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New York International Chapter News

A publication of the International Law and Practice Section of the New York State Bar Association

A Word from Our Immediate Past Chair

I'm pleased to report that 2002 was a very good year for the International Law and Practice Section and thanks are due to the ever-increasing contributions of our members. We, unfortunately, did not have the capacity to turn around a souring global economy or resolve any international conflicts, but we did have a fair number of accomplishments, some of which I would like to recount.

We began the year with a focus on the subject of "cross-border legal services." Our objective was to fashion a position for submission to the United States Trade Representative (USTR) for its consideration in develop-

(Continued on page 2)

A Word from Our New Chair

I am very pleased to be able to contribute this brief message to our International Chapter Newsletter.

Our International Chapters are one of our Section's most important resources. ICs serve as our eyes and ears into the important legal developments in many leading jurisdictions around the world. ICs also afford our Section members the ability to call on IC members when they need resources in those jurisdictions, a need which is becoming progressively more frequent, despite the current international climate.

My own experiences speak to this. I have frequent need for competent legal services around the globe. I

(Continued on page 4)

Inside

A Word from Our Immediate Past Chair

(continued from page 1)

ing a proposal for the World Trade Organization's Doha Round of Negotiations regarding the "progressive liberalization" of the General Agreement on Trade in Services (GATS). Our mission was to advocate that United States attorneys should have access to foreign markets consistent with New York State's liberal provisions for foreign lawyers and law firms. A number of our members, including Jim Duffy, Mike Maney, Tom Bonner and Manuel Campos-Galvan began working furiously to pull the proposal together in time to meet USTR and Doha Round deadlines as well as coordinating their efforts with a like-minded group at the Association of the Bar of the City of New York (ABCNY). Additionally, Les Reizes arranged to have the work-in-progress placed on the agenda of the House of Delegates so the recommendation could, ideally, be presented to the USTR with the full force of the New York State Bar Association (NYSBA). Fortunately, Steve Krane, then-president of NYSBA, expressed keen interest in the Section's work and provided insight into concerns the House of Delegates would undoubtedly have, particularly with respect to matters related to multidisciplinary practice. Considerable advocacy was required to assure the House of Delegates that the Section's proposal, if passed by NYSBA and adopted by USTR, would not provide an opening for multidisciplinary practice through some back door left ajar. The Section's efforts proved successful and the proposal was adopted by NYSBA in April 2002 and promptly submitted to USTR together with an identical proposal adopted by the ABCNY. The Doha Round of Negotiations on legal services will be continuing for a considerable period of time (the negotiations are scheduled to be completed by January 1, 2005) and much more work needs to be done. The Section is fortunate in that its efforts will benefit from the continuing involvement of Steve Krane and Sydney M. Cone, III (a leading authority on GATS and our liaison with ABCNY), who have both joined the Section.

In April 2002, the Executive Committee of NYSBA also considered the position of the Section with respect to a proposal by the Law Society of England and Wales to modify the legal education requirements for persons having studied law abroad who wish to sit for the New York bar examination. The Law Society sought change providing for eligibility based on the Society's certification of the person as a solicitor. The Section's position opposing modification of the education requirements, drafted by Jim Duffy and Mike Maney and presented by Tom Bonner, emphasized that the New York rules required everyone, regardless of citizenship, to have a specific minimum formal education in common law. As there were paths to certification as a solicitor in England and Wales that did not meet New York's educational criteria, the Section argued persuasively that it would undermine the intent of the New York rules to premise eligibility for the bar on certification as a solicitor. The Committee on Legal Education and Admission to the Bar supported the Law Society's proposal; however, the Executive Committee of NYSBA concluded our position was the one deserving of support.

In addition to the Executive Committee and House of Delegates of NYSBA paying close attention to the work of our Section by virtue of our efforts concerning cross-border legal services and the eligibility of solicitors to sit for the bar, we were in the spotlight regarding an effort to create a dialogue with the Central Bar of Iran. Following the tragic attack on the World Trade Center on September 11, then-President Krane received a letter of sympathy from the Central Bar of Iran. He became interested in exploring the possibility of sending a small delegation of lawyers to Iran to discuss legal issues of mutual interest and turned to our Section to pursue the matter. A number of our members expressed interest in this project, including Saul Sherman, Chuck Biblowit and Carole Basri and there was a considerable amount of excitement when our initial overture to the Central Bar of Iran resulted in a welcome with open arms. Unfortunately, before we were able to work out the considerable details, President Bush pronounced Iran as being part of the "axis of evil" and the communications from the Central Bar of Iran dwindled and then stopped. (Surprisingly, I received a Christmas card from my counterpart at the Central Bar of Iran and there lingers some hope of a meeting down the road.) Despite the disappointment of an unrealized project, some good has come from the exercise. The prospect of sending a delegation of lawyers to Iran intrigued the Executive Committee of NYSBA on a conceptual level. I would not at all be surprised to see other bold ventures initiated. Our Section has already been asked by NYSBA President Tom Levin to explore the possibility of sending a delegation to Cuba and, hopefully, we will be able to contribute to its realization.

In May 2002, our Section held its Executive Retreat in New York City to do our small part in honoring the victims of the World Trade Center bombing and helping the survivors by contributing to the economic well-being of the city. My thanks to Jack Zulack for organizing the retreat and to Jack and his firm, Flemming, Zulack & Williamson, for serving as our host in lower Manhattan.

In October 2002, our Section held its Fall Meeting in Rome and the three-day conference was an unparalleled success due to the extraordinary planning and execution of Paul Frank, Francesco Gianni and Tomaso Cenci, as well as countless others, including Linda Castilla. Gianni, Origoni, Grippo & Partners could not possibly have been more gracious hosts for our Section in Rome. While it may not have been surprising to have attracted a high number of registrants, given the appeal of Rome, we had phenomenal attendance at the programs throughout the conference. This was a real tribute to the panelists who had to compete head-on with one of the world's most alluring cities. Not only was the conference a great success from a substantive standpoint, but the Section was able to make a profit despite the high expense of staging a first-rate event in Rome. This was not the result of good luck, but rather the result of countless hours of preparation by the planning committee.

Our Annual Meeting in January 2003 focused on Sarbanes-Oxley and its impact on foreign companies whose securities are registered in the United States. Jim Duffy, Paul Frank and Calvin Hamilton brought together a distinguished group of speakers with expertise on corporate and securities law in numerous countries who were wrestling with squaring Sarbanes-Oxley with the laws of foreign jurisdictions. The program was followed by our luncheon at which we presented our annual Award for Distinction in International Law and Affairs. This year, we were privileged to honor Professor Eric Bergsten, who was nominated by Jack McMahon and was quite well known to a number of the members of our Executive Committee. Professor Bergsten spent many years on the United Nations Commission on International Trade Law (UNCITRAL) before joining the faculty at Pace Law School and is one of the world's leading authorities on international commercial and trade law as well as alternative dispute resolution. He developed Pace University's William C. Vis International Commercial Arbitration Moot held annually in Vienna and serves as its Director. The Moot, sponsored by UNCITRAL, the American Arbitration Association and other prestigious organizations, brings together over one hundred teams of law students from more than thirty countries for a week of international commercial arbitration. We were also honored to have Professor Bergsten introduced by William K. Slate II, President and Chief Executive Officer of the American Arbitration Association, as well as by having the Dean of Pace Law School, several professors and a group of law students in attendance for the award. Additionally, we were pleased to present our annual writing competition award to Michelle Ray Pinzon together with the prize of $2,000 provided by Cleary, Gottlieb, Steen & Hamilton in memory of its former partner, and our former chair, Albert Pergam.

There are numerous other members of our Section deserving of recognition for contributions which made my year as chair so rewarding. The officers, Jim Duffy, Paul Frank, Bob Leo and Jack Zulack, could not have been more supportive. Numerous committee chairs held important programs, and Meryl Sherwood and Helena Tavares Erickson successfully carried on with the Women's Interest Networking Group instituted by my immediate predecessor, Isabel Franco. Additionally, Joyce Hansen and Allen Kaye worked tirelessly to promote membership; Allen Kaye and John Blyth each organized a major CLE program; Lester Nelson, Chuck Biblowit and David Detjen continued to publish our Section's impressive publications; Marco Blanco and Ewout Van Asbeck made amazing progress in planning for this year's Fall Meeting in Amsterdam; a significant number of former Section Chairs remained extremely active in the Section; and, we welcomed back Larry Darby from Hong Kong and Eduardo Ramos Gomez from Singapore. We had a very good year and I'm certain that the Section's accomplishments this coming year will raise the bar even higher.

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A Word from Our New Chair

(continued from page 1)

cannot emphasize too strongly how pleasing it is to be able to contact an IC Chair or Member with a problem in their jurisdiction and know my client will get top-tier services because of our common bond as members of our Section.

This year, our Section will be placing greater emphasis on the members of our ICs. At our last Executive Committee Meeting on March 4th in New York City, we agreed to create a special part of our annual Seasonal Meeting that is devoted exclusively to our ICs. We have not worked out all the details yet, but we already have the general format of what we plan to do.

Traditionally, our annual Seasonal Meeting (which will be in Amsterdam this year) starts on a Wednesday afternoon with an Executive Committee Meeting followed by an opening reception for the general membership of our Section. This year, we are going to have Tuesday evening and Wednesday morning devoted entirely to our ICs with a special reception for IC Members Tuesday evening. We will also have meetings Wednesday morning devoted exclusively to IC business. There will be no additional charge to IC members attending these events, provided they also register for the full meeting.

