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A Word from Our Immediate Past Chair

As I write this, I realize it will not become available until after my term of office has ended and Paul Frank's has begun as the 2004 Section Chair. A year goes quickly these days, and this was an extremely difficult year for me, despite the many enjoyable times I had as Chair. I prefer to focus on the good things that happened during the year and keep those memories close to me rather than focus on the loss of my wife this past year, just as I prefer to focus on the memories of the good times we shared together rather than her loss.

One thing I had determined to emphasize during my term was the enhancement of the role of our Chapters in the life of our Section. I felt strongly, and I continue to feel strongly, that our Chapters are one of our

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A Word From Our New Chair

On behalf of the officers of the Section and the members of the Executive Committee, I wish to extend our most heartfelt condolences to Jim Duffy, our Chair, on the death of his beloved wife Lannie. Those of us who had the good fortune to know Lannie through her participation in many events of the Section, at the Fall Conferences, Executive Committee Retreats and other activities of the Section, will miss her greatly. We recall Lannie especially at the Meetings in Mexico City and in Monaco. We missed her in Amsterdam as well, knowing of her role in planning the Meeting and her great desire to be with us. May Lannie rest in peace for eternity.

We also pay tribute to Jim who throughout the several months of Lannie's final illness was committed to

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Inside

A Word from Our Immediate Past Chair

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Section's most important resources. Because of this belief, with the full support of our Section's leadership, we implemented a number of new activities for our Chapters. We are also actively exploring setting standards and expectations for our Chapters and those who serve as their chairs. You will hear more about this in the coming months as these changes come into place.

This year, we invited those of our Chapter Chairs who attended the Fall Meeting (that was held in Amsterdam this year) to a number of special events that preceded the meeting. There was no additional cost to the Chapter Chairs for these events, so long as they registered for the Fall Meeting. The primary purpose of these events was to bring our Chapter Chairs closer together, not only with their fellow Chapter Chairs, but also with the leadership of our Section and the leadership of our Association. We began with a reception and dinner the evening before the official start of the Fall Meeting. The next morning, we had a special program for Chapter Chairs that afforded an opportunity for them to share views and information with each other and with many of our Section's and our Association's leaders, including Association President Tom Levin. I am pleased to report these special events were well-attended, and we plan to make this a regular feature of our future Fall Meetings, the next one of which will be in Santiago, Chile, in November 2004.

I see a continuously expanding role for our Chapters as New York law continues to grow as the de facto international legal standard and New York lawyers continue to expand their influence around the world. New York law has already assumed, almost by default, an extremely important role as an international legal standard. Your Section, with the full support of the Association, is actively exploring ways to solidify this role for New York law and formalize and enhance it whenever possible. These efforts include direct negotiations with the European Union represented by the CCBE, and possible unilateral amendments to New York's foreign legal consultant rules designed to increase the importance of being a member of the New York Bar. It is still too early to know whether these efforts will prove successful; however, it is important that we recognize the role New York law plays in international transactions and take steps both to protect and preserve its integrity and to insure that only qualified New York lawyers advise on New York law. This objective has two important goals, the integrity of New York law and the integrity of those who advise on it. Our answer to this two-pronged need is to make it easier for qualified attorneys to become New York lawyers, because these attorneys will then become subject to New York's disciplinary rules and MCLE requirements. New York's disciplinary rules prohibit a New York lawyer from advising in areas where he or she is not competent to do so, even within the scope of New York law. New York's MCLE requirements provide a minimum level of contact with education and learning about New York law.

Our Chapters are our Section's and our Association's eyes and ears that allow us to see how New York law is being used and applied around the world and who is advising on our law. Our Chapters should be our front-line guardians of New York law in their respective jurisdictions. Our Chapters should also seek to ensure that only those who are qualified to practice New York law do, in fact, do so. This is important, because, when New York law is misused or not properly applied, this tends to depreciate its importance and its usefulness. Our Chapters should, therefore, by definition be a safe and reliable source of sound advice on New York law for the local bars and business communities within their jurisdictions.

Our Chapters should also be a safe pair of hands for members of our Section and our Association who may have needs in the Chapters' jurisdictions. All Association members and particularly our Section members should feel able to contact the Chapters to obtain competent local legal advice from attorneys who understand both local law and New York law and how the two interface with one another. Our members should also feel comfortable that this advice will be delivered according to the client-oriented standards for which New York lawyers are well known. Moreover, the common bond between our Chapters and our Section should provide a higher level of assurance that work referred to Chapter members will receive an appropriate level of support so that the referring member will not be let down or disappointed.

Conversely, Chapter members should feel free to contact other Section members when they need the latest information on recent developments in New York law and federal law. Our Section's leadership encourages our Chapters to develop active programs and publicize them among the Section as a whole. This is why we have a Chapter Chairs listserve and professional staff in Albany to support Chapter activities. As the Section has many members who travel often and everywhere, it should also be possible for Chapters to have a pool of qualified experts who can provide support for these programs. This will not only afford opportunities to enhance local knowledge of New York law, but it will also allow Chapters the opportunity to invite local busi-

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Our Co-Editor

Six months have passed since I became the Co-Editor of the *New York International Chapter News* and it has been a privilege for me to become involved in this prestigious community. As a partner in a Canadian national business law firm, with a strong cross-border practice, I know that my partners are extremely pleased to join me in increasing our involvement in the International Law and Practice Section of the NYSBA. We view this Section as a means for foreign lawyers to support the New York legal community, and its International Chapter, while simultaneously working to create an atmosphere where trans-border legal practice becomes commonplace. This newsletter serves as a wonderful vehicle to ensure these goals are achieved.

In the previous issue, articles were submitted from a cross-section of legal communities and the content of the newsletter was a reflection of the diverse countries from which they came. In line with the purpose of this newsletter, the previous issue continued the tradition of uniting legal counsel from around the globe in an effort to share information and benefit from our mutual interests and experience. As Co-Editor, I hope we will continue to use this newsletter to leverage our objectives and move even further ahead toward our goal.

With your involvement, some of the most interesting and pressing issues can be raised, and explored. I look forward to taking part in some of the thoughtful discussion that our contributions to this pursuit provoke.

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A Word from Our New Chair

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performing his duties as Chair of the Section, even as he was devotedly at Lannie's side, his wife of over 39 years, during those final weeks.

A few words on the business of the Section. The Committees have been the heart of the Section over the years and many of them continue to present informative and interesting programs that attract audiences, even when other Continuing Legal Education programs are proliferating. The International Bank Securities & Financial Banking Committee, the Central & Eastern European and Central Asian Committee and the International Investment Committee are only a few of those that have presented programs in recent months. Moreover, new Committees are being formed that reflect the diverse interests of the members of the Section. The Executive Committee recently approved the creation of the International Privacy Law Committee and there are proposals being considered for an International Entertainment Law Committee and a Committee on African Law. All members of the Section are encouraged to consider making proposals for the formation of new Committees of the Section, as well as participating in the many existing Committees.

Members of the Section, of course, are also encouraged to contribute to our three publications, the *New York International Law Review*, *The Practicum* and the *New York International Chapter News*. Please contact the Editor of each publication or if you are uncertain as to which of the three publications is appropriate for the piece, please contact me.

Looking ahead, I also would urge members of the Section to plan on attending the Fall Meeting in Santiago on November 10–14, 2004 (when it actually will be spring in Chile, adding pleasant weather to an attractive location for the conference). In addition to the programs that will be presented at each Meeting, there will be a number of enjoyable social events and the opportunity to meet with your fellow members of the Section.

Best wishes to all for a healthy and rewarding year 2004.

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IL & P Country News

Argentina

New Regulations on Foreign Companies in Argentina

I. Introduction: General Resolutions Nr. 7/2003 and Nr. 8/2003

Highly relevant regulations regarding the supervision of foreign companies have been recently enacted by the Office of Companies' Supervision (*Inspección General de Justicia*, or IGJ) in charge of the Public Commercial Register (*Registro Público de Comercio*) in the city of Buenos Aires. These new regulations referred to as General Resolution Nr. 7/2003 (the "Resolution 7/03") and General Resolution Nr. 8/2003 (the "Resolution 8/2003" and jointly with the Resolution 7/03, the "Resolutions"), though based on preexisting legal rules, effect important changes in the approach of the IGJ to the discussed topic of the activities of foreign companies in Argentina. Moreover, it could be deemed as a reflection of some policies adopted by the new National Government.

II. Legal Background of the Resolutions

Prior to the description of the content of the Resolutions and in order to permit their full comprehension, a brief description of their legal background will be helpful.

The Argentine Companies Act (Nr. 19.550, hereinafter the "Companies Act") provides several rules related to the activities of foreign companies in Argentina. The following are the most important ones:

1) Companies incorporated abroad are governed, as to their existence and formalities, by the law of the place where they have been incorporated (Section 118).

2) Foreign companies may perform isolated acts and participate in judicial proceedings in Argentina (Section 118).

3) In order to perform activities in the country on a regular basis or establish a branch, an agency or another kind of permanent representation, foreign companies shall (Section 118):

   3.1) Provide evidence of the existence of the company pursuant to the laws of the country of incorporation.

   3.2) Establish a domicile in Argentina, and fulfill the requirements of publication and registration applicable to companies incorporated in Argentina.

   3.3) Provide grounds for the decision of establishing said representation and appoint the person who will be in charge of it.

   3.4) Keep separate accounts in Argentina.

   3.5) Determine a capital stock for the branch when required by special laws.

4) In order to participate in a local company, foreign companies shall (Section 123):

   4.1) Provide evidence of the incorporation of the company in accordance with the laws of their respective countries.

   4.2) File the documents of incorporation, bylaws, amendments and further documents related to their legal representatives with the Public Commercial Register and with the National Register of Corporations, as the case may be.

5) Companies incorporated abroad having their main offices or businesses in Argentina shall be deemed local companies vis-à-vis the fulfillment of the requirements for the incorporation, amendments and control of their activities (Section 124).

The Resolution 7/03 makes special reference to this Section 124 of the Companies Act. The Resolution 8/03 refers to the first part of Section 118 of the Companies Act, which sets forth a general principle for foreign companies performing isolated acts or participating in judicial proceedings in Argentina.

III. Content of the Resolution 7/03

The Resolution 7/03 provides new rules and requirements concerning different situations. For the sole purpose of making it clearer, its content could be divided into two main different parts.

The first part of the Resolution 7/03 refers to the situation of foreign companies that request their registration before the City of Buenos Aires Public Commercial Register in order to either (i) perform activities in the country on a regular basis or establish a branch or another kind of permanent representation (hereinafter, the foreign companies referred to as "Section 118 Companies"), or (ii) participate in a local company (hereinafter, the foreign companies referred to as "Section 123 Companies").

The second part concerns the situation of foreign companies which are already registered as Section 118 Companies and/or Section 123 Companies.

A. Situation of Foreign Companies Applying for Their Registration Under Section 118 and/or Section 123 of the Companies Act

Section 1 of the Resolution 7/03 states that foreign companies applying for their Registration as Section 118 Companies and/or Section 123 Companies shall:

1. Inform if they have any legal prohibition or restriction to perform all their activities or their main ones in their place of origin. Said information shall be evidenced by the agreement or act of incorporation and its amendments, if applicable. In the event that the referred documents are not clear enough for such purpose, they shall be complemented by the text of the applicable foreign legal rules, and if it is not conclusive, a legal opinion of a lawyer or notary of the correspondent jurisdiction shall be filed together with a certification stating that its professional license or commission is in force.

2. Provide evidence concerning the fulfillment outside Argentina of at least one of the following requirements on the date of the application for registration:

   2.1. Existence of one or more agencies, branches or permanent representations, attaching for that purpose the certificate of good standing granted by the administrative or judicial authority of the place where they are located.

   2.2. Ownership of participations in other companies as non-current assets in accordance with the generally accepted accounting principles.

   2.3. Ownership of fixed assets in their place of origin, whose existence and value shall be evidence by the elements set forth in 2.2.

The ownership of the company's participations, their value and the percentage of the capital stock that these participations represent in the participated company, as well as the ownership and value of the fixed assets mentioned in 2.3 shall be evidenced by the balance sheet of the company or by a certification issued by an officer duly authorized (whose power of attorney shall also be evidenced) on the accounting entries transcribed in the corporate books and registers.

In the case that the applicable law does not require the company to furnish such accounting information, other documents may be filed, but the value as evidenced by these documents shall be pondered by the IGJ.

Section 2 of the Resolution 7/03 states that the IGJ shall deny the registration of foreign companies which do not fulfill at least one of the requirements detailed in point 2 above. As explained in the preamble of Resolution 7/03, the grounds for this denial reside in Section 124 of the Companies Law that, as summarized above, sets forth that companies incorporated abroad having their main offices or businesses in Argentina shall be deemed local companies for the purposes of the fulfillment of the requirements for incorporation, amendments and control of activities.

B. Situation of Foreign Companies Already Registered Under Section 118 and/or Section 123 of Companies Act

Section 3 of the Resolution 7/03 refers to the situation of agencies, branches and permanent representations of foreign companies already registered under Section 118 of the Companies Law in the IGJ. According to Section 3, these agencies, branches and permanent representations shall file together with its accounting statements—obligation that arises from other preexisting regulations—an accounting certification describing the composition and value of the company's assets (detailing the current and non-current ones) located outside Argentina. The IGJ may waive the obligation to submit this certification if other elements are filed in its place which evidence that the main activity of the company is developed abroad.

On the other hand Section 4 of the Resolution 7/03 sets forth that the representatives of Section 123 Companies shall:

1. Submit the same information established in Section 3 (as described above), dated on the closing date of the last accounting statement approved by the parent company at the time of the submission, or on the date of the drawing up of the accounting information required by the law applicable to the company. In this case, the IGJ may also waive the obligation to submit the accounting certification if other elements are filed in its place which evidence that the main activity of the company is developed abroad.

2. Provide evidence of the fulfillment of some requirements imposed by the National Tax Authority (*Administración Federal de Ingresos Públicos*, or AFIP). These requirements relate to some periodical information duties that any representative of foreign companies shall perform.

Section 5 is one of the most important rules of Resolution 7/03 since it establishes that the IGJ may require that foreign companies adapt their bylaws or incorporation agreements to Section 124 of the Companies Act if, as a result of the evidence provided by the company or other information obtained by the IGJ either exercising the powers granted by the law 22.315 or supplied by other administrative agencies, any of the following scenarios emerge:

1. The company does not have assets outside Argentina.
2. The value of its non-current assets abroad is not significant in comparison with the value of its participation in the local company or companies, and/or the value of its assets in Argentina or the amount of the transactions informed to AFIP.
3. After carrying out an inspection in the local headquarters, it is determined that they are the real center of management and administration of the company.

According to Section 6 of the Resolution 7/03, companies shall have a 180-day-term in order to make the adaptation set forth by the IGJ following Section 5; otherwise the IGJ may judicially require the cancellation of the registration of the company and, as the case may be, its liquidation.

The IGJ shall directly require this cancellation regarding Section 118 Companies and Section 123 Companies that do not fulfill the requirements established by Section 3 and 4 of Resolution the 7/03 during two calendar years from January 1, 2004.

The Resolution 7/03 does not clarify the content or extent of said "adaptation." In a personal interview held by the author with an important officer of the IGJ, it was known that this adaptation could be carried out either through one of two different procedures:

1. To request the "nationalization" of the foreign company.
2. To request the change of domicile of the company from abroad to the country.

Section 8 of the Resolution 7/03 establishes that the IGJ shall not register any minutes to shareholders' or partners' meetings where a foreign company not registered under Section 123 of the Companies Act voted, whatever the extent of its participation, provided that these votes were necessary in order to take the respective resolution.

In the case of companies obliged to submit their accounting statements, their approval and other company's decisions adopted in the shareholders' or partners' meetings in the conditions described in the paragraph above shall be declared irregular and non-enforceable for administrative purposes.

If the minutes to the shareholders' or partners' meetings evidence that the participation of the foreign company has not been considered to determine the quorum and the majority of votes, the IGJ shall verify these extremes taking into account only the rest of the capital stock present at said meeting.

The participation of companies not registered under Section 123 of the Companies Act in shareholders' meetings of stock companies subject to the supervision of the IGJ may result in the imposition of the sanctions established in Section 302 of the Companies Act upon the directors of such stock companies.

IV. Content of the Resolution 8/03

The Resolution 8/03 deals with the matter of the isolated acts performed by foreign companies. As it was previously said, Section 118 of the Companies Act states in its first part that foreign companies may perform isolated acts and participate in judicial proceedings in Argentina.

The concept of "isolated acts" has not been totally clarified yet. The preamble of the Resolution 8/03 points out the existence of recent judicial resolutions where the matter acquires enormous relevance since courts concluded that the acts performed by a foreign company not registered under Section 118 of the Companies Act were unenforceable.

In the case *Rolyfar S.A. vs. Confecciones Poza S.A.*, the plaintiff became the assignee of a mortgage whose assignor was a foreign company not registered under Section 118 of the Companies Act. The assignee began the foreclosure of the mortgage and the defendant raised a defense for the lack of registration of the assignor. This defense was sustained by the Second Instance Court since it was proved that said assignor had entered into several loans agreements and mortgages in the past in the country. The court considered that, regarding the number of similar operations carried out in the same period in which the mortgage under foreclosure was created, this mortgage could not be deemed an isolated act.

Similarly, in the case *Cinelli, Nicolasa vs. Dispan S.A.*, the plaintiff (wife and son of a deceased debtor of a loan) claimed the nullity of a loan and mortgage, stressing that the creditor was not registered under Section 118 of the Companies Act when these acts were entered into. The First Instance Court considered that the existence of two other mortgage foreclosures carried out in the same period in which the loan and mortgage whose nullity was requested had been entered into was enough evidence to consider these as not isolated acts. Conversely, even though the judge failed to declare the nullity of the loan and the mortgage, he decided that they were not enforceable due to the lack of registration of the creditor under Section 118 of the Companies Act.

By Resolution Nr. 8/2003 the IGJ creates within the jurisdiction of the city of Buenos Aires a register for isolated acts performed by foreign corporations (hereinafter, the "Register").

The Register will contain the information related to the acts performed by foreign companies under the qualification of isolated acts involving the constitution, acquisition, transfer or cancellation of in rem rights over [real estate] property located in the jurisdiction of the city of Buenos Aires.

The report to be provided to the Register shall contain information related to the document filed before the Real Estate Registry of the city of Buenos Aires and the data of the notary public participating in the act, the data of the parties (in the case of the foreign company, it shall contain the reference to the original domicile, the representative involved in the act, his personal domicile and the one established for the purposes of the act), the nature of the act, the accurate identification of the asset or right subject to the act, the economic amount involved in the transaction, and the information related to any other prior act that could also be considered as isolated.

The IGJ will elaborate, together with the Real Estate Registry of the city of Buenos Aires, the conditions for the provision of the information to be filed with the Register created by means of the Resolution 8/03.

It is important to mention that the IGJ will evaluate the information obtained from the Real Estate Registry in order to determine if the activity performed by the foreign company becomes, due to its repetition, its economic meaning, the destiny of the assets or other circumstances related to the execution of the act, its habitual or even its main activity.

In order to conduct such analysis, the IGJ may request further information related to the performance of those acts from: (i) those representing the company incorporated abroad in the act considered as isolated; (ii) the notary public participating in the act; (iii) those considered as sellers of the assets, or debtors by means of a mortgage; (iv) the assignors of mortgage rights; (v) the AFIP (limited to the information already provided to such agency by the foreign company); and (vi) the management of the building where the real estate property is located. The IGJ may also conduct, solely or together with other governmental agencies, inspections on the real estate property, with the purpose of verifying the destiny and economic conditions of the premises, as well as the current location of the company management.

With respect to the representatives of the foreign company, the Resolution 8/03 establishes that in case that (i) the domicile of the foreign company is located in a country with low or no tax obligations, (ii) the value or destiny of the assets involved in the act, or (iii) the repetition of those acts should allow the existence of the circumstances provided in Sections 118 or 124 of the Companies Law to be presumed, then such representatives might be obliged to provide the Registry with the information established by the Resolution 7/2003.

It is also important to bear in mind what the consequences of the result of the aforementioned analysis are in case that the IGJ concludes that the activity of the foreign company is subject to the provisions of Section 118 of Companies Law (regular activities developed within the territory of Argentina): it will be compelled to comply with all the registrations established by said law, including the necessary adaptation described above. Otherwise, the IGJ may request the judicial liquidation of the assets and operations of the foreign company, and its subsequent dissolution and liquidation.

In addition, the IGJ may extend the regime provided by the new Resolution to acts filed before other registries (i.e., related to machinery, aircraft, ships, etc.), both national or provincial (coordinating in this case the activities with local authorities), in order to obtain information also from said registries regarding isolated acts performed by foreign companies in Argentina.

The new Register will be in force after a 180-day term counted from the date of validity of the Resolution 8/03, which will be in force after a 30-day term counted as from its publication in the *Official Gazette*.

V. Some Final Conclusions

The Resolutions studied in this article (applicable only in the city of Buenos Aires) show a change in the scope of the IGJ, which seems determined to control certain irregular situations. Although this new approach is based on rules enacted several decades ago, they were never effectively applied. The problem is that Argentina urgently needs the reactivation of its economy and in accomplishing this task, foreign investments become essential. The new Resolutions, although inspired in laudable principles, could mean an obstacle to these investments.

There is no doubt about the existence of foreign corporate schemes that constitute fraudulent and/or evasion structures. Nevertheless, this is obviously not predicable of all foreign companies in Argentina, even though they do not fulfill the requirements set forth by the Resolution 7/03.

One of the problems that could be pointed out regarding the Resolution 7/03 is that it does not take into account the companies group phenomenon. Among the almost infinite combinations that a companies group may adopt, it is possible to understand the wish to "encapsulate" the businesses in the countries abroad into structures created for these purposes. Then, if the group itself could evidence that it holds different assets and activities in other countries, the situation should be appreciated by the IGJ as a whole and not from the narrow perspective of the Resolution 7/03. If from the analysis of the companies' group structure, it arises that it obeys to real business reasons or needs and there is no intention to elude Argentine law but to make more reliable rules applicable from the perspective of the foreign investor (unfortunately, Argentina has recently provided enough examples of shameful legal insecurity), the IGJ should take into account the situation as a whole.

In relation to the two judicial cases mentioned above, they reach unfair situations. In the *Rolyfar* case, the lack of register could be punished through any kind of sanction, but it seems excessive to inhibit the judicial claim of the credit. In the *Cinelli* case, it also seems excessive to deem the existence of two other mortgage foreclosures (apart from the mortgage whose nullity was claimed) as constituting a situation of regular performance of activities by foreign companies in Argentina. Section 118 of the Companies Act uses the expression "isolated acts" (and not "isolated act"). Therefore, the existence of several acts does not constitute per se a regular activity. These judicial resolutions do not contribute to generate the adequate framework of legal security so necessary to attract foreign investment.

