
- Facilitation payments are banned under UK Act but often allowed in existing anti-bribery policies, again sometimes subject to a set monetary limit. Policies will need to recognise the change or a rider will need to be issued to all employees whose sphere of operation includes the UK or UK entities, or UK-based individuals.
- Many FCPA-based policies are designed to cover bribes to foreign public officials and some repeat the definition given in the FCPA. Again, that policy is dangerous as bribing a U.S. official will clearly be an offense under the UK legislation and, as we have already said, the UK legislation covers private corruption too.

For many corporations with good existing FCPA policies, the short-term remediation work required is

not onerous and a proper review will be time well spent given the severe penalties of the UK Act and the likelihood of enforcement.

Stepping Up Enforcement

The new legislation is set against a rising tide of enforcement. Already the UK authorities have been involved in significant investigations this year, including joint investigations with US authorities and joint prosecutions of both BAE Systems and Innospec. International enforcement appears to be high on the agenda. The UK Ministry of Justice's introduction to its materials on the UK Act states: *"The Bribery Act reforms the criminal law to provide a new, modern and comprehensive scheme of bribery offences that will enable courts and prosecutors to respond more effectively to bribery at home or abroad."*

There is growing public pressure on governments around the world to police the activities of corporations doing business in their countries. Investigations in the last 12 months or so have featured more than 40 countries.

The Challenges of Respecting the Rights of Individuals

One of the trends of the first half of the year in internal investigations into corruption has been the strength of data privacy law in Europe and the increasing willingness of suspects and their lawyers to use their privacy rights to slow down or block an investigation. KPMG says that issues like data privacy are very challenging or challenging to 82% of the corporations faced with an internal investigation.[3] For most corporations facing the prospect of an internal investigation or a regulatory inquiry, detailed advice will be needed on local bribery and corruption laws, applicable laws with extra-territorial reach (such as the FCPA and Bribery Act 2010) but also on the data protection rights of each suspect in the investigation.

The process of changing or adapting an ethics policy is also not without its challenges. The law in Europe can require a corporation to inform or consult with worker's representatives prior to introducing or changing an ethics policy. The well-rehearsed challenges of introducing and maintaining an ethics helpline in Europe to enforce a policy continue to grab the attention of European data regulators and the courts.

The Future

The next 6 months are likely to see more of the same. In the U.S. alone there are reportedly an additional 150 investigations under way.[4] With the addition of the UK Act we are promised new activity in other countries. At a meeting in London in July held in co-operation with our Section's London Chapter, the Indian Minister of Law and Justice, Veerappa Moily, said his government was anxious to protect whistleblowers to increase reporting of corruption and that new anti-corruption legislation would be introduced "within 8 or 9 months." The pressure is increasing on developing nations to join the club of countries clamping down on corruption. This new raft of legislation adds to the perfect storm for those charged with maintaining a corporation's compliance strategy. Corporations are under pressure to reduce compliance and legal headcount whilst at the same time increasing the countries they operate in. Often their new markets are countries previously rejected because of the risks of doing business there. Corporations need to work hard to maintain and refine their compliance strategy—failure to do so exposes them to risks which are greater than ever before.

Endnotes

1. The text of the Act can be found at http://www.legislation.gov.uk/ukpga/2010/23/contents.
2. Section 7 of the Bribery Act 2010. The offence covers UK corporate entities and *"any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom."*
3. Source: Brighttalk webcast at www.brighttalk.com.
4. http://www.time.com/time/business/article/0,8599,1977526,00.html#ixzz0kWssI1Vi.

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Public Tenders and the Fight Against Corruption—The Czech Approach

I. Introduction

While the Government of the Czech Republic widely promotes the participation of foreign companies in public tenders,[1] many of these companies think twice before involving themselves with the Czech public sector or even go so far as to adopt a no-public-tenders policy. Their wariness raises the question of why, especially since the EU Public Procurement Directives[2] apply and they are considered to be an EU-wide harmonization tool that promotes principles of transparency and equal treatment. The answer is two-fold.

First, Czech legislators still manage to implement these EU Directives at the national level either the wrong way or by adopting a "holier than thou" approach, where they seek to improve on the EU legislation but, in the end, cause more confusion. In many cases they create a very complicated and overly formal framework far removed from the standard business practices and, by implication, the expectations of prospective bidders. It goes without saying that such complexity and formalities are easily

misused and thereby significantly contribute to less transparency and more unpredictability in public tenders.

Second, a considerable number of contracting authorities still believe the notion of a "fair and transparent public tender" can only be found in a foreign language dictionary, so to speak. The temptation to cut off a sizable piece of the cake—for example, the amount of approximately USD 11 billion in public procurement funds in 2009[3]—is still difficult to resist for some people. Not surprisingly, the City of Prague ranked first in terms of redistributing the largest amount of public procurement funds in 2009, closely followed by the Ministry of Defense,[4] yet both entities would rank equally highly in a contest for most suspicious and less-value-for-money tenders.

II. Where the Problems Come From

One of the main issues dates back to 2006, when a new framework implementing the EU Directives was adopted. Discussions held on the use of public-private partnership models led to the belief that concessions were so unique that they required a stand-alone framework, separate from contracts on public supply, service and works. Therefore, in addition to the Czech Public Procurement Act,[5] the Czech Concession Act[6] (hereinafter the "Procurement Act" and the "Concession Act") was adopted in July 2006.

From the very beginning, it was beyond any doubt that this dualism would bring more problems than benefits. The contracting authorities struggled to distinguish between proper award procedures. Procedures for concession awards were almost identical to those applicable to standard contracts, but contained unjustifiable differences. Failure to follow the proper procedure resulted in the invalidation of the entire award process, even if the award process happened to comply with the other act.

In addition to this dualism, a number of other issues made it more difficult for prospective bidders. For example, strict and complex rules on qualification criteria and submission of supporting documents, very often heavily underestimated by the foreign bidders, served as an efficient means for screening bidders, most of whom were excluded for negligible formal deficiencies in comparison to the subject-matter of the tender. This occurred, for example, in an "Internet for schools" tender held by the Ministry of Education, where five out of six bidders were excluded on grounds of failing to comply with formalities. This case caused a wave of criticism as the winner also suffered from formal deficiencies yet was not excluded. This naturally cast a shadow on the whole tender. The Office for the Protection of Economic Competition eventually concluded that the public tender had been held in accordance with law, but the Supreme Audit Office noted its inefficiency.[7]

The limited tools for checking award procedures, in particular the qualification criteria and bid assessment phase, by the bidders involved, not to mention the general public, creates a natural environment to manipulate tender results. In this respect, an infamous incident occurred in a tender for construction work where the drawing of lots was rigged.[8] The drawing of lots is allowed under certain circumstances when the number of bidders is too high. Surprisingly the draws are often won by small, lesser known or unknown companies that at the end of the day enjoy a 20% profit margin through a contract with the contracting authorities, compared to the standard 6% or lower margins.[9]

The lack of transparency was also amplified by the attempt of some bidders to hide their identity. It was not unusual for shell companies to be established solely for the purpose of public procurement. "Seven joint-stock companies and twenty limited companies that won tenders [in 2009] were entered into the Commercial Register either just before the end of 2008 or during 2009."[10]

III. 2009 Amendment—A Starter

The 2009 amendment to the Procurement Act became effective as of January 1, 2010. Apart from reflecting recent amendments to the European Directives, its main objective was to simplify award procedures from the perspective of the bidders and to refrain from imposing certain unnecessary requirements, such as the obligation to submit a declaration confirming that the bidder is bound by the entire content of the bid for the entire award term—a superfluous requirement since the legal order of the Czech Republic already stipulates such obligations pursuant to the nature of tender contracts.