New York attorneys are extending their reach throughout the world as we grow and prosper with our clients who are facing up to the challenges and benefits of global business. There are many ways lawyers and law firms can address the challenges of the global marketplace. I do not believe it will be possible in my lifetime, at least, to see a truly global law firm, if such a thing is possible. However, I can easily see independent lawyers and law firms with a common bond and common interests cooperating to provide the highest quality legal services around the globe to serve the interests and needs of joint clients. I see this as the best model for meeting the global needs of the international client.

I would encourage you to share my vision and my commitment to making our Section and the New York State Bar Association an important catalyst for creating a network of superior lawyers and law firms around the globe. We seek a network of lawyers and law firms who share the common bond of being members of our Section. This will enable us to work effectively with one another to serve the needs of global clients wherever those needs may arise.

Being less than excellent is not all right. It is not professional. As individual lawyers and law firms, we can be excellent and professional in our respective jurisdictions, but it is a vain hope to believe a single law firm can have the same level of excellence and professionalism in every jurisdiction. Being the best we can be and building on our common bond of being New York lawyers and members of the New York State Bar Association is an important goal. This way, we can all join as needed to serve our clients better and achieve results no single law firm can accomplish.

I look forward to seeing as many of you as possible in Amsterdam. Please remember your Section wants you to come. Your Section needs you to be more involved. Your Section hopes to get to know you better and for you to know your colleagues better. Please save the dates, starting Tuesday evening, October 21, 2003, through Sunday morning, October 26, 2003. Tuesday evening and Wednesday morning are reserved for IC activities. There is no charge for IC members who register for the remainder of the meeting. I should add this is an easy way to get your MCLE credits for the year.

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Garden City, N.Y.

Our New Co-Editor

I would like to take this opportunity to introduce myself to the International Law and Practice Section and to thank Oliver Armas for inviting me to join him as Co-Editor of the *New York International Chapter News*. I look forward to working with Oliver and together, we will continue the tradition of producing a relevant, informative and professional newsletter for the Section.

I am a Canadian business lawyer. My practice focuses on mergers and acquisitions and corporate finance transactions. I have recently been involved with the opening of a Canadian business law office in New York City. This experience has provided me with a deeper understanding of the breadth of legal integration that Canada and the United States have experienced in the past decade. These and other continental ties are only going to become more pervasive, and with that, the relevance of international law becomes integral to all areas of legal practice.

As a new member of the New York legal community, and on behalf of all of the partners of Fraser Milner Casgrain, LLP, I would also like to take this opportunity to thank the New York State Bar Association for their receptive welcome to the New York legal community.

During its 160-year history in Canada, Fraser Milner Casgrain, LLP has been an active member of numerous industry and trade associations and is committed to involvement in a variety of community initiatives. My partners and I intend to have a similar presence and involvement in New York City. I believe that it is incumbent upon attorneys to assist in the continuing education and development of the legal community, and I intend to work diligently with the International Law and Practice Section to provide such assistance.

Thank you for this opportunity.

Richard A. Scott, Co-Editor
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IL & P Country News

Argentina

Laws No. 25,612, 25,670 and 25,688; Environmental Minimum Standards

Section 41 of the Argentine Constitution as amended in 1994 recognizes the right to a healthy, balanced environment, the purpose of sustainable development; the "polluter pays" principle, whereby environmental damage generates the obligation to "restore" (subject to law); the right to information; and a ban on the entry of hazardous waste.

Since the authority to protect the environment is included in the generic prevention and control concept which falls within the scope of police power, pursuant to the federal nature of our Constitution, said authority has been conferred to the provinces and, only by delegation, to the Nation. However, the national government is empowered to issue federal laws providing for minimum standards that must be fulfilled throughout the Argentine territory.

In the last few months, Congress has enacted several laws related to the protection of the environment, setting forth such minimum environmental standards for industrial waste, PCBs and water.

In this regard, Law No. 25,612 (hereinafter the "IWL"), Law No. 25,670 (hereinafter the "PCBL") and Law No. 25,688 (hereinafter, the "WL") respectively regulate the *"minimum standards for environmental protection vis-à-vis the overall process of industrial waste and that originated by activities involved in rendering services," "the minimum environmental protection standards to manage Polychlorinated Biphenyls"* and *"the minimum environmental requirements for preservation, development and rational utilization of water."*

1. The IWL, passed in July 2002, covers all industrial waste, be it "hazardous" or "non-hazardous" and, even though it has not been regulated yet, governs, throughout the Argentine territory, the obligations resulting from the generation, storage, transport, treatment and final disposal of industrial waste.

   By enacting such law, the Congress attempted to replace and repeal National Law No. 24 051 on Hazardous Waste (hereinafter the "HWL"). However, the National Executive Branch, upon promulgating the IWL, vetoed Section 60 thereof that provided for the repeal of the HWL. As a result thereof, at present both laws continue to co-exist and overlap.

In general terms, the IWL imposes on local authorities the duty to identify the generators of waste matter and the obligation to keep registers in which the generators, carriers and operators of such industrial waste and services must be recorded.

As concerns the transportation of waste, the IWL provides that when the waste must be transported outside the frontiers of a given province or of the City of Buenos Aires, a prior agreement must be reached between or among the respective jurisdictions allowing such transfer.

In turn, the generators of industrial waste and/or waste generated by activities involved in rendering of services, are under the obligation to periodically submit a sworn statement informing the authorities about the nature of the waste generated and the processes whereby it was produced; likewise, it is mandatory for them to use a manifest to document the transfer thereof.

Following the guidelines of the HWL, the new law establishes a system of responsibility for damages caused by industrial waste, which modifies the general liability system established by the Civil Code. According to the IWL, the generator of the waste, in its capacity as owner thereof, is liable for the damages it has caused. This liability continues even after it has been delivered to the carrier or the treatment plant or final disposal plant.

Moreover, the IWL establishes the presumption, unless otherwise proved, that all industrial waste is regarded as a dangerous thing under the provisions of section 1113 of the Civil Code. The generator, in its capacity as owner or custodian, is not released from liability upon evidencing the negligence of a third party for whom it is not responsible, whose action could have been avoided by exercising the due care and diligence required in the particular circumstances.

The liability of the generator for damages caused by industrial waste continues to exist despite the transformation, specification, development, evolution or treatment thereof, save for (i) damages caused by the greater hazardousness of waste as a result of defective treatment in the treatment or final disposal plant and (ii) when waste is used as input in another productive process.

The administrative penalties imposed for violation of the IWL range from fines to suspension and cancellation of record in the registers; in case of second offenses, the penalties become more burdensome, and in case of infringements by corporate persons, the latter's executive officers are jointly and severally liable.

2. Passed in November 2002, the PCBL sets forth the minimum environmental protection standards to manage PCBs.

   As provided in the PCBL, PCBs are understood as polychlorinated biphenyl, polychlorinated terphenyl (PCT), monomethyltetrachlorodiphenylmethane, monomethyldichlorodiphenylmethane, monomethyldibromodiphenylmethane and any mixture containing a total of the above substances in excess of 0.005% by weight (50 ppm).

   The main aspects of the PCBL are summarized below:

   (i) The installation of equipment containing PCBs throughout Argentina as well as the bringing into the Argentine territory of PCBs and equipment containing them is prohibited.

   (ii) It sets forth that manufacturers, traders and persons having PCBs, or which used PCBs or devices containing PCBs should be registered with the Integrated National Registry of PCBs Holders, which was created under this law. Those having devices that contain an aggregate volume of PCBs of less than a liter are released from this obligation.

   (iii) Persons using PCBs should take out a civil liability insurance, surety bond, bank guarantee, self-insurance, repair fund or any other similar guarantee to secure that any possible environmental damages shall be cured and to cover any health risks that their business may cause.

   (iv) It provides for the gradual replacement of the devices that contain PCBs, fixing the year 2010 as due date, and it prohibits the restocking thereof. It further provides that the holders who wish to keep said devices in operation should decontaminate them before said year. In addition, the PCBL provides that all decontaminated devices should carry a label with the following wording: "decontaminated device that contained PCBs."

   (v) All PCB holders must submit a plan for the removal of devices containing PCBs before 2005.

   (vi) All PCB holders have the following obligations, to be discharged before January 18, 2003:

   -mark the equipment and containers that contain PCBs and used PCBs, and attach a label reading "contains PCBs";

   -keep an internal *record* of the activities involving PCBs; and

   -condition the devices containing PBCs, the PBCs and used PBCs storage areas and take all necessary steps to avoid risking the health of people and polluting the environment.

   The administrative sanctions against breach of Law 25,670 range from warning, fines and disqualifications to shutting down; and in case of second offenders, penalties are doubled.

3. Passed in December 2002, the WL sets forth the minimum environmental requirements for preservation, development and rational utilization of water.

   Pursuant to the WL, the term "water" includes water that makes up the aggregate streams and bodies of water, either natural or artificial, surface or subsoil, as well as that held in aquifers and underground rivers, together with atmospheric water.

   Additionally, some activities are deemed as "utilization of waters" by the WL, such as the taking and diversion of surface waters, the dumping of substances into surface waters, the discharge of substances into coastal and underground waters, the change in physical, chemical or biological characteristics of water, etc. The WL provides that a permit must be previously obtained to carry on such activities.

   Lastly, it stipulates that the national environmental authority is vested with powers to fix the maximum pollution levels pursuant to the various uses of water, as well as the environmental guidelines and standards concerning quality of water, and to draw up and update the National Plan for the preservation, development and rational use of water.