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Brazil

Brazil Increases Efforts Against Copyright Infringement

With the enactment of Law 10.695, signed on July 2, 2003 by the Brazilian President, Luiz Inácio Lula da Silva, new provisions have been introduced to better fight copyright infringements. The new law modifies Brazilian Penal and Penal Procedure Codes' sections amplifying the types of copyright infringements considered as a felony and their length of imprisonment and specifying new procedures for seizure and destruction of the illegal material.

The Crime and Its Punishment

According to the former paragraph 184 of the Penal Code, the violation of author's rights was considered a crime and its sentence would be unfolded when the violation was (i) the reproduction of the material with the intention of profiting from it and (ii) the original or copied material was exhibited, sold, rented, acquired, introduced in the country, hidden, lent, exchanged or deposited without authorization.

The sentences imposed for copyright infringements were usually set for a short period of time and thus could be suspended[1] and later dismissed. The new law establishes a minimum sentence of two years for cases where the offender directly or indirectly profits from the illegality, and thus suspension of the sentence will no longer be an option, but only probation, which means that the offender will have to serve at least one-third of the sentence in prison before being eligible to enjoy it. This provision alone will discourage the illegal reproduction and distribution of copyrighted material.

But there is more: The rights protected under the new provisions have been broadened and now include not only the author's rights, but also those of the artists, interpreters or performers, and phonogram producers. Moreover, the new rules have also included the means used to infringe the copyrights, especially the use of the Internet that have sensibly hurt the artists of the music industry with the non-authorized reproduction and distribution of their copyrighted material.

Exception is expressly made, however, to the limitations and exceptions established in the Brazilian Copyright Law[2] and the reproduction of a copyrighted material for personal use without the intention of directly or indirectly profiting from it.

The Seizure and Destruction of the Illegal Material

The new law has also added eight new rules of procedure in cases of copyright infringements, which will make the prosecution and remediation more efficient. The most relevant procedure rules are that (i) the police will now be entitled to seize the suspected illegal material and the equipment, support and related materials used to carry on the crime, (ii) the victim will act as the bailee of the illegal material during the trial, (iii) artists' associations may act as prosecutor's assistants, and (iv) the judge may order the destruction of the illegal material upon the victim's request if the charges are not challenged or the offender cannot be determined.

Conclusion

The new law came as an answer to the outcry of the Brazilian artists that have been suffering, as their peers of other countries, with the widespread non-authorized reproduction and distribution of their works, especially through the Internet. Brazil has one of the most comprehensive copyright laws but was lacking some more stringent and effective rules to prosecute and punish the violators. With the new law, the Brazilian legislators have addressed this deficiency and the country expects that the rights of its artists and of those from abroad become better protected.

Endnotes

1. The suspension of the sentence, or *Sursis*, can be set by the criminal judge whenever the sentence carries a length of the imprisonment of less than two years and other conditions are met.
2. Law 9.610 of Feb. 19, 1998.

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The Brazilian Approach to Harassment in the Workplace

One of the new trends in the Brazilian labor courts is the discussion of cases related to the mistreatment of employees by their employer, which has been labeled in Brazil as "moral harassment."

Although, the subject matter is not new, since abuses against employees are as old as employment itself, it is almost natural that after discrimination and sexual harassment have finally been addressed, other forms of misconduct against employees are defined, characterized and consequently forbidden by courts and law.

Moral harassment has been identified as a genuine problem in developed as well as in less resource-rich countries. Modern-life pressures of maintaining the status quo and the growing threat of unemployment due to the general slowdown of the global economy are breeding centers for abuses in any workplace. Anxiety, frustration and depression related to work are commonplace in our societies and deprive human beings of exploiting their capacities in full. Therefore, moral harassment, as with any other type of harassment, should be prevented by increasing the awareness of rights and obligations of employees and employers and by imposing heavy sanctions against the perpetrators.

The Brazilian labor courts have so far agreed on a basic definition of moral harassment. Several appellate sentences have adopted the concept that moral harassment consists of prolonged and repeatedly exposing workers to humiliating and/or embarrassing situations during working hours and within the context of their jobs.[1] In addition, the courts have determined that such behavior is a proximate cause of physical and psychological damages to the victimized worker and thus are punishable.

However, since harassment may be subtly performed and the consequences of being wrongfully found guilty of harassment may be disastrous, it is hard to prove in court. For instance, the Brazilian labor courts have rejected appeals of cases where only oral testimony was available or the victim had not sought outside help, such as complaining to the labor department or seeking psychological assistance.[2]

Also, it is important to point out that an institution may be held responsible for the wrongdoing of one employee against another. Three elements must be present: (i) the harassment must have indeed taken place, (ii) the company had knowledge or should have had knowledge that the harassment was taking place and (iii) it did not take steps to prevent or curb it. The actual difficulty of demonstrating that all the elements are present, however, should not in any circumstances lead to adversary judgments without irrefutable evidence, since the judicial system should preserve the integrity of people and institutions, even those accused of harassment. Advocating for something different could create a dangerous precedent and recklessly risk the image and honor of the accused, who could well be himself a victim of frivolous persecution.[3]

On the other hand, whenever there is strong evidence of misconduct, the courts are willing to seriously penalize the wrongdoer. The Brazilian Appellate Court of the 17th Region last year upheld a lower court sentence in which the employer was ordered to pay, in addition to the legal severance, an indemnification of the equivalent of a month of salary per year of work and a penalty of paying the indemnification in double. In such case, the employee worked for the guilty company for twenty-three years.[4]

The imposition of such penalties, then again, may be controversial since it was applied by analogy.[5] The Brazilian judicial system is based on civil law, as opposed to common law, and thus must rely, predominantly, on specific statutes. Therefore, legislators are also working in Congress to pass a specific bill amending the labor code ("CLT"), which shall define moral harassment and impose the double indemnification, and thus provide the necessary statutory legal base.[6] Nevertheless, it is uncertain when such bill may become law since there is a larger movement toward an overall reform of the labor code and consequently the moral harassment bill may be caught in the middle of the political agenda.

Endnotes

1. TRT 2d Region, Appellate Sentence 20030361740, Case 02146.2003.902.02.00-6; TRT 17th Region, Appellate Sentence 9029/2002, Case 1142.2001.6.17.0.9 and Appellate Sentence 5742/2003, Case 01607.2002.006.17.00.2.
2. TRT 2d Region, Appellate Sentence 20030361740, Case 02146.2003.902.02.00-6, and TRT 17th Region, Appellate Sentence 5742/2003, Case 01607.2002.006.17.00.2.
3. Extracted from the article *Prova de Assédio em Juízo* by Mario Gonçalves Junior, published by Gazeta Mercantil on Oct. 4, 2002.
4. TRT 17th Region, Appellate Sentence 9029/2002, Case 1142.2001.6.17.0.9.
5. Article 478 of the CLT (Labor Code).
6. PL 5970/2001.

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Arbitration In Brazil and the 1958 New York Convention—Relevant Issues

Over the last five decades arbitration has developed and solidified as an efficient means of settling commercial disputes in various jurisdictions; in Brazil, however, during the same period, arbitration has experienced a period of stagnation. Development and solidification implied a move from a legal framework crafted in the 19th century to a modern one and consistent with the intent of the parties as well as the replacement of Conventions executed in the 1920s by a well-received New York Convention in 1958.

Stagnation in Brazil was due basically to two factors: 1) the existence of old-fashioned codified rules governing arbitration which had not incorporated and, therefore, lacked the most modern mechanisms to force the parties to institute arbitration, as previously agreed upon, and 2) further, the reluctance of Brazil in adhering to and ratifying the 1958 New York Convention.

Nevertheless, upon having adhered to and ratified the 1958 New York Convention without opposing any reserves, Brazil joined the developed nations and this has certainly been the step forward that was missing to definitely consolidate the framework of arbitration in Brazil, favoring the dissemination of the procedure.

Although arbitration has always been provided by Brazilian laws, namely the Civil Code and the Civil Procedure Code, the then-existing framework did not give enough assurance to the parties that, even if they had agreed to submit their contractual disputes to arbitration, the arbitral proceedings would be actually instituted upon the emergence of a concrete dispute. Should one of the parties fail to abide by the arbitration clause and actually fail to perform the obligations thereunder, the other party would be entitled, at most, to claim damages. The rules governing arbitration failed to create a resort to specific performance, and the absence of an appropriate legal remedy ended up hindering the intended use of the dispute resolution system.

Despite the imposition of huge pre-liquidated damages in case of breach by a party to accept the institution of arbitration, such alternative has not been helpful. There are cases where the interest of a party is far beyond the payment of damages, even if the amount is huge. There are interests that come into play that are invaluable . . .

Nevertheless, by the end of the third quarter of 1997, on September 23, 1997, the Brazilian Congressional Houses passed Federal Law No. 9,307, and introduced into the Brazilian legal system the Arbitration Act. This new law properly addressed the solution for the main impediment for the development of arbitration in Brazil upon granting specific performance to the arbitration clause. This is not the main focus of this article, but for purposes of recording the historical events surrounding the Arbitration Act, the constitutionality of certain sections thereof has been challenged on grounds of the same breaching of individual rights provided by the Brazilian Federal Constitution. The Arbitration Act was finally declared constitutional by the Federal Supreme Court, and undoubtedly this decision paved the road for the development and dissemination of arbitration in Brazil.

The importance for Brazil in having a strong framework for arbitration may be measured by the voluminous amount of corporate transactions completed since the beginning of the second half of the last decade that represented an increase of foreign equity investment in the country, the expansion of investments by local groups and the actual number of privatizations and greenfield projects in the infrastructure industry. The increasing presence of foreign investors in those areas was per se a strong claim for the introduction of a modern and effective legal statute to allow the parties to resort, whenever necessary, to institute arbitration to settle their disputes.

Although the Arbitration Act contained a set of rules governing the recognition and enforcement of foreign arbitral awards (substantially similar to the principles and language of the New York Convention), an important piece was still missing in that framework. Earlier, Brazil had adhered to and ratified the Panama Convention, but owing to the limited scope of participants, the enhancement and upgrading of the arbitration framework still depended on the adhesion to and ratification of the 1958 New York Convention, and such adhesion materialized in 2002 only. More than 40 years had elapsed since the New York Convention was established when Brazil finally adhered to the text without opposing any reserves. Reasons for such delay? Whichever those may be, they are, at this point, of minor importance, and shall have no more than historical contents.

Therefore, all circumstances are now favorable, and may lead arbitration to a phase that shall be characterized by its development and solidification as an effective means for settlement of disputes. There is, further, a perfect synchronicity between the momentum of adhesion by Brazil to the Convention and the present stage of implementation of large infrastructure and industrial projects in Brazil, and the dissemination in the marketplace of complex and sophisticated transaction structures. In all such cases, the use of arbitration to settle any disputes that may arise is not only desirable, but of the essence. Moreover, owing to the recent move toward private-sector participation in the oil and gas industry in Brazil and the prospective implementation of public and private partnerships, the choice of arbitration to settle disputes under the relevant contractual chain required from the party of the industry players eliminates doubts and uncertainties as to the actual effectiveness of the arbitral proceedings.

While issues and doubts with respect to the scope and mode of application of the New York Convention have confronted the signatory countries for several decades, Brazil is now having the opportunity to walk that same path. It may be said that Brazil is experiencing the infancy of its relationship with the New York Convention, and the issues that are now being raised in the legal marketplace were expected, and must be seen as a normal stage in the creation of a history of the Convention in Brazil. Furthermore, the adhesion of Brazil to the Convention triggers questions with respect to certain conceptual aspects sustaining the doctrine behind the Brazilian Arbitration Act. There resides the very purpose of this article. The intention is not the final settlement of those issues. By virtue of their nature, the same may encompass different views. Our purpose is to bring some ideas and contribute with materials for such discussion. Therefore, our intent is to discuss issues that derive from the Brazilian Arbitration Act and the language of the New York Convention.

Undoubtedly, the provisions of the Arbitration Act brought fresh air to the legal framework upon eliminating the legal requirement that prevailed in the country for many decades whereby the enforcement of a domestic arbitral award would only be admitted if the ratification by a court had first been secured. Under the Act, the domestic arbitral award produces the same effects of a judgment and whenever it provides for the payment of any amounts by one party to the other it shall be deemed a title eligible for summary collection proceedings. This has only been made possible by the revocation of the old law under which such effect should only exist upon the court ratification being obtained.

The first issue to be discussed in this article refers to the nationality of the arbitral award and the relevant consequences stemming therefrom. As per the Arbitration Act, precisely in the chapter crafted to deal with the recognition and enforcement of foreign arbitral awards, such awards are defined as "those which have been passed outside the national territory." In other words, any award passed outside the boundaries of the Brazilian territory shall be deemed of a foreign nature. By contrast, domestic awards shall be the quality of the decision passed by the arbitral tribunal or sole arbitrator that has been passed within Brazil. So far and from a technical standpoint, arbitral awards may be divided into two different categories, to wit: domestic or foreign.

The distinction of the awards is based on the place where such award has been passed. Nevertheless, it seems to us that, although this criterion may be valuable to identify the nationality of the award and determine the relevant effects, it may be insufficient to cover all sorts of awards that may derive from arbitral proceedings.

While we accept the criterion of place of arbitration to determine the nationality of the award, we also understand that the nature of arbitration proceedings and consequently of the awards passed thereunder may not be precisely defined by applying solely such criteria.

International arbitration shall exist whenever local and foreign parties are involved, but not necessarily shall the relevant awards bear this same nature by the mere fact of the nationality of the parties. For Brazilian law purposes, these shall only coincide if arbitration proceedings take place outside Brazil. Otherwise, by applying the aforementioned criteria, we shall have an international arbitration and a domestic award.

Nevertheless, one may easily figure out several examples of international arbitrations held in Brazil or otherwise involving parties from signatory countries of the New York Convention that would lead, as the case may be, to the existence of foreign and domestic awards. The reason for this discussion is that a deep analysis of the outcome of such examples intrigued us. We are convinced that such issue is not merely theoretical, insofar as it has actual practical consequences on a more comprehensive legal and conventional approach.

It is always useful to recall that, as per the law, a domestic award, as aforesaid, may be immediately enforced to the extent that the ratification requirement has been lifted. The first conclusion is that depending on the nationality of the award, the effects shall differ. This is due to the fact that foreign arbitral awards may only be enforced after the same are ratified by the Federal Supreme Court. We would like to retain at this point the different effects generated by awards.

The question that intrigued us is related to effects. Among the examples that one can figure out, one is the nature of the award issuing from an arbitration held in Brazil and involving a Brazilian and a foreign party. References are found in foreign doctrine to domestic, foreign and national awards, depending on the criteria adopted, which vary from the place of arbitration to the nationality (or absence of a defined nationality of the applicable laws). Our analysis, in turn, goes beyond the place of arbitration or nationality of the applicable laws. We understand that there is another category of awards that, irrespective of the place of arbitration, maintain a relationship with the fact of the parties issuing from a signatory country of the New York Convention or other regional or multilateral convention.

In our view, it seems myopic to state that awards are either domestic or foreign only. Assuming an international arbitration, irrespective of the place where proceedings are held, it is common sense that the award shall be deemed foreign in the jurisdiction where proceedings have not been held, but domestic in the place of arbitration. But when it is stated that the award is, under one perspective, a domestic award, such award still keeps the nature of an award under the New York Convention. It is precisely in view of that circumstance that we propose to admit, under the existing framework in Brazil, a third category of arbitral awards. We make reference to *non-foreign awards* in contrast with the domestic and foreign awards. The non-foreign awards, from a Brazilian law perspective, are those passed in the context of international arbitrations but for the purposes of laws of the jurisdiction where they were passed, treated identically to domestic awards. The important feature of such category is the maintenance of its relationship with existing conventions, such as New York, Panama or any other regional context, despite being treated identically to the domestic awards. The quasi-domestic nature of such awards entitle them to be treated identically to domestic awards in the place of jurisdiction. Nevertheless, in any jurisdiction where the arbitration proceedings have not been held, it shall be deemed a foreign award, including for the purposes of enforcement against a Brazilian party, if such party has assets outside Brazil and enforcement thereof in such third jurisdiction is deemed more convenient to the winning party. In such case, the New York Convention nature of the award, for instance, would have to be recognized. The ambidexterity feature of the non-foreign awards is definitely not inherent to the category of domestic awards.

This proposed category of awards is not inconsistent with the Brazilian Arbitration Act. In reality, the Act defines explicitly and expressly foreign awards only. Therefore, it is fair to say that, except for foreign awards, any other award shall be deemed domestic. We would then rephrase, however, such statement to say that, excluding the genuine foreign awards, any other award, which contains an international feature, shall be deemed to produce the effects identical to those from which domestic awards benefit.

Another issue and also a source of extreme concern is the construction being made by a number of professionals in the marketplace as to the possible lifting of the exequatur requirement in light of the text of the New York Convention. Article III of the Convention states:

> Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Based on this language, certain professionals have assumed the position that the requirement imposed by the Arbitration Act whereby foreign arbitral awards may only be enforced upon their ratification by the Supreme Court would be in breach of the text of the Convention.

As per the Federal Constitution (Section 102(I)(g)), the authority to ratify foreign judgments rests solely with the Federal Supreme Court. In reality, and prior to the coming into force of the Arbitration Act, the meaning of the expression "foreign judgment" has never been discussed, nor has it been even challenged. In the past, the Supreme Court adopted the position in its case law that such court would only ratify foreign judgments, and not arbitral awards. The requirement then imposed by the Supreme Court for admission of any request for ratification would be the arbitral award having been ratified first by a court of competent jurisdiction. In other words, until the enactment of the Arbitration Act the Supreme Court ratified only judgments of foreign courts. Therefore, it has never been a matter of discussion whether the expression *foreign judgments* encompassed or not foreign arbitral awards and there was not room for such discussion. It may sound weird to the reader to refer to the expression *foreign judgment* when encompassing arbitral awards. The text of the Arbitration Act utilizes the expression "*sentença arbitral*" to refer to arbitral award. In reality, the word "*sentença*" is traditionally utilized to refer to court judgment, but is also used to identify arbitral awards. The use of the same word in Portuguese led to the discussion whether the expression *foreign judgments* provided by the Constitution encompassed court judgments and arbitral awards.

The coming into force of the Arbitration Act represented a change in the existing scenario. As per the Act, the requirement for dual ratification was lifted, and the Supreme Court is empowered by the Constitution to ratify arbitral awards. Section 35 of the Arbitration Act states that the foreign arbitral award in order to be recognized or enforced in Brazil shall be subject only to the ratification by the Federal Supreme Court. There are already several cases where the Supreme Court ratified foreign arbitral awards and acknowledged the application of the aforementioned Section 35. Despite the adhesion to the New York Convention, the provisions of the Arbitration Act governing the recognition and enforcement of foreign arbitral awards are in full force and effect, and have not been derogated or revoked by such adhesion. Should we assume that such portions of the Arbitration Act would have been derogated or revoked by the New York Convention, how, then, would Brazil be treating arbitral awards issuing from jurisdictions that have not adhered to the New York Convention?

Pursuant to the Brazilian law principles, upon ratification of a treaty or a convention, the provisions of the same shall prevail over those contained in the domestic law in force to the extent that such texts are inconsistent or contradictory. Therefore, it would be, in our opinion, a long shot to state that the existing provisions of the

Arbitration Act have been revoked by the adhesion to the New York Convention. They remain in full force and effect, but with respect to signatories of the Convention they simply do not apply. We trust that such construction of both texts is more coherent.

Therefore and from a Brazilian law standpoint, it is our understanding that any attempt to eliminate the requirement of ratification by the Federal Supreme Court for the purposes of recognition and enforcement of foreign arbitral awards would be deemed unconstitutional.

The issue, which has been raised in Brazil following the adhesion to the New York Convention, is whether or not such a constitutional requirement would breach the letter of the New York Convention, especially the final portion of Article III. The argument brought into discussion by those who challenge the applicability of the ratification requirement is that such requirement would be deemed a condition more onerous than the conditions that are imposed on the enforcement of domestic arbitral awards. Under the Arbitration Act, the domestic arbitral award has the same effects as a court judgment and entitles the winning party to benefit from summary collection proceedings, should the award provide for monetary payments. Thus, assuming for debate purposes only that such ratification requirement was treated as a *condition,* we would have to admit that in contrast with the domestic awards, the requirement would be deemed a more onerous condition.

Undoubtedly, this argument may not prevail to support the opinion in light of the text of the Convention. In reality, the Convention creates a clear distinction between *procedures* for enforcement and *conditions* for enforcement of foreign arbitral awards.

The opening statement of Article III of the Convention grants full authority to local laws to establish the *procedures* for enforcement of the foreign awards by stating, *"each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the* ***rules of procedure*** *of the territory where the award is relied upon. . ."* Therefore, the Brazilian procedural rules are those contained in the Constitution with respect to the incumbency of the Supreme Court. The spirit and letter of the Convention lead us to conclude that such procedure, which is mandatory under the Constitution, does not breach nor violate the Convention. Even if we apply the procedural rules contained in the Arbitration Act, the applicable ones shall be those dealing with the recognition and enforcement of foreign arbitral awards and certainly not those applicable to the domestic awards. There resides the importance for construction purposes of the preceding statement recognizing the full force and effect of the provisions of the Act with that same respect. In any event, even if we admitted the revocation or derogation of those provisions by the Convention, it would be inconsistent with the letter of the Convention, while the provision that imposes the ratification requirement would still survive and be in line with the letter and spirit of the Convention.

In reviewing the text of the Convention we realize that the argument raised in the marketplace treats the procedural rules as a condition, as if such expressions were interchangeable. The challenge of such a requirement would be made on grounds of ratification being a more onerous condition. The ratification by the Supreme Court is a requirement that falls within the rules of procedure of Brazil and, with that specific request, no impediment exists in the Convention for the contracting state to establish them as it may see fit. The ratification process does not allow any retrial or re-examination of the merits of the award passed by the arbitral tribunal. In the course of such process, the Supreme Court will determine whether the award violates public policy, national sovereignty or good morals. The violation of public policy is defined by the Convention as grounds for recognition and enforcement being refused (Article V (2)(b)).

We fully agree, however, that any condition imposed by a contracting state other than those provided by the Convention would be in breach of the letter and spirit of the text. Our conclusion is based on the language of Article III referred above whereby it is stated that while the recognition and enforcement is made in accordance with the rules of procedure of the territory of the contracting state where they are sought, it also clearly states that ". . . under the conditions laid down in the following articles." If Brazil still had in force the requirement for prior ratification of the award by a court of competent jurisdiction where the award was passed, such requirement would be in breach of the Convention by Brazil innovating in terms of conditions for enforcement. Therefore, the Convention is restrictive with respect to conditions for enforcement and limited them to those mentioned in its text.