In addition, a black-list register was established to keep track of entities prohibited from participating in public tenders pursuant to the Procurement Act. The threat of being put on this list is of concern to entities submitting qualification documentation or information proving to be untrue or incorrect. Such entities are kept on the list for a period of three years based on a decision taken by the Office for the Protection of Economic Competition. Originally the black-list was intended to be a preventative measure against unfair behavior by certain bidders, but this measure has the capacity to be misused against all bidders since the Procurement Act does not differentiate between willful misconduct or negligence when assessing an infringement. Furthermore, the sanction is limited to only incorrect information while ignoring other possible infringements of the procurement procedure. Based on the 2009 amendment, a black-list register for recording entities prohibited from entering into concession agreements was also introduced to the Concession Act. To add to the confusion, both registers are completely independent of each other.[11]

IV. 2010 Amendment—Main Course

A further amendment to streamline the award procedures and get rid of formalities was approved in the

pre-election period of May 2010 and came in force on September 15, 2010. The amendment is also aimed at lowering the risk of corruption by imposing clearer and more strict rules and emphasizing disclosure of information, especially in relation to the ownership structure of the bidders. The bidders must now submit, as a part of the qualification, a list of their members or shareholders, and a list of employees or shareholders who have worked for the contracting entity in the past three years and have been involved in the decision-making process.

The most disputable and controversial new criterion is a ban on companies with non-registered bearer shares from participating in public tenders due to issues of transparency, since owners of companies with non-registered bearer shares cannot be identified. This was one of the cards played by all political parties during the pre-election campaign to address the fight against corruption. It was therefore included in the amendment without significant opposition from any political party. However, a number of companies subsequently realized that they would not be allowed to participate in public tenders unless they changed the form of their shares. This includes a number of listed companies as well as companies owned by the Government.[12] Moreover, such a ban appears to be of a discriminatory character and as a result may be incompatible with EU law.

There are other changes aimed at strengthening the transparency of award procedures through extensive disclosure of, and access to, information regarding the qualification criteria and bid assessment. The contracting authorities will be newly obliged to express the business benefit of the project by disclosing the value-for-money indicator should the tender be based on the most competitive offer, which is one of the basic contract award criteria for assigning public contracts next to the lowest tender price.

The ill-fated procedure of lot-drawing has also been amended and the bidders now have the right to check the lot-drawing device as well as the lots.

Another major improvement is that qualification documentation may now be submitted in copies only and original or certified copies are no longer required, which will definitely save bidders both costs and time.

Finally, special provisions applicable to "Above-the-Threshold Public Contracts," which refer to the Concession Act and therefore so-called "quasi-concessions," have been revoked. Quasi-concessions were applicable when the public contract had been concluded for a definite term of at least five years and contractors had to bear certain economic risks.

V. A Dessert Still To Come

No doubt, the 2009 and 2010 amendments have brought about many positive changes. Nevertheless, the latter, in particular, must be interpreted in the context of the political situation at the time of its adoption—namely the pre-election campaign, when there was strong pressure to approve the amendment as soon as possible. The reason is that all political parties turned the fight against corruption into a major campaign issue. On some items, this quick-win approach was to the detriment of the quality of the proposed solution.

The new Government that emerged from the May 2010 elections declared itself to be a "government of fiscal responsibility, rule of law and fight against corruption."[13] It is therefore expected that further improvements to the Procurement Act will come soon and contain anti-corruption measures as well as additional improvements to the award procedures. The current Minister for Regional Development confirmed the intention of the Government to approve a "major amendment to the Procurement Act."[14]

However, the first issue on the agenda will be a proposal of several members of the Parliament to amend the Procurement Act in order to remove references to ownership structure as a qualification criterion and get rid of the ban on bearer shares. Despite certain hesitation from the left-wing parties, hopefully this amendment will get sufficient support as the provisions in question do not fit in with the concept of public procurement and have an inequitable impact on all companies with bearer shares.

Endnotes

1. *See* www.portal-vz.cz, a website administered by the Public Procurement and Public Private Partnership Department of the Ministry for Regional Development, with information available in English.
2. Directive No. 2004/17/EC, Directive No. 2004/18/EC.
3. *See* www.businessinfo.cz/cz/clanek/brezen-2010/2009-objem-verejne-zakazky-209-mld-korun/1001909/56593/ accessed on July 12, 2010.
4. *See* www.businessinfo.cz/cz/clanek/brezen-2010/2009-objem-verejne-zakazky-209-mld-korun/1001909/56593/ accessed on July 12, 2010.
5. Act No. 137/2006 Coll., the Public Procurement Act, as amended.
6. Act No. 139/2006 Coll., on Concession Agreements and Concession Procedures.
7. *See* http://investice.ihned.cz/1-10076440-18887060-i00000_d-a9 accessed on July 26, 2010.
8. The rigged drawing of lots from the Municipality of Karlovy Vary in 2007, known as "Ceska losovacka," earned more than 100,000 views on youtube.com. The first bidders were drawn in only a second, whereas the lot-drawing of the fourth and fifth bidder lasted nearly half a minute, as the person drawing the lots apparently could not find the "appropriate" lots.
9. *See* http://ekonomika.idnes.cz/jdeme-s-cenou-na-krev-tvrdi-stavebni-firmy-marzi-maji-pres-20-procent-1p2-/ekonomika.asp?c=A100811_193432_ekonomika_abr accessed on August 13, 2010.
10. *See* www.businessinfo.cz/cz/clanek/brezen-2010/2009-objem-verejne-zakazky-209-mld-korun/1001909/56593/ accessed on July 12, 2010.

11. The registers can be accessed on-line here: http://www.isvz.cz.

12. For example, Telefonica O2, a leading fixed and mobile phone operator, or CEZ, a state-owned power supplier.

13. *See* the Government Policy Statement dated August 4, 2010: www.vlada.cz/assets/media-centrum/dulezite-dokumenty/Programove_prohlaseni_vlady.pdf.

14. *See* www.financninoviny.cz/zpravy/podminky-pro-zadavani-verejnych-zakazek-cekaji-velke-zmeny/521731&id_seznam=376 accessed on August 16, 2010.

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The Costa Rican Free Trade Zone Regime

The Costa Rican Free Trade Zone Regime offers a wide array of business opportunities to foreign investors who want to take advantage of the country's unique characteristics, including doing business in the oldest democracy of Latin America; the availability of a highly educated and skilled workforce; and the tax benefits granted by the Free Trade Zone Regime. Furthermore, Costa Rica has enacted legislation to strengthen the Free Trade Zone Regime pursuant to the regulations set forth by the World Trade Organization. This explains why almost 260 companies, mostly foreign, are currently operating under the Regime through local subsidiaries.

The Free Trade Zone Regime currently in force provides a set of incentives and benefits to companies that manufacture, handle, process, produce, trade or provide goods or services for exportation or re-exportation, as well as to scientific or technological development companies that make new investments in the country. This Regime, originally created to attract exporting companies, is governed by the Free Trade Zone Regime Law, Number 7210, and its regulations (the "Law"). In order to benefit from the Regime, companies must meet certain requirements and establish their operations within specific areas destined for this purpose (free trade zones).

The income benefit provided depends on the company's location. Companies located within the Extended Metropolitan Area (the more densely populated area, which includes San Jose, the capital city, and nearby Provinces), as defined by the Law, can benefit from an exemption of 100% on income tax during the first 8 years of operation and 50% during the next 4 years. Companies located outside the Extended Metropolitan Area are granted an exemption of 100% on income tax that applies during the first 12 years of operation and 50% during the next 6 years.

Additionally, manufacturing companies that make a new investment, and meet certain requirements, such as being part of a defined strategic sector of the economy, are partially or totally exempt from income taxes. If operations are located within the Extended Metropolitan Area, they can benefit from a special income tax rate of 6% during the first 8 years and 15% during the next 4 years. If located outside the Extended Metropolitan Area, the income tax rate is 0% during the first 6 years, 5% during the next 6 years, and 15% during the following 6 years of operation.

In general, some of the additional tax incentives established in article 20 of the Law include an Exemption from:

i) payment of all taxes and duties on imports of raw materials required for the operation of the business;

ii) all taxes and duties affecting imports of machinery and equipment corresponding to the beneficiary's operation;

iii) all taxes and duties on imports of fuels, oils and lubricants required for the operation of the business;

iv) taxes on capital and net assets and the payment of the real estate transfer tax, for a term of ten years as of the date of approval of operations of the company;

v) sales and consumer taxes;

vi) all taxes on remittances abroad;

vii) all municipal taxes and licenses for a term of ten years; and

viii) all taxes on profits, including dividends paid to shareholders in accordance with the following differences:

   a. 100% for companies located in zones of "higher relative development," for a term of up to eight years and 50% for the following four years.

   b. 100% for companies located in zones of "lower relative development," for a term of up to twelve years and 50% for the following six years.