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Investing in Argentina: Certain Environmental Issues

Abstract: This summary discusses the Environment General Law (EGL) rules, which provide not only the concept for the minimum preservation standards set forth in the national Constitution, but also the basic aspects that will govern the national environmental policy. The discussion includes certain environmental standards that should be taken into account when considering the possibility of investing in Argentina.

Summary: Back in 1994, the National Constitution was amended. Even though the main purpose of the amendment was to allow presidential reelections, certain modern concepts were also introduced. Among these concepts, section 41 deals with the right of all inhabitants to enjoy a healthy and balanced environment, appropriate for the human development, together with the duty to preserve it.

To that end, section 41 also established the duty of the Congress to pass a law guaranteeing minimum preservation standards for the environment. Eight years later, the Congress approved the EGL (Law 25.675) establishing normative guidelines that will govern the national environmental policy. The main guidelines are briefly summarized below.

- **The Environment as a Legally Protected Value**: The EGL sets forth the minimum standards toward adequate and sustainable environmental management, the preservation and protection of biological diversity, and the implementation of a sustainable development.
- **Minimum Preservation Standard:** The EGL establishes that the minimum preservation standard as identified in section 41 of the National Constitution is any regulation granting uniform environmental protection, and that is aimed to impose the conditions that are necessary in order to guarantee the protection of the environment.
- **Public Order:** The EGL clearly establishes that its terms are of a public order nature, which means that they may not be modified or altered by private agreements. Moreover, it stresses that its terms shall be used for the interpretation of the specific regulations to be passed, which shall be valid insofar as they are not opposed to the terms of the EGL.
- **Federal Environmental System:** The EGL creates the Federal Council for the Environment (COFEMA in its Spanish initials) which will be the entity in charge of developing the coordination of the national environmental policy among the national government, the provincial governments, and the government of the city of Buenos Aires. Furthermore, the EGL creates an Environmental Compensation Fund, with the purpose of guaranteeing the quality of the environment, the mitigation of damages or dangerous effects over the environment, and the preservation of ecologic systems and the environment.

What is an environmental damage?

The EGL defines an environmental damage as any relevant alteration that adversely modifies the environment, its resources, the ecosystems equilibrium, or the collective goods or values. Any person that is held liable for an environmental damage shall be responsible to bring back the environment to its previous conditions. In case that such restoration is not feasible, such person shall be subject to an indemnification to be set by the justice, to be deposited with the Environmental Compensation Fund.

Is it a legal requirement to make an evaluation of the environmental impact?

Any activity within the Argentine territory that may degrade the environment, or any of its components, or to affect the population's quality of life, significantly, shall be subject to a prior evaluation of environmental impact. This evaluation must contain a detailed description of the activities to be performed, the identification of the impact on the environment, and the steps to be taken in order to mitigate the undesired negative effects thereto.

Is it necessary to hire any insurance?

Yes, all natural persons or legal entities, private or public, performing activities that are risky to the environment, the ecosystems and their components, shall have to hire an insurance policy with a good-reputation company in order to guarantee the financing to restore any eventual environmental damage.

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Australia

Australian Law Issues for Secured Funding for Corporate Acquisitions

Introduction

This article focuses on specific Australian law issues in relation to taking security over an Australian company to secure debt funding on a corporate acquisition. This is in the context where the acquiree companies involve a foreign holding company and an Australian subsidiary company. Specific Australian law issues include the method of taking security, the concept of stamp duty payable on the security, and Australian government-imposed restrictions in certain circumstances on the granting of security. We then examine the ranking of employees over secured creditors in an insolvency situation. An understanding of the peculiarities of Australian securities law can assist in the founding of reasonable expectations for how to approach the granting of, and perfection, in security by Australian companies.

The Main Types of Australian Security

The most common types of security that may be taken in Australia include the following:

(a) Fixed and floating charge by the Australian subsidiary;

(b) Real property mortgage by the Australian subsidiary;

(c) Share mortgage over the shares in the subsidiary by the holding company; and

(d) Assignment (or mortgage) by the Australian subsidiary of receivables.

Note that in Australia, floating charges are usually the form of security given over a company's circulating assets such as receivables, inventory and cash.

Perfecting Security—Filing and Registration Requirements

Mortgages and charges taken in Australia must be registered. If a charge is not registered, it will lose priority to subsequent registered charges. If an event of insolvency occurs in respect of the Australian company, the charge may be unenforceable against a liquidator.

If the holding company carries on business in Australia, it would be required to be registered as a foreign corporation with the Australian Securities and Investments Commission (ASIC). In that case, a share mortgage given by the holding company would be required to be registered as a charge.

Payment of Stamp Duty on Australian Security

Stamp duty is payable in the Australian States or Territories where the assets that are the subject of the security are located. Stamp duty must be paid within a specified period after the execution of the security.

The precise rate of duty differs from State to State, but is approximately 0.4% of the amount secured where the securities are expressed to be unlimited. The chargor is usually liable to pay.

Where the facilities are for a large amount and the Australian component of the overall security represents a small proportion of the total security, the amount of duty payable may be reduced by limiting the amount secured by the security, usually with reference to the value of the assets that are the subject of the security.

It also may be possible to minimise the imposition of duty by structuring the security using a combination of structures that attract only nominal or limited amounts of stamp duty.

Government Restrictions on Dealings by Australian Subsidiaries

The Australian Federal Government can restrict the ability of non-Australians acquiring interests in various Australian assets, including shares in Australian companies.[1] Notification to the Foreign Investment Review Board in Australia prior to the proposed acquisition is required where the total assets or land value of the Australian subsidiary are in excess of A$50 million or more than 50% of the total assets of the corporate group being acquired. If the Australian Federal Treasurer does not take action against the proposal within 30 days after notification, the Government loses its ability to block the proposal or impose conditions. Approval is normally granted unless the proposal is judged to be contrary to the national interest.

Required Corporate Benefit of the Australian Subsidiary

Unless the Australian subsidiary derives a commercial or corporate benefit from a transaction it enters into, that transaction may be set aside in the event of the insolvency of the Australian subsidiary or the corporate group. It is not sufficient to show that the arrangements confer a general benefit on the corporate group. The test applied by the Australian subsidiary is whether a reasonable person in the position of a director of the Australian subsidiary would have entered into the arrangements having regard to:

- the whole of the circumstances existing at the time;
- the benefits to other parties to the transaction and the benefit and detriment to the Australian subsidiary;
- whether the commercial benefit is sufficient to outweigh the risk being incurred by the Australian subsidiary in entering into the arrangements.

To commit a company to an agreement that is not in its best interests is a breach of the directors' fiduciary duties. The directors of the company may become personally liable if a transaction authorised by them is not for the benefit of the company.

Financial Assistance

If the proposed acquisition involves the Australian subsidiary financially assisting the acquisition vehicle, by giving a guarantee, to acquire shares in the foreign holding company, it will attract the operation of section 260A of the Australian Corporations Act 2001 ("Corporations Act").

The effect of section 260A is that the Australian subsidiary may financially assist the purchaser to acquire shares in its holding company if the giving of the financial assistance would not "materially prejudice" the interests of the Australian company or its shareholders or the Australian company's ability to pay its creditors.

If there is any doubt as to whether the "no material prejudice" test is satisfied, shareholder approval should be sought.

The application of the "no material prejudice" test requires a comprehensive assessment of the effect of the proposal. If there is uncertainty about the proposed effect of the proposal on the assets, future profitability, returns to shareholders, or future cash flow of the Australian company and the group generally, it would be beneficial to obtain an accounting opinion to the effect that the proposal would not be materially prejudicial to the interests of shareholders or creditors of the Australian subsidiary.

Any Australian company providing financial assistance must lodge notification at ASIC and must also seek a shareholder resolution at least 14 days before the financial assistance.[2]

Enforcement—Priority of Secured Creditors in Insolvency

Even though the Australian subsidiary may have perfected security and all of the obstacles described in the paragraphs above have been dealt with, the potential exists for a secured creditor's priority in an insolvency situation to be secondary to the subsidiary's employee's entitlements.

When secured creditors seek to enforce their security, they are normally entitled to ignore the claims of unsecured creditors until the debt has been satisfied. Under Australian law, there are two exceptions to this principle, both relating to employee entitlements.

First, in a liquidation, if there is not enough uncharged property available to pay certain employee entitlements, the liquidator is entitled to make payments for those employee entitlements out of assets which are the subject of a floating charge.[3]

The second exception is where a secured creditor has enforced a floating charge by appointing a receiver or taking possession of the floating charge assets itself. Before any of the floating charge assets can be applied to the secured debt, those assets must be used to pay certain employee entitlements before they can be applied to secured debt.[4]

The employee entitlements which have priority are:

(a) unpaid wages and superannuation contributions;[5]

(b) compensation for injuries under worker's compensation laws;[6]

(c) amounts due for "leave of absence" that is, long service leave, extended leave, recreation leave, annual leave, sick leave or any other form of leave which the employee was entitled to;[7] and

(d) retrenchment payments due under the employee's contract of employment, or which by law, award or agreement relating to employment conditions, must be paid on termination of employment.[8]

These priority entitlements can give rise to very significant claims. In a recent corporate collapse by a national airline,[9] the estimated priority entitlements of employees are in the order of A$600 million.

Employees only have priority with respect to assets which are subject to a floating charge. The question is whether that priority can be defeated by a lender taking a fixed charge over assets which would normally be subject to a floating charge.

In 1996 a trial judge of the New South Wales Supreme Court held that it was possible to defeat the priority claims of employees with respect to receivables simply by using the device of taking a fixed charge over whatever receiveables remained uncollected at the time a secured creditor sought to enforce its security. Thus employees had no priority over the uncollected receivables.[10] In coming to that conclusion, he relied on a 1994 English decision.[11] In 2001 the United Kingdom Privy Council held that the 1994 decision was wrongly decided. Although Australian courts are not bound to follow decisions of the Privy Council, it would not be safe to assume that the *Whitton* case currently represents the law in Australia.