The confusion in the marketplace derives from the reading of the final portion of Article III. Our understanding is that such language, which has been inserted into the text on the basis of a proposal made by the British delegation to the U.N. Conference in 1958, refers solely to conditions and reinforces and emphasizes only the reference to the "conditions laid down in the following articles," having, then, no impact on the freedom granted to the contracting states to establish at their discretion the procedural rules applicable to the enforcement of foreign arbitral awards.

In sum, whenever an arbitral award is passed outside Brazil, domestic laws shall treat it as a foreign arbitral award, and recognition and enforcement thereof in Brazil shall require the prior ratification by the Brazilian

Supreme Court, even if such award is passed in the context of the New York Convention.

After reading this text, the reader may conclude that the issues mentioned here may be seen as non-issues, and that the conclusions are obvious. Nevertheless, the reader must bear in mind that Brazil is a newcomer to the community of signatory parties of the New York Convention, and it is reasonable that such issues may emerge upon professionals aligning the domestic laws and the Convention. Those same questions may have arisen in other jurisdictions in the past, but Brazilians are paying a high price in reinventing the wheel due to the long delay that preceded the adhesion. Nevertheless, we are convinced that such adhesion is so important for timely accomplishment that we will have to expedite the process of analysis of any inconsistencies or conflicts, and will be able to rescue the time lost.

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Brazilian Energy Law—A Brief Overview

The wake of the fifteenth anniversary of the Brazilian Constitution, which was published in October 1988, brings up an analysis of its importance to the Brazilian society and especially to Brazilian energy law.

The Brazilian Constitution of 1988 represents the consolidation of democracy and the constitutional principles of sovereignty, citizenship and human dignity, among others. The forty amendments to the Brazilian Constitution issued since 1988 are the result of a gradual process of experimentation with those principles and with Brazilian reality.

The Constitutional principles of the social value of work and of free enterprise guided Constitutional Amendments Nos. 5, 6, and 9, which resulted in the end of state monopoly over the activities involving the oil and natural gas industries.

Constitutional Amendment No. 5 allowed the states of the federation—which must render piped gas distribution services within their territory—to delegate exploitation to third parties upon concession. The privatization of the piped gas distribution companies in the states of Rio de Janeiro and São Paulo started up the process of opening the exploitation of the oil and natural gas activities to the private sector.

At the federal level, the regulation of the exploitation of electric energy services by private parties was strengthened and the state monopoly involving the oil industry was broken.

In 1995, the process of privatization of the energy distribution companies was initiated, and in 1997, Law No. 9478/97—the Petroleum Law—was published to regulate the concession to private parties of the exploitation of activities of the oil industry in light of Constitutional Amendments Nos. 6 and 9.

Sections 170 *et seq.* of the Constitution restricted the state's direct exploitation of economic activities to those involving national security or relevant public interest, thus strengthening the state's regulatory and supervisory role.

Aiming at supervising and regulating the economic activities—and especially the industries recently opened to exploitation by private parties—the regulatory agencies were implemented: at the federal level, there are the National Petroleum Agency (ANP) and the National Agency of Electric Energy (ANEEL), and at the state level, commissions of public service, such as the Commission for Energy Public Services (CSPE) in the state of São Paulo.

Within the experimentation process with the principles of the Brazilian Constitution, new challenges to the Energy Law emerged. The free access to transportation pipelines in Brazil, pursuant to Section 58 of the Petroleum Law, is currently under a public consultation process led by ANP. The limits and contours of the right of free access by any interested third party to use the transportation pipelines and maritime terminals in Brazil are under discussion.

Further, the ruling of the Brazilian energy framework is being remodeled. The Ministry of Mines and Energy has recently announced a new proposal for the electric energy framework. The balance between self-regulation by the private companies acting in the area and state regulation is sought-after, especially in light of the 2001 energy rationing crisis.

There is still much to be done in the field of energy law in Brazil. Based on a retrospective analysis, one may verify that the improvement of the law requires the strengthening of the venture between the society and the state in light of the principles of the economic order, free initiative and consumers' rights.

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Canada

Canada, the U.S. and the Kyoto Protocol: Conflict Ahead?

The United States originally was a signatory to the Kyoto Protocol ("the Protocol") of the United Nations Framework Convention on Climate Change (UNFCCC) which imposes a general requirement on developed countries to reduce their emissions of carbon dioxide and certain other emissions ("GHGs") to an average of 5% below 1990 emission levels by the end of the first commitment period of 2008-2012. However, in March 2001, the Bush Administration indicated its intention to withdraw from the Protocol and develop a domestic "Made in America" plan to address air contaminants. The U.S. "Clear Skies Initiative" was announced in February 2002. In essence, it is a multi-pollutant approach to control air contamination that will impose new caps on emissions of sulphur dioxide, nitrogen dioxide and mercury from power plants. There will, however, be no mandatory reductions of GHGs, as defined under the Protocol, by U.S. emitters under the Clear Skies Initiative.

Canada, on the other hand, has signed and ratified the Protocol. Under Annex B to the Protocol, Canada is required to reduce its emissions of GHGs to 6% below 1990 levels. Current estimates are that this is approximately 25% below current emission levels. Once the required number of governmental ratifications is obtained and the Protocol actually enters into force, massive investments will have to be made in pollution reduction technology by Canadian industry if the Canadian government is to meet its Protocol obligations.

Given the scope of Canada's reduction commitments, current Canadian plans to implement the Protocol envisage a number of far-reaching measures to promote and facilitate adherence to Protocol standards by Canadian industry. Such measures include a domestic emissions trading system that imposes caps on emissions from large emitters of GHGs and possibly upstream oil and gas producers. As well, there are proposals for cost-sharing programs to help various entities meet their Protocol commitments, enhanced government financial support for research and development in GHG reduction and incentives, and regulations and tax measures to help promote changes in specific sectors.

Given that the U.S. is not party to the Kyoto Protocol, equivalent mandatory limits on GHG emissions will not apply to U.S. entities. Consequently, in today's integrated North American economy, Canadian manufacturers and service providers will likely be facing regulatory and financial burdens which their U.S. competitors will not face. Potentially severe competitive disadvantages for Canadian industry in certain cases will be created, with inevitable pressures on the Canadian government to adopt mitigating measures in specific sectors to compensate for regulatory disequilibria.

Such fundamental regulatory discrepancies between two countries, which enjoy the world's largest bilateral cross-border trade relationship, may ultimately result, *inter alia*, in differentiated regulatory treatment for U.S.-origin carbon-intensive products in Canada or potential reductions in exports of Canadian carbon-intensive products to the U.S. market. Such Canadian measures in turn could conceivably lead to trade disputes down the road under the provisions of either the North American Free Trade Agreement (NAFTA) or the World Trade Organization (WTO).

For example, emission caps on upstream oil and gas and carbon-intensive products are likely to result in mandatory reductions in production or consumption of energy products. It is quite possible that the Canadian government could be tempted to impose rebalancing measures such as compensatory border taxes or quantitative restrictions on imports or exports of carbon-containing goods to deal with these problems. Quantitative restrictions prima facie contravene the provisions of General Agreement on Tariffs and Trade (GATT) Article XI that prohibit quantitative restrictions on imports or exports, subject to the exceptions contained in GATT Articles XX and XXI.

In the area of services trade, road transport and pipeline transmission are service activities that are subject in many cases to the trade in services obligations of the General Agreement in Trade in Services (GATS). The extent to which service activities in relation to carbon-producing industrial processes are subject to the existing GATS obligations of WTO member countries without qualification, including national treatment, is a question that has yet to be resolved.

The introduction of an emissions trading system under which emission trading permits are allocated or otherwise granted only to capped Canadian producers and not to other market participants, may give rise to allegations by U.S. interests that national treatment on internal regulation of Canadian markets is being denied to U.S.-origin products in the Canadian market. Such treatment is potentially contrary to GATT Article III:4 and the national treatment provisions of NAFTA.

Other potential grounds for challenge to Canadian implementing measures for Kyoto commitments exist in the investor-state provisions of Chapter 11 of the NAFTA. Such claims might rest on allegations that the Canadian system denied national treatment or most-favored nation treatment to U.S.-owned investments in Canada and/or resulted in the diminution of the value of their Canadian investments, thereby effecting a de facto expropriation of U.S. investment interests.

The Canadian Federal Government has the unilateral power to sign and ratify the Protocol without parliamentary approval. However, owing to the split constitutional authority in Canada in matters pertaining to the environment, it does not have all of the necessary constitutional powers to fully implement Protocol commitments without the co-operation of the provinces. There will be a requirement for the Federal Government to try to ensure that all of the Canadian provinces comply fully with Kyoto commitments so as to ensure equality of treatment of Canadian and foreign goods, services and investment in the future. Certain Canadian provinces, including its main energy-producing regions, have already indicated their displeasure with the scope of the commitments the Federal Government has undertaken. While such opposition has not deterred the Canadian Federal Government from proceeding to ratify the Kyoto Protocol, the domestic political battles in Canada over Kyoto implementation are far from over.

In summary, by ratifying the Kyoto Protocol at a time when its largest trading partner has not, the Canadian Government will have to deal with a number of potentially disruptive trade issues as it implements its Protocol commitments. The scope of the GHG reduction measures and any mitigating measures that the Canadian government chooses to offset the competitive imbalances created in the North American free trade zone, together with U.S. reaction to such measures, remain to be determined.

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Iraq

Rebuilding Iraq
Legal Challenges Facing Foreign Investments in the Reconstruction of Iraq©

I. Introduction

The goal of this presentation is to identify and discuss some of the important issues and considerations with respect to funding the massive rebuild of Iraq.

At the outset, The Council on Foreign Relations originally estimated the amount of funding required to rebuild Iraq to be in the range of $100 billion to $500 billion over the next five years. However, recent estimates for the next four years, as determined at the October 23–24, 2003 Madrid (Spain) International Donors Conference (IDC) were lowered substantially to approximately $56 billion (as estimated by the World Bank and United Nations). From the Madrid Conference, donors pledged approximately $33 billion (primarily by loans) of the approximately $56 billion required (with the U.S. pledging approximately $20 billion of that pledge). Notwithstanding, this estimated funding is in itself an enormous obstacle.

The funding process, as well as future investments in Iraq, will be influenced greatly by (i) the status of the currently effective Iraqi laws, (ii) how quickly these laws and the regulations promulgated thereto will change, and (iii) what shape and content will result from that change. BearingPoint is currently leading an effort, including the structuring of new laws, as part of an initial $9 million U.S. Agency for International Development (USAID) grant (which may become more than $70 million in the coming years). This effort, in part, is geared toward the development of Iraq's infrastructure and its international economic integration.

On June 12, 2003, the U.S. Department of Commerce ("Commerce") prepared the first draft of an analysis of the commercial laws in Iraq, including the laws regulating the financing of Iraqi infrastructure projects, and entitled it the "Overview of the Commercial Law of Iraq" (the "Commercial Overview"). In its *Business Guide for Iraq*, Commerce identified a number of impediments that could affect adversely the development of infrastructure projects in Iraq.

The intention of this presentation is to provide a comprehensive list of some of (i) the recent changes to the laws of Iraq, (ii) the major obstacles to the funding and growth of Iraqi infrastructure, and (iii) the examination of potential solutions thereto. Iraq's unstable security situation will dictate the extent and degree that foreign investments will be able to penetrate into that nation. Nevertheless, this presentation will focus on how Iraqi's current legal structure, together with the recent changes to the existing laws promulgated by the Coalition Provisional Authority (CPA), will affect these foreign investments. Ambassador Paul Bremer, in the recitals of the CPA Order Number 39 ("Order 39"), dated September 19, 2003, wrote, among other issues, that facilitation of foreign investments in Iraq will assist to develop infrastructure, foster the growth of Iraqi business, raise capital, and result in the introduction of new technology into Iraq.

II. Discussion

A. Trade Bank of Iraq

Drawing from the experience of 50 years ago when the U.S. established similar mechanisms to assist countries like Germany and Japan rebuild their nations after World War II, one of the CPA's first orders was to establish the Trade Bank of Iraq (TBI). The TBI's main objective will be the facilitation of trade flows and the increase of imports, particularly those of heavy construction equipment, by issuing and confirming letters of credit—in essence guaranteeing payments to foreign exporters. On August 28, 2003, the Board of Directors of the U.S. Export-Import Bank ("Ex-Im Bank") approved a $500 million facility to insure financial products offered by the TBI. The Ex-Im Bank's letter of credit insurance policy insures the relationship between the TBI and a U.S. bank. Therefore, it reduces the risk taken by a participating U.S. bank.

On September 1, 2003, J.P. Morgan Chase & Co. was chosen out of six finalists to lead the consortium of 13 international banks that will manage the TBI's operations. The TBI is seen as a crucial vehicle in enabling

Iraq to import food, electrical equipment and oil-refining machinery that Iraq requires to rebuild its country. Peter McPherson, while serving as the Financial Coordinator of the Iraqi reconstruction effort, expressed the CPA's intent to eventually open the TBI's programs to banks worldwide. The "open-door" policy to foreign investments is seen as a necessity to the reconstruction of Iraq.

However, members of the CPA have expressed concerns with respect to offshore Baathist Party money finding its way back into the country and establishing again that Party's financial dominance. The financial supremacy of the former regime presents significant concerns for the interim Iraqi government as well as the U.S. Administration. In an attempt to attract the necessary funds for the reconstruction of Iraq, the newly formed government inadvertently may appoint the very same people that it is trying to eradicate. It is of no coincidence that in many of the Eastern European countries the financial dominance of ex-communist leaders and their followers is reflected not only in the strength of the socialist parties (the newer and the more democratic version of the communist parties), but also in the financial monopoly that they have created throughout Eastern Europe.

The TBI's life is initially set at 12 months, with an option to extend it for an additional three years. Thus, the question arises: should the life of the contract not be extended, what would the U.S. Administration, together with the CPA, have achieved during this 12-month period? It has been reported that certain countries, like Japan, are hoping to encourage trade with Iraq by providing Japanese companies trade insurance for transactions entered into with the Iraqi government. However, this insurance is aimed at assisting Japanese companies overcome the dominance of Iraqi government business by U.S. and British firms. U.S. companies have won a controlling share of all the reconstruction contracts, including the ones not funded by the U.S. government. Therefore, other countries have commenced competing for Iraq's business and are not necessarily collaborating with the U.S. in this rebuilding effort.

B. Central Bank of Iraq and Control of Monetary Policy

In an effort to free the Central Bank of Iraq (CBI) from political interference, Ambassador Bremer, on July 7, 2003, signed CPA Order Number 18. Under this Order, Articles 21 and 22 of the Central Bank of Iraq Law No. 64 of 1976 were suspended to the extent that these laws authorized the CBI to loan funds to Iraqi Government Ministries. Furthermore, the CPA provided the CBI the authority to determine and implement the monetary and credit policy without the approval of the Iraqi Ministry of Finance. The prospect of foreign investors investing in new and/or expanding operations in Iraq require that the monetary and credit policy of the Iraqi banks be established for determining the foreign currency issues of these international transactions, as well as the structuring credit facilities.

A primary concern to foreign investors is the kind of banking system selected to shape and develop the Iraqi monetary and credit policies. The Gulf region has had a great influence in Iraqi banking, which varies from country to country. However, the growth of Islamic banking and finance has been quite recent in that region (since the 1980s). Also, the U.S. intends to establish a Western democratic system in Iraq. Thus, the challenges facing the CPA in establishing a forward-looking banking system, receptive to the traditions and customs of the Iraqi society, has been a daunting task.

On September 19, 2003, the CPA issued Order Number 40 ("Order 40"), which creates the laws establishing and governing the new Iraqi banking system (the "Bank Law"). Order 40, in establishing a new Iraqi banking system, develops a foundation for Iraq's economic growth and development. The provisions of the Bank Law were modeled significantly after the Western approach to bank regulation. They provide the CBI full legal and operational authority. Most importantly, the Bank Law provides the Iraqi banks the powers and authorities associated with those of a modern bank operating in the international banking system. Also, the Bank Law confers on subsidiaries and branches of banks, partially or entirely owned by foreign persons, the same treatment under the Iraqi laws as that provided to Iraqi domestic banks.

Foreign banks are allowed to establish their presence in Iraq either through the establishment of (i) a majority or wholly-owned subsidiary bank in Iraq, or (ii) a branch/representative office of such foreign bank. In either event, the foreign bank must acquire a banking license issued by the CBI. Subsidiaries of foreign banks are required to have 50 billion dinars of capital (the equivalent of $25 million). Until December 31, 2008, the number of licenses issued to banks controlled by foreign persons is limited to six. However, a foreign person can own fifty percent 50% or more in any Iraqi bank.

In their recent analysis of the Bank Law,[1] Pillsbury Winthrop's attorneys, Ayaz Shaikh and Glen Cuccinello, identify the similarities between the Bank Law and the Western banking system. In this regard, they discuss the provisions related to (i) the risk-adjusted capital adequacy requirements, (ii) lending limits on specified percentages of the lending bank's capital, (iii) provisions for on-site examination of Iraqi banks and their subsidiaries and affiliates by the CBI, etc. Furthermore, in their analysis, Shaikh and Cuccinello note the continuation of the absence of the traditional Islamic banking practices in Iraq, such as the Islamic prohibition on the charging of interest. The authors state that the Bank Law resembles U.S. banking laws, particularly the laws that restrict certain activities to the banks (wholesale or retail trade, manufacturing, transportation, agriculture, etc.).

It has been reported that the CPA, and the Iraqi Governing Council, are currently conducting a selection process for selecting and licensing six foreign banks to establish and conduct operations in Iraq.

C. "Medium-Term" Financing

Iraq's wealth in natural resources is little paralleled. It is estimated that Iraq has the second largest proven oil reserves in the world, at approximately 112 billion barrels. Oil historically has been Iraq's major source of revenue. Thus, great emphasis has been placed on funding Iraq's declining oil infrastructure. The general consensus is that Iraq's archaic wells cannot pump enough oil to raise the country out of its financial troubles. The Ex-Im Bank reportedly is examining the creation of certain medium-term financing mechanisms (such as letters of credit) to support the rehabilitation of Iraqi oil fields and, thus, assist increase oil production.

Experts estimate that the rehabilitation of the oil fields and an increase in oil production will require a substantial amount of funding. In contrast, Iraq has a reported international debt between $60 billion and $130 billion. This liability has forced the confiscation of most of the Iraqi's international assets. Unless many of the countries owed money by Iraq agree to forgive a large portion of the debt, the Ex-Im Bank and other financial institutions seeking to participate in Iraq will have difficulty in raising these funds.

It may prove to be a very difficult "sell" for countries, such as Russia and Germany, to participate in writing off large portions of these receivables. In this regard, Russia not only opposed the war with Iraq, but also is one of Iraq's biggest creditors. Germany openly declared at the latest G7 meeting in Washington that it will insist on repayment of its portion of the debt. In fact, Russian President Vladimir Putin, during his interview with the *New York Times* on October 6, 2003, restated that Russia would consider a partial relief of Iraq's $8 billion debt, but only to the extent that other major creditor nations in the Paris Club would do the same.

On October 23–24, 2003, the international community, as mentioned, held the IDC in Madrid, Spain. The United States, the United Nations, the European Union (EU), Japan, the United Arab Emirates and the International Monetary Fund (IMF) co-organized the IDC. The intent of the IDC was to secure international funding for the Iraq reconstruction. Also, it provided the international community an opportunity to meet after the sharp divisions caused by the war in Iraq. The process of rebuilding Iraq has turned out to be a larger, and a more dangerous, challenge than what initially was anticipated by the U.S. Administration. Thus, the political and the financial support of the international community have become even more vital.

As mentioned, of the approximate $33 billion pledged to date for Iraq reconstruction, the U.S. will provide the largest sum, at approximately $20 billion. Japan is the next largest pledge/donor at $5 billion (of which $3.5 billion consists of medium-term loans) and may send troops to Iraq. Other countries have pledged the following amounts: Saudi Arabia stated that it would provide a financing package of $500 million for project finance and $500 million to export credits (with no grants). The 15-nation EU pledged $236 million, thus bringing to approximately $826 million its combined oil package offered to date for Iraq. Iran pledged a credit facility of approximately $300 million. It also provided other concessions to Iraq, such as (i) permitting Iraq to use Iranian oil terminals for exports, and (ii) providing Iraq electricity and gas supplies. According to Reuters, other countries made varying additional monetary pledges for Iraq. See Attachment A.

Furthermore, prior to the commencement of the IDC, on October 1, 2003, the European Commission (EC) announced its proposal to commit 200 million euros to the reconstruction of Iraq. Many viewed this EU pledge to be insignificant in light of an estimated $56 billion required to rebuild Iraq. In its communication to the European Parliament, the EC stressed that the lack of a stable and sovereign Iraq, and a multilateral framework to channel support from the international community for the reconstruction of Iraq, will hinder EU's participation in such reconstruction process beyond the IDC. In the same communication, the EC announced that the international donors prefer to keep their contributions independent of the CPA and the Development Fund of Iraq.

To that effect, the World Bank and the United Nations are spearheading the creation of a coherent budgetary framework to ensure a transparent and efficient reconstruction program through the establishment of a Multi-Donor Trust Fund for Iraq. As mentioned, the World Bank and United Nations originally estimated Iraq's reconstruction needs, in preparation for the IDC, to be $36 billion. This amount, however, excluded the $20 billion estimated for the reconstruction of critical sectors such as those of oil and security, which together aggregate to the current total projected sum of $56 billion for these reconstruction efforts. Furthermore, the EC's communication clarified that the EU's further involvement and support toward Iraq largely will depend on the co-operation of Iraq's neighbors, specifically Turkey, Jordan, Syria, Saudi Arabia and Iran.

D. Additional Legal Issues and Considerations

1. Constitution of Iraq

Since 1958, Iraq has had six interim constitutions, with the latest version offered by the Baath Party in 1990, but never ratified. Through the Revolutionary Command Council, Saddam Hussein issued over 1,500 resolutions. These directives ranged from amendments to the Iraq Constitution to changes in laws related to trade and taxes. This erratic approach has created such chaos in the Iraq legal system that immediate action is necessary to sort through this hodgepodge of laws and regulations.[2]

During the CPA's operational briefing on September 2, 2003, Ambassador Bremer announced another important step toward creating a sovereign self-government of Iraq. In this regard, he proposed the creation of a preparatory committee to determine the means by which Iraq will draft its first non-interim constitution. During the briefing, Ambassador Bremer emphasized that the Iraqi Constitution will be written by Iraqi people. He suggested having the newly written document subjected to a referendum requiring that the Iraqi people, for the first time in their history, be involved directly in the approval of their own constitution.