Also, export processing enterprises that reinvest in the country may receive an additional exemption on the payment of income tax. Furthermore, processing companies—independent of whether they export or meet special requirements—may enjoy other benefits such as the importation of merchandise with tax suspension when

the merchandise is submitted to transformation, repair, reconstruction, or assembly within Costa Rican territory.

The Law also provides, pursuant to article 20 (bis), another advantageous alternative to extend the term of the exemptions. Beneficiaries may obtain from the Government an extension of the incentives if they make a considerable additional investment (i.e., works in progress, non-depreciable real estate, machinery and equipment and software used in the business). If the extension is granted, the incentives will consequently be granted as if the beneficiary were applying for the first time. Therefore, under article 20 bis of the Law, said incentives would be available as of the date of notification of the approval of the extension, or the date of commencement of operations for income tax purposes.

The above-indicated benefits have attracted a very significant number of companies that have focused on specialized manufacturing and services operations, all of which acknowledge the success of the Free Trade Zone Regime.

In conclusion, it is important to note that the request to obtain the corresponding authorization to operate under the Regime is handled by PROCOMER (Office for the Promotion of Foreign Trade), which is part of the Ministry of Foreign Trade (COMEX). The procedure to obtain such authorizations is relatively expeditious and straightforward, as is the setting up of the local subsidiary or selected legal vehicle to operate in Costa Rica.

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The Audiovisual Communication Services Law

The Audiovisual Communication Services Law No. 26,522 (the "Law") provides an entirely new legal framework for audiovisual and audio broadcasting services within Argentina.

As part of this framework, this law creates a "Public Registry of Signals and Producers" which will contain information related to (a) producers of content to be broadcast through the services regulated by the Law; and (b) distribution and/or broadcasting companies of signals or exhibition rights for the distribution or broadcasting of content or programs through services regulated by the Law.

In particular, the Law establishes that persons responsible for the production and broadcasting of "packaged signals" to be broadcast in Argentina must register in the above mentioned registry, appoint a legal representative or agent in Argentina and establish a special domicile within the City of Buenos Aires. This is in addition to providing certain specified corporate information.

Even though the Law became effective on October 19, 2009, implementation and enforcement by the Federal Government was initially suspended by means of two preliminary injunctions. However, recent decisions by the Argentine Supreme Court and a Federal Court of Appeal reversed these injunctions.

Decree 904/2010

As a result of these judicial developments, on June 29, 2010, the National Government enacted Decree No. 904/2010, which further regulates the "Public Registry of Signals and Producers" established by the Law.

Pursuant to this Decree, in order to comply with the mandatory registration, producers of content must provide the following information to the Audiovisual Communication Services Federal Authority:

(a) Name and Surname of the individual, or the corporate name of the company;

(b) Certificate confirming that the company is duly organized under applicable laws;

(c) Corporate chart (i.e., indicating the name of both the shareholders and the members of the management and corporate bodies);

(d) Establishment of a legal domicile within the territory of the Republic of Argentina;

(e) Business name or other name by which the entity is commonly recognized;

(f) Documentary evidence of tax status; and

(g) Condition of the Producer (Independent / Related Company).

After registration, part of this information is made publicly available on the internet. Any subsequent changes to the information must be notified to the Registry within a term of 30 calendar days from their occurrence.

Lack of registration is considered a "serious fault" under the Law. It may lead to fines and prevention of content or signals of foreign origin from being further broadcast by domestic broadcasters.

Companies who distribute or broadcast signals, or who hold exhibition rights for the distribution or broadcasting of content or programs, are subject to similar information and registration requirements.

Decree 1225/2010

On September 1, 2010, the Law was further regulated by Decree No. 1225/2010.

The most critical issue arising from this regulation is the implementation of article 161 of the Law, which gives companies a year to divest all licenses that exceed what the new regulatory framework allows.

The Law sets forth limits to multiple licenses. In this sense, article 45 of the Law establishes that participation in corporate licenses may be held with the following limitations on a national level: (a) one satellite license, which excludes the possibility of being a holder of any other type of license; (b) up to ten licenses plus one television broadcasting license, when it involves licenses for radio broadcasting, over-the-air television and subscription television with use of the radio spectrum; (c) up to twenty-four licenses for subscription broadcasting services provided through a physical link at different locations. At a national level, no Company may provide services to more than thirty-five percent (35%) of the total national population or subscribers to the services.

On the local level, the Law sets forth the following limitations: (a) up to one radio broadcasting license through amplitude modulation; (b) one license for radio frequency modulation, or up to two licenses provided that there are more than eight licenses in the main area of service; (c) up to one subscription television license, provided that the holder is not already an over-the-air television licensee; (d) up to one over-the-air television license, provided that the holder is not already a subscription television licensee. In no case may a holder have more than three licenses in the same main area of service.

Finally, service providers for radio broadcasting, over-the-air television and subscription television with use of the radio spectrum may be holders of only one signal of audiovisual services. Holders of subscription television services may not be in possession of channels other than self-production signals.

As a consequence of the new limits to multiple licenses, certain media groups that currently operate in Argentina may be forced to divest some holdings.

Decree 1225/2010 now contemplates a voluntarily adequacy stage as well as a compulsory adequacy process should private owners of radio and TV stations refuse to submit to it. This compulsory adequacy process implies the "forced" transferring of privately owned licenses by Audiovisual Communication Services Federal Authority.

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Trusts in Israel

Introduction

Trusts, as an institution, have been recognised by the Israeli legal system since the 1920s. However, only public trusts were regulated under the *Charitable Trusts Ordinance* enacted in 1923. Private trusts were not regulated by statute until the *Trust Law of 1979* was enacted ("Trust Law").

Trust Law in Israel is based on the Anglo-American model and is rather general and rudimentary. The law is intended to apply to various different types of fiduciaries. Any relationship where someone is holding property for the benefit of another can be considered a trust. No specific form or procedure is required. It is not the will of the parties that determines whether a trust exists, rather, it is the content of the relationship that determines whether or not a trust has arisen.

The Israeli Succession Law

Inheritance in Israel is governed by the Succession Law 1965, which is considered a relatively flexible statute with respect to the freedom of the testator to bequeath his estate; no forced heirship rules are applicable in Israel.

The Succession Law applies to all persons who at the time of their death were domiciled in Israel or have left assets in Israel. Where a deceased lived abroad and left assets in Israel, Israeli Succession Law, as well as the rules of private international law, will be applicable. International Succession proceedings can be long and cumbersome. These proceedings can be avoided by the creation of a trust.

However, the Israeli Succession Law is rather rigid when it comes to formal requirements and procedures. When drafting wills and creating trusts it is therefore important to ensure that these documents do not infringe on the provisions of the Succession Law or the intestate rules may apply.

Section 8 of the Succession Law is clear:

> 8(a) An agreement about a person's estate and a waiver of his estate, made while that person was alive, is void.
>
> 8(b) A gift made by a person with the intention that it be vested in the donee only upon the donor's death is not valid, unless it is made by a will under the provisions of this Law.

In other words, the only way for someone to legally dispose of his assets upon death is by way of a valid will. A will can be revoked at any time during the testator's lifetime and no beneficiary is entitled to claim that he relied on the previous will. Thus, no irrevocable settlement

of assets is valid if it is to take effect upon the death of the settlor. A beneficiary entitled to assets by means of a gift may raise a claim in case the gift is revoked. The case law shows that in a conflict between the Gift Law, the Trust Law and the Succession Law, the latter's provisions prevail. Due to the potential for conflict, the drafting of a will or the creation of a trust requires diligence and professional advice.

Characteristics of a Trust

A trust is defined by Trust Law as a relationship to any property, by virtue of which a trustee is bound to hold the same, or to act in respect thereof, in the interests of a beneficiary or for some other purpose.