In addition to the uncertain status of priority claims in Australian courts, there is another reason it may be unwise for a secured lender to take a fixed charge over assets that would normally be the subject of floating charge security.

As a result of a number of high-profile corporate collapses in recent years, the Australian Government was forced to legislate to prevent structures and transactions which have the effect of defeating employee priorities in an insolvency. The legislation operates in a number of ways to protect employee entitlements from being defeated by transactions which were entered into with the intention of defeating or reducing employee priority entitlements.[12]

Conclusion

The granting of security by an Australian subsidiary has various legislative hurdles and considerations to take into account. The uncertain status of the ranking of employee entitlements with regard to fixed charges presents a further consideration with regard to the Australian component for the securing of debt funding in a corporate acquisition. An awareness of the issues that surround the participation of an Australian subsidiary in granting security will assist in grasping what issues must be addressed and what may be possible for the Australian subsidiaries to grant under Australian legislation.

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Endnotes

1. The Foreign Acquisitions and Takeovers Act (FATA) and the policy guidelines issued by the Foreign Investment Review Board (FIRB).
2. Corporations Act § 260B.
3. Corporations Act § 561.
4. Corporations Act § 433.
5. Corporations Act § 556(1)(e).
6. Corporations Act § 556(1)(f).
7. Corporations Act § 556(1)(g).
8. Corporations Act § 556(1)(h).
9. Ansett Airlines Limited.
10. *Whitton v. ACN 003 266 886 Pty Limited* (1996) 42 NSWLR 123.
11. *re New Bullas Trading Limited* [1994] BCC 36.
12. Corporations Act pt. 5.8A.

Brazil

The Brazilian Limited Liability Quota Companies Under the New Civil Code: The New Concept of "Control"

After many years of discussion in Congress, the new Brazilian Civil Code (law 10.406/02) entered into effect on January 11, 2003. The new Code introduced several new rules in many areas of law in Brazil.

In the corporate area, one of the most relevant changes introduced by the new Brazilian Civil Code, which is perhaps the most interesting for foreign investors, is related to the organization of business entities in Brazil.

Most corporate types in Brazil were previously regulated by the 1850 Brazilian Commercial Code, except for those regulated by specific legislation, such as the limited liability quota company (or the so-called "*limitada*"), ruled by 1919 Decree 3.708, and the *corporations* ("sociedades anônimas"), ruled by 1976 law 6.404.

The new Code revoked the 1850 Brazilian Commercial Code and the 1919 Decree 3.708, and thus now regulates all types of Brazilian companies, except for those which remain being governed by specific legislation, such as the *corporation* (as law 6.404 has not been altered).

Traditionally, the two main types of companies that have been used for most business operations in Brazil have been the *limitada* and the *corporation*. Statistically, the *limitada* has by far been more utilized than the *corporation*. One of the reasons for this preference for the *limitada* was that, under the revoked 19-article Decree 3.708, the partners had more flexibility to establish their rights and obligations in the articles of association. Besides, the Decree did not require the publication of any documents and/or financial statements in newspapers, which made the *limitada* less bureaucratic and less expensive to operate than the *corporation*.

Since it is governed by specific legislation, the *corporation* has not been affected by the new Brazilian Civil Code. The *limitada*, however, has dramatically been changed by the new Code.

One of the most relevant changes regarding the *limitada* has to do with the minimum required quorums for the approval of certain corporate matters by the partners. Under the old legislation, the minimum voting requirements were 50% plus one quota, although the articles of association could establish higher quorums for certain corporate matters, as agreed by the partners. Therefore, partners representing the majority of the capital stock could be, under regular conditions, the controlling partners of the *limitada* if the articles of association did not establish higher quorums. Based on that, partners holding a 50%-plus-one quota would have the control of a *limitada*.

The provisions of the new Brazilian Civil Code, however, deeply affect the *limitadas* in this aspect. The new law provides for minimum voting requirements higher than the majority of the capital stock in several cases. Certain matters will now depend on favorable votes of partners representing the majority of the partners attending the meeting while certain others will depend on favorable votes of partners representing three-fourths (3/4) of the capital stock, in accordance with the importance and complexity of the matter involved. In other cases, even the vote of partners representing the totality of the capital stock (unanimous vote) may be required.

The election and destitution of managers will now require at least the affirmative vote of partners representing two-thirds (2/3) of the capital, and the affirmative vote of three-fourths (3/4) of the capital will be necessary for the approval of amendments to the articles of association, mergers, consolidations and dissolution of the *limitada*. The unanimous vote is required for the election of non-partner managers, if the capital stock is not fully paid in, and, likewise, for the transformation of the *limitada* into another corporate type, if the articles of association do not expressly provide for a lower quorum.

Consequently, the concept of control of the *limitadas* has dramatically changed with the new Brazilian Civil Code. By virtue of the new legal minimum voting requirements, partners holding the majority (50% of the quotas plus one) of the capital stock no longer control a *limitada*. As a general rule, the control of a *limitada* now requires a minimum three-fourths (3/4) equity participation. If the capital stock is not fully paid in, the controlling interest must be even higher: 100% of the quotas.

Such higher minimum voting requirements directly affect the existing Brazilian joint ventures formed as *limitadas* whereby the control is based on a simple majority. In these companies, if the majority partner wishes to remain with the control of the company, he will have to raise its interest, or to transform the company into a *corporation*.

Due to the new minimum voting requirements established by the new Code, alternatives must be created if the intention is to control a company holding less than three-fourths (3/4) of the company. One of them could be to use the *corporation*, since in this corporate type the control remains with shareholders holding the majority of the shares.

However, the *corporation* might not be the best vehicle for the foreign investor for other reasons (for example, the *corporation* does not have the "pass-through entity" status, according to the tax laws in the United States).

An in-depth analysis should be done case-by-case by the investor doing or intending to do business in Brazil and its local lawyers in order to preserve or to have the control of the Brazilian company. The matter has clearly become more complex under the new Civil Code, which, aiming at promoting the protection of minority partners, has on the other hand created some difficulties to the controlling partners' life.

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Brazil: The New Limited Liability Company

Foreign investors often establish a direct presence in Brazil through a local subsidiary, thereby securing direct control over activities, management and personnel. In addition to market and management considerations, foreign investors may choose to invest alone and establish a Brazilian subsidiary, rather than enter into a joint venture with or acquire an existing local company, to avoid labor and tax succession concerns associated therewith.

Brazilian laws provide for several types of company forms, of which the limited liability company (*Sociedade Limitada* or *Limitada*, as it is commonly referred to) and the corporation (*Sociedade Anônima* or *S.A.*, as it is commonly referred to) are most utilized.

The *Limitada* is now governed by the Brazilian Civil Code of 2002, which became effective on January 11, 2003. In the event of omissions in the applicable chapter of the Civil Code, the *Limitada* shall be supplementary governed, depending on the language of the articles of association, by the Corporation Law (Law 6.404 of December 12, 1976, as amended), or by the regulations of the *Sociedade Simples*, which is a new type of company also regulated in the Civil Code.

A *Limitada* needs at least two partners, also known as quotaholders, whether or not they are Brazilian resident individuals or legal entities. A partner who is not a Brazilian resident must be represented by a Brazilian resident pursuant to a power-of-attorney.

The articles of association and any amendments thereto may be drafted to suit the purposes of the *Limitada*, but must be written in Portuguese and set out: (i) the names of the partners and respective personal data, (ii) the name of the *Limitada*, which must include its purpose and the expression *"Limitada "* and may not be identical or similar to the name of a pre-existing company, (iii) the address of the head offices; (iv) the company's purposes, which must be clearly described, (v) the company's duration, which may be determined or undetermined, (vi) the company capital and whether or not it is fully-paid and the payment term, and (vii) each partner's participation in the capital and that the responsibility of each partner is limited to the company's subscribed capital. Other provisions may be included if the partners so desire, such as (i) regulations on the transfer of equity participation, (ii) the audit committee, (iii) corporate actions that require prior approval from the partners, in addition to those specified by law and (iv) authorization for the exclusion of minority partners from the company, if due cause is present.

The capital of a *Limitada* is represented by units called "quotas," with no issuance of certificates of ownership. The capital is denominated in Brazilian currency and recorded in the articles of association, as amended from time to time to reflect any assignment and transfer of quotas and capital increases and reductions. No minimum capital requirements exist. However, where the company seeks to appoint a nonresident individual to a management position, the individual must obtain the required resident status in Brazil through a permanent visa, which in its turn triggers minimum capital requirements.

Each partner must subscribe for quotas, which may be paid upon subscription or subsequent thereto in cash or moveable or immovable property. The value of moveable or immovable property contributions are not subject to expert appraisal, and may be an amount mutually accepted by the partners, which nevertheless shall be jointly liable for five years with respect to any deficiency between the actual value of the assets and the value attributed to them at the time of the capital contribution. A partner who fails to fully pay up quotas subscribed for by it on the terms provided in the articles of association may (i) be removed from the *Limitada* upon reimbursement of any amounts it has previously paid, (ii) be charged for losses and damages, or (iii) have its participation in the company reduced to those quotas already paid up, always at the discretion of the remaining partners.