On August 13, 2003, the Iraq Governing Council appointed 25 members of this preparatory committee. Its main task was to provide recommendations on the process of drafting the constitution. However, the duty of the preparatory committee has proven to be more difficult than anticipated by the U.S. Administration. Despite the six-month deadline required by Secretary of State Colin Powell to draft a new constitution, the Iraqi consensus is that such a deadline will be impossible to reach.

The disagreements extend not only to the role that Islamic law will play in this new political structure, but also to the issue of who will draft this new constitution. A controversy also has arisen regarding the method of selecting the drafters. An election by popular vote would provide the Shiite Muslims, who represent approximately 60% of the population, a majority at the upcoming April convention for drafting of the new constitution. Other Iraqis, including some Shiites and rival Sunnis, view the Shiites' dominance as highly dangerous. Using their influence, Shiites may push for a greater role of Islam in the new Iraqi government.

Furthermore, disagreements have commenced between the U.S. Administration and the members of the Iraq Governing Council. The U.S. Administration strongly believes that the adoption of Iraq's new constitution is a condition precedent to the transfer of sovereignty and the end of the occupation in Iraq. Members of the Governing Council, on the other hand, contend that a process as important as drafting a new constitution cannot be limited to six months. Additionally, in their view, the longer timetable required to draft the constitution does not warrant a longer occupation. However, officials of the U.S. Administration clearly have stated that if a constitution must be drafted before a government can exist, then Iraq will receive a new constitution.

2. Foreign Investments

a. CPA Order 39

On September 19, 2003 Ambassador Bremer signed Order Number 39 ("Order 39") into law. Order 39 abolishes the existing Iraqi foreign investment law, replaces it with the provisions of the new Order 39, and launches a new phase in the process of rebuilding Iraq.

The initial proposal of this Order 39 (first discussed in the August 28, 2003 New York Times article, entitled "U.S. seeking Foreign Investments for Iraq"), barred foreign investments in certain industries such as railroads, oil, natural resources, electricity, water and sewage. Section 6(1) of Order 39, instead, limits these restrictions only to natural resources involving primary extraction and initial processing, without being more specific as to the identity of these "natural resources" and types of "initial processing."[3]

Furthermore, Order 39 does not limit the amount of foreign capital to be invested in Iraq, as previously proposed by the CPA. Earlier, the CPA was considering a requirement, whereby it and a panel of Iraqi leaders would have the authority to reject within 60 days any foreign investment of $40 million or more under certain circumstances. In this regard, the rejection could occur if they believe the proposed investment would threaten national security or if the investor had a "history of unlawful behavior." Additionally, section 6(1) of Order 39 expressly states that this Order does not apply to banks and insurance companies.

Article 16 of Iraq's Interim Constitution prohibits foreign ownership of "immobile property," except as otherwise provided by law. Similarly, section 8 of Order 39 prohibits a foreign investor or a business entity with any level of foreign investor participation to purchase the rights of disposal and usufruct of private real property. However, section 8(2) of Order 39 allows a foreign investor or a business entity to obtain a license for the use of real property. This license shall not exceed 40 years. In addition, Order 39 imposes no limit on the number of times that one may renew these licenses.

Under the old Iraqi law, foreign nationals (other than nationals of Arab countries) were not permitted to directly invest in (i) the establishment of, or to acquire stock in, an Iraqi company, or (ii) an Iraqi project. Moreover, foreign companies that were allowed to invest in Iraq were required to comply with the Arab boycott of Israel.

Section 4 of Order 39, however, and most significantly, now provides foreign investors the same treatment as that provided to Iraqi investors, without any continuing requirement of adherence to the Arab boycott of Israel. Furthermore, Order 39 no longer limits the percentage ownership of a foreign investor in a newly formed or existing business entity in Iraq or Iraqi project. Such investor may own 100% in an Iraqi entity or project.

Additionally, section 5 of Order 39 provides that foreign investors establishing trade representation offices or branches in Iraq must register with the Iraqi Registrar of Companies. Order 39, however, has not changed the cumbersome legal requirements of establishing local branch offices, licensing of business activities, record keeping, and maintenance of accounting records in Arabic.

Section 7 of Order 39 permits foreign investors to establish their presence in Iraq by choosing among a variety of entities: (i) a wholly-owned business entity in Iraq, (ii) a business entity jointly-held with an Iraqi investor, (iii) a branch office or (iv) a direct acquisition of a company. However, section 6(2) of Order 39 prohibits a foreign investor from participating in retail sales in Iraq, until such foreign investor has deposited $100,000 in a non-interest-bearing account in a duly-licensed Iraqi bank located in Iraq. Also, section 7 of Order 39 provides foreign investors full and immediate payment of shares, profits, dividends, proceeds from the sale or other disposition of their foreign investments, interest and royalties.

Order 39 clearly has facilitated the infiltration of foreign investments in Iraq. In trying to identify additional sources of funding, during New Fields Inc.'s Iraq Reconstruction Conference held on August 28, 2003, in Arlington, Virginia, participants stated that the Baghdad Stock Exchange has a market capitalization of $160 million. At that Conference, experts opined that the ability of foreign companies to float in Iraqi's local exchange would be a significant financial tool.

Foreign investors interested in investment opportunities in Iraq must be aware that, in addition to security concerns, power outages, poor telecommunication services, general infrastructure inadequacies, and currency exchange problems, they also will face additional significant difficulties. Some of these obstacles will include compliance with the legal requirements of establishing local branch offices, licensing of business activities, record keeping, and maintaining accounting records in Arabic.

b. Trade Liberalization

As part of the effort to encourage foreign investment in Iraq, the CPA has suspended all tariffs, duties, fees and similar charges for imported goods entering Iraq until December 31, 2003. However, Mr. Christopher Wall, a partner with Pillsbury Winthrop LLP, warns that significant legal barriers remain for companies interested in the rebuilding of Iraq. These restrictions range from existing sanctions to complex rules about export licenses.[4]

Notwithstanding, on September 19, 2003, the CPA issued Order Number 38 ("Order 38"), which, in an effort to assist the Iraqi people in reconstructing their country, imposes a "Reconstruction Levy" at a rate of 5% of the taxable value of imported goods. This Reconstruction Levy shall be effective for two years commencing January 1, 2004.[5]

Section 1(4) of Order 38 imposes this levy on most imported goods. Nevertheless, section 2(1) of Order 38 excludes the following humanitarian goods from the Reconstruction Levy: (i) food, (ii) medicine and medical equipment, (iii) clothing, (iv) books, (v) goods for humanitarian assistance, (vi) similar imports which are exempted from the Vienna Convention on Diplomatic Relations of 1961 on the Privileges and Immunities of the United Nations, and (vii) goods imported by the United Nations, other international or not-for-profit organizations, or foreign governments which goods are used for the benefit of the public. Furthermore, Order 38 exempts from the Reconstruction Levy (i) imports under the Oil for Food contracts, (ii) persons and entities affiliated with the CPA (including the CPA itself) and (iii) the Coalition forces.

c. Free Trade Zones and Industrial Development

With the intent of promoting certain free trade zones, Iraq Law No. 3 of 1998 created the Free Trade Zones Authority, which is an independent legal entity. According to Law No. 3, income and capital gains from investments in the free trade zones are exempt from all Iraqi taxes and fees, including the incomes of non-Iraqi employees working in these zones. Additionally, imports and exports are exempt from tariffs and other taxes, so long as they do not move into the Iraqi domestic market. Foreign currencies also may move in and out of the zones without any restrictions.

Both Iraqi and foreign persons and companies can apply to operate in a free trade zone. Law No. 3 requires foreigners to provide an "Arab boycott of Israel" certification. However, with the passing of the new Order 39, such requirement should no longer apply. According to the Overview, at least three free trade zones have been established under the law.

Iraq Law No. 20 of 1998 created the General Directorate for Industrial Development, an independent legal entity, to promote investment in industrial projects in both the private and public sectors. Projects licensed under this law can receive up to a 10-year tax holiday, depending on the nature and location of the project.

State-owned property may be made available to the projects on special terms. Unless recently changed, Law No. 20 grants to only Iraqi persons and companies the right to apply for a license to operate under this law.

3. Commercial Agency Law

Commerce's Commercial Overview describes the Iraqi Commercial Agency Law as follows:

> Commercial Agency Law No. 51 of 2000 ("Agency Law") regulates the operations of commercial agencies as well as relations between government entities and Arab or other foreign suppliers. Specifically, the law requires commercial agencies to be licensed, registered in a special register, and supervised. Commercial agencies are defined as every business, which is practiced in Iraq by an agent on behalf of a natural person, or a corporate body abroad no matter whether it is a commercial agency, a commission agency or any other commercial agency provided for by the laws of commerce, companies and transportation. The Registration of Companies Department (Registrar) of Iraq is further authorized to consider "any commercial activity" as an agency. The Agency Law further requires a party interested in appointing an agent to apply to the Registrar, the department designated to supervise the application of the law. *To obtain a license, agents should be of Iraqi nationality, reside in Iraq, be legally competent and at least 25 years old, have not been convicted of an "honor-violating" felony, have a commercial office in Iraq, be enrolled in one of the chambers of commerce in Iraq and have a trade name, be "fully loyal to his homeland," and not be a government official or have interests in the public service*. (Emphasis added.)

Foreign nationals cannot be commercial agents or distributors under the current Iraqi Commercial Agency Law. This issue causes practical problems for international investors trying to establish business operations in Iraq.

4. Debt/Interest

As discussed at the beginning of this presentation, the TBI, Ex-Im Bank and a large number of financial institutions will play a significant role in rebuilding Iraq. They will develop the necessary financial mechanisms to support the reconstruction effort. More likely than not, most of these financial mechanisms will require the negotiation of debt facilities.

While charging interest is allowed in Iraq, unlike in many Arab nations, Article 174 of the Iraqi Civil Code prohibits the compounding of interest. It also caps interest rates as a percentage of the total amount of the debt principal, without, however, exceeding a maximum of 7% and adversely affecting "the commercial rules of custom and usage." Also, any contract terms exceeding this 7% maximum interest limit are automatically reduced. If the parties do not agree on an interest rate, the loan will be deemed to be interest-free.

It remains to be seen if these restrictions will affect adversely the structuring of these debt transactions. Also, financial institutions involved in the reconstruction process must understand what constitutes "custom and usage" according to Iraqi public policy and commercial law.

5. Contract Law

The Overview states that many fundamental principles of Iraqi Contract Law are similar to those found in Western legal systems. However, some important differences exist such as: (a) mutual consideration in the Western sense is sometimes not required for a valid contract as long as a lawful subject matter and a reason to be bound exist; (b) the primary remedy for breach of contract is specific performance even though compensatory damages are allowed when specific performance is unavailable or inappropriate; and (c) the statute of limitations for contract claims in Iraq can be as long as 15 years.

According to Articles 121 and 124 of the Iraqi Civil Code, fraud alone will not cancel a contract. The defrauded party must have suffered demonstrable injuries as a result of the fraud. The claimant also must demonstrate that, without the existence of the fraud, such person would not have become a party to the contract. This provision, alone, would represent a very cumbersome requirement for a contracting foreign investor. In the absence of other laws or regulations that can protect foreign investors in these circumstances, contracting in Iraq would expose these investors to a great amount of risk. To date, we are not aware of any proposals that can serve as the basis for how the law should be changed.

6. Enforcement of Foreign Judgments and Arbitral Awards

After 1968, the new Baathist Party marginalized the judiciary by ending the separation of powers, making civilian courts submissive to the military court system, and creating special courts outside the regular judicial system. The CPA's first step to restore the separation of powers among the different branches of the government was the adoption of Order Number 32 on September 4, 2003. Order Number 32 transferred the entity responsibility for the management of international litigation, claims and arbitrations involving the Government of Iraq and its governmental agencies, instrumentalities and companies, from the previous regime's Office of the Council of Ministers to the Ministry of Justice.

Section 10 of Order 39 permits contracting parties to elect the arbitration mechanisms outlined in Iraqi law in relation to settlement of disputes. At present, Iraq has no domestic law requiring the recognition or enforcement of arbitral awards from non-Arab countries, according to Commerce's Commercial Overview. However, Iraq is a member of the Permanent Court of Arbitration at the Peace Palace, The Hague, Netherlands (1899). Iraq also has ratified the Geneva Protocol on Arbitration Clauses (1923, ratified by Iraq in 1926). Furthermore, it has entered into several bilateral agreements and Arab League conventions on the enforcement of judicial and arbitral awards, including the Riyadh Convention for Judicial Cooperation (1983) ("Riyadh Convention"). Article 37 of the Riyadh Convention, with a few exceptions, requires member states to recognize and enforce arbitral awards issued in other member states without examining the merits of the case.

Commerce's Commercial Overview suggests that companies wishing to enforce a foreign arbitral award in Iraq (i) first may require a judgment from a domestic court and (ii) then may proceed to enforce that court decision through the Iraqi procedures for the enforcement of domestic judicial awards. This suggestion would prove to be very costly and time-consuming for foreign investors. Further, Iraq does not officially recognize non-Arab court judgments (other than foreign judicial awards of countries maintaining a bilateral agreement with Iraq, if named by Iraqi government-issued rules, and subject to a condition of reciprocity) and arbitral awards. Thus, a U.S. investor or company may be forced to try all of its claims before an Iraqi, or other Arab country, court or arbiter.

Foreign investors, as such, must investigate which Arab country or countries would best provide a just and enforceable arbitral award or court judgment of an Iraqi-based dispute, so that it is enforceable in Iraq. Many believe that Bahrain may offer such a venue of a rapid, just and enforceable judgment.

7. Corruption/Ethical Concerns

The current Iraqi laws do not hold the government and its officials accountable, and instead grant them full immunity from censure and prosecution, with respect to any requests for, or requirements of, bribery or other corrupt payments.

The U.S. Foreign Corrupt Practices Act expressly prohibits an American citizen, company or entity from providing any foreign official anything of value to obtain or retain business. Moreover, this important U.S. statute imposes civil and/or criminal penalties, including incarceration and government contract debarment, for any proven violations thereof. Public companies' stock can be adversely affected by such proven violations or sometimes by the mere insinuation thereof.

As a result, the U.S. investor likely would be hurt in competitive bids against other foreign companies, in which their governments do not prohibit (and in some instances, in effect encourage through the offering of tax incentives) such corrupt payments from being made to Iraqi government officials whom are not held accountable in such situations.

III. Conclusion

The issues discussed throughout this presentation demonstrate significant hurdles for potential U.S. and other foreign investors. Investors also must understand that Iraq's legal system is deeply rooted in the Islamic Shari'a system. It would be difficult to establish business relationships without an understanding and/or knowledge of Islam, which is an intricate part of all aspects of life in Iraq. Thus, it is imperative that U.S. investors do their homework, work closely with their legal advisors and proceed carefully, before investing significant capital in Iraqi companies and/or Iraqi projects.

ATTACHMENT A

IRAQ DONORS[6]

MAIN DONORS: Following are details of some of the main contributions made or pledged by various countries and organizations, as outlined by the DAWN Group from Reuters, which provided statistical information:

AUSTRALIA—$14 million in aid plus $38 million committed to humanitarian needs and $31 million for reconstruction.

BELGIUM—$5.88 million for reconstruction. Total $20 million.

BRITAIN—$495.7 million to March 2006. Total commitment of $911 million.

CANADA—Already pledged $76.57 million for reconstruction and offered a further $76.57 million at Madrid. It has also pledged $76.57 million for humanitarian aid.

CHINA—$24 million.

DENMARK—$55.4 million in aid, of which $26.9 million for reconstruction and $28.5 million for humanitarian assistance. Also providing export guarantee scheme of $158.2 million.

EU—EU and member states pledged a total of $826 million for rebuilding in 2004. Of that, European Commission making 200 million euros available from EU budget. Total pledges from EU community budget and member states until 2007 stand at $1.53 billion. EU also giving $858.9 million humanitarian aid to end 2004.

FINLAND—$5.9 million in 2004 grants.

GERMANY—An estimated $118 million, about 50 million euros of that through the EU.

INDIA—Further $10 million on top of $20 million given so far, including a hospital and 50,000 tons of wheat.

IRAN—Offered to allow oil exports through Iranian terminals or to enter into an oil swap arrangement with Iraq of up to 350,000 bpd. Also promised up to $300 million in buyers and suppliers credits and offered to supply electricity and gas.

ITALY—$235.9 million in addition to share of EU reconstruction contribution. Military contribution $270.6 million in 2004 every six months.

JAPAN—Pledged a further $3.5 billion in medium-term loans on top of $1.5 billion of grants already pledged, bringing its total of promised aid to $5 billion.

KUWAIT—$1 billion already given in technical and humanitarian aid since April. Offers further $500 million aid.

NEW ZEALAND—$3 million.

NORWAY—$74.13 million during 2003-2006.

SAUDI ARABIA—$1 billion package, half in project finance for education, health, infrastructure and housing until 2007.

SOUTH KOREA—$200 million from 2003-2007 on top of $60 million earmarked earlier this year.

SPAIN—$300 million in aid to 2007.

SWEDEN—$43 million for 2003-2005 in humanitarian assistance only, until there was either a sovereign Iraqi government or U.N. authority overseeing reconstruction.

TURKEY—$50 million from 2004 to 2007.

UNITED ARAB EMIRATES—$215 million for humanitarian aid and reconstruction work.

UNITED STATES—$20 billion over 18 months.

WORLD BANK—$3-5 billion available over next five years.

IMF—$2.5-4.25 billion over three years.

Endnotes

1. Ayaz R. Shaikh & Glen R. Cuccinello, *Reconstruction of Iraq, Coalition Provisional Authority Issues Order Number 40 Adopting New Banking Law Modeled on Western Bank Regulatory Approach*, Pillsbury Winthrop News Brief, Oct. 27, 2003.
2. Special Report by the United States Institute of Peace, Apr. 13, 2003.
3. Mark J. Riedy, *Reconstruction of Iraq, Coalition Provisional Authority Issues Order Number 39 Allowing Foreign Investments In Iraq*, Pillsbury Winthrop News Brief, Sept. 23, 2003.
4. Christopher R. Wall, *Statutory Provisions Requiring U.S. Sanctions Against Iraq Suspended—U.N. And Other U.S. Sanctions Continue In Force*, Pillsbury Winthrop News Brief, May 9, 2003.
5. *See supra* note 3.
6. *$40 billion pledged in aid, loans for Iraq: Madrid Conference*, The DAWN Group of Newspapers (Internet version), Oct. 25, 2003, pp. 3–4.

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Mexico

Acquisitions in Mexico

Introduction

The Mexican legal regime that applies to cross-border acquisitions is relatively flexible and generally allows for the parties to tailor the transactions in such a manner that the business arrangement may be implemented as originally envisioned. However, Mexico is very formalistic and form is of paramount importance. Applicable legal principles and form should be considered in advising on acquisitions of Mexican entities or assets.

This article reviews the legal regime that generally applies to an acquisition of a Mexican business by a private non-Mexican investor, be it through a share transaction or an asset transaction. The article will not mention the requirements that would apply if the acquisition were carried out through the Mexican Stock Exchange or the requirements that apply to acquisitions of regulated businesses (e.g. financial institutions, concessionaires, etc.), since such topics require extensive consideration.

On a limited type of companies and activities, foreign investment restrictions may apply to the acquisition, and depending on the value of the acquired assets, or of the acquired company and the interest to be acquired, the foreign investor may be required to give prior notice to the Federal Competition Commission (*Comisión Federal de Competencia*) (CFC). Also, on transactions that exceed the applicable threshold amount, the foreign investor may be required to obtain prior authorization from the National Commission of Foreign Investments (*Comisión Nacional de Inversiones Extranjeras*) (CNIE). If the existing Mexican company to be acquired has not recorded its constitutive instrument with the National Registry of Foreign Investments (*Registro Nacional de Inversiones Extranjeras*) (RNIE), it must do so, and it must submit a written report on its activities to the RNIE within the first four months of each year.

Foreign Investment Restrictions and Requirements

Restrictions Applicable to Acquisition of Entities

One of the first aspects that the foreign acquirer needs to consider is the foreign investment legal regime that applies to the acquired entity. That is, the acquirer needs to verify if there are restrictions to the participation of foreign investment in the activity that is conducted or is expected to be conducted by the entity to be acquired.

In the last decade, Mexico has come to see itself as part of the global economy and, with relatively few exceptions, Mexican law now permits foreign private investment in most areas of economic activity. Mexican law prohibits private investment in areas reserved exclusively to the state, but those areas are fewer in number and of generally decreasing significance as a proportion of the overall economy. Some foreign investment restrictions remain, including specific investment categories that are reserved to the Mexican State, others that are reserved to Mexican nationals and others in which quantitative or qualitative limits or administrative requirements apply.

Enacted contemporaneously with the adoption of the North American Free Trade Agreement (NAFTA) in 1993, the Foreign Investment Law, together with the 1998 Regulations, is perhaps the most significant economic reform legislation passed during the last decade. The Foreign Investment Law made significant substantive and procedural changes that served to open up the Mexican economy to foreign investment.

The Foreign Investment Law defines foreign investment as: (i) participation of foreign investors, in any proportion, in the capital stock of Mexican companies; (ii) participation by Mexican companies with majority foreign capital; and (iii) participation of foreign investors in the activities and acts specified in the Foreign Investment Law. The Foreign Investment Law specifies that, except as otherwise provided, foreign investment may participate in any proportion in the capital stock of Mexican companies, acquire fixed assets, participate in new economic activities or the manufacture of new product lines, open and operate facilities, and expand or relocate those already existing. However, the Foreign Investment Law rules on foreign participation in particular activities apply without prejudice to the special laws governing those activities. Moreover, the treatment afforded to investors from Mexico's partners under NAFTA or other multilateral or bilateral trade agreements may differ from the general Foreign Investment Law rule.

In activities and companies reserved exclusively to Mexican citizens and Mexican companies with a clause prohibiting foreign participation, except through neutral investment with the appropriate governmental authorization (*inversión neutra*), foreign participation is not permitted, directly or through trusts, agreements, shareholders' agreements or constitutive documents, pyramiding structures, or other mechanisms granting control or participation.

In activities and companies in which foreign participation is permitted only in specified percentages, except through neutral investment with the appropriate governmental authorization or as provided by treaty, foreign participation may not exceed these Foreign Investment Law limits directly or through trusts, agreements, shareholders' agreements or constitutive documents, pyramiding structures, or other mechanisms granting control or participation. Indirect foreign investment through Mexican companies with majority Mexican participation is not factored in for purposes of determining the percentage of foreign participation in the restricted activities, provided that the Mexican companies are not controlled by foreign investment.