There are several necessary elements required to constitute a trust. A trustee must be endowed with control over any asset, although there are no specific rules as to the manner of control. A common means of control is acquired through the passing of title of the asset to the trustee. The trustee may, however, be vested with control over the asset by simply being empowered to act with respect to the asset in a manner such as distributions, investments or sale. The trustee is obligated to manage and administer any assets of the trust in order to fulfill the trust's purpose, to benefit an individual, or for the attainment of a goal.

Many fiduciary relationships, whatever their legal source, fall within this broad definition of a trust, even though they would not be categorized as such in other jurisdictions.

The purpose of a trust can be to benefit one or several beneficiaries, who must be identified unless the trust has a specific purpose (purpose trust).

A typical purpose trust is a trust created for some public purpose, which can be charitable or non-charitable. A public purpose trust requires registration at the Registrar of Public Endowments within three months from the date of its appointment. Failure to register is a criminal offence. The trustee has to file annual reports and is under the supervision of the Registrar. This oversight is deemed necessary as the absence of certain beneficiaries increases the potential for abuse of the assets by the trustees.

A settlor is necessary as creator of a voluntary trust. However, Israel also recognizes relationships without a settlor like statutory fiduciaries, many of whom are appointed by the court, such as guardian, administrator of an estate or a liquidator of a company.

Creation of a Trust

A trust can be created by law, contract or deed. Trusts "created" by law include all statutory fiduciaries, as discussed above.

A written or oral trust agreement defines the rights of the parties, and can only create an inter vivos trust. The agreement can be changed by the parties at any time.

A trust created by deed must be in writing and has to be signed before an Israeli notary during the lifetime of the settlor or constitute part of a written will. The deed must determine the intent of the settlor to establish a trust, the purpose of the trust, as well as the assets and conditions. In case of trust assets, the inexistence of a trust deed can be "healed" by a court declaration determining the purpose and conditions. A trust created under a deed may be amended only if explicitly provided for in the original deed or by agreement of both the settlor and all of the beneficiaries. A court may amend the trust, taking into consideration the purposes of the trust.

A trust created by deed comes into force upon receipt and control by the trustee of the trust assets. In comparison, in a contractual trust the trust commences at the time the trustee gains control of the asset, even where the asset is not yet in the trustee's possession.

In a contractual trust there may be a conflict with the law of inheritance as explained above (section 8 of the Inheritance Law).

A Testamentary Trust

A trust settled upon the death of the settlor as part of a will must be in writing and in accordance with the formal requirements for wills as set out in the Succession Law. Only a trust settled by a deed can create a mortis causa trust. In this case, there is no need for a notary's confirmation.

Where testaments would have been declared void for uncertainty in regard to beneficiaries or assets for a legacy under the Succession Law, trust law will give effect to them provided that the wishes of the testator, as expressed in the testament, can be fulfilled by constituting a trust. The courts consider the fulfilment of the wishes of the testator as the prime objective of the law relating to wills.

Beneficiaries

Beneficiaries have no proprietary right in the trust assets. The right of a beneficiary under a deed is not assignable. It may not be pledged or attached unless so permitted in the deed or ordered by the court. It may then be alienated only for claims of alimony or taxes due by the beneficiary. Under specific circumstances, such as for the incapacitated or those who are limited in their ability to exercise proper discretion in the running of their affairs, the court may also order that the right of the beneficiary may serve to satisfy other debts of the beneficiary.

Trustee

Any natural or legal person, including corporate entities, capable of undertaking binding obligations and performing legal acts may act as a trustee. Natural persons must be at least 18 years old and capable of running their own affairs. The powers of a trustee can be balanced between several trustees. A protector, although not recognised under Israeli Law, can be granted the power to appoint and remove trustees.

A trustee has to hold the trust assets separately from any other property so that it can be distinguished.

A trustee's duties are to preserve, manage and develop the trust property and to further the achievement of the trust's purpose. He must take all the necessary steps to fulfill these duties.

In carrying out his responsibilities, a trustee must exercise the loyalty and diligence which a reasonable person would exercise under the circumstances.

A trustee is not entitled to remuneration for carrying out his responsibility, unless such activity is part of his business. However, the court may award remuneration if it finds that the extent of his functions calls for it. A trustees is entitled to reimbursement for reasonable expenses and liabilities incurred in the course of carrying out his responsibility. He may collect fees from the trust assets and secure his rights by a lien on the assets.

Trust funds that are not needed for day-to-day requirements of the trust must be held or invested by the trustee in a manner conducive to the preservation of the assets and to the production of income. A trustee also bears duties of account keeping and public trusts must also report to government authorities.

A breach of duty entitles both the beneficiaries and the trust to compensation from the trustee.

A trustee may apply to the court for instructions, and in so doing, will not be held responsible if he acts in good faith and in accordance with those instructions. Self-dealings are void, and a trustee or any of his relatives who benefit from any self-dealings may have to account for the value of the benefit.

The assets of the trust are separate assets and not the assets of the trustee. Personal creditors of the trustee may not claim against the trust assets. Debts incurred in connection with the administration of the trust are enforceable against the trust and the payment thereof overrides the rights of the beneficiaries to the trust assets.

Protector

As mentioned above, although Israeli law does not recognize the institution of a protector, the structure of a trust may be such as to include a *de facto* protector.

Public Endowment

A public endowment is an endowment with a public benefit as its purpose where the beneficiary is a specific group of persons with a particular shared characteristic, for example, a group of people suffering from cancer. The law provides examples such as education, culture, religion, scholarship, science, art, social welfare, health, or sports, as constituting a "public benefit." A public endowment does not receive the status of a legal entity (PCA 46/94 Abramov v. The Commissioner of the Land Registry, 50PD(2)202).

Foreign Trusts

The use of foreign private trusts as well as continental foundations provides greater possibilities than trusts established under Israeli Law. These vehicles are widely known and used by practitioners in Israel. However, their main application is in the capacity of nominee agreements and trust relationships created by law.

The Israeli Trust Law does not allow generation skipping, which is often possible under foreign trust structures. As a result, it is necessary to admit a settlor's will for probate proceedings in order to achieve the settlor's goal of creating a trust that is to exist for a number of generations.

This situation leads professionals to advocate the establishment of trusts in foreign jurisdictions to be managed by non-Israeli trustees.

Taxation of Trusts

As a result of the overhaul of the tax system, the Taxation of Trusts Law came into force in 2006 and the deadline for its implementation for the years 2006-2008 was December 31, 2009.

This law distinguishes between four categories of trusts, a foreign settlor trust, an Israeli resident trust, a foreign beneficiary trust and a testamentary trust.

The foreign settlor trust is a favorable trust for foreign residents who wish to appoint an Israeli trustee, rather than an offshore trustee. It is also used by non-resident family members who wish to establish a trust for the benefit of Israeli family members.

A foreign settlor trust (whether revocable or irrevocable) is a trust in which all settlors are foreign residents at the time of formation of the trust and during the tax year, or the settlor and the beneficiaries are non-residents of Israel during the tax year.

A foreign settlor trust is viewed as a foreign resident and taxation is based on the settlor. As the settlor's place of residence is the trust's residence, the trust's assets or profits that are not derived from sources in Israel are not

taxable in Israel. Further, there are no reporting obligations in Israel.

The Israeli resident trust, as the default category, is a trust in which at least one settlor and one beneficiary at the time of formation or during the tax year are residents of Israel. This trust's taxation is based on the settlor and the relevant Israeli tax rates are those applicable to individuals.

It should be noted that the trust maintains its status even if the settlor immigrates to another country and no exit tax would be payable.

A foreign beneficiary trust is an irrevocable trust that is established by at least one Israeli resident for the benefit of one or several foreign beneficiaries. This trust is taxed based on the residence of the beneficiaries and assets. Income derived abroad should not be subject to any tax in Israel. There are certain reporting obligations on the trustee to ensure that no beneficiary of the trust is an Israeli resident, and in certain cases, that an Israeli resident beneficiary may not be added as a beneficiary of the trust.