Profit distributions may be effected at the discretion of the partners and/or may be specifically provided for in the articles of association, both as to time and amount. The articles of association may authorize profit distributions that are not in proportion to the respective quota interest of each partner. However, this flexibility does not benefit partners seeking to effect foreign remittances of profit distributions. The interest of a foreign investor in a company is recorded in a foreign investment registration with the Central Bank of Brazil, which entitles the partner holding title thereof to effect foreign remittances of company profit distributions in proportion to or less than, but not more than, the quota interest recorded therein.

Quota transfers and assignments among the partners and/or to third parties are subject to the provisions of the articles of association. In the absence of specific provisions in the articles of association, quotas may be freely transferred among partners, and may also be transferred to third parties if there is no objection from partners representing at least one-fourth of the capital. A *Limitada* may redeem issued quotas, provided that such quotas are acquired with available funds and without prejudice to the capital. Changes in capital ownership and levels are effected by an amendment to the articles of association registered with the competent state registry.

As a matter of internal relationship among partners, each partner shall be responsible for the payment of its respective subscribed quotas. With respect to claims of third parties, however, all partners shall be jointly liable for the entire amount of the corporate capital until it is fully paid. Personal unlimited liability may attach to a partner who votes for or consents to a resolution contrary to the articles of association or the law.

The law provides for different quorums of approval for the decisions to be taken by partners. The quorums indicated below relate to those matters that shall be necessarily decided by the vote of partners:

(1) Three-fourths of the capital for (i) amendments to the articles of association; and (ii) merger, consolidation, dissolution and termination of liquidation procedures.

(2) Two-thirds of the capital for (i) appointment of managers that are not partners once the company's capital is fully paid-in (unanimous approval is required until capital is fully paid-in); and (ii) unless otherwise established in the articles of association, removal of managers that are partners and have been appointed in the articles of association.

(3) More than 50 percent of the capital: (i) appointment of partner managers in a separate document outside the articles of association; (ii) removal of managers other than partner managers appointed in the articles of association; (iii) manager compensation if not established in the articles of association; and (iv) court-relief proceedings.

Such quorum requirements may be increased, but not decreased, by contractual provisions included in the articles of association. Other matters submitted to the partners shall be approved by a majority of votes, unless otherwise established in the articles of association.

A partner who dissents to an amendment to the articles of association or to a merger or consolidation is entitled to withdraw from the *Limitada*. If the articles of association are silent with respect to the dissenter's rights, the dissenter will be entitled to receive the amount of its equity participation in cash, calculated at book value as of the date of the decision that triggered the withdrawal right, within ninety (90) days of such decision.

Unless approved in writing by all partners, all matters to be decided by partners shall be submitted for approval in a partners' meeting. Such meetings may take the form of more rigid general meetings (*assembléias*) or more flexible meetings (*reuniões*). The former is mandatory for companies with more than ten partners, and the latter may be adopted by all other companies. While *assembléias* must follow mandatory legal requirements, including publication of call notices in newspapers, *reuniões* provide more flexibility because they can be freely regulated in the articles of association.

Annual partners' meetings must be held within the first four months following the end of each fiscal year. Any other meetings shall be held if and when company interests so require. In annual meetings, partners shall review financial statements and management accounts, appoint new managers, if applicable, and decide on any other matters included in the agenda. Copies of the financial statements shall be forwarded to the partners at least thirty days prior to the meeting.

Management of the *Limitada* may be vested in one or more resident individuals, appointed in the articles of association or in a separate document. Managers may be partners or not, but in the latter case the articles of association must expressly authorize the appointment of non-partner managers. The *Limitada* is liable for all acts performed on its behalf by managers acting within the scope of their powers.

The *Limitada* may have an audit committee comprised of three or more members, all of whom reside in Brazil and are elected at the annual partners meeting. The responsibilities of the audit committee include (i) to review, at least quarterly, the books and accounts of the company, (ii) to denounce any mistakes, fraud or crimes relating to company matters, and make suggestions in the interest of the company, (iii) to call annual partners meetings when managers fail to do so, and (iv) to perform certain acts during the liquidation of the company.

The following *Limitada* documents shall be published in newspapers: (i) resignation of managers in order to produce effects against third parties; (ii) call notice for *assembléias*; (iii) corporate document approving a reduction of capital with reimbursement of funds to partners; (iv) corporate document or judicial decision approving the dissolution of the company; and (v) corporate document approving the consolidation, merger or spin-off of the company.

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China

China's First Year in the WTO—Progress and Problems

After 15 years of arduous negotiations led by the United States on behalf of the international community. China became a member of the World Trade Organization (WTO), the world's leading multilateral body setting rules and standards for international commerce, on December 11, 2001.

On one level, China's accession was simply one more consequence of its decision in the late 1970s to open its doors to the outside world and to join the major multilateral organizations forming the fabric of the international community from which Mao Zedong had held China aloof.

But acceding to the WTO had special importance to China, beyond its entry into the dozens of other institutions it joined as it emerged from its cocoon.

First, the WTO requires members to accept the free market principles that are at its core, e.g., removal of barriers to trade, nondiscriminatory treatment for foreign companies, elimination of export subsidies, requirements for state-owned companies to make decisions on a commercial basis, use of sound science to justify agricultural quarantines and bans, and so on. China's accession package was noteworthy in the expansiveness of its commitments in such areas.

Second, China's leaders understood that subjecting China to the WTO's rules and disciplines could advance their own objective of reforming China's economy according to market principles. The need to comply with international obligations could help, and has helped, override bureaucratic and protectionist objections to necessary change.

Third, in accepting the rules and disciplines of the WTO, China has had to pledge to take significant steps to bring transparency to the black box in which policy, regulations, and decisions were made before. It has promised, for example, to publish draft regulations and laws for a period of public comment before their promulgation, to cease enforcement of non-public directives, to assure that judicial bodies independent of regulators review trade-related rulings, and to accept the authority of WTO dispute settlement panels.

And finally, it has pledged to open its markets to the goods and services provided by foreign countries. It committed to do so, *inter alia,* through deep tariff reductions, breaking of monopolies on the right to export and import, vastly increasing quotas and tariff-rate quotas on restricted goods, and allowing sharply increased access to foreign companies in the services sector, e.g., banking, insurance, securities, express carriers, distribution, legal, accounting, telecommunications, and information technology.

China's accession has profound significance not only to China but also to the world. To have the world's fourth-largest trading country, soon to be the world's second-largest economy, and the leading magnet for foreign direct investment standing outside the system of international rules governing trade could only be a source of frustration and friction for other countries grappling with how to deal with the entry of this new behemoth into the international trading system. The disruptions that China's emergence inevitably will bring can now be addressed in conformity with the well-established legal instruments and principles that have evolved over the half-century since the creation of the WTO's predecessor organization, the GATT.

There has been considerable skepticism about the ability and willingness of China to honor these commitments it has undertaken. Sympathetic critics point to the difficulty of moving an underdeveloped country of over 1.25 billion people, with a rudimentary grounding in the rule of law, into conformity with the WTO's rules-based system. Those less supportive point to the dictatorship of the Communist Party, the opaqueness of the political process, and the vested interests in China resistant to markets and competition.

A little more than a year after accession, how has China been doing in honoring its commitments?

The picture is complex, but on balance provides grounds for encouragement.

China's leadership, and the Ministry of Foreign Trade and Economic Cooperation (MOFTEC) that negotiated the agreement, have manifested an attitude to do what China needs to do. Under their stewardship, close to 1,000 WTO-inconsistent laws have been repealed and hundreds more amended. There has been a steady stream of new laws and regulations designed to embody China's WTO commitments in domestic law. MOFTEC has led a nationwide campaign designed to foster understanding in the provinces of the requirements of WTO, and it has established a functioning Enquiry and Notification Center to answer questions by businesses and the public on the meaning of trade-regulated regulations.

In terms of specific commitments, the record varies markedly from sector to sector. The chief factor that distinguishes commitments China has smoothly implemented from those where implementation has been rocky has been which agencies have been involved.

When MOFTEC has had direct or relatively unchallenged responsibility for implementation, implementation generally has been satisfactory. For example, the promised tariff cuts have been posted with very few anomalies. Trading rights, or the right to import and export, have been expanded beyond the state monopolies in line with China's pledge. Laws consistent with WTO standards on anti-dumping and countervailing duties have been passed.

In areas where MOFTEC has less jurisdiction, and where ministries with protectionist constituencies or turf to protect are dominant, the results have been more mixed.

The area of greatest frustration to American exporters has been agriculture. The Ministry of Agriculture, along with other ministries responsible for implementing China's agriculture commitments such as the State Development and Planning Commission and the State Administration of Quality Supervision and Inspection and Quarantine (AQSIQ), have thrown up roadblocks to imports. A variety of restrictions—set-asides for agricultural imports intended for processors and re-exporters, issuance of quotas in quantities too small to be usable, delays in allocating quotas, and lack of transparency—have prevented the expanded tariff rate quotas that were supposed to be allotted from achieving their full potential. China's erratic performance in establishing a regime to regulate biotechnology products—issuing regulations requiring testing and labeling, allowing insufficient time for producers to test, threatening to halt imports of products that failed to comply with poorly thought-out new standards—failed to provide the predictability that growers and shippers needed, and disrupted trade in soybeans and corn. Phytosanitary standards set impossible standards, such as a zero pathogen level, for some products.

China's services commitments require the cooperation of regulators for effective implementation, and here again the record has been mixed. The China Insurance Regulatory Commission has imposed capitalization requirements upon branches that make their establishment unprofitable and impractical. The People's Bank of China has adopted a similarly restrictive approach on capitalization requirements. Air express carriers have gone through a difficult year in which the China Postal Service tried to roll back rights and privileges they enjoyed before accession. The People's Bank of China has delayed granting foreign automobile manufacturers and dealers the promised right to provide auto purchase financing.