There are also certain activities and companies for which prior authorization from the CNIE is required for foreign investment to participate with more than 49 percent.

Regardless of the activity, prior authorization from the CNIE is required for direct or indirect foreign investment greater than 49 percent in an existing Mexican company whose total assets exceed the threshold figure set annually by the CNIE. The current general threshold is Mex. $1,565,895,000 (roughly US $142,354,090 at Mex. $11 to US $1). No such restriction applies to the acquisition of assets of existing Mexican companies.

Restrictions Applicable to the Acquisition of Real Property

Due to the regalian title system inherited from Spanish law, concerns rooted in Mexican history brought about additional restrictions on private ownership of Mexican land. The resulting impediments seemed arcane to foreign investors accustomed to common law notions of real property. In recent years, however, the Mexican legal system has evolved to permit foreign ownership of Mexican real property—outside and inside the Restricted Zone (a girdle 100 kilometers wide along the northern and southern borders and 50 kilometers wide along the coastline)—and the Foreign Investment Law, in particular, significantly reduced procedural impediments to foreign ownership of land.

Competition Considerations

If after considering the foreign investment legal regime it is determined that the acquisition transaction may be carried out as envisioned, the parties will need to analyze if the transaction calls for a notification to the CFC.

Following a preventive policy regarding mergers and acquisitions, the Federal Economic Competition Law (the "Competition Law") requires prior notice to the CFC of a concentration that exceeds a specified price, asset value, or annual sales volume. The table below shows the threshold figures, computed as a function of the General Minimum Daily Wage (GMDW),[1] so that amounts are adjusted for inflation as the GMDW is adjusted.

Concentrations Requiring Prior Notice to the CFC	
Transaction	**Threshold**
If the price of the overall transaction, whether in a single act or a succession of acts, is greater than the equivalent of:	12 million times GMDW
If the overall transaction, whether in a single act or a succession of acts, entails the accumulation of 35% or more of the assets or shares of an economic agent the value of whose assets or sales is greater than the equivalent of:	12 million times GMDW
If two or more economic agents take part in the transaction, and (a) whether separately or together, the value of their assets or annual sales volume is greater than the equivalent of:	48 million times GMDW
and (b) the transaction entails an additional accumulation of assets or capital stock greater than the equivalent of:	4.8 million times GMDW

One of the following parties to a prospective concentration must file the concentration notice: the merging party, the party acquiring control of the companies or associations, or the economic agent that intends to carry out the act or produce the effect of accumulating the shares, participation units, trust interests, or assets that are the subject of the concentration. The economic agent must file the concentration notice before any of the following possible events takes place: (a) the legal act is completed under applicable law or, if applicable, the condition precedent to the act is met, (b) one economic agent acquires or exercises de facto or de jure control, directly or indirectly, over the assets, trust interests, participation units or shares of the other economic agent, (c) the parties sign a merger agreement, or (d) if the concentration involves a succession of acts, the act that, when completed, results in the concentration exceeding the threshold amounts shown in the table above. If any of these events occurs outside Mexico, the economic agent must file the notice before the event has legal or material effects in Mexico.

Once it has received notice of a prospective concentration, the CFC has 45 calendar days (plus an additional 60 calendar days in exceptionally complex cases) to examine the concentration and determine whether to approve, conditionally approve, or disapprove it, based on a duly founded resolution. If the CFC fails to act within that period, the Competition Law deems the concentration approved. If the CFC imposes conditions, they must be proportionate to and directly linked to correcting the concentration's effects, and the notifying parties may request the CFC to consider proposals from the parties before rendering its decision. Once the CFC has expressly authorized a concentration, third parties cannot later challenge the concentration, unless they prove that the CFC based its resolution on false information. For a concentration that does not require prior notice to the CFC, the CFC or any interested party may raise a challenge within one year after the date the concentration occurs.

For transactions that fall within the regulations' narrow definition for restructurings that have a *de minimis* effect in Mexico, the economic agents need only file a simple notice to the CFC within five days after the transaction. Since the Competition Law covers conduct of economic agents outside Mexico that affects a market in Mexico, the fact that a concentration involves a foreign company does not exempt it from the notice requirement. The concentration is exempt from any notice requirement, however, if it falls within the regulations' narrow definition for foreign restructurings that have virtually no effect in Mexico.

The Competition Law invests the CFC with significant powers to prevent, punish, and deter anticompetitive conduct. With respect to a concentration, in addition to imposing a substantial monetary fine, the CFC may order the total or partial divestiture (*desconcentración*) of the result of a wrongful concentration.

Tax Considerations

The tax aspects of an acquisition are generally the subject of intensive due diligence and negotiation. The scope of this article does not permit us to expand on all of the tax provisions that should be considered in an acquisition process. However, we do believe it is relevant to briefly mention the taxes and obligations applicable to a non-Mexican acquirer of a Mexican entity or asset.

Tax Considerations on Share Transactions

The acquisition of shares of a Mexican entity is not taxed for the acquirer, provided the acquisition is carried out at fair value. If the acquirer were a foreign entity with no permanent establishment in Mexico, no withholding obligation would apply to the acquirer either. There are, of course, tax considerations that apply to the acquisition of a Mexican entity. However, in general terms, it is fair to conclude that a foreign private acquirer of a Mexican entity is not required to make any tax payment or withholding solely due to the acquisition of shares of a Mexican entity.

Tax Considerations on Asset Transactions

For the acquisition of chattels, the rule is relatively simple and provides that the acquirer would be required to pay VAT, except in the case of export transactions. As for the acquisition of real estate, the general principles differ.

Throughout Mexico, a municipal tax applies on the transfer of title to real property. In general, the person acquiring title pays the tax upon the signature of the title documents before the notary public. The amount of tax depends on the value measure and the applicable rate. Typically, the value measure is the highest of three property value measures—the sale price, the appraised value, and the tax value of the property (including any fixtures). The applicable tax rate varies depending upon the municipality (ranging between 1.5 and 4.5 percent). This tax and related notary fees, which are generally calculated as a percentage of the value of the interest transferred, represent a significant burden on commerce in land and buildings in Mexico. The cost of acquiring real property in Mexico sometimes creates an incentive to structure the acquisition of real property held by a Mexican company through acquisition of equity rather than acquisition of title to the property.

The transferee usually bears the notary fee and other costs associated with title transfer, including the appraiser's fee, recording fees, as well as real property acquisition tax and outstanding ad valorem taxes. If the real property includes buildings or other fixtures, the sale may be subject to Value Added Tax (*Impuesto al Valor Agregado*) (IVA).

Real estate transactions effected through Mexican trusts are also subject to this tax, as are transfers by gift or assignment, including assignments that are the result of a merger or liquidation of a business entity.

Other Considerations and Formalities

As mentioned earlier, there are certain formalities that need to be complied with for the acquisition of entities or assets to be valid, and for the title to be enforceable.

Formalities on Share Transactions

Requirements for transferring equity in a Mexican business entity—usually a stock corporation (*Sociedad Anónima*) (S.A.) or a limited liability company (*Sociedad de Responsabilidad Limitada*) (S. de R.L.)—are set out in the *estatutos* contained in the constitutive instrument of the entity. Unless the *estatutos* otherwise provide, shares in an S.A. are usually transferable by endorsement and delivery of the share certificate to the transferee and recording of the transfer and the name, nationality, and domicile of the buyer in the S.A.'s stock record book. Transfer of a participation unit in an S. de R.L., which always requires prior consent of at least a majority of owners, is recorded in the S. de R.L.'s ownership record book. If the constitutive instrument does not contain a clause permitting foreign participation, the existing shareholders or owners may cause the constitutive instrument to be amended to permit foreign participation.

Formalities on Real Property Transactions

To acquire title on real property in Mexico, one must establish the legal title in accordance with the civil code in effect where the property is located.

An owner of real property in Mexico transfers title by means of a public document (*escritura pública*) executed before a Mexican notary public. A certificate from the public registry of property is required as evidence of the property's legal status. A certificate from the tax authorities is required to verify that outstanding taxes and fees on the property have been paid up to the date of the transfer. The Mexican notary public then records the original public document in the public registry of property in the municipality in which the property is located. The transferee takes title subject to liens of which the transferee has actual or constructive notice through the Mexican recording system, as well as encumbrances that arise by operation of law. Recording with the property registry gives the transferee priority over subsequent filers for the interest transferred.

The recording process alone may be insufficient to protect the transferee against clouds on the title. In planning a project involving real property in Mexico, foreign businesses can anticipate and reduce the risk of title defects by conducting a title search, including all recorded interests in the chain of title and an investigation of any unrecorded interests, such as tax liens, easements and *ejido* rights. By including this step in the due diligence checklist, investors can determine whether any releases should be included in the acquisition documents.

In the case of properties for residential use located in the Restricted Zone, the acquisition process may involve the additional expense of forming and maintaining a Mexican trust to hold legal title to the property. Foreign individuals and entities, as well as Mexican companies with a clause admitting foreign participation subject to the Calvo Clause, have to use a Mexican trust for acquiring a beneficial interest for residential use of real property in the Restricted Zone. Such Mexican trusts may have a term of up to 50 years, which may be subsequently renewed.

This article includes material from the *Investing in Mexico Today* publication of Santamarina y Steta, S.C.

Endnote

1. The GMDW in effect in the Federal District beginning 1 January 2003 is Mex. $43.65 (roughly US $3.96 at Mex. $11 to US $1).

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Netherlands

Netherlands Introduces Thin Cap Rules

Last year, the Netherlands Parliament adopted a bill that introduced thin capitalization rules to the Netherlands. The new rules entered into force on January 1, 2004.

The primary objective of the thin capitalization rules is to disallow interest deductions to the extent a company's debt exceeds its equity over and above certain ratios. The Netherlands thin capitalization rules include two tests; companies, themselves, can elect which one will apply. The thin capitalization rules only apply to Netherlands entities that form part of a group of companies. In addition, the disallowance of the deduction does not apply to interest paid to third parties irrespective of the actual debt/equity ratios maintained.

Debt/Equity Ratios

3:1 Test

The first debt/equity ratio that should not be exceeded is set at 3:1. This ratio is based on the average amounts of debt and equity as derived from the Netherlands tax accounts at the beginning and end of each book year. For this ratio, debt is defined as any positive balance of amounts borrowed and loaned. The fact that only the balance between the loans payable and receivable is recognized as debt, implies that group financing companies are unlikely to be adversely affected by the new rules.

Furthermore, debt is only recognized as such, if the interest paid on such debt is deductible for tax purposes. Interest paid on hybrid loans is not deductible. Consequently, hybrid loans will not be treated as debt when calculating the debt/equity ratio. It should be noted that the thin capitalization rules only apply to actual loans such as bank loans, group loans, notes and bonds. The rules do not apply to other liabilities such as tax or pension provisions.

Another important issue is that the thin capitalization rules only come into play to the extent the excess debt exceeds 500,000 euros.

In respect of the 3:1 debt/equity ratio, equity is defined based on existing Netherlands law and case law and will not be set at the difference between the balance sheet total and the aggregate amount of debt. As mentioned before, certain hybrid loans are not considered debt. Such loans are, however, not considered equity by definition, but only in cases wherein these loans are considered equity pursuant to case law.

Alternative Test

In the event that the debt/equity ratio, determined on the basis of the abovementioned principles, exceeds 3:1, a company may elect to apply an alternative debt/equity test. Such election can be made each and every year at the discretion of the company. This alternative test compares the company's debt/equity ratio with the ratio of the group of companies to which it belongs. The ratio of the group is determined on the total amount of debt in relation to the total amount of equity of the group. If the debt/equity ratio of the Netherlands entity involved does not exceed the debt/equity ratio of the group, the interest remains deductible. Unlike the first test, the alternative debt/equity ratio is calculated on the basis of the commercial accounts of the group and the company, the amounts borrowed and on-lent are not offset when calculating the amount of debt, and the 500,000-euro limit is not applicable.

Deduction Disallowance

If the company meets neither of the two ratios, the interest deduction will only be denied to the extent that the interest due to related entities (either directly or indirectly) exceeds the interest received from related entities. A company without such balance of interest due to related entities will not be affected by the new rules even if its debt/equity ratio exceeds the two ratios.

Under Netherlands tax law, entities are generally deemed to be related if one entity holds directly or indirectly 1/3 or more of the shares of the other company. Please note, however, that the new rules will not apply to a group of companies that form a so-called fiscal unity, because all the companies of the group that are part of a fiscal unity, for tax purposes, are deemed to have been absorbed by the top holding company of the group.

It should be noted that interest paid to third parties on back-to-back loans, or loans guaranteed by a related company, will most likely be treated as interest paid to related entities.

The thin capitalization rules do not re-characterize the disallowed interest as dividend (i.e. there will be no Netherlands dividend withholding tax issue). Furthermore, the disallowed interest cannot be carried forward or carried back. Accordingly, the disallowed interest cannot be offset against years in which the taxpayer meets the debt/equity ratio.

Conclusion

The new thin capitalization rules will neither affect Netherlands companies that are not part of a group nor Netherlands companies that act as the top holding company of a group. The latter companies will not be affected, as they will be able to rely on the above-described alternative test. Problems may arise for Netherlands subsidiaries of foreign groups that are financed with group loans and for Netherlands subsidiaries of Netherlands groups, if such subsidiaries do not form part of a fiscal unity.

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Pakistan

Crying Over Spilt Oil: Analysis of International Law Options for Pakistan to Recover Losses Resulting From the *Tasman Spirit* Oil Spill

On 27 July 2003, the Maltese-flagged oil tanker *Tasman Spirit* ran aground near the port of Karachi. The tanker was carrying an estimated 67,500 tonnes of Iranian crude oil under charter by the Pakistan National Shipping Corporation (PNSC) for the state-run Pakistan Refinery Ltd. On 14 August 2003, the tanker broke apart, spilling an estimated 30,000 tonnes of oil into Karachi's coastal waters ("the incident"). The full extent of the damage resulting from the oil spill, the worst in Pakistan's history, is as yet unknown, but experts warn that it could potentially be a "major disaster."

So far, public opinion has focused on the environmental damage and the Pakistani Government's allegedly incompetent response to the incident. Little attention has been paid to the legal options available to the Pakistani Government and other affected parties to recover losses resulting from the oil spill. As both the cause of the incident and the extent of the resulting damage are yet to be ascertained, a definitive legal analysis is premature. However, this article briefly discusses the potential options available to the Pakistani Government and its people in seeking compensation for the damage.

An official preliminary enquiry into the cause of the incident is underway. In the meantime, the local press is rife with speculation about its cause, including: concerns about the seaworthiness of the *Tasman Spirit* (a 24-year-old, single-hull vessel); the possibility of a navigational error (worsened by the Karachi Port Trust (KPT) not dredging the channel properly); and the negligence of government authorities both in chartering an "old and substandard" vessel and handling its grounding.

Who Will Pay the Compensation?

The Pakistani Government and its agencies will incur substantial clean-up costs and related losses as a result of the *Tasman Spirit* oil spill. In a major maritime oil pollution disaster, the primary mechanism for recovery is usually under the Civil Liability Convention 1992 ("CLC 1992") and the International Oil Pollution Compensation Fund 1992 ("the Fund," together referred to as the "Conventions"), both concluded under the auspices of the International Maritime Organization. To claim compensation under the Conventions, damage must be suffered in a country that is a party to the convention. The flag state of the tanker and the nationality of the owner are irrelevant to the determination of jurisdiction. As Pakistan is not a signatory of the Conventions, it will not be able to claim under either convention, which give prompt recourse to funds as a result of oil spill damage.

The CLC 1992 provides a simple mechanism for recovering the costs of clean-up measures and pollution damage on a strict liability basis. The tanker owner and its insurers are subject to limited exceptions (e.g., if the damage resulted from an act of war or grave natural disaster or was wholly caused by the negligence of public authorities in maintaining lights or other navigational aids).

If Pakistan were a party to the CLC 1992, anyone suffering damage from the resulting pollution (e.g., individuals, corporations, the government and its agencies) could bring a claim for compensation against the tanker owner or directly against its insurer without the need to prove fault in lengthy and costly litigation. Such claims may include costs of clean-up measures taken to prevent or minimize pollution damage, property damage, economic loss (e.g., reduction in income from tourism or fisheries) and the cost of restoration of the environment.

Under the CLC 1992, the tanker owner's liability is capped by reference to the tonnage of the vessel (e.g., the maximum amount of compensation available for a 50,000-tonne tanker would be US $31 million). However, this limitation does not apply where the damage results from the owner's personal act or omission if this act or omission is done with the requisite intention or recklessness.

Where the amount under the CLC 1992 is insufficient to meet the costs of the pollution damage, a further layer of compensation is available from the Fund. Assuming that Pakistan was a member of the Fund, the maximum combined compensation potentially available would be approximately US $189 million (as of 01 November 2003, the maximum available would be US $282.49 million). In May 2003, a supplementary international oil pollution fund was set up to provide for additional compensation where the amount under the Fund was insufficient. As a result, the total amount of compensation available to states that are members of the supplementary fund is approximately US $1,000 million.

Under the CLC 1992, claims need to be made against the owners or directly against the insurers. Under the 1992 Fund, claims need to be submitted to the Secretariat of the Fund in London.

Who Will Be Liable?

As the CLC 1992 and Fund regimes do not apply, there is likely to be a proliferation of complex claims in the Pakistani courts under domestic legislation. This piecemeal approach may lead to considerable uncertainty as to the legal, operational and financial responsibilities of the parties involved (e.g., the tanker owner, cargo owner or the P&I Club) as well as the amount of compensation available to pay for the clean-up and damage.

Potential defendants would include the tanker owners (Asimina Maritime Limited); the servants or agents of the owner or the crew members; the charterers (PNSC); and the managers/operators (Polembros Shipping Limited).

Tasman Spirit's Classification Society may also be a potential defendant. Whilst actions against Classification Societies have traditionally been unsuccessful, it might be possible to bring a claim if there is strong evidence of negligence by the relevant Classification Society in issuing a classification certificate.

Claims against the port agencies of other countries may be possible, if they negligently or recklessly inspected or "cleared" the *Tasman Spirit* en route to Karachi. Further, under the United Nations Convention on Law of the Sea, a state that allows vessels to be registered under its flag has duties to ensure the vessel's safety at sea, and this obligation is emphasized in relation to oil pollution. As the *Tasman Spirit* is registered in Malta, it may be worth exploring whether the Maltese agencies have breached their relevant duties as a flag state.

The Battles Begin

The KPT has fined *Tasman Spirit's* owner US $200,000 for pollution. According to the KPT, all salvage and drainage expenses will be paid by the tanker owner and its insurers. However, in the absence of the CLC 1992 and Fund conventions, both Polembros and the American Club (the tanker owner's P&I insurers) have admitted to Lloyd's Fairplay that they are currently unsure about their exact legal positions. According to Joe Hughes, chief executive of the Shipowners Claims Bureau of the American Club, they are focusing on the immediate task of clean-up operations. "We will then have to wait and see how the legal dimension pans out," said Hughes.

Recent reports indicate that the KPT is planning on suing PNSC for damages of up to US $1 billion. PNSC, in turn, is considering proceedings against the tanker owner and its agents. No information is available as to the nature of these claims. It may be worth noting that the charter party between PNSC and the tanker owner is reported to contain a clause providing that "Owners warrant that during the charter party the vessel is covered by their P&I Club for oil pollution damages up to USD 1,000,000,000 (USD 1 billion) for all pollution risks." However, the charter party reportedly provides for arbitration in London under English law, so technically PNSC would need to bring arbitration proceedings in London under English law, whereas under the CLC 1992, the Pakistani court would have been the relevant court for the dispute with the tanker owner.

The incident has already sparked public interest litigation in the national courts—Rupees 10 billion[1] in damages are sought against the Federation of Pakistan, the Trustees of the Port of Karachi, PNSC and the Federal Environmental Protection Agency, under case number 899/03 in the High Court of Sindh alone.

The costs of salvage and clean-up are just some of the many losses that will result from the *Tasman Spirit* oil spillage. Even if *Tasman Spirit*'s insurers agree to foot this bill, they will be restrained by the limit of their insurance policy. Then, there is the question of other damage. Under their charter party with the PNSC, *Tasman Spirit*'s owners have reportedly warranted to take out insurance cover for oil pollution damages up to US $1 billion, so in theory funds should be available to pay the compensation.

However, those affected may be left without compensation if recovery from the owners, their agents or insurers is insufficient or not possible. If Pakistan were a party to the Fund, up to US $189 million could have potentially been available to all those affected by the oil spill, including the Pakistani government, without a need to prove fault. Instead, claimants must now battle for compensation in what is likely to be complicated and protracted litigation. Furthermore, the uncertainty of who will ultimately pay for the damage is reportedly already hindering the clean-up operations at Karachi's beach.

The Importance of Being Earnest

The Pakistani Government has come under heavy public criticism for its response to the incident, which included an initial cover-up followed by statements downplaying its seriousness.

On 26 August 2003, *The News* reported that in the previous year, the KPT had concealed an oil spillage of 1,300 tonnes when another PNSC-chartered tanker, *MT Golden Gate*, struck the submerged wreck of a fishing trawler. The KPT explained that the dead fish littering

Karachi's beach were dumped by foreign deep-sea trawlers. (*The News* of 26 August 2003 stated: "Oil spill from another tanker last year concealed from masses").

Pakistan's National Oil Spill Contingency Plan is still in draft form even though as a signatory to the International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990 (OPRC 90), it is required to have in place at least a national contingency plan and pre-positioned oil-spill-combating equipment.

More public outcry is likely to follow if those affected are unable to recover their losses. There will be a need to explain why Pakistan did not join the CLC 1992 and Fund. Over one hundred countries have ratified either or both the CLC 1992 and Fund. Neighboring India is a member of both the CLC 1992 and Fund. Given that Pakistan is the world's fourteenth largest importer of oil, it should assess how either or both of the CLC 1992 and Fund would best serve its interests or whether the best solution lies in enacting tough domestic legislation governing oil pollution. For example, the U.S.A. has not ratified the international oil compensation conventions, preferring to enact its own legislation, the Oil Pollution Act 1990, which regulates this area.

There are no direct costs for the Pakistani Government in becoming a party to the CLC 1992 and Fund. The potential financial obligations under the CLC 1992 are backed by the compulsory insurance that tanker owners are required to maintain. The Fund, on the other hand, is financed by levies on companies (public or private) based in the member states that receive more than 150,000 tonnes of oil annually by sea. Pakistan's oil imports were around 5 million tonnes in the last fiscal year alone. Therefore, the Pakistani government may end up indirectly paying for the Fund's membership through levies charged on state-owned oil companies.