The reporting obligations with respect to trusts can rest with the trust, the trustee, the settlor or the beneficiary depending on the categorization of the trust under the Taxation of Trust Law.

There is no inheritance tax or death duty in Israel and no gift tax. The country of residence, domicile or nationality is not relevant in this context nor is the country where any assets of the estate may be situated.

Underlying Company

The Taxation of Trusts Law provides for the establishment of an underlying company within Israel or abroad. The underlying company is used for the formal separation of the trustee's personal assets and the trusts' assets. It is also used to hold assets of the trust where registration of title is required (i.e., in the Land Registry). The underlying company is a legal entity or a group of people holding the trust's assets for the trustee, directly or indirectly, for example, a typical company, foundation, partnership, etc. The trustee of an underlying company can be Israeli or foreign.

This new legislation implemented an important change in the Taxation of Trusts Law: An underlying company is now regarded as a "flow through entity" and the Israeli Tax Authorities "ignore" the company for tax purposes, treating the assets and the income derived therefrom as if they were held directly by the trustee.

Prior to implementation of the new legislation, an underlying company managed by an Israeli Trustee was regarded, according to the management and control test, as an Israeli company and was therefore subject to corporate taxes and reporting requirements in Israel.

By means of an underlying company, a trustee of a foreign settlor trust can hold the assets of the trust without being subject to tax or reporting requirements in Israel on income derived outside Israel.

Conclusion

There are many advantages to managing trusts in Israel and the Taxation of Trusts Law has created greater opportunities to establish and manage trusts in Israel. It is possible to establish and manage foreign trusts in Israel without any influence on the taxation of the trust assets. In the case of a foreign settlor trust, assets are exempt from tax. The law also creates the possibility of operating or holding an Israeli company to serve trustees in foreign jurisdictions as a substitute for offshore companies.

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* * *

Section News

Task Force on New York Law in International Matters

At the June 18, 2010 Meeting of the NYSBA Executive Committee, the International Section presented a Resolution proposing that the NYSBA establish a task force on "New York Law in International Life." Our Section presented the Resolution in response to a request from NYSBA President Stephen Younger. In requesting that our Section take the lead to push forward this initiative, President Younger indicated to our leadership that he felt that the NYSBA had an important role to play in highlighting the international dimension and reach of New York law. President Younger's sentiment very much reflects where our Section has been heading since September 2009, when we adopted our three "Long-Term Missions," one of which included acting as a "Custodian of New York Law as an International Standard." On October 19, 2010, NYSBA President, Stephen Younger, announced the creation of a Task Force on New York Law in International Matters. The announcement of this Task Force is a very exciting achievement for our Section. Below we have provided you with the Section's Recommendation, as well as a copy of the President's news Release.

* * *

Recommendation by the International Section of the New York State Bar Association of Resolution to Be Adopted by the Executive Committee of the New York State Bar Association Regarding the Place of New York Law in International Life

Keeping in Mind that,

The pre-eminence of New York State in the financial, commercial, and cultural life of the world has provided a powerful impetus for the adoption of New York law as the governing law of countless cross-border financial, commercial, fiduciary and personal transactions and relationships, causing New York law to become a pre-eminent standard of private international law;

The status of New York law as an international legal standard carries with it a corresponding responsibility to make New York law as strong, flexible and useful as possible for the ordering of cross-border business and personal transactions and to make New York itself as effective and efficient a forum as possible for the resolution of cross-border private disputes;

Maintaining and strengthening New York law as an international standard not only renders a service to the international legal community but also benefits New York itself by making New York a more attractive environment for investment in New York from around the world and as a site from which to launch business, commercial and cultural endeavors both within and without New York;

NOW THEREFORE, the International Section of the New York State Bar Association recommends the Executive Committee of the New York State Bar Association to resolve to establish a Task Force on "New York law in International Life," such Task Force to consist of such representatives of the membership of the New York State Bar Association (including without limitation representatives of the International Section) and its constituent county and municipal bar associations as the President of the New York State Bar Association should deem appropriate, the purposes of such Task to be:

(a) To undertake such study or studies as it may deem advisable to gain a more critical understanding not only of the strengths of New York law as an international standard but ways in which New York law could become more effective and useful for the ordering of private transnational transactions and relationships and New York a more effective and efficient forum for the resolution of cross-border disputes, and to develop such recommendations for the modification and supplementation of New York law as may be appropriate for these ends;

(b) To engage such offices of New York State and New York municipalities as may be appropriate in discussion and dialogue for the purpose of exploring ways in which to foster, both inside and outside New York, a better knowledge and understanding of New York law, its relevance to transnational commerce and culture, and the relationship of New York law to other important sources of private transnational law around the world.

(c) To call upon the entire New York State Bar Association membership and staff (including without limitation the International Section and its Chapters and Committees) to assist with these efforts."

June 5, 2010

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NYSBA News Release

For Release: Immediate
October 19, 2010
For this and other related news items go to www.nysba.org/newscenter

Contact: Nicholas J. Parrella
Associate Director of Media Services
nparrella@nysba.org
518-487-5532

State Bar President Stephen P. Younger Creates Task Force on New York Law in International Matters

Task Force to Focus on Strengthening New York Law as an International Legal Standard and Encouraging Parties to Use New York as a Forum for Dispute Resolution

Seeking to highlight the critical role that New York domestic law plays in a wide variety of cross-border business and international commercial transactions, State Bar President Stephen P. Younger of New York (Patterson Belknap Webb & Tyler LLP) today announced the formation of the Task Force on New York Law in International Matters. The task force will undertake a systematic review of New York law to gain a more critical understanding of its strengths as an international standard and will formulate proposals designed to promote the use of New York law in cross-border transactions and to encourage parties to use New York as a forum for the resolution of disputes.

"As the financial capital of the world, it is imperative that lawyers, business leaders and commercial investors understand the international dimension that New York law plays in guiding cross-border transactions and resolving international disputes," said Younger. "Our aim is not just to educate the legal community and the business world about the benefits of using New York law, but to advance comprehensive recommendations that will ensure New York law retains its position as an international legal standard for commercial transactions in the global marketplace."

The task force will also look at the role of New York as an international center for dispute resolution. New York has long been a popular venue for international arbitration and New York's Commercial Division regularly attracts litigants from around the globe.

Co-chaired by Joseph T. McLaughlin of New York (Bingham McCutchen LLP) and James B. Hurlock, former chairman of White & Case LLP, the Task Force on New York Law in International Matters will include experts in the fields of commercial law, arbitration and litigation, as well as leaders of New York's business and financial sectors.

Specific issues to be addressed by the task force include: increasing awareness among New York lawyers of the role domestic New York law plays in cross-border commerce, examining the competition between New York law and other legal systems in the global legal marketplace, studying the advantages and disadvantages of litigating in New York courts and arbitration facilities, and examining the use of New York law in other areas such as trusts and non-profit law.

Increasing Awareness of and Promoting New York Law

The importance of New York domestic law in the formation, documentation and administration of countless cross-border transactions and other business deals needs to be better understood and appreciated by attorneys and business leaders. It is widely recognized that the great majority of cross-border transactions—perhaps as many as 90 percent—are negotiated and drafted in the English language. Of these, a great number are governed, at the parties' choice, by New York law. Moreover, New York law clauses also have a substantial positive impact on generating economic development in New York State.

It is essential to underscore that these transactions are not governed by special rules of New York law expressly directed to international situations. Rather, these are the same rules of domestic New York law—especially those of New York contract, commercial, corporate and franchise law, but also those of New York agency law and trust law—that apply to New York residents themselves.

Therefore, it is imperative that attorneys working to resolve problems controlled by New York law or in coming up with new solutions under New York law be aware that any resolution or solution has potentially significant impacts on the reputation of New York law around the globe as well as within the borders of New York. The task force will seek to encourage and mobilize the intellectual and professional resources of experienced attorneys to assist in the continued development of domestic New York law as a force in private international law throughout the world.

The first meeting of the task force is scheduled for Thursday, October 21st at Bingham McCutchen in New York City.