In the areas where China has been slow in complying, the problem has sometimes been traceable to the resistance of an affected sector supported by its patron ministry, and in yet other cases by the sheer magnitude of the required undertaking.

Fulfillment of commitments on import of fertilizer, for example, has been hampered by the efforts of Chinese manufacturers, supported by the Ministry of Finance and State Economic and Trade Commission, to block American competitive products. The result has been discriminatory taxes and delays in quota allocation.

Protection of intellectual property rights is another area where the Chinese made strong commitments, yet it remains at the top of the agenda for many American companies in China. China has in fact recently put in place WTO-consistent laws protecting copyrights, patents, and trademarks. Its Supreme People's Court has assigned responsibility for adjudication of IPR-related offenses to a specially trained corps of judges. Enforcement, however, remains grossly inadequate, and piracy levels for most copyright sectors, for example, exceed 90%. The combination of cultural proclivities, poor judicial and prosecutorial training, reluctance to impose adequate penalties, and bias against foreign right-holders conspire to assure the problem will take years to address.

Finally, the record in bringing transparency to China's trade rule-making regime illustrates the magnitude and importance of China's WTO undertaking. For the first time in its history, China has now begun to publish regulations for public comment before their effective date. They have been collecting submissions by Chinese and foreign stakeholders, and in some instances delaying and amending regulations to be promulgated as a result. In a system that traditionally has paid scant regard to the views of those affected by central directives, this is a hugely important step. At the same time, the adequacy of the public notice has varied greatly from ministry to ministry, with some taking the commitment seriously and others regarding it as an annoyance.

This mixed record testifies to the difficulty of what China has pledged to undertake, not to a decision by China to walk away from its commitments. U.S. officials have raised all these and other concerns with the Chinese, and the reaction has rarely been a rebuff. More often it has been a plea for understanding, some temporizing, and exploration of ways to fulfill commitments without excessively damaging domestic interests. This kind of dynamic occurs in all the world's leading trading regimes. In the case of China, it is fortunate to have a set of broad written commitments that provides a standard by which to judge performance, and a country whose leadership and people generally recognize that their commitments are not concessions to trading partners, but voluntary reforms in their own interest.

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Understanding Franchising in China

Franchising in China

Franchising is a new business concept for China. It first entered China, as in many other places, in the form of chain fast-food restaurants. As a result, for many years, franchising has been equated with "chain stores"; even the Chinese national franchise association was initially known as the "Chinese Chain Store Association," and is now changed to "Chinese Chain Store and Franchise Association."

Successful Examples

The Chinese market has been difficult for foreign investors to penetrate, due to cultural and language barriers. Additionally, there are legal restrictions, particularly in the area of retail sale, where direct investment by way of wholly foreign-owned enterprises is still prohibited.

Despite legal and practical barriers, by the end of 2001, over 1,000 franchisers had entered the PRC, rising 40 percent from that of 2000, encompassing over 50 industries. As expected, the most successful enterprises are in the areas of (1) food and beverages, (2) garments and (3) retailing. Some examples are fast-food restaurants (e.g., KFC, McDonald's, Starbucks and Haagen-Dazs), clothing retail (e.g., Benetton and Crocodile), furniture retail (e.g., IKEA) and convenience stores (e.g., 7-Eleven).

Why Is Franchising Suited to China?

Why is franchising appealing to those who desire to do business in China?

Firstly, China's huge size and vast cultural differences (even among different provinces and tribes within herself) makes it difficult, expensive and time-consuming to penetrate into that country and further, to expand one's business nationwide. Franchising is one brilliant idea to do so—all the advantages of a franchise can be best felt in such an environment. A franchisor can utilize the local franchisee's capital, knowledge of local custom as well as relations with local governments, to swiftly and effectively spread its name across the country. Most in the business predict that franchising will have a success story similar to that in the United States.

Secondly, since the opening up of China, foreign products have always had a special appeal to the Chinese people. Unfortunately, for a long time, they are not affordable items to the general mass. Nevertheless, with the improvement of living standards, the increasing spending power and the growing disposable income of her people, the time is ripe to introduce foreign goods and styles of life to this nation; and franchises with the right products and timing are likely to flourish. Additionally, the "one-child" policy has created a generation of pampered children, with a vast appetite for new toys, gadgets and varieties of fast food, and parents willing to spend on any children's items and educational franchises.

Thirdly, in areas which are not yet open to direct investment by wholly foreign owned enterprises, such as retail businesses, franchising is the only way to expand into China. By tight contractual provisions, a foreign franchisor can develop such "closed" businesses in China under its own trade names, trademarks and business concepts.

Last but not least, the PRC government has proclaimed her support and determination to develop franchising as a business development vehicle and a 15-year plan has been put forward.

Regulating Franchising?

At present, the main legislation relating to franchising in the PRC are the "Measures Concerning the Administration of Franchise Operations (for Trial Implementation)" issued on 14 November 1997 by the Internal Trade Bureau ("Trial Measures"), and the "Administrative Regulations of Management of Franchise Operating Enterprises" ("Administrative Regulations") promulgated on 26 January 2000. While both stipulate some general guidelines on franchising concepts, neither provide strict regulation. However, a new Franchise Law will come into place later this year.

The direction of franchising in the PRC has been headed by the Chinese Chain Store & Franchise Association (CCFA), a State agency appointed by the PRC Government. Article 17 of the Trial Measures empowers the CCFA to (i) establish the rules and ethics of franchising, (ii) promote the concept of self-regulation and (iii) provide services to both franchisor and franchisee with a view to promote the development of the trade. Despite this, no Code of Ethics has yet been promulgated. Nevertheless, optional recordal of local franchises with the CCFA under the Administrative Regulations and a successful recordal gives some status as a "proper" franchise.

Licensing of Intellectual Property Rights

In the absence of strict statutory regulation of franchises, contractual licensing of intellectual property rights is the key to maintain continuity and control of a franchising arrangement. Article 13 of the Trial Measures provides that a franchise contract must be in writing. Further, Article 15 provides that the assignment and licensing of intellectual property rights (including patents of inventions and designs, trademarks and computer software) in a franchise should comply with the relevant laws and regulations of the PRC.

(a) Trade Name

The most recognizable feature of a franchised business is of course the business name. The public will automatically associate a franchisee which uses the franchisor's business name with the franchisor, as well as the quality of goods and services guaranteed by the franchisor's name or expected of the franchisor. It is therefore of utmost importance that the franchisee, in being given the right to trade under the franchisor's name, will be able to live up to the standards of the franchisor and the expectation of the franchisor's customers.

There is no registration system for trade names in China, but such may be registrable as trademarks for services, in which case the comments in (b) below apply.

(b) Registered Trademarks

Under Article 40 of the Trademark Law, a trademark owner may only license a third party to use its registered trademark by entering a trademark licensing agreement. The licensor will supervise and the licensee must ensure the quality of the products or services covered by the registered trade mark. Additionally, the licensee must indicate the name of the licensee and the place of origin of the goods on the goods for which the registered trade mark is used. The trade mark licensing contract should be recorded at the Trademarks Office. Although there are no statutory sanctions for failure to do so, in practice, the licensee requires evidence of such recordal before it can obtain forex rights so as to remit license fees or royalties outside China in a foreign currency.

(c) Copyright

Items such as operating manuals, accounting software, shop layout designs, recipes, uniform designs, artwork for promotional and branding materials, are all copyrighted materials which must be considered in a franchising contract.

Under Article 24 of the Copyright Law, parties who use the works of another must conclude a contract with or obtain a license from such person. Article 24 goes on to provide that the licensing contract must contain terms as to (i) the method of use of the licensed work, (ii) whether the licensed right to use is exclusive, (iii) the scope and term of the license, (iv) the rate and method of remuneration, (v) liability for breach of contract and (vi) other matters as necessary between parties. Rates of remuneration as stipulated under Article 27 may be determined by agreement between the contracting parties or with reference to the standard set by the Copyright Administrative Department of the State Council.

China has a registration system for copyrights including software. Although it is purely voluntary, registration provides for prima facie proof of copyright subsistence and ownership. Where copyright is registered, the relevant licensing contract shall be recorded at the Copyright Administrative Department or the Software Registration Centre as appropriate.

(d) Patents and Industrial Designs (Registered Designs)

Under Article 12 of the Patents Law, an entity or individual exploiting the patent of another must conclude a written licensing contract for the exploitation and must pay to the patentee, a fee for the exploitation of the patent. The licensee must make express provision if it is intended that the licensee may sub-license to third parties the right to exploit the patent. The relevant licensing contract should be recorded at the Patents Administrative Department.

(e) Business Know-how and Trade Secrets

Trade secrets and valuable business know-how are recognized as property rights and protected under the Anti-Unfair Competition Law in China. However, there is no registration system for such proprietary rights and the owner will have to use tight contractual provisions to prohibit the recipient thereof from using or disclosing the same without authorization. From a practical point of view, the owner should restrict the circulation of and access to such information to those who have genuine need to access such information, and such persons should have signed confidentiality agreements with the owner beforehand.

New Franchise Law

While franchising has not to date been heavily regulated by law, with the increasing popularity of this business format, the Chinese government is concerned about improper commercial activities or even fraud on small businesses or young entrepreneurs, through use of the tool of franchising. As a result, China is preparing to legislate on franchising whereby the parties' rights will soon be regulated in greater detail by law, in addition to the franchise contract.

A new Franchise Law has been drafted and is expected to come into force this year. Some important terms are discussed below.