Pakistan could become a party to the CLC 1992 without joining the Fund. However, signing the CLC 1992 without joining the Fund would only provide limited comfort, as compensation would be restricted to the amount of the tanker owner's insurance. In cases where the losses exceed this insurance (or even where insurance is not available or the owner is exempt), the Fund's resources offer relief. While the risk of a major oil spill may be small, its consequences can be enormous. In the *Prestige* oil spill off the Spanish coast (42,000 tonnes), only £17.5 million were available from the tanker owner's insurance while the Fund allotted £154.3 million, as Spain was a member state. On the other hand, in the *Exxon Valdez* spill off the Alaskan coast (38,800 tonnes), there was no recourse to the CLC 1992 or the Fund as the U.S.A. is not a party to these conventions. However, Exxon paid $2.2 billion in clean-up costs and $300 million to affected Alaskans. Having said that, not all tankers are owned by large corporations like Exxon and if the oil spill results from a tanker owned by a small company with limited insurance cover, there is a risk of recovering no compensation at all. In view of the amount of oil moving through Pakistani waters, "paying" for the Fund's protection may well be worth considering.

As legal battles heat up in the Pakistani courts with the oil spill affectees seeking compensation, the comparative certainty and simplicity of claims under the CLC 1992 and Fund may give the Pakistani Government much food for thought. Litigation in the Pakistani courts can drag over several years and property disputes spanning a couple of decades are not unknown. A disaster such as the *Tasman Spirit* oil spill can be more than a tragedy; it can be a wake-up call. Pakistan must now consider in earnest how best to exploit the international conventions and funds discussed to better protect itself from future crises like the *Tasman Spirit* oil spillage.

Endnote

1. Approximately US $1=57 Pakistan Rupees.

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Key Facts
Name: *Tasman Spirit*
Owners: Asimina Maritime Limited of Valetta, Malta
Operators/Managing Company: Polembros Shipping Limited
Port of registry: Valetta, Malta
Captain: Karystinos Demetrios
Classification number: 791437
International Maritime Organisation (IMO): 7404669
Year: 1979
Built by: Onomichi Zosen Kabushiki Kaisha shipyard in Japan (bearing yard no. 265)
P&I Insurers: The American Club

Spain

Main Features of the Tax Regime of the Spanish Holding Company (ETVE)

1. Introduction

A Spanish holding company or "Entidad de Tenencia de Valores Extranjeros" (better known by the Spanish acronym ETVE) is a regular Spanish company subject to a 35% tax on its income, but fully exempt from taxation on qualified foreign source dividends and capital gains.

In addition to these standard features of a holding company, the ETVE regime offers a substantial advantage vis-à-vis other attractive European holding company locations, as dividends distributed by the Spanish holding company to non-Spanish resident shareholders are exempt from the Spanish withholding tax on dividends. In addition, capital gains triggered by a nonresident shareholder on the transfer of its interest in a Spanish holding company are not subject to the Spanish 35% capital gains tax to the extent that such capital gains (indirectly) arise from an increase in the value of the foreign holdings of the Spanish holding company.

Finally, effective from 1 January 2002, the ETVE may recognize a tax-deductible allowance on the difference between the acquisition cost of its participation in the foreign subsidiary and the equity value of such foreign subsidiary. The tax deduction may be used to offset taxable income triggered by the ETVE through, e.g., a trade or business in Spain or financing provided to group companies.

The ETVE is protected by European Union directives such as the Parent/Subsidiary Directive and the Merger Directive and is regarded as a Spanish resident for tax purposes pursuant to Spain's 49 bilateral tax treaties. Spain's broad tax treaty network with Latin America and the European character of the ETVE make it an attractive vehicle for channeling capital investments in Latin America as well as a tax-efficient exit route for European Union capital investments. Also, it must be pointed out that the European Council, through the work of the Primarolo Group, has determined that the ETVE is in conformance with the EU Code of Conduct and does not represent potentially harmful tax competition.

2. Exemption on Qualified Foreign Source Income

The main tax feature of the ETVE is that (i) dividends obtained from qualified nonresident subsidiaries and (ii) capital gains realized on the transfer of the shares held by the ETVE in qualified nonresident subsidiaries are exempt from Spanish Corporate Income Tax ("CIT"). The exemption applies subject to the fulfillment of certain requirements governing (i) the foreign investments made by the ETVE, as well as (ii) the ETVE itself.

2.1 Qualified Foreign Investments

According to Articles 130 and 20 bis of the CIT Law, dividends and capital gains received by the ETVE from nonresident subsidiaries will be exempt from Spanish taxation if the following requirements are met:

(1) The ETVE holds a minimum 5% participation in the equity of the nonresident subsidiary or, alternatively, the acquisition value of the interest in the nonresident subsidiary amounts to 6 million euros;

(2) The ETVE directly or indirectly holds the interest in the nonresident subsidiary (and any second-level subsidiary) for at least one year;

(3) The nonresident subsidiary is subject to and not exempt from a tax similar in nature to the Spanish CIT and is not resident in a tax haven country or jurisdiction; and

(4) Finally, the nonresident subsidiary is engaged in an active trade or business.

2.2 Minimum Participation and Holding Period

The equity of the nonresident subsidiary may be represented by shares, quotas or other forms of capital interest. Dividends will be exempt at the level of the ETVE even if the required one-year holding period is completed after the dividends have been received or the shares in the nonresident subsidiary have been transferred. In comparison, the capital gains will be exempt only if the one-year holding period requirement is met the date on which the transfer takes place.

The 5% participation must be met by the ETVE on the direct and indirect holding of any first tier (in this case, alternatively, the acquisition value of the interest in the first-tier nonresident subsidiary must amount to 6 million euros) and lower-tier subsidiaries.

For the purposes of computing the time during which the participation has been held by the ETVE, foreign participations will be considered to have been held by a newly incorporated ETVE from the date on which they were held by other companies pertaining to the same consolidated group for accounting purposes.

2.3 Subject to and Not Exempt from Tax

The nonresident subsidiary must be subject to and not exempt from a tax of a nature similar to the CIT. Determining the degree of compatibility of foreign tax systems with the Spanish CIT is difficult. "A tax of a similar nature" will include any foreign tax levied on the income of the nonresident subsidiary, even if levied on a partial basis. For the purposes of this test, it is irrelevant whether the object of the foreign tax is the nonresident subsidiary's income, turnover or any other index-linking element of the nonresident subsidiary. This requirement will be deemed met if the nonresident subsidiary resides in a tax treaty country (except for Switzerland).

Finally, nonresident subsidiaries located in one of the tax haven countries or territories (as established by Royal Decree 1080/1991) do not qualify for the ETVE tax exemption regime. It must be pointed out that, under a recent amendment to Royal Decree 1080/1991, those countries or territories that enter into a tax treaty with Spain will immediately cease to be deemed a tax haven.

2.4 Active Nonresident Subsidiary

The nonresident subsidiary must be actively and primarily engaged in an active trade or business carried out abroad; certain passive income may be generated by the nonresident subsidiary to the extent that it does not exceed 15% of its total turnover. In general, any trade or business is eligible to the extent that the nonresident subsidiary possesses sufficient material and human resources to perform such trade or business activity.

A nonresident holding company subsidiary will be deemed to be carrying out an active business to the extent that, with respect to its participated nonresident entities, (i) it holds a minimum 5% participation and (ii) it exercises management and control, and provided that (iii) the participated nonresident entities qualify as active entities engaged in a trade or business.

A nonresident financial subsidiary will be deemed to be active if (i) it is engaged in financial transactions with individuals or entities resident in its jurisdiction of residence or in a foreign country, other than Spain, (ii) to the extent that such financial services are rendered through the material and human resources available to the nonresident financial subsidiary.

3. Qualified Holding Company

A Spanish company will qualify as an ETVE if the following requirements are met:

1. The corporate purpose of the Spanish company includes, among others, the holding of participations in operating nonresident entities;
2. The Spanish company carries out its activities with the necessary "human and material resources";
3. The shares or quotas of the ETVE are in registered form (therefore, Spanish-listed companies may not opt for the regime, since their shares are in book-entry form); and
4. The Spanish holding company informs the Spanish tax authorities that it opts to be subject to the Spanish holding company regime provisions.

3.1 Corporate Purpose

The ETVE may conduct any activities, in Spain or abroad, in addition to holding participations in nonresident companies. However, such activities will not be covered by the holding company regime. Therefore, any profits will be subject to the general 35% CIT tax rate and the dividends distributed on such profits will be subject to regular Spanish withholding tax.

It must be mentioned that it is not necessary for the Spanish Holding Company to control and manage the activities of the participated companies, but rather the participation itself. The Spanish tax authorities have interpreted this requirement very flexibly.

3.2 Material and Human Resources

This requirement is closely related to the previous one.

The Spanish General Tax Directorate (DGT), the administrative body in charge of drafting and interpreting tax legislation, has clarified this essential requirement for ETVE in two recent non-binding rulings (May 22, 2002 and December 20, 2002).

The DGT takes the view that the proper "human and material resources" requirement is met, *inter alia*, if the day-to-day management of the ETVE is vested in one or more directors of the company empowered with sufficiently broad powers of attorney to allow him/her to manage the ETVE, provided that such director is resident in Spain for tax purposes. Day-to-day activities include the performance of accounting, tax and legal obligations required for the fulfillment of the corporate purpose of the ETVE.

Conversely, the DGT has expressly stated that if those services are completely outsourced, it will be deemed that the company does not fulfill the "human and material resources" requirement.

Please note that it is not necessary for the ETVE to control and manage the activities of the participated companies, but rather the participations themselves.

Finally, it should be noted that both DGT rulings are framed within the context of the EU Code of Conduct and the attempt by the Ecofin Council to eliminate harmful tax competition within the EU; certain resolutions of courts of justice in other European countries—such as the Judgment of the Tax Court of Cologne of June 22, 2001—are also interpreting "substance" in a similar fashion.

3.3 Filing with the Spanish Tax Authorities

It is no longer required that the ETVE obtain a ruling from the Spanish tax authorities confirming the application of the regime. Under current regulations, it is sufficient for the ETVE to file a notice with the Spanish tax authorities confirming its intention to apply the holding company tax regime. In addition, the Spanish holding company may file ruling requests on the interpretation of the regulations and requirements of the regime. The special tax regime will come into effect in respect of the fiscal period of the ETVE, which ends after the notice is filed.

4. Deduction of Costs

The value of a participation in the nonresident subsidiaries may be written down for accounting and tax purposes under the general CIT rules applicable to all Spanish resident companies. Financing expenses connected with a participation are tax deductible without limitation. Foreign exchange gains and losses are taxable or deductible.

5. Deduction of Goodwill on Foreign Subsidiaries

Pursuant to a new rule introduced in the CIT Law as of January 1, 2002, when an ETVE acquires a participation in a nonresident entity which meets the requirements to benefit from the participation exemption regime (as described above), the difference between the acquisition cost of the shares and its underlying book value (i.e., the equity value of the foreign subsidiary) shall be attributed to the assets of the foreign subsidiary in accordance with accounting valuation rules (i.e., limited to the market value of the assets). The difference not so attributed to the step-up of the assets shall be tax-deductible in 20 years (up to 5% per year) for the ETVE and may be used to offset taxable profits of the ETVE (i.e., those profits not linked to its participations in foreign subsidiaries). Such tax deduction would not be reflected in the accounting books of the ETVE. An open issue remains as to whether such tax deduction is applicable to the goodwill attributable to second and lower-tier foreign subsidiaries of the ETVE.

6. Liquidation Losses

A loss realized upon the liquidation of a foreign subsidiary is deductible.

7. Exemption of ETVE Dividend Distributions

Dividends distributed by the ETVE to its nonresident shareholders out of qualified exempt income (i.e., dividends and capital gains that were exempt from tax at the level of the ETVE) will not be subject to the Spanish dividend withholding tax. However, the dividend withholding exemption does not apply to nonresident shareholders resident in a tax haven country or territory, as established by Royal Decree 1080/1991 (and mentioned above).

Otherwise, dividends distributed by the ETVE will be subject to the standard 15% withholding tax or the reduced bilateral Tax Treaty rate, as applicable. In the context of an EU resident shareholder, dividends paid by the ETVE to its European Union resident shareholder will not be subject to the dividend withholding tax if the EU shareholder (i) takes one of the forms set out in the Annex to the Parent/Subsidiary Directive; (ii) is subject to and not exempt from tax as listed in Article 2.c of the same Directive; (iii) owns directly at least 25% of the share capital of the ETVE and, finally, (iv) such participation has been held for a period of at least twelve months immediately prior to the dividend payment or is held until the one-year period is completed. In the latter case, the withholding will be levied upon distribution and the EU resident shareholder will be entitled to claim a refund once the one-year holding period has been completed.

8. Capital Gains on Transfer of ETVE

Capital gains triggered by the nonresident shareholders, other than a tax haven company, on the (i) transfer or full amortization of its interest in the Spanish holding company or (ii) liquidation of the Spanish holding company will not be subject to the Spanish capital gains tax to the extent that the capital gain triggered by the nonresident shareholder is equivalent to (i) the existing reserves (from qualified exempt income) of the Spanish holding company, and/or (ii) a difference in value of the interest in the foreign subsidiaries of the Spanish holding company, if such interest fulfills the requirements described above for minimum participation and holding period.

The capital gains exemption represents a substantial improvement to the ETVE tax regime since capital gains are normally subject to a 35% tax. Although in a tax treaty context, a capital gain on the disposition of shares in the ETVE will generally not be subject to Spanish taxation, some tax treaties entered into by Spain, such as the U.S.-Spanish tax treaty, allows the latter to tax the capital gain at the general 35% tax rate provided that the foreign shareholder has a "substantial interest," usually more than 25% of the capital, in the Spanish entity.

EU resident shareholders will not be subject to tax on the capital gain triggered by the disposition of the interest in the ETVE provided that at no time during the 12-month period prior to the disposition of such interest, the EU resident shareholder held a participation in the capital of the ETVE equal to or greater than 25%.

9. Liquidation of an ETVE

The liquidation of an ETVE triggers a capital gain, not subject to withholding tax, taxable as described in paragraph 8, above.

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United States

Considerations Before Obtaining International Trademark Registrations Through the Madrid Protocol

One year ago, the United States became a member country of the Madrid Protocol, an international trademark registration filing system. As of November 2, 2003, United States entities may file international trademark applications using the Madrid system. This article reviews the provisions of the Madrid Protocol, the procedure for filing international trademark applications using the Madrid Protocol system, and the advantages and disadvantages of filing international trademark applications using the Madrid Protocol versus filing in individual countries of interest.

The Madrid Protocol allows an applicant from a Member Country to file a single international trademark application through the World Intellectual Property Organization (WIPO). An application filed with WIPO may then be extended to any Madrid Protocol member country, at the applicant's election.

The international registration obtained from WIPO under the Madrid Protocol is not an international trademark; rather, it results in a "bundle" of national rights. Similar to a United States trademark registration, an international registration is valid for ten years and may be renewed in ten-year increments.

To file an international application under the Madrid Protocol based upon a trademark application or registration issued by the United States Patent and Trademark Office (USPTO), the applicant must either be domiciled in, a national of, or have a real and effective industrial or commercial establishment in the United States. Similar to a basic United States trademark application, an international application may contain a Paris Convention priority claim if the applicant claims priority based upon the first-filed application and does so within six months of the filing date of the first-filed application.

Once counsel determines that an applicant is entitled to file an application under the Madrid Protocol, the applicant files a "home" application with the trademark office of the member country, otherwise known as the "Office of Origin." The applicant then files with the Office of Origin an application for international registration based upon the home application or an already existing home registration. On the application, the applicant provides a list of countries to which it would like to extend the home application/registration.

The Office of Origin then will forward the application to WIPO, which will examine the application to ensure that all formalities are met and will issue an international registration with a corresponding certificate. WIPO then will publish the particulars of the international registration in the WIPO *Gazette* and forward the international registration to all designated countries where protection is sought. Upon receipt of a Madrid Protocol application, the trademark office of each designated country will evaluate the application for registration in its country.

Applicant and counsel should be aware of the advantages and disadvantages of the Madrid Protocol before using this international trademark registration filing system.

The main advantage of the Madrid Protocol is that the applicant may file a single application with WIPO, which has the same effect as filing separate applications in all designated countries. Further, the applicant does not need to retain local counsel in each designated country to extend its application to each country of interest.

Another major advantage for trademark owners that receive their registrations through the Madrid Protocol is the ability to file documents related to the international registration in a central location and to pay one single, all-inclusive fee. For example, the trademark owner submits one payment with WIPO to designate more countries to which to extend the international registration. Further, the international trademark owner files a single renewal application with WIPO, which will forward the renewal request to the designated countries. Finally, the trademark owner may use a single form and pay a single fee to make changes that has effect for all registrations. For example, if the trademark owner narrows the description of goods or services, the owner may submit a single form with WIPO and the changes will take effect in all designated countries that permit the requested change to the registration.

Although there are many advantages to using the Madrid Protocol, applicants and counsel should understand the disadvantages as well. For the first five years, the validity of the international registration depends upon the validity of the originating application or registration. This means that if any problems arise concerning the home application or registration during this five-year period and the home application does not mature into a registration or the home registration is cancelled, then the international application or registration will experience the same fate. Following the five-year period, the international registration becomes independent of the home application or registration.

Even though the Madrid Protocol simplifies the process of filing internationally, applicant and counsel no longer have local agent advice in the designated countries as part of the preparation and filing process. The absence of a local agent may deprive applicant and counsel of advice on relevant local issues. For example, local counsel often informs applicant and counsel whether the mark is suitable in the country of interest or has a negative connotation in the local language, advises on how best to draft the description of goods and services based upon local practice and strategy, and recommends, when appropriate, filing for the mark in the local language or in a stylized fashion as well. Further, United States counsel may not have access to certain countries' trademark databases, making it difficult for United States counsel to determine the availability of a mark in that country and whether the search results would affect the filing strategy in that particular country. Additionally, local counsel generally provides clients with reminders of deadlines and other relevant information regarding compliance with local laws and use requirements and monitors the trademark applications and registrations in the local trademark office.

Another disadvantage of obtaining trademark registrations via the Madrid Protocol filing system is that most countries do not issue a separate trademark registration, which may cause problems for trademark owners who find it beneficial to possess actual registration certificates. Also, trademark owners may assign registrations received through the Madrid Protocol filing system only to entities that are entitled to file independently under the Madrid Protocol. For example, Canada currently is not a member country; therefore, a trademark owner cannot assign trademark registrations obtained via the Madrid Protocol to a Canadian company. The time period for responding to correspondence from WIPO and the trademark offices of the designated countries also is often as short as ninety days and the applicant must file responses directly with the trademark office that issued the refusal, which entails hiring local counsel to represent the applicant.

Finally, applicants should be aware of the limitations of filing under the Madrid Protocol when using the United States as the country of origin. The USPTO offers a more limited scope of protection than other countries because of USPTO specificity requirements for the description of goods and services. For example, to register a trademark for software, the USPTO requires an applicant to specify the field and function of the software. In contrast, most other countries will permit registration with the broader description "computer software." As a result, United States applicants may receive a more narrow description than desired in the international arena where an applicant may want broader protection for its mark. An applicant also must provide an affidavit of intent to use in the United States to file a non-use-based application and must prove use in United States commerce before receiving registration. Most other countries do not have use requirements to receive registration of a mark.

Other limitations attendant upon using the United States as the country of origin exist as well. For example, the USPTO conducts a more rigorous substantive examination of the application than many other trademark offices, making it more difficult to obtain registration. Finally, a greater possibility exists that the USPTO will issue a refusal based upon a likelihood of confusion with a prior-registered mark because the USPTO has one of the most popular registries in the world.

Currently, while fifty-seven countries are members of the Madrid Protocol, there are still some notable countries and regions that are not part of the Protocol. They include Canada; Hong Kong; Indonesia; Iran; Israel; Malaysia; Mexico; New Zealand; Philippines; South Africa; Taiwan; Thailand; the Arab region (Egypt, Syria, Iraq, etc.); the Latin American region (Brazil, Argentina, Chile, etc.); and the European Union as a whole, although most Western European countries are members in their individual capacity.

The Madrid Protocol is useful and cost-effective when seeking registration in approximately ten or more member countries, excluding the European Union (EU) member countries. In the EU, applicants should consider obtaining an EU trademark registration via the Office of Harmonization of the Internal Market (the EU Trademark Office). This strategy often is more cost-effective than extending the application to numerous individual EU countries and avoids prosecuting the application in multiple EU trademark offices under the Madrid system.

While it may be simpler to file one international trademark application using the Madrid Protocol rather than filing multiple trademark applications in different countries, applicants and counsel should consider the disadvantages and limitations as well as the advantages before electing to file international trademark applications using the Madrid Protocol.

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All Roads Lead to New York: Asset Discovery Devices

Everyday, billions of dollars in transactions originate in or are processed through New York. Inevitably, loss occurs. Inevitably, disputes happen. Untold numbers of foreigners are touched by this commerce. Almost by necessity, New York's courts have an importance beyond their jurisdictional parameters. Thousands of lawsuits are filed in New York courts each year. Yet, while there is no guarantee that a loss will be made whole or a dispute resolved efficiently, there are devices that assist the litigation decision-making process with respect to claim collectibility, defendant identification and asset discovery.

We deal with selected asset discovery devices available in New York that position a claimant to pursue meaningful and focused litigation, and collection. There are at least two (sealing of files and pre-action disclosure) that a litigant should consider before commencing a plenary action. These are particularly well suited to a foreign claimant who will be able to obtain the necessary facts before commencing a commercial litigation that may prove to be expensive, draining and, possibly, unsuccessful in a system foreign to it.

As to sealing, New York provides as follows:

> Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding seal-

ing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as the parties. 22 N.Y.C.R.R. § 216.1(a)

The public interest is to ensure that the process of the administration of justice is transparent and that it is seen to be so. The general principle is that the courts must be open and accessible. The public interest may yield to the private interest of a litigant in certain circumstances. Arcane financial matters or personal details are not always going to be matters that should be publicly available. *See In re Twentieth Century Fox Film Corp.*, 190 A.D.2d 483, 485–487.

Consider the corporate victim of a trademark breach. It finds that it is incurring significant loss, likely as a result of wrongful conduct. It does not know who or what is causing such loss. It needs to investigate and position itself to recover on the loss. Extra-judicial inquiries by the victim's investigators have revealed only so much about the class of perpetrators. What is the victim to do and how to do it in a way that does not alert the potential obligors?