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The 77,000-member New York State Bar Association is the official statewide organization of lawyers in New York and the largest voluntary state bar association in the nation. Founded in 1876, State Bar programs and activities have continuously served the public and improved the justice system for more than 130 years. For more information, please visit www.nysba.org.

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NYSBA-UIA Joint Seminar on Cross-Border Transactions and Investments

On September 13 and 14, 2010, the NYSBA International Section (NYSBA International) held a joint seminar with Union Internationale des Avocats (UIA) at the Yale Club in New York City on the topic of "Cross-Border Transactions, Business Formations and Investments: Legal Aspects, Business Trends and How Lawyers Can Add Value." The seminar was a great success, and this success demonstrated NYSBA International's ability to muster the talent, resources and attention that these types of meetings require. Founded in 1927 and headquartered in Paris, the UIA is "the world's only multilingual, multicultural bar association with a global reach." It has been one of NYSBA's priorities to build a relationship with a prestigious global bar association like the UIA.

This program provided participants a unique opportunity to learn about the key features of international investments, M&A deals and transactions in an era of increased cross-border activity. The program also covered a broad range of subtopics. The organizing committee members of the seminar from NYSBA International included Carl-Olof Bouveng, Michael Galligan, Andre Jaglom, and Christopher Kula. This seminar was attended by approximately 70 participants from many different countries ranging from North and South America, as well as Europe. According to Michael Galligan, a recent Chair of NYSBA International, this seminar represents "a milestone in the development" [of NYSBA International] because, at least to the best of his knowledge, it was "the first conference of this magnitude that we have sponsored here in New York City with one of the major multi-jurisdictional international bar associations."

On Day One, the seminar opened with an introduction by Carl-Olof Bouveng, Chair of NYSBA International, and Corrado de Martini, President of the UIA. This was followed by a presentation by a keynote speaker, Michael Miller, General Counsel of Monster.com. The rest of the program for Day One featured five panel discussions on various topics ranging from U.S. inbound and outbound business formation/investment issues, fundamental considerations for cross-border transactions (which emphasized the practical aspects for lawyers involved in cross-border transactions, including due diligence and planning issues), and regulatory changes facing U.S. and foreign private investment funds and other investment vehicles. The panelists included practitioners from France, Ireland, Poland, Portugal, Spain, Switzerland, Argentina, Mexico and the U.S. Day One concluded with a cocktail reception and a dinner at the Penn Club.

A major part of the program on Day Two was a case study led by panelists from Germany, Hungary, Portugal, Switzerland, Mexico and the U.S. The panel discussions covered two related complex cross-border divestment and acquisition transactions undertaken by an entity with multi-national operations, and involved the more common banking, tax, corporate and securities law issues that arise in transactions that involve multiple jurisdictions. During this session, panelists from different countries offered comparative law perspectives, e.g. the highlights of different jurisdictional "pitfalls" and issues that practitioners face in these types of cross-border transactions. The last part of the program was an insightful presentation by investment banking and finance professionals on the market trends of cross-border M&As and investments. The seminar ended with closing remarks by Carl-Olof Bouveng, and the meeting Co-Chairs, Steven Hammond (UIA) and Christopher Kula (NYSBA International).

This joint seminar was planned as a part of NYSBA International's long-term strategy to develop relationships with major international bar associations including the UIA, International Bar Association (IBA), and the American Bar Association International Section (ABA International) to promote NYSBA International's long-term Three Missions, which were adopted by the Executive Committee on September 15, 2009. It took a year of careful preparation to launch this successful seminar, and in February 2010 the late Steve Krane identified this UIA joint seminar as one of the most important events under his prospective leadership.

Michael Galligan commented on the importance of this event in remarks that he prepared for the IBA Annual Meeting reception in honor of NYSBA International in Madrid (October 5, 2009): the Three Missions "exemplify [the] unique synthesis of New York affiliation and worldwide orientation" of NYSBA International, and "we welcome the efforts of other major international bar associations who want to establish connections with the New York international law community." He then continued: "[w]e are very happy to be co-sponsoring with the UIA in September of next year in New York City a one and a half day conference on international investment law, including cross-border finance, mergers and acquisitions and trade. We would be very happy to entertain co-sponsoring similar events with the IBA and other international bar associations." Based on these remarks, it was contemplated that this UIA joint seminar would help NYSBA International establish a good template for similar joint events with the IBA, the Inter-American Bar Association, and the Inter-Pacific Bar Association amongst others.

In the same remarks, Michael Galligan further added: "[w]e welcome the participation of members of other international bar associations in helping us to develop our distinctive missions." Michael believes that every one of these missions, while having a "New York angle," has "great interest and significance for legal practitioners and scholars around the world, whether in the nature of developing good law for international transactions and relationships, strengthening the mechanisms for international dispute resolution, or helping to lead the way towards the development of significant and productive international treaty laws through the UN system."

Albert L. Bloomsbury
alabloom@mac.com

* * *

Chapter News

Conference/Webcast on Russia and International Trade, Human Rights, and Energy Law

The Central and East Europe Committee held a half-day CLE program on April 23, 2010 at Columbia University on "Russia's Expanding Engagement in International Law in Trade, Human Rights, and Energy Investments." About 75 attendees heard presentations by former State Department Legal Adviser John Bellinger, Assistant U.S. Trade Representative Christopher Wilson, former Deputy Secretary of the Energy Charter Secretariat Andrey Konoplyanik, Tanya Lokshina of Human Rights Watch, and several Columbia faculty, private legal practitioners, and in-house counsel.

The conference was organized by David Miller and Daniel Rothstein of the Central and East Europe Committee, hosted and generously sponsored by Columbia's Harriman Institute and Columbia Law School, and co-sponsored by the ABA's Russia/Eurasia Committee. This event was a significant milestone for the Russia-focused committees of both NYSBA and ABA: their first joint program with the Harriman Institute, the country's most important center for research on the former USSR and East Europe.

The Central and East Europe Committee would like to continue to organize topical brown bag lunches. If you are interested in hosting or attending such a program, please write to dmiller@rakowerlaw.com or djr@danielrothstein.com.

Editor's Note: The Committee Chairs submitted this summary in time for publication in the previous edition of the* Chapter News*. Due to an oversight it was not included. I apologize for the delay.

* * *

Member News

Leading Law Firm Gonzalez & Ferraro Mila Signs a Representation Agreement with the Foreign Investment Office of Dubai

Buenos Aires, September 13, 2010. The Foreign Investment Office (FIO), an agency of the Department of Economic Development in Dubai, has confirmed the appointment of the law firm Gonzalez & Ferraro Mila (GFM) as its representative in Argentina.

Through this agreement, GFM shall facilitate agreements between the Foreign Investment Office of Dubai and such Argentine entities or individuals wishing to do business with the Emirate.

"We are very pleased with this agreement, because it will allow us to further develop investments between both economies, through a direct contact with the Foreign Investment Office and Dubai's Department of Economic Development," mentioned Pablo Melhem, partner at GFM.

Mr. Fahad Al Gergawi, CEO of the Foreign Investment Office in Dubai, said that having a firm with the caliber of Gonzalez & Ferraro Mila to represent them in Argentina was a very promising step towards improving business ties with the country.

"*Argentina and South America are indeed a key country and region for Dubai. This representation agreement further cements commitment from both parties to continue to further build investment and trading opportunities*."

As background to this agreement, GFM is a member of the Gulf Latin America Leaders Council, an organization dedicated to the promotion of investments and strategic alliances between Latin American and Gulf Cooperation Council countries. Earlier this year, both such organizations and GFM participated on a business development tour in the Gulf countries.

About the Foreign Investment Office

FDIdubai, Dubai's official foreign investment office, is an agency of the Department of Economic Development. Its role is to promote investment opportunities in Dubai, support international investors to establish a presence there, whilst taking advantage of Dubai's strategic location to access the MENASA region. It assists in the identification of sector-specific opportunities, provides connections to a network of both government and non-government partners, and provides support throughout the investment lifecycle from setup to growth.