Types of Franchises

Under the draft new Franchise Law, three forms of franchising are identified: direct franchising, regional franchising and sub-franchising.

Under direct franchising, the franchiser directly gives the franchise to the franchisee, who operates its own retail outlets according to a franchising agreement. The franchisee has no right to sub-franchise. Under regional franchising, the franchisee can operate its own retail outlets in a designated region and during specified time but again, there is no right to sub-franchise. Under sub-franchising, the franchisee is given an exclusive right to franchise in a designated region, and will have the right to establish its own outlets as well as to sub-franchise.

Licensor and Licensee—Definitions

The draft new Franchise Law provides that a franchisor should own at least three types of intellectual property rights, ranging from trade names to technical know-how to management skills, and have resources for licensing. Also, for restaurants, retail and "other services," a franchisor must own at least three direct-operated stores that have been in operation for at least one year. On the other hand, a franchisee should have the requisite economic resources, including capital and staff, etc., and possess management skills.

Terms of a Franchise

Under the draft new Franchise Law, a franchising agreement must contain the following terms: (i) the details, scope, duration, geographical location and exclusivity of the franchise; (ii) the basic rights and obligations of both parties; (iii) terms, amount and method of payment; (iv) confidentiality clause; (v) insurance clause; (vi) breach of contract; (vii) the duration, alteration, renewal and termination of the agreement and resolution of disputes; (viii) non-competition clause; (ix) promotion and advertising; (x) protection of consumer's rights; and (xi) any other terms as required under the PRC Contract Law and considered necessary by both parties.

Disclosure Requirements

In addition, there are provisions in the draft new Franchise Law requiring both franchisors and franchisees to disclose information relating to the franchise. Franchisors are required to disclose information such as name, capital, operations and tax return of the franchise, as well as the supplies and training provided. Franchisees need to provide financial and credit/asset proof, etc.

Compulsory Recordal of Franchise

The draft new Franchise Law further requires registration of a franchising agreement with a governmental agency (as opposed to CCFA under current provisions) within 30 days of its signing.

Conclusion

With her entry into WTO and tremendous support and determination from the Government, the world is turning its attention toward the vast and unsaturated consumer market of the Eastern Dragon. For those with limited capital but a lot of courage and foresight, and those who do not wish to miss out on this golden opportunity to expand their business into China, franchising is the ultimate answer.

Disclaimer: This article is a guide for information only and should not be used as a substitute for proper legal advice; for which please contact the writer directly.

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Europe

Corporate Governance Reform—The Status of Sarbanes-Oxley in the European Union[1]

The American chief executive officer, chief financial officer, and board of directors can find no greener pastures by taking up new corporate residence in Europe. The European Union (EU) and its individual member states[2] are following America's lead to closely scrutinize the corporate decision-making process and make it more accountable. The Sarbanes-Oxley Act (2002) (SOA) offers swift U.S. measures to remedy the economic perfect storm set in motion by the crises at Enron, Global Crossing, Adelphia, Tyco, and others. However, as has been the case historically in just about everything else imaginable, Europe walks a slower, more cautious and studied pace.

The international business community should be mindful that corporations with European origination, which have either a U.S. listing, U.S.-registered securities, or are subsidiaries of such companies, will likely be impacted by SOA. Conversely, American corporations operating in European jurisdictions, listing shares on foreign exchanges, or owning subsidiaries that do so, need to carefully track the progress of the EU and each particular jurisdiction in terms of their respective legislative and administrative agendas.

Key Elements of SOA

SOA established unprecedented standards for ethics in corporate governance, auditing and financial reporting. The act affects all publicly traded companies that qualify as "issuers" under the Securities and Exchange Act of 1934 whose securities are registered under section 12 of the 1934 Act. SOA contains far-reaching rules on accounting oversight, auditor independence, corporate responsibility, enhanced financial disclosure, analyst conflict of interest, and corporate and criminal fraud accountability. The new law directly impacts certified public accounting firms auditing public companies, by making them accountable to the newly created Public Company Accounting Oversight Board (PCAOB). Oversight will be accomplished through registration, annual inspections, annual fee requirements and specific ad hoc investigation of alleged misconduct. SOA also bans CPA firms from auditing clients for whom they do consulting work, and provides for enhanced fines or up to 20 years imprisonment for offenses such as destroying, altering, hiding or falsifying documents or records—obstruction of a federal investigation.

SOA makes it unlawful for an officer, director or agent of the corporation to fraudulently influence, coerce, manipulate, or mislead the auditing CPA firm. The SEC is required to issue rules requiring a publicly traded company's audit committee to be comprised of at least one member who is a *financial expert*. The act vests such audit committees with responsibility for the appointment, compensation and oversight of any *registered* public accounting firm employed to perform audit services.

Perhaps the most significant attribute of SOA is the duty it imposes on chief executive officers (CEOs) and chief financial officers (CFOs) to certify annual reports. Certification is a sworn statement by the CEO and CFO of a public company stating that such officer has reviewed the financial reporting documents, and that the documents are devoid of material misstatements and omissions of fact. In addition, CEOs and CFOs are now responsible for establishing and maintaining internal controls to ensure they are notified of any significant financial developments (corporate officers' ignorance is no excuse).

SOA gives these provisions teeth by admonishing that if there is such a material misstatement or omission that causes the company to restate its financial reports, the CEO and CFO forfeit any bonuses and other incentives received during the 12-month period following the first filing of the erroneous financials. The corporation also risks an outright *ban* on the sale of its securities through the various national exchanges.

SOA has also intensified civil and criminal penalties for fraudulent acts by corporate insiders and expands the statute of limitations for securities fraud. Finally, the act provides for other miscellaneous remedial measures designed to address specific abuses prevalent in the highly publicized corporate scandals mentioned above. Such remedial measures include enhanced financial disclosure of off-balance sheet transactions, and eradication of personal loans and extensions of credit to company executives.

Developments in the European Union Since SOA: Financial Services Action Plan (FSAP)

The careful progress of corporate reform in the European Union results in part from the history and purpose of its creation. The EU, for example, does not purport to be a replacement nation-state for existing governments. To the contrary, the individual member states delegate limited sovereignty to create specific common institutions representing the interests of the Union as a whole. Enabling legislation essentially derives from basic treaties between the member states.

The principal objectives of the Union are:

- to establish "European citizenship," minimum *fundamental* civil rights and free mobility throughout the EU;
- to ensure "freedom, security and justice" (akin to the concept of equal protection in the United States);
- to promote the general economic and social welfare of the EU through development of a market, common currency (the Euro), mutual economic development, and common social policy such as environmental protection;
- to advance the notion of a "united Europe" for stronger assertion of its interests throughout the world.

In light of the history and purpose of the EU, its goal is transparent: to foster consensus and address issues clearly common to the individual member states. Change follows consensus; the EU as an institution is not designed to be idealistic and overly proactive absent a clearly discernible mandate communicated from the governments of the individual member states.

Presently, there is enough common concern about the proliferation of the United States' current economic crisis that some level of preventive action is favored. The EU is developing a paradigm for reform under the Financial Services Action Plan (FSAP), already having been established in 1999 to review existing codes of corporate governance in terms of identifying legal and administrative barriers to a single unified European capital market.

The EU has also made slow but steady progress by providing for the implementation of international accounting standards for all listed EU companies by 2005. European companies which list their shares both in their home country and in the U.S. must prepare their financial disclosure documents twice under different and sometimes conflicting rules. To address this problem, the EU and the U.S. (through the Securities Exchange Commission) are exploring the proposed convergence/mutual acceptance of the International Accounting Standards (IAS) and the U.S. standard, which is the Generally Accepted Accounting Principles (GAAP). There is current debate over which is more appropriate. On the one hand, GAAP is heavily "rules based," whereas, on the other hand, the IAS permits a more subjective "true and fair" override principle. The U.S. Financial Accounting Standards Board (FASB) and the International Accounting Standards Board (IASB) have announced a joint project to reach consensus on the differing standards.

European officials have generally taken a softer and less intrusive approach than the U.S. by issuing "guidelines" and modifying existing corporate practices rather than passing tough new laws like Sarbanes-Oxley. However, certain member states such as France, Germany, and Italy have enacted or proposed at least somewhat aggressive reform.

High Level Group of Company Law Experts

As to the EU, the European Commission has mandated the High Level Group of Company Law Experts

("Group") to develop a policy on corporate governance and European company law. The Group recently published its report in November 2002.

Because the EU requires the board of directors to be responsible for financial and key non-financial statements of the company (in contrast to the U.S., where these functions are delegated to the corporations' officers), the Group's recommended reforms are focused at the director level. For example, the Group recommends that a strong and effective role for independent non-executive or supervisory directors, and an appropriate regime for director remuneration should be achieved in the shorter term. Furthermore, it is recommended that where the companies are listed, shareholders should have a choice between a unitary board structure (to include both executive and non-executive, non-supervisory independent directors combined), and a two-tiered board structure (separate boards for independent and managing/supervisory directors). This, it is hoped, would achieve a greater level of accountability at the highest corporate policy making levels.

The Group also recommends greater financial disclosure through enactment of an integrated cross-border legal framework to facilitate efficient shareholder information and communication. This would require listed companies in the EU to provide shareholders with electronic facilities to access relevant information and to vote *in absentia* through the corporate Web site.

Finally, the Group admonishes against an aggressive campaign to create a single European Code of corporate governance, as the underlying company laws in the member states are not harmonized in various key areas. Rather, the EU should actively coordinate the corporate governance efforts of member states through their company laws, securities laws, listing rules, codes or otherwise, in order to facilitate mutual sharing of information. In short, the Group favors less rash enactment of uniform EU law to ensure a continuous debate on corporate governance standards, compliance, and enforcement.

European Commission—Company Law Action Plan

The European Commission was expected to publish a *Communication on Company Law* by the end of the first quarter of 2003. According to the Internal Market Commissioner, Frits Bolkenstein, the Commission will present its *Company Law Action Plan* which will identify necessary actions, define priorities, and most importantly determine whether the necessary initiatives should be enacted in binding or non-binding fashion. The Commissioner stated in a speech on January 30, 2003, that the analysis of recent developments in the U.S. and the SOA will be an important element in the preparation of the Company Law Action Plan. He stated that the EU strongly supports the objectives of the SOA to enhance corporate governance, audit, and accounting standards in the U.S. However, he expresses the EU's concern about the potential impact of the SEC implementing rules giving the SOA extraterritorial effect.

In May 2002, the EU proposed a code of conduct on the independence of auditors, including five-year auditor rotation, and member states endorsed the *Market Abuse Directive* to harmonize and toughen rules against insider trading.[3]

Reform Enacted in the Individual Member States

The individual member states have passed various resolutions which respectively mandate somewhat diluted reforms as compared with Sarbanes-Oxley. In the United Kingdom, corporate governance reforms are gradual and do not promote a dramatic break with current corporate governance practices. The *Higgs Report*[4] recommends that a majority of the company's board members should be independent, outside members. In contrast, existing guidelines recommend that one-third of board members be non-executives, and the majority of those should be independent. Furthermore, greater communication between shareholders is recommended, as is a limitation that insider directors and chairpersons of one listed company not be permitted to chair a second listed company.

In Spain, the Aldama Report emphasizes greater corporate transparency and self-regulation. It also recommends more independent board members but doesn't recommend a minimum percentage. In addition, companies should explain how directors and executives are appointed and disclose compensation packages.

In France, proposals for a new financial markets law were presented on February 5th to the French cabinet, which called for an annual report on corporate governance by a new financial markets regulator, the Autorite des Marches Financiers. This report also calls for the formation of a separate body to regulate France's system of independent company auditors and require company directors to disclose purchases and sales of shares in their company.

In June 2002, the German government passed into law the Transparency and Disclosure Act, which instituted the Cromme Code, a new voluntary code of corporate conduct aimed at making supervisory boards more active by requiring that they be given more information and crack down on poor attendance at board meetings. Germany has a dual-board system, consisting of a managing board and a supervisory board of outside directors. The new code also requires companies to disclose executive pay, and recommends that independent directors sit on supervisory boards.

Austria does not have a formal corporate governance code, but in April 2002, a working group on corporate governance presented a first draft of its code of conduct. The code, which applies to all listed firms, consists of legal requirements (such as the presence of independent directors on both supervisory and management boards), "comply or explain" rules (such as adoption of the "one share, one vote" principle), and additional recommendations of best practice. Austria has also introduced mandatory audit firm rotation rules for banks and listed companies.

Belgium has made numerous corporate governance developments in recent years, culminating in five codes. Nonetheless, last year the government proposed detailed modifications of the Companies Code, which were approved in August. The new rules increase the importance of independent directors.

European corporate governance reform, both in terms of the Commission and in terms of the individual member states, has clearly not risen to the emergency level that it has in the U.S. under SOA. Nevertheless, the EU has made significant progress at its own carefully navigated pace. Perhaps the EU approach will further advance the cause of ethics in corporate conduct from the groundwork laid by the U.S. under SOA, and mutual benefit will result.

To stay informed regarding the progress of the EU and its individual member states, one Web site to visit is http://cfoeurope.com (there are many good sources of information, but this one we found to be up-to-date and user-friendly).

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Endnotes

1. Information was drawn for this article from the following sources:

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   "Comparative Study of Corporate Governance Codes Relevant to the European Union and its Member States," Jan. 2002, *available at* http://europa.eu.int/comm/internal_market/en/company/company/news/corp-gov-codes-rpt-part1_en.pdf.

   "Report of the High Level Group of Company Law Experts on A Modern Regulatory Framework for Company Law in Europe," Brussels, Nov. 4, 2002, *available at* http://www.ecgi.org/publications/documents/report_en.pdf.

   Frits Bolkenstein (Internal Market Commissioner), Corporate Governance in Europe, speech delivered Jan. 30, 2003. *See* http://europa.eu.int/comm/internal_market/en/speeches/index.htm.

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   "Institute of European Affairs, EU-US Project Group – Special Supplement on Corporate Governance," *available at* http://www.iiea.com/files/euus/corporate_governance.pdf

2. The European Union member states include Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, The Netherlands, Austria, Portugal, Finland, Sweden, and the United Kingdom. Currently, the several candidates for membership include Bulgaria, Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Romania, Slovenia, Slovakia, and Turkey.
3. The Market Abuse Directive aims to address definitions of insider trading including requiring investment analysts to disclose share ownership, comprehensive public disclosure by issuers, and fair representation of investment research.
4. The Higgs Report is entitled, "Review of the Role and Effectiveness of Non-Executive Directors." The report is aptly named for Derek Higgs. Higgs is Chairman of Partnerships UK plc and a non-executive director of Egg plc, The British Land Company plc, Allied Irish Banks, plc and Jones Lang La Salle Inc. He is also a senior adviser in the UK to UBS Warburg and a Director of London Regional Transport and Coventry City Football Club. He was a director of Prudential plc between February 1996 and December 2000, and Chairman of its fund management subsidiary, M&G Investment Management Ltd. Prior to joining Prudential, he spent 24 years as a corporate adviser with the SG Warburg Group. He is Chairman of Business in the Environment, a member of the Financial Reporting Council and a qualified chartered accountant.

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New Proposal for an EU Takeover Directive

Background

The European Commission first formally announced its intention to propose a Directive concerning takeovers and other general bids in its 1985 White Paper on the completion of the internal market within the EU. In January 1989 the Commission presented a proposed text for this Directive to the Council of Ministers, which was opposed by a number of EU member states on a variety of conflicting grounds and was the subject of prolonged negotiation.

Basic principles for the proposed Directive were, however, unanimously approved by the Council on 19 June 2000. In response the European Parliament suggested a number of amendments, only some of which were accepted by the Commission. In order to resolve the outstanding differences of opinion, a conciliation committee produced a compromise text, but in July 2001 the proposal was nevertheless rejected by the Parliament, some twelve years after the original presentation to the Council of Ministers.

The rejection was largely as a result of a change of position by the German government, which wanted to ensure that a target's management was not prohibited from taking defensive action against a bid, in the light of concerns (perhaps built on certain misconceptions) that European companies would be left too vulnerable to being taken over (particularly as contrasted with U.S. companies, to whom poison pill defences were available). There were also factions which believed the proposal would not give sufficient protection to the employees of companies involved in a takeover bid.

After this, the Commission set up the High Level Group of Company Law Experts under the chairmanship of Jaap Winter with the task of presenting suggestions for resolving the issues raised by the European Parliament. In January 2002 the Group published its report on issues related to takeover bids, and the Commission has now presented a new proposal for a Directive on takeover bids.

Basic Principles of a European Takeover Directive

The European Commission believes that without a Takeover Directive there can be no truly integrated capital market within the EU and the purposes and efficacy of the internal market would be significantly limited. Although allowing member states some flexibility as to detailed implementation in their own jurisdiction to accord with national practices, the Directive would provide a common legal framework for takeovers in the EU, including protections for minority shareholders on a change of corporate control, with benefits for shareholders generally as well as employees and others. These benefits would include greater procedural transparency and the facilitation of corporate restructurings, in turn making the European market as a whole more appealing and more competitive.

The principles for a Takeover Directive adopted by the Council of Ministers in June 2000 were that:

(i) holders of securities in an offeree company should be treated equally;

(ii) sufficient time and information should be allowed to enable the offeree and its security holders to come to a properly informed decision on a bid;

(iii) the directors of an offeree company should act in the interest of the company as a whole;

(iv) false markets should be prevented; and

(v) the business of an offeree company should not be hindered by a bid for longer than reasonable.

The New Proposal

The new proposal follows the same basic principles as its predecessor, but has been supplemented so as to provide what is said to be a "comprehensive response" to the European Parliament's concerns, adopting some (but not all) of the recommendations of Jaap Winter's group of experts.

The proposed Directive sets out certain fundamental principles by which takeovers would be governed, and provides means for determining the competent national authority for the supervision of any takeover within the EU as well as the national law applicable in the case of a cross-border takeover. It would ensure a basic level of disclosure of information on an offer, guaranteeing transparency during the takeover, and would provide shareholders (in particular minority shareholders) with a minimum level of protection on an equivalent basis throughout the EU: this would be based on a requirement for a mandatory bid to be made for all of a company's shares when there is a transfer of control and an "equitable price" to be paid to all shareholders under such a bid. As under the previous proposal, the management of a target company will be entitled to put in place defensive measures (of the kind referred to as "frustrating action" in London's City Code on Take-overs and Mergers) with the explicit authorisation of a general meeting of shareholders after a bid has been launched, but would be prohibited from doing so without consulting shareholders.

The new proposal differs from its predecessor in that:

(i) it introduces procedures for both "squeeze-out" and "sell-out" rights, enabling bidders compulsorily to acquire outstanding minority stakes and minority shareholders to require bidders to buy them out;

(ii) it includes a definition of the "equitable price" to be paid in the case of a mandatory bid, which will normally be the highest price paid by the offeror or its current parties during a period of six to twelve months prior to the bid;

(iii) it introduces new rules for