New York's sealing provision provides for just such a case. In fact, it is fair to say that the public and private interest coalesce where a petitioner seeking pre-action disclosure (about which, see below) does not want to alert its possible counter-parties because there is a reasonable suspicion that those counter-parties may take action to subvert the court's process by, for example, sequestering assets or removing them from the jurisdiction; or destroying or manipulating evidence. How efficacious would the court's process be if assets were secreted or evidence destroyed? In such a case, by sealing the file, the private interest of an intended claimant complements the public interest of orderly justice.

Sealing a court file is, however, not done in a vacuum. Tied to sealing is a petition under CPLR 3102(c) for pre-action discovery. CPLR 3102(c) provides: "Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order."

The numbers of cases dealing with this issue are few. The Appellate Division (First and Second Departments) has held that it is proper to order pre-action disclosure, under CPLR 3102(c) when "Petitioner establishes that it likely has causes of action" and "the information sought is material and necessary" to Petitioner's framing of a complaint. *Wien & Malkin LLP v. Wichman*, 255 A.D.2d 244, 680 N.Y.S.2d 250 (1st Dep't 1998). *See also Stuart v. New York City Transit Auth.*, 112 A.D.2d 939, 940, 492 N.Y.S.2d 459, 460 (2d Dep't 1985).

The potential plaintiff has to demonstrate that there is a cause of action. *In re: Peely*, 43 Misc. 2d 1082, 252 N.Y.S. 2d 944 (1964). It might seem to be a contradiction to require that there be a cause of action (which usually presumes the identity of the defendant). Clearly CPLR 3102(c) gives the intended claimant sufficient leeway to make its investigations before the cost and effort of a plenary action are incurred.

The relief available under CPLR 3102(c) is discretionary. Any concern that any litigant could jump in to seek relief under CPLR 3102(c) is assuaged by checks and balances in granting such relief. One such check is that pre-action discovery is not available to determine whether a cause of action exists. *Merck-Medco Managed Care LLC vs. Value Health Inc.*, 254 A.D. 2d 519, 678 N.Y.S.2d 681 (3d Dep't 1998). Put another way, a fishing expedition is not going to be sanctioned by the court.

Most relevantly for the petitioner in the above-referenced example, is the case of *Banco de Concepcion vs. Manfra, Tordella & Brooke, Inc.*, 70 A.D.2d 840, 417 N.Y.S.2d 734 (1st Dep't 1979). Here, the court found that the deposit of a number of checks in numbered accounts representing a significant part of the proceeds of a fraudulent scheme sufficiently met the statutory requirement that there be an existing cause of action. The bank, into which the funds were deposited, was directed to make its personnel available for deposition and otherwise to produce documents to reveal the identities of a person who maintained accounts involving the subject transactions.

Consider, too, the following. Bank A has paid out on a forged check. It sues the presenting bank (B) for discovery—to determine the recipient of the funds. A did not know where the money went. B has the information, but absent a court order, cannot give out that information and, further, absent the appropriate sealing of the file and gag on it, would have to disclose to its customer A's inquiry. Obviously, A did not want to tip its hand to the as-yet-unknown forgers. A moves for a sealing of the file and for the appropriate discovery. It obtains the same from B and so is able to identify the potential obligors and so determine whether and where it should commence litigation against them to recover its loss. Comparable examples are to be found in two unreported cases: *In re Application of LaSalle Bank N.A.*, (Sup. Ct., New York Co., Index No. 604312/00) and *In re Application of Cole Taylor Bank & Prison Mortgage Co.*, (Sup. Ct., New York Co., Index No. 103405/00).

There is no doubt that the burden to establish the devices discussed here is high. Otherwise, almost any case would arguably become "sealable" and subject to never-ending motion practice.

The benefits of the devices are numerous. Some have already been discussed (public and private interest satisfied; court's process respected and not rendered futile, for example). The two devices used together in a complementary way enable a claimant to determine the efficacy and cost-benefit of litigation. The devices promote an efficiency early on in the decision-making process. These are practical benefits. If the device yields information that implicates obligors, then the resulting plenary litigation against those defendants and measures taken to secure relief will more likely lead to a satisfying and satisfactory result.

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Prescription Drug Import Battle

For the uninsured and elderly in the United States, Canada and other foreign countries might yet be a solution to obtaining more affordable prescription medications. In a surprise move on July 25, 2003, the House of Representatives approved a bill that would make it easier for Americans to import cheaper prescription drugs from foreign countries. The bill is expected to face stiffer opposition in the Senate and continues to be strongly opposed by the Food and Drug Administration (FDA).

Currently, in almost all cases it is illegal for any American to buy Canadian or other foreign prescription medications for use in the United States. Even with a prescription signed by a Canadian physician, obtaining medications in Canada for U.S. citizens violates both American and Canadian laws. To make matters worse, there is no guarantee the medication dispensed in Canada is identical to the medication that would be dispensed in the United States. The FDA has turned up its law enforcement efforts against anyone involved in bringing drugs from foreign countries like Canada into the United States. In fact, the FDA has said it will take enforcement action against physicians writing prescriptions to be filled for U.S. citizens in Canada, any pharmacy filling such prescriptions, and anyone in between such as those who run "store-fronts" and Internet sites for this purpose. Admittedly, for now, the FDA has said it does not intend to criminally prosecute consumers such as the elderly trying to obtain affordable medications for personal use. Having said this, keep in mind that this is purely the FDA's present enforcement policy and it could change at any moment.

Everyone agrees the high price of prescription medications is one of the greatest health problems in the United States. Senior citizens and the uninsured are particularly hard-hit because they are forced to pay for their medications in full without the benefits of the discounts and co-payments that insurance coverage may provide. Often people are forced to choose between their medications and heat—or even food.

Looking for a solution, many Americans, especially those in border states like New York, have turned to Canada. Medications purchased in Canada are generally less expensive than their counterparts purchased in the United States—often a lot less expensive. Nonetheless, United States citizens cannot legally purchase drugs from Canada by mail, in person, or even through the Internet. The *only* exception is the FDA's "Personal Importation Policy" that permits certain experimental drugs to enter the United States even though not yet approved here, but only if the FDA has reviewed and approved their use for a specific patient.

The FDA has taken a great deal of political heat for its policy and enforcement efforts. In fact, in a recent development, some House Republicans are starting to support a bill legalizing the importation of medications from Canada. The FDA isn't budging, though. Commissioner Mark McClellan sent a letter to the House claiming the bill would prevent the FDA from overseeing the safety of America's prescription drugs. The FDA believes because imported drugs are not subject to its strict quality standards, foreign prescription drugs may have different strengths, be more prone to counterfeiting, contain untested substances, and have improper labeling, all of which could seriously and adversely affect the health of millions of Americans.

If ultimately the federal government permits prescription drugs to be imported from foreign countries, the effects will be far-reaching. Some will be positive, and some may be negative. For instance, patients in international border areas such as Buffalo who can buy their medications in Canada may experience savings. The cost of prescription drugs also may be lower for patients in the heartland of the country if their pharmacies can purchase from less expensive foreign wholesale sources and pass their savings onto their customers. In addition, employers could benefit if they find their costs of health care coverage lowered, permitting some to offer better health insurance coverage—or even permitting smaller businesses to offer coverage for the first time. But some effects may not be beneficial. For instance, many fear that opening the borders will increase the risk of counterfeit or contaminated medications. Still others predict that if pharmaceutical manufacturers' profits are adversely affected there will be less research and development of new medications that save or improve the quality of American lives. Pharmaceutical pricing may also become more uniform among all countries and the hoped-for savings might never be realized. As long as these competing issues remain, importation of prescription drugs will continue to be strongly debated on Capital Hill and among all Americans.

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It's a Small World, After All: Select International Insolvency Issues

With increasing globalization, foreign entities now more often find themselves in situations where they are creditors of companies that have filed for bankruptcy protection in the U.S. Bankruptcy filings involving such foreign creditors can create traps for the unwary. This article will highlight a few of the more common and/or interesting international insolvency issues that could potentially arise for such creditors.

Cross-Border Cases

Increasingly, insolvent debtors with international operations that file for bankruptcy in the U.S. will also file for insolvency protection in one or more of the foreign countries in which they have substantial assets or large numbers of creditors. The U.S. Bankruptcy Code[1] itself does not provide any guidance for administering such "cross-border" cases. Instead, it has become increasingly common for the cases to be coordinated through a "Cross-Border Insolvency Protocol." These protocols, which are agreements approved by the courts involved, govern how the international aspects of the cases will be administered.[2] Thus, in situations where a foreign creditor learns that its debtor has filed for bankruptcy protection in the U.S., one of the first things the creditor should investigate is whether the debtor has also filed for insolvency protection in the creditor's country. If so, depending on the terms of the Cross-Border Insolvency Protocol (if one has been entered), the creditor may only have to interact with the court in its own country and concern itself with its own country's laws. If not, the creditor will need to understand how the U.S. Bankruptcy Code may impact its ability to collect on its claim against the debtor.

Application of the Automatic Stay

The central mechanism by which the U.S. Bankruptcy Code impacts a creditor's ability to pursue collection of a pre-bankruptcy petition claim is the "automatic stay." Upon the filing of a U.S. bankruptcy petition, creditors are automatically enjoined by U.S. federal law from taking various collection actions against the debtor.[3] More specifically, the automatic stay, with certain exceptions, prohibits: (1) commencing or continuing litigation against the debtor; (2) enforcing a judgment against the debtor or property of the bankruptcy estate; (3) acting to obtain or exercise control of property of the bankruptcy estate; (4) acting to create, perfect, or enforce a lien against property of the bankruptcy estate; (5) acting to create, perfect or enforce a lien against property of the debtor to the extent the lien secures a pre-bankruptcy petition claim; (6) acting to recover a pre-bankruptcy petition claim against the debtor; (7) setting off a pre-bankruptcy petition debt owed to the debtor against a claim asserted against the debtor; and (8) commencing or continuing a proceeding before the United States Tax Court involving the debtor.[4]

The U.S. Bankruptcy Code provides that the bankruptcy estate includes property "wherever located and by whomever held."[5] In addition, a jurisdictional provision specifies that the U.S. court have jurisdiction of all property of the debtor "wherever located."[6] Thus, foreign creditors need to be aware that U.S. courts have held that the automatic stay has international effect, and bars collection actions taken outside of the U.S.[7] A U.S. court can order sanctions for violating the automatic stay, and can enforce those sanctions against a foreign creditor's property located in the U.S.[8] Even if a foreign creditor owns no property in the U.S., it is also possible that a court in the creditor's own country may be willing to enforce a contempt sanction entered by a U.S. court.

The U.S. Bankruptcy Code contains provisions by which a creditor can obtain relief from the automatic stay for "cause" or, particularly with respect to a secured creditor, if the debtor has no equity in the collateral and it is not necessary for the debtor's reorganization.[9] Thus, before taking an action prohibited by the automatic stay, a foreign creditor (especially one with assets in the U.S.) should request such relief from the U.S. bankruptcy court. However, absent compelling circumstances, the foreign creditor will likely have to submit its claim in the U.S. court just like domestic creditors.

The Revenue Rule

One foreign creditor that may find itself in a type of catch-22 situation is a foreign government that has a claim against a U.S. debtor for taxes arising under the foreign government's laws. The automatic stay applies to "all entities,"[10] which includes a "foreign state."[11] Thus, a foreign government is technically not able to pursue its tax claim outside of the U.S. bankruptcy court. However, a foreign government's attempt to pursue its claim in a U.S. bankruptcy case may run afoul of the "revenue rule."[12]

The revenue rule provides "that courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns."[13] U.S. courts will enforce this rule and dismiss civil tax claims of foreign governments unless a U.S. statute or treaty[14] provides otherwise.[15] It is possible to craft an argument that Congress has in fact abrogated the revenue rule in bankruptcy cases. Specifically, the U.S. Bankruptcy Code grants priority status to tax claims[16] of "governmental units," which, again, is defined to include a "foreign state."[17] However, because a statute abrogating the revenue rule must demonstrate "clear evidence of congressional intent," it is not clear that the statute speaks directly enough to the issue to overcome the common law. Indeed, one bankruptcy court has noted that "[t]he United States Courts will not enforce the tax claims of foreign nations."[18]

Although a U.S. bankruptcy court may ultimately not allow a foreign government's claim for taxes, the existence of the revenue rule as a bar to determining the claim arguably constitutes "cause" for the bankruptcy court to lift the stay to permit the foreign government to pursue collection in its own country. Or, if the debtor or its affiliate has filed a companion case in the foreign jurisdiction, the creditor might seek relief from the foreign court. These are likely the foreign government's best defense avenues to pursue if the revenue rule is raised against it.

Conclusion

The insolvency practice increasingly involves international issues, many of which remain unresolved. When a foreign creditor learns that its debtor has filed for bankruptcy protection in a U.S. court, that creditor cannot assume that the U.S. proceeding cannot impact its rights. Instead, when warranted by the economics of the situation, it should act with diligence to preserve its claim in the U.S. proceeding with the assistance of U.S. counsel.

Endnotes

1. 11 U.S.C. §§ 101-1330.
2. 1 Collier International Business Insolvency Guide ¶ 9.03 (2003).
3. *See* 11 U.S.C. § 362(a).
4. *See id*. 11 U.S.C. § 362(b) lists various actions that are not subject to the automatic stay.
5. 11 U.S.C. § 541(a).
6. 28 U.S.C. § 1334(e).
7. *See, e.g., United States Lines, Inc. v. GAC Marine Fuels Ltd. (In re McClean Indus., Inc.)*, 76 B.R. 291, 296 (Bankr. S.D.N.Y. 1987) (rejecting claim that bankruptcy court improperly extended its jurisdiction by holding foreign creditor in contempt for instituting foreign proceedings against U.S. debtor in violation of automatic stay).
8. *See id.*
9. 11 U.S.C. § 362(d).
10. 11 U.S.C. § 362(a).
11. *See* 11 U.S.C. § 101(15) & (27).
12. It does not appear that this particular issue has been decided in any reported opinion, so it is possible that counsel for U.S. debtors are not generally aware of it, in which case they may be overlooking a potentially valuable claim objection.
13. *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 109 (2d Cir. 2001). The revenue rule is well-established and has been enforced by several U.S. courts. *See e.g., United States v. Pasquantino*, 305 F.3d 291, 296 (4th Cir. 2002); *United States v. Boots*, 80 F.3d 580, 587 (1st Cir. 1996); *Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson*, 597 F.2d 1161, 1163-1164 (9th Cir. 1979).
14. For example, the United States-Canada tax treaty provides that a revenue claim *finally adjudicated* in the courts of the foreign country can be accepted for collection by the courts of the other country. *See R.J. Reynolds*, 268 F.3d at 119–20.
15. *Id*. at 129; *European Cmty. v. Japan Tobacco, Inc*. 186 F. Supp. 2d 231, 235 (E.D.N.Y. 2002) ("Once the revenue rule is triggered, an action is barred from going forward, with one exception: where the plaintiff can show adequate manifestation of executive or legislative will sufficient to allay the foreign relations and separation of powers concerns underlying the revenue rule, suit may proceed.").
16. *See* 11 U.S.C. § 507(a)(8).
17. *See* 11 U.S.C. § 101(27).
18. *Askanase v. United States (In re Guyana Dev. Corp.)*, 189 B.R. 393, 396 (Bankr. S.D. Tex. 1995).

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Gibson, Dunn & Crutcher LLP
Dallas, TX

Safer Skies? The Controversy Over Sharing Airline Passenger Data

Introduction

The inherent differences between the American and European approaches to protecting the privacy of personally identifiable data ("Personal Data") are currently being played out in a battle over airline passenger information. On the one hand, the United States insists that, for reasons of national security, it requires access to the Personal Data of all passengers and crew members of airlines flying into the United States. On the other hand, European privacy regulators and consumer groups are claiming that the U.S. demands are overbroad and that, among other things, U.S. authorities are demanding more Personal Data than is actually required and are failing to provide data subjects with adequate assurance regarding the use of their Personal Data. Caught in the middle are the air carriers who are being asked to comply with two conflicting sets of requirements.

The U.S. Demand for Passenger Information

In response to concerns about national security and terrorism, the U.S. has recently passed a number of laws that require transportation companies to share with U.S. authorities certain Personal Data regarding their passengers and crew members. Specifically, in November of 2001, the U.S. adopted the Aviation and Transportation Security Act.[1] Among other requirements, this legislation obliges airlines flying into the United States to disclose to the Commissioner of Customs Personal Data relating to passengers and cabin crew ("Passenger Manifest Information"). The transfers of Personal Data must be completed before the plane takes off, or at the latest 15 minutes after departure. While the Personal Data is to be provided to the Commissioner of Customs, it may be shared with other federal agencies.

Also, in May of 2002, the U.S. adopted the Enhanced Border Security and Visa Entry Reform Act of 2002.[2] Among other requirements, this law obliges airlines arriving and departing from the U.S. to transmit certain Personal Data relating to passengers and crew to U.S. immigration authorities. Similar to the case of the Aviation and Transportation Security Act, while Personal Data provided pursuant to the Enhanced Border Security and Visa Entry Reform Act is to be transmitted to a single agency, in this case, the immigration service, it can thereafter be shared with other federal agencies.

Airlines that fail to comply with the disclosure requirements mandated by the U.S. may be subject to a host of penalties including fines and the loss of landing rights in the U.S.

European Concerns

European privacy regulators have expressed concern about a number of issues related to the mandatory disclosure of airline passenger Personal Data to U.S. authorities. As a result, U.S. and EU authorities have been hard at work in attempting to craft a solution that will address adequately U.S. authorities' need for airline passenger Personal Data while also respecting the privacy rights of travelers.

In May of 2003, U.S. authorities made a number of concessions, including proposing reducing the Personal Data retention time period from 50 to 6-7 years and agreeing to appoint a Chief Privacy Officer in the Department of Homeland Security. However, very serious concerns still remain. Currently, the main points of contention have centered around the following issues: the sheer volume of Personal Data requested by U.S. authorities; the length of time of retention for such Personal Data, the lack of appeals procedures and the insistence that the Personal Data may be used to investigate not only terrorism but also "other serious criminal offences."

A Resolution?

While high-level negotiations between EU and American officials have continued, the European Parliament has also weighed in with a draft resolution declaring that the European Commission must resolve the matter by December 2003. The draft resolution establishes three requirements that must be met in order for a solution to this crisis to be acceptable. First, the Commission must ensure that there is no discrimination against non-U.S. citizens and that no Personal Data is retained beyond the passenger's stay in the U.S. Second, passengers must be informed of the Personal Data transfer upon their purchase of a ticket and give their consent to the transfer. Finally, passengers must be provided with access to swift and efficient appeals procedures in the event they encounter difficulties as a result of the transfer of their Personal Data to the United States.

If the Commission is unable to reach a settlement on these terms, the transfers of airline passenger Personal Data must be ceased. If the European Commission fails to comply with the terms of the resolution, the European Parliament may commence proceedings against the Commission in the European Court of Justice. As such, the European Parliament's resolution has added a new sense of urgency to an already charged debate.

As of this writing, a resolution of the crisis was said to be pending. The looming deadline imposed by the European Parliament has made the need for a prompt resolution even more critical. Only time will tell if the appropriate parties will be able to come to terms on an effective solution that properly balances national security concerns with individual privacy rights.

The Future . . . More Cross-Border Privacy Disputes?

In recent years, much has been made of the differences between the U.S. and the EU with respect to privacy and personal data protection. At one point, there was some belief that the U.S. would be revising its privacy laws and enacting new legislation in order to make the U.S. approach more compatible with that of the EU. Today, that seems much less likely. In recent years, the implementation of new data privacy legislation has become much less of a priority in the United States. On the other hand, comprehensive data protection laws and active data protection supervisory authorities are in place throughout the EU. At the same time, public pressure regarding cross-border transfers of data continued to mount. All of this tends to suggest that the current battle over the transfer of airline passenger data may be a sign of future data transfer scrimmages to come.

Endnotes

1. P.L. 107-071, Aviation and Transportation Security Act, passed by the 107th Congress on Nov. 19, 2001.
2. P.L. 107-173, Enhanced Border Security and Visa Entry Reform Act of 2002.

Jacqueline Klosek
Goodwin Proctor LLP
Roseland, NJ

Firm News

Alfaro-Abogados

In spite of the long, prolonged crisis in Argentina, we are proud to announce our law firm has continued to grow and expand in several areas. The economic situation in Argentina is now stabilizing and consumption is coming back to normal levels. There are positive signs that indicate that the economy is in the verge of a recovery.

New Headquarters Office: In our process of expansion, we have changed the headquarters address in Buenos Aires to a larger office to better service our clients:

Av. Libertador 498, Buenos Aires, Argentina, C1001ABR, Tel.: (54-11) 4393-3003, Fax: (54-11) 4393-3001.

Two New Partners: Mr. Sebastian Rodrigo and Mr. Federico Brandt have been nominated as new partners of the law firm, effective as of January 1, 2003 and July 1, 2003, respectively.

Human Resources Department: We have reinforced this area by the incorporation of Mr. Carlos E. Miguez, an experienced lawyer in this field of practice, formerly with the prestigious firm of Moltedo.

Patent and Trademarks Alliance: We have entered into a Strategic Alliance with Etcheverry & Etcheverry to provide Patent and Trademarks services to our clients. The firm is headed by Martin Etcheverry, a lawyer with a long-standing career in the United States and in Argentina.

Sponsorship of Main Business Conferences: We have participated as sponsors in several events for the business community in Argentina, most of them organized by IDEA, which is a business organization whose members are important businessmen and the major companies from Argentina.

During 2003 our lawyers have spoken in several conferences in the U.S. and abroad on key legal issues with regard to Argentina. If you are interested in receiving a copy of any of the papers and speeches described below please send an e-mail to smatteozzi@alfarolaw.com and we would be delighted to forward it to you:

American Foreign Law Association Meeting celebrated in New York City, on February 12, 2003, "How to restore and protect economic rights in the Argentine Crisis"; International Bar Association's Biennial Conference on Project Finance, celebrated in Washington, D.C., on April 7-9, Session I, "The Global View: Project Finance and Infrastructure after the Crash of 2001"; International Bar Association's Insolvency and Investor Confidence: Challenges and Responses Conference, celebrated in Rome, Italy, on April 27–29, 2003, "Sovereign Debt Reform"; Annual Symposium on Private Investments Abroad, celebrated on June 17-18, in Dallas, Texas, "Foreign companies facing Uncle Sam's rules on governance"; International Bar Association Annual Conference, San Francisco, September 14-19, 2003; "Project finance tools and structures for hotel developments and acquisitions", "International and intra-continental cross-border insolvencies in and with Latin America"; "The practical do's and don'ts of hiring and firing"; New York State Bar Association International Law and Practice Section 2003 Meeting in Amsterdam, October 22-26, 2003, "Transnational Practice and Legal Professionalism."