About Gonzalez & Ferraro Mila

The law firm Gonzalez & Ferraro Mila was formed by a team of highly skilled professionals, with extensive experience in legal areas such as commercial, corporate and finance law. GFM represents both local and foreign companies and financial institutions in matters related to M&As, corporate finance, energy and mining law, infrastructure, real estate, agribusiness and entertainment law, among others. For additional information about GFM, please visit http://www.gfmlaw.com.ar/.

* * *

FMC Brand Launch

On September 13, 2010, Fraser Milner Casgrain LLP, one of Canada's leading business and litigation law firms, publicly launched its new brand identity—FMC—to the legal and business communities. This milestone in the firm's history reinforces its commitment and dedication to its people and clients, while reflecting its distinctive culture, vision and values that have earned it a prominent place in the Canadian legal landscape.

The new FMC brand represents more than just a new logo and colours—it captures its evolution as a dynamic, forward-looking organization focused on its people and clients, and consistently delivering superior business solutions through excellence in service, value and teamwork. The FMC compass—a key visual element of the FMC corporate identity—is a symbolic guide for differing views and values coming together to offer inspired and educated guidance.

Building on the firm's rich heritage, its long history of achievement and its core values, FMC remains committed to providing unparalleled service to its clients, both nationally and internationally, and serving the needs of its firm members and communities. A centerpiece of the firm's business model is the creativity and innovation unleashed by its people's diverse backgrounds and perspectives, and their dedication to community giving through its award-winning national Diversity and Inclusiveness, and *Pro Bono* Initiatives.

To support its focus on its clients, FMC became the first Canadian law firm to introduce the role of Chief Client Officer. Recently appointed to this position was John Rider who, in his role, has assumed responsibility for monitoring service levels, client satisfaction, and the growth and success of client relationships. John acts, in large part, as a liaison between FMC and its clients, ensuring that the clients' needs are not only being met, but rather exceeded. For more information, please visit www.fmc-law.com.

* * *

Sheppard, Leo & Pillsbury

Bob Leo of Meeks, Sheppard, Leo & Pillsbury (www.mscustoms.com) is pleased to announce that the firm recently welcomed a new associate. Jason Roberts is a 2010 graduate of Brooklyn Law School, where he completed an externship with U.S. Customs & Border Protection's Associate Chief Counsel, New York office. Jason has traveled extensively throughout East Asia and speaks Japanese fluently. He will focus his practice on U.S. import and export law and regulations from the firm's New York City office. He has also joined our International Section.

* * *

ILA 2010

Dr. Hong Tang is a practicing lawyer and scholar focusing on international law and policy, and a member of the NYSBA International Section. Dr. Tang was recently invited to present his work at the 74th Biennial Conference of the London-headquartered International Law Association (ILA), also serving as the 100th Anniversary of the Netherlands Society of International Law, which was held in the "legal capital of the world"—The Hague, Netherlands (August 15-20, 2010).

While presenting his own work, Dr. Tang also met with top experts in international law from around the globe. The theme of the conference was the promotion of the rule of law in international affairs, achieving peace and justice through international law.

The above picture was taken at the event. The background is the famous "Peace Palace" where the U.N. principal judicial organ—the International Court of Justice (ICJ)—is located. Dr. Tang can be reached at tang@lawyer.com.

* * *

Abreu Advogados and Ferreira Rocha & Associados Celebrate a Portuguese-Mozambican Partnership

Abreu Advogados and the Mozambican Law firm Ferreira Rocha & Associados (FRALAW) celebrated a protocol of cooperation and strategic partnership, on the 13th of October in Maputo, Mozambique. The two law firms provide joint legal services to their clients both in Mozambique and in Portugal.

Both firms recognize Mozambique as an important developing market, with a huge growth potential and numerous business opportunities.

Integrated Partnership

Abreu Advogados (with its head office in Lisbon) and Ferreira Rocha & Associados (with offices in Maputo) are independent law firms, subject to distinct jurisdictions and statutes, who define their position in their respective markets as independent projects of reference.

This partnership is a direct result of common values and philosophy of both law firms, thereby bringing an added value to their legal services in Mozambique and Portugal. This partnership will further increase the two firms' capacity of responsiveness, through knowledge sharing and the creation of multidisciplinary teams, allowing a joint and specialized approach, focused primarily on client needs.

Consolidating the Future

The growing global trade, together with Mozambique's strong growth, emphasises the economic activities between Mozambique and Portugal and creates the opportunity for a strategic partnership between two law firms. This partnership allows clients the chance of being properly represented in both countries by professionals who are well-trained and knowledgeable of their legal systems.

"For Abreu Advogados, who has a collaboration agreement in the African continent, since 2007, in Angola, this partnership is part of the firm's expansion and growth policy," explains Luis Gouveia Fernandes (Partner of Abreu Advogados).

"Ferreira Rocha & Associados sees this partnership as a way of consolidating the firm's growth, both domestically and internationally, with the support of an experienced and efficient 'machine' as Abreu Advogados," says Paula Duarte Rocha (Managing Partner of Ferreira Rocha & Associados).

Further to cooperating on legal issues, the partnership also includes complementary areas, such as Law Firm Management, Image, Marketing and Communication, Information Technology Systems, Knowledge Management and Exchange of Lawyers. In addition, as a further benefit to the clients, the two law firms will share legal studies and consulting solutions.

For more information, please visit: www.abreuadvogados.com.

* * *

Araoz & Rueda

Madrid's Araoz & Rueda expands its litigation and international arbitration capacity. Chapter co-chair and New York/Spain/Paris/England qualified Clifford J. Hendel informs that the firm has recently taken on as partner ex-Clifford Chance partner Iñigo Rodriguez-Sastre to bolster the capabilities of its expanding dispute resolution practice. In recent years, Iñigo's practice has steered towards international arbitration, in which he is active both as counsel and arbitrator (currently serving as arbitrator on designation of a variety of international and Spanish arbitral institutions, including the London Court of International Arbitration, the International Chamber of Commerce, the Court of Arbitration for Sport and the Court of Arbitration of the Madrid Chamber of Commerce). Iñigo began has career at Baker & McKenzie in Madrid and brings a solid litigation and arbitration background to the firm in a period in which dispute resolution has become the firm's principal practice area.

* * *

New International Section Members

Sarah Elizabeth Aberg
David Abimbola
Mara Susannah Abols
Natalia Alenkina
Adena L. Altman
Matthew Carl Anderson
Roy Michael Anderson
Leroi J. Andrews
Maria Elisa Arango
Hector Arangua Lecea
Fabiana C. Araujo
Octavio Aronis
Ann C. Barcher
Kathryn L. Bedke
Brian G. Bellerose
Andrea Bertolini
Joel Bruce Blumberg
Filip Boras
Philip V. Bouklas
William Joseph Bratton
Amelie Brewster
Guillaume Denis Marie Briant
Walter Brummund
Leonard N. Budow
Charlene A. Caprio
Kathryn Elizabeth Carroll
Timothy D. Castle
Sylvia Y. Chen
Irene Chiu
Moin Uddin Choudhury
Michael Charles Cimasi
Peter B. Clark
Travis Daniel Coleman
Billie Colombaro
Lhosa Anne Daly
Leslie K. Danks Burke
Stefano Enrico De Stefano
James G. DeBrosse
Arti K. Desai
Yajing Di
Amelie Kate S Draper
Katherine Marie Duglin
Angela Joy Edman
Henry Noh Edmunds
Hagit Muriel Elul
Melanie Jeanne Estrada
Peter Finan
Elizabeth K. Fitzgerald
Benjamin Porteous Flavin
Michael Eli Flynn-O'Brien
Jennifer I. Foss
Olivier Girardot
Adina Meira Gluckman
Ana M. Gonzalez
Rachel Gore
James Benjamin Gwynne
Beth Ann Haddock
Eun Hee Han
Kate Julia Hardy
Marie-Lorraine Henry
Michael R. Herman
Juana Corina Hopwood
Eric Moss Husketh
Shigehiko Ishimoto
Holleh Javidan
Myrtho Rose-Lys Jean Noel
Paul Michael Jindra
Robbin Marie Johnson
Joseph Kamien
Edward M. Kaplan
Joshua Hart Kaplan
Barbaros M. Karaahmet
Amanda J. Keller
Najia Sheikh Khalid
Dustin Marc Konigsberg
Stacie Ann Kosinski
Kelley Anne Kuntz
Jennifer S. Lane
Nina Laskarin
Ian Moises Lee
Ronald A. Lehmann
Sheldon Leibenstern
Urim Lekaj
Lauren Heidi Levin
Matthew David Levy
Jing Li
Ling Li
Sviatlana Liashchyna
Zheyuan Liu
Yvonne Melissa London
Peter John Lord
Monica Lugo
Michael Anton Mahovlic
Simon I. Malinowski
Heidi Ingeborg Malmberg
Susan Jennifer Mangan
Yuxin Mao
Lindsey Marchessault
Edwin Dilesio Maria
Jose Tadeo Martinez Campo
Barbara Margot Maucher
Caroline Nancy McHale
Andrea Medina
Zoe Murray Meier
Nicholas Melissinos
Saverino Mercadante
Kimmo Juhani Mettala
Lindsey R. Mielziner
Carlos Mauricio Sakata Mirandola
Sudhir Mishra
James A. Montgomery
Stephen Joseph Moran
Lea Michelle Mosena
Xiao Qian Mu
Rebecca Ann Musarra
Laura B. Mutterperl
Terry Myers
Steven Matthew Nadel
Michael Nicodema
Timothy Albert O'Connell
Anne Frances O'Donoghue
Kevin Michael O'Gorman
Eoghan Patrick O'Hargain
Darren D. O'Keefe
Arlene D. O'neill
Camille Oberkampff De Dabrun
Ira C. Olshin
Victor Odhiambo Ondoro
Kumiko Onoda
Guadalupe Ornelas
Finn Overgaard
Sarah Sohyun Park
Yanhua Peng
Richard T. Petrillo
Shivani Poddar
Vinicius Portugal
Edward Sinclaire Purdon
Leah Therese Ratcliff
Brian P. Redding
Rolon A. Reed
Sohyun Sophie Regimbal
Nicolas Ariel Reyes
Judit Rius Sanjuan
Jason Roberts
Remy Antonio Rodas
Luisa Rosario
Charles Bernard Rosenberg
Eiman Sadegh
Elie Salamon
Victoria Beth Salem
Denise Barthel Sanchez
Geoffrey Richard Sant
Jeremy Schlosser
Christina Cathey Schuetz
Aman Shareef
Mridula Shrestha
Raphael Charles Soffer
Hye Kyung Sohn
Jonathan Jun-xu Song
Ariana Bree Stamper-Gimbar
Jan Stejskal
Damion K. L. Stodola
Mohammad Ali Syed
Sapna Tailor
Mahbubar Talukdar
Lee Cheng Tan
Emily Tejerina
Saya Teraoka
Stela Cristina Tipi
Sorina Dana Tira
Lauren August Toussaint
Corin Trandafir
Tzu-hui Tu
Thomas Francis Turturo
Deirdre Twomey
Mitsutoshi Uchida
Yoshihito Ueno
Jon Umarov
Antonio Urbina
Ryunosuke Ushijima
Austin Patrick Van
Peter Van Der Velden
Britanny Renee Vanderhoof
Caleb Vesey
Rafael Villac Vicente De Carvalho
Lea Mary Vuillerod
Karin Maria Waechter
Marian Anne Waldmann
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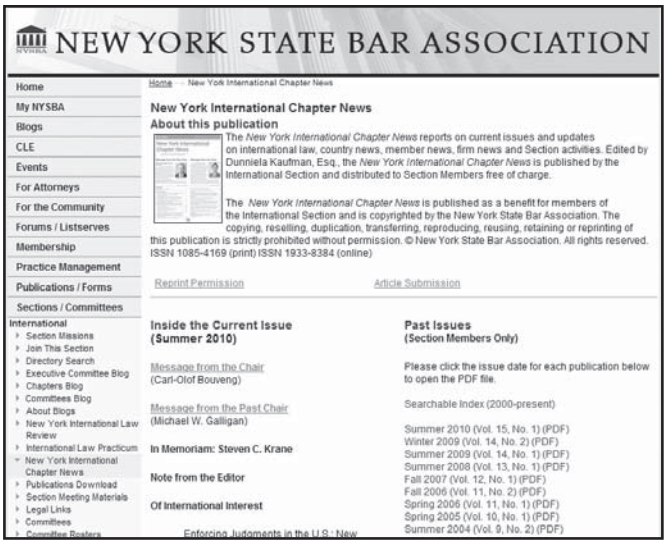

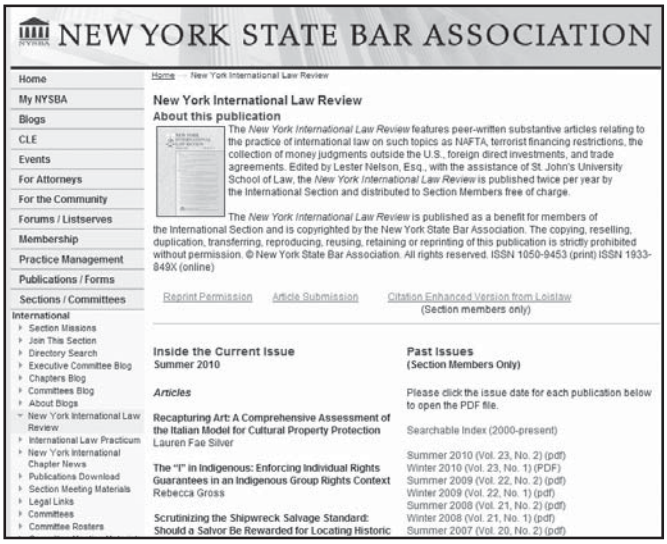

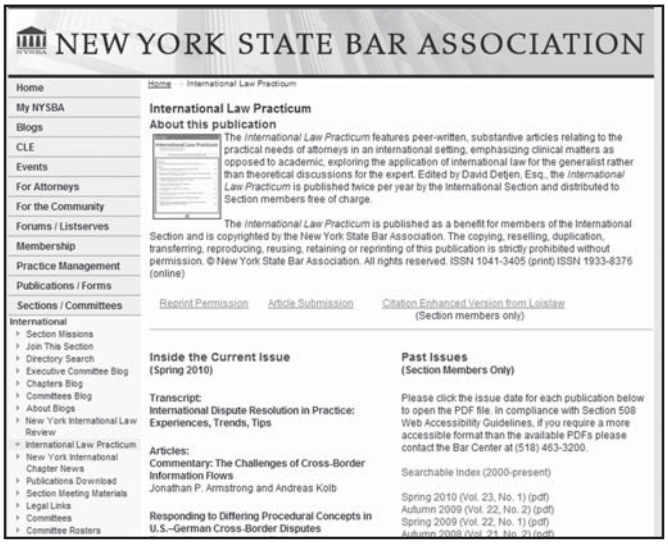

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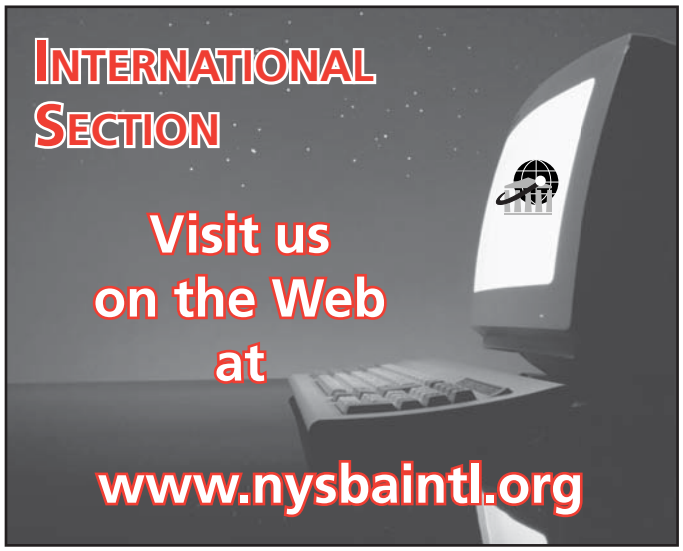

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