Masuda Funai Expands and Relocates Downtown Office

November 4, 2003—The law firm of Masuda, Funai, Eifert & Mitchell, Ltd. has announced the expansion and relocation of its downtown office to 26,000 square feet at 203 North LaSalle Street in Chicago. The firm moves from its existing location at One East Wacker Drive effective Monday, November 17, 2003.

"The principal objective of our relocation was to move from multiple floors to a single floor, thus promoting workspace efficiency" said Dayne Kono, Managing Partner of Masuda Funai. "At the same time, we've created a comfortable, employee-friendly work environment and implemented universal office sizes, which also contributed to improved space utilization." The new 26,000-square-foot office will accommodate growth and improve operations through the use of cutting-edge technology and state of the art space planning.

"Again, we're seeing savvy law firms like Masuda Funai align their real estate needs with their business plans," said David J. Gelfand, senior managing director of the real estate advisory firm, Julien J. Studley, Inc. "By taking advantage of current soft office market conditions and carefully designing space needs, Masuda Funai benefits from improved rent-to-revenue ratios and more streamlined operations."

Gelfand, John D. Ziesmer and Stephan Richford of Studley represented Masuda Funai in the lease transaction. Additional market analysis and consulting services were provided to Masuda Funai by Yasuko Okigawa and Kay Rohan of the full-service commercial real estate firm of TriStar Associates LLC, of Mt. Prospect. Masuda Funai received in-house legal representation from Keith Groebe, Chair of the Firm's Real Estate

Group. Architectural and interior design services were provided by Hydzik Shade Associates of Chicago. M&J Wilkow, owner of 203 North LaSalle, was represented by Jack O'Brien.

Hodgson Russ Partners Featured Panelists at National Canadian Corporate Counsel Conference

Hodgson Russ LLP partners Pamela Davis Heilman and Joseph P. Galda were featured panelists at the National Spring Conference of the Canadian Corporate Counsel Association (CCCA), "Corporate Counsel in a Changing Regulatory Environment," held in Calgary, Alberta.

Ms. Heilman, the lead attorney for Hodgson Russ's CCCA involvement, was a member of a panel that discussed "Ethics and Corporate Governance: Developing a Model That Works." Mr. Galda participated in "The Post-Enron Regulatory Impact on Accounting and Audit Functions: Key Concerns for In-House Counsel." The conference program included an essay by Hodgson Russ partner Denise O'Donnell, "U.S. Regulatory and Criminal Enforcement in the Aftermath of September 11 and the Sarbanes-Oxley Act."

Ms. Heilman said, "Hodgson Russ is delighted to have sponsored and taken part in a conference program of such exceptional caliber, with speakers from industry, government, and the private sector sharing proactive strategies for mastering compliance and minimizing risk in today's fast-paced regulatory environment."

Ms. Heilman practices in the areas of international commercial transactions, not-for-profit corporations, professional corporations, and mergers and acquisitions. She is vice president of the Business Division at Hodgson Russ and a member of the Firm's Corporate & Securities and Canada Practice Groups. As one of the lead lawyers in the cross-border Canada/U.S. practice, Ms. Heilman regularly counsels Canadian organizations and businesses considering expansion into the United States. Ms. Heilman also has extensive experience counseling nonprofit organizations and closely held businesses. Ms. Heilman, who received a J.D. from SUNY at Buffalo School of Law and an A.B. from Vassar College, practices out of the firm's Toronto and Buffalo offices.

Mr. Galda concentrates his practice in cross-border financing, corporate finance, venture capital, private and public securities, and mergers and acquisitions. His clients come from a wide variety of industries, particularly emerging growth and high-technology businesses, principally in the information technology and biotechnology industries. He represents clients from across the United States, Canada, Australia, the United Kingdom, and the Netherlands. He received a J.D. from Rutgers School of Law and a B.A. from Rutgers University.

Two Hodgson Russ Partners Speak at International World Day for Women Entrepreneurs Conference

Hodgson Russ LLP partners Pamela Davis Heilman and Carol A. Fitzsimmons were among the presenters at an international conference jointly presented by Women Entrepreneurs of Canada (WEC) and the National Association of Women Business Owners (NAWBO) to commemorate the fourth annual World Day for Women Entrepreneurs.

The NAWBO/WEC Joint Business Forum was held May 15 through May 17 at the Sutton Place Hotel, Toronto. Women entrepreneurs and key business leaders from across North America attended.

Ms. Heilman and Ms. Fitzsimmons presented "Growing Your Business in the United States: How to Avoid Corporate, Tax, Immigration, and Distribution Roadblocks and Detours."

Ms. Heilman said, "The Joint Business Forum was intended to assist women entrepreneurs in building strategic alliances, the goal espoused by WEC and NAWBO. We believe this is one of the most effective means of promoting talented businesswomen."

Ms. Fitzsimmons noted, "This important conference provided attendees with opportunities to make key contacts and explore opportunities for cross-border business expansion."

WEC, founded in Toronto in 1992, is a resource, support, and opportunity network for established Canadian women entrepreneurs. Among WEC's accomplishments are three international conferences for businesswomen, two all-women trade missions to the United States, the first pre-budget roundtable for women, and countless networking opportunities for its members.

NAWBO, incorporated in 1975 and headquartered in Washington, D.C., has more than 90 chapters and more than 8,000 members. NAWBO is committed to empowering, encouraging, and developing women-owned businesses, and is America's only dues-based national organization that represents the interests of women entrepreneurs in all types of businesses, at all levels of development.

Ms. Heilman practices in the areas of international commercial transactions, not-for-profit corporations, professional corporations, and mergers and acquisitions. She is vice president of the Business Division at Hodgson Russ and a member of the firm's Corporate & Securities and Canada Practice Groups. As one of the lead lawyers in the cross-border Canada/US practice, Ms. Heilman regularly counsels Canadian organizations and businesses considering expansion into the United

States. Ms. Heilman also has extensive experience counseling nonprofit organizations and closely held businesses. Ms. Heilman, who received a J.D. from SUNY at Buffalo School of Law and an A.B. from Vassar College, practices out of the firm's Toronto and Buffalo offices.

Ms. Fitzsimmons concentrates her practice on international and business tax matters and estate planning. She is a member of Hodgson Russ's General/International Tax and International/Cross-Border Practice Groups. Ms. Fitzsimmons regularly counsels clients on tax issues related to business operations, advantageous business structures for tax and estate planning, business expansion into the United States from foreign jurisdictions, tax considerations in private and public offerings, personal tax issues involved in compensation and relocation of executives, tax consequences of relinquishment of U.S. citizenship or lawful permanent resident status, and U.S. tax issues affecting U.S. taxpayers resident abroad. Ms. Fitzsimmons received a J.D. from the University at Buffalo Law School and a B.A. from Nazareth College of Rochester.

Former WTC Tenant Thacher Proffitt & Wood LLP Moves Back Home to Downtown NYC

The largest former WTC law firm to move back is also one of New York's oldest law firms

September 2, 2003—In a Winter Garden ceremony today law firm Thacher Proffitt & Wood LLP, a former tenant of Two World Trade Center until September 11, 2001, was welcomed to their new offices at Two World Financial Center.

"Thacher Proffitt's return to Lower Manhattan signals a growing tide of businesses returning to downtown," said Deputy Mayor for Economic Development Dan Doctoroff. "Their commitment and tenacity prove that the New York business community is pulling together to rebuild our City."

"Thacher Proffitt is finally home," said Paul Tvetenstrand, Managing Partner of Thacher Proffitt & Wood LLP. "Remarkably, we have been able to continuously service our clients and grow our business through the last two years without any interruption whatsoever. The move is a final chapter in our recovery from the disaster of September 11, 2001. We are proud that our decision to return downtown is, in so many ways, emblematic of the inevitable triumph of that community." said Tvetenstrand. "For this, we are thankful and deeply indebted to our clients, to both the New York Police and Fire Departments, to our lawyers, our staff, and our friends at other law firms who supported Thacher Proffitt in every way they could.

"We hope that our return downtown will give something back to the community that helped us."

Thacher Proffitt's new offices occupy 145,000 square feet on the 26th-29th floors of Two World Financial Center. According to John Whitehead, Chairman of the Lower Manhattan Development Corporation, "Thacher Proffitt's move reinforces our abiding message that the downtown business community is growing stronger every day."

A Word from Our Immediate Past Chair

(continued from page 2)

ness people, accountants, bankers, clients, etc., to events that will allow the invitees to have a better understanding of New York law and get to know practitioners in their local area who are competent to give advice on New York law. More important, this sort of activity reinforces the notion that no member of our Section is alone in the practice of law. Every member has available to him or her a great wealth of competent and experienced practitioners who are willing and able to share their knowledge about New York law.

I realize these are very idealistic goals, but this is the vision your Section's leadership has for our Chapters. Fulfilling these goals is the expectation we have for the leadership of our Chapters and their members. We are not there yet, but, in my year as Chair, I have had the privilege and the pleasure of meeting many of our Chapter leaders and members, and I believe we have made a very good start toward reaching these goals. I also feel very confident that your Section's leadership is in very strong hands and that our future Section leaders will strive to pursue these goals actively and effectively.

James P. Duffy III, Immediate Past Chair
Berg & Duffy LLP
Garden City, N.Y.

Event News


Fraser Milner Casgrain LLP and The NYSBA International Chapter Co-Host A Luncheon for The Honourable Ralph Klein, Premier of Alberta

Fostering the important cross-border relationships between the U.S. and Canada, The Honourable Ralph Klein, Premier of Alberta, visited New York City last June 26, 2003. His eventful visit included a breakfast meeting with senior officials of the New York Stock Exchange and a tour of the trading floor at the opening of the market. Following the NYSE meeting, Premier Klein spoke at a high-profile business luncheon at the Union League Club, as part of the U.S./Canada Business Speaker's Series. With an estimated audience of 250 in attendance, Fraser Milner Casgrain's Chair Jeff Barnes co-hosted the lunch with Fulbright & Jaworski LLP and the International Law and Practice Section Committee on International Investment.

Premier Klein spoke to his audience about the "Alberta advantage," which has been the source of prosperity for the province, discussing several issues and resources of mutual interest between the United States and Alberta. Foremost in his remarks were the vast energy resources, economic growth and investment opportunities Alberta offers. He also stressed the importance of free trade between the United States and Canada. With the advent of the free trade agreement, trade with the United States accounts for one-third of Alberta's GDP. Of the province's top twenty export markets, 16 of them are American states.

Premier Klein referred repeatedly to the sincere friendship and respect Canada holds for the United States.






Member News

Lauren D. Rachlin Joins Hodgson Russ

Hodgson Russ LLP is pleased to announce Lauren D. Rachlin has joined its law practice. Mr. Rachlin, a New York attorney licensed as a foreign legal consultant in Ontario, is resident in the firm's Buffalo and Toronto offices.

Concentrating his practice in international business law with a primary focus on Canada, general corporate law, international trade, distribution, and investment, Mr. Rachlin joins Hodgson Russ after 22 years as a partner at another major Buffalo-based firm, which merged with his firm, Rachlin & Rachlin.

Mr. Rachlin serves by appointment on the United States Trade Representative's International Trade Advisory Committee on Customs and Trade Facilitation. He has also served in expert capacity on dispute resolution panels under both the Canada Free Trade Agreement and the North America Free Trade Agreement (NAFTA).

Mr. Rachlin was the driving force behind the creation of the International Law and Practice Section of the New York State Bar Association (NYSBA), and served as the Section's first Chair. Mr. Rachlin was a founder of the Western New York International Trade Council, now the World Trade Center Buffalo Niagara. He serves this organization as a director and legal counsel.

Mr. Rachlin has served as a member of the United States Delegation to the United Nations Human Rights Commission. He is an arbitrator for the American Arbitration Association and the International Chamber of Commerce. He has also served on the executive committee of the U.S. National Commission for UNESCO and was a member of the International Advisory Committee of the World Arbitration Institute.

Among other articles, Mr. Rachlin is the author of "A Guide to Effective International Arbitration: Practical Considerations in International Arbitration Proceedings," *International Law Practicum*, and "Establishment of New Business Enterprises in the United States," *Investment/USA*, and the co-author of "Why Corporate Clients are Moving Offshore to the Caribbean Basin," New York State Bar *Journal*. He lectures frequently on international corporate legal matters.

Mr. Rachlin received a J.D. from Harvard University and a B.S. from the University at Buffalo.

With approximately 200 attorneys practicing in all major areas of law, Hodgson Russ is the 209th largest law firm headquartered in the United States, as reported by *The National Law Journal*. The firm, which was established in 1817 and is among the oldest law firms in the U.S., is the only law firm that can count two former U.S. presidents, Millard Fillmore and Grover Cleveland, among its alumni. The eight offices of Hodgson Russ are located in Albany, Buffalo, JFK International Airport, and New York City, N.Y.; Newark, N.J.; Boca Raton and Palm Beach Gardens, Fla.; and Toronto, Ontario, Canada.

Omer Ozden Joins Hodgson Russ LLP's Toronto Office

Attorney Omer Ozden has joined the Toronto office of Hodgson Russ after practicing for an extended period in Greater China. Mr. Ozden is a New York attorney licensed as foreign legal consultant in Ontario, and is the latest addition to the firm's Corporate & Securities Practice Group.

Prior to joining Hodgson Russ, Mr. Ozden was an associate with Morrison & Forester LLP at that firm's Hong Kong office. He studied Mandarin Chinese on scholarship at National Taiwan Normal University in Taipei (he is fluent in Mandarin Chinese). Mr. Ozden founded and operated a legal and business consulting company in Beijing, China, before entering private practice.

Mr. Ozden focuses on international capital markets transactions related to the U.S., Canada, and Asia. He represents global institutional investors, U.S. and Asian venture capital houses, and a number of U.S., Canadian, and Asian technology and emerging growth companies in various stages of private equity and venture capital financings. A large part of his practice involves representing issuers in various securities matters, including public offerings and U.S. securities law compliance. Mr. Ozden's cross-border experience includes advising Canadian companies seeking to invest or establish operations in the U.S. and foreign investors seeking to conduct direct investment or acquisition transactions in China and elsewhere in Asia.

Mr. Ozden attended the University of Windsor and University of Detroit's Joint International Law Degree Program, graduating with a Canadian LL.B. and an American J.D. He also received a Bachelor of Commerce from the University of Toronto with a major in Finance.

Established in 1817, Hodgson Russ is one of the oldest law firms in the United States and has approximately 200 attorneys practicing in all major areas of law. The firm has been counseling Canadian clients on cross-border legal issues for over 50 years and has one of the largest Canadian practice groups among U.S. law firms. As licensed foreign legal consultants in Ontario, Hodgson Russ attorneys advise Canadian clients on U.S. legal issues affecting cross-border business operations in the United States. The eight offices of Hodgson Russ are located in Albany, Buffalo, JFK International Airport, Johnstown, and New York City, N.Y.; Boca Raton and Palm Beach Gardens, Fla.; and Toronto, Ontario, Canada.

Cuatrecasas

In July 2003, Javier Villasante joined the Madrid office of Cuatrecasas as Partner in the M&A Group, after three years as Managing Partner of the New York office.

International Law and Practice Section Fall Meeting Amsterdam 2003

A. Thomas Levin and Lorraine Power Tharp

James P. Duffy, III, Judge Thomas Buergenthal and A. Thomas Levin

This year's Fall Meeting of the International Law and Practice Section of the New York State Bar Association led the participants to Amsterdam in the Netherlands. The meeting was held October 22–26, 2003 at the historic Amstel Intercontinental Hotel, located directly along the Amstel River. The meeting was chaired by Marco A. Blanco of Curtis, Mallet-Prevost, Colt & Mosle LLP and co-sponsored by the International Bar Association and the Union Internationale des Avocats. As in previous years, it attracted a wide variety of practitioners from many countries, including professors, judges, lawyers and government officials.

James P. Duffy III of Berg & Duffy LLP, the Section's chair, opened the meeting by introducing the President of the New York State Bar Association, A. Thomas Levin, partner at the law firm Meyer, Suozzi, English & Klein P.C., who welcomed the conference participants to Amsterdam. In addition to the current President of the Association, the Section was honored that the Immediate Past President, Lorraine Power Tharp of Whiteman Osterman & Hanna LLP, and the association's president preceding her, Steven C. Krane of Proskauer Rose LLP, attended the meeting as well.

Presentations and panel discussions in the different areas of law revolved around this year's theme, "National Legislation and Extraterritorial Effects." The first plenary session on Thursday addressed differences in the U.S. and European understanding of shareholder value and was co-chaired by Prof. Steven Schuit of Allen & Overy, the Section's Chapter Chair in the Netherlands, and George J. Sampas of Sullivan & Cromwell LLP. The Chief Prosecutor of the recently established International Criminal Court, Luis Moreno-Ocampo, addressed the conference's participants as luncheon speaker. Mr. Moreno-Ocampo informed the audience on the progress of the formation of his Chief Prosecutor's office in The Hague and outlined the first case he intends to bring to the International Criminal Court.

The further programs of that day included a variety of issues such as the extraterritorial and transnational enforcement of antitrust laws, or questions relating to

A. Thomas Levin, Clifford Sobel and James P. Duffy, III

Clifford Sobel and James P. Duffy, III

legal issues related to peer-to-peer file sharing over the Internet, which was very timely in light of the lawsuits that the Recording Industry Association of America had just filed against a number of individuals in the United States.


Piano Factory Reception

In the evening, the participants enjoyed a visit to the Peace Palace in The Hague, the seat of the International Court of Justice, where the group was greeted by the Honorable Thomas Buergenthal. Justice Buergenthal joined the participants for a cocktail reception in the Peace Palace's lobby before dinner was served at the nearby Kurhaus.

The next day began with a plenary session chaired by Joseph D. Pizzurro of Curtis, Mallet-Prevost, Colt & Mosle LLP, and Philip von Schmidt auf Altenstadt of Houthoff Buruma. The panelists discussed issues related to the developments in the exercise of international and extraterritorial jurisdiction by U.S. courts. During lunch, the Honorable Clifford M. Sobel, U.S. ambassador to the Netherlands, spoke to the participants and emphasized the historic ties between the U.S. and the Netherlands, as well as the importance and strength of today's economic relationship.

In addition to the other presentations on Friday and Saturday, the participants had the opportunity to enjoy the sights of Amsterdam, including the Rijksmuseum, the Van Gogh Museum and a canal boat tour through the historic canals of the city. On Saturday, the conference concluded with a gala dinner and dance at the Park Plaza.

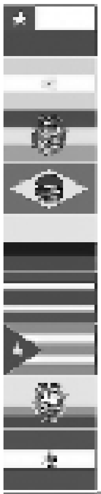
The Section is very pleased to have received strong support from this year's sponsors of the Fall Meeting and would like to thank the following firms: Citco; De Brauw Blackstone Westbroek; Loyens & Loeff; Stibbe; Allen & Overy; Alston & Bird LLP; Clifford Chance LLP; Curtis, Mallet-Prevost, Colt & Mosle LLP; Flemming, Zulack & Williamson, LLP; Houthoff Buruma; NautaDutilh; Phillips Nizer LLP; and the Braggiotti Gallery.

The International Law & Practice Section has been one of the fastest growing sections in the New York State Bar Association. We welcome you to join us for the 2004 Fall Meeting in Santiago!

NEW YORK STATE BAR ASSOCIATION

INTERNATIONAL LAW AND PRACTICE SECTION

SAVE THE DATE



FALL MEETING 2004

SANTIAGO de CHILE

November 10 - 14, 2004

The Ritz-Carlton Hotel

The 2004 Fall Meeting of the NYSBA's International Law and Practice Section will be held in Santiago, Chile, from Wednesday, November 10 through Sunday, November 14, 2004. The meeting is designed to go beyond national boundaries and aims at being a true **Latin American Summit**. The main theme will be "Latin American Bilateral and Multilateral Trade Agreements: Alliances or Competitors?" The Chair is now accepting proposals for substantive programs.

The meeting will be held at the new Ritz-Carlton Hotel in the Las Condes/El Golf section of Santiago. The hotel features everything you would expect from a Ritz-Carlton, and is located within a few blocks of leading Chilean law firms active in the international practice of law. The El Golf area also offers shopping, restaurants, etc. A subway station is close to the hotel.

Locations for social events currently under consideration include the Los Leones Golf Club, the Palacio Cousiño, the Club Hípico race track, the former Congreso Nacional, the Enoteca Restaurant on the top of Cerro San Cristóbal, and the Palacio de la Moneda (the Presidential Palace). Spousal Trips are also being planned, *e.g.* a tour of historic Santiago, visits to the Pre-Colombian and Ralli Museums and a day trip to the Coastal City of Valparaiso. A Golf Tournament is also being under consideration. Possible locations for Pre- and Post-Meeting Trips include Cuzco and Machu Picchu (Peru), as well as Chile's Lake District and Tierra del Fuego.

Sponsorship opportunities for the meeting are currently available.

Reserve your spot today! To request further information, please use the attached form. Thank you.

Oliver J. Armas
Meeting Chair

REQUEST FOR INFORMATION
SOLICITUD DE INFORMACIÓN
SOLICITAÇÃO DE INFORMAÇÕES

☐ Mr./Sr. ☐ Mrs./Sra. ☐ Ms./Srta.

Title
Título ……………………………………………………………………………………………

Last Name
Apellidos
Sobrenome ……………………………………………………………………………………………

First Name
Nombre
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Firm/Company
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City, State, ZIP
Código postal y ciudad
CEP e Cidade ……………………………………………………………………………………………

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Interest (✓ all that apply)	☐ attendee	☐ speaker	☐ sponsor
Interés (✓ lo que corresponda)	☐ participante	☐ orador	☐ patrocinador
Interesse (✓ todos que se aplicam)	☐ participante	☐ orador	☐ patrocinador

Comments
Comentarios
Comentários ……………………………………………………………………………………………

NEW YORK STATE BAR ASSOCIATION (INTERNATIONAL LAW AND PRACTICE SECTION) -- FALL MEETING
SANTIAGO DE CHILE -- NOVEMBER 10-14, 2004: A LATIN AMERICAN SUMMIT

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International Law and Practice Section

New Section Members

Karina Aiello Rocha
Laura Ruth Abel
Regan Kathleen Alberda
Hansen Alexander
Fabiola Altimari
Davina A. Amiri
Kimberley Tamara Tokunboh Arigbede
Diana Armstrong
Linda V. Aro
Ester Aronova
Luisa Erminia Arosio
Javier Asensio
Konstadina Athanasakou
Hala Audi
Ann S. Auiler
Ana Beatriz Nunes Barbosa
Nava Bat-Avraham
Roberta Marie Beary
Oleh Olexandrovych Beketov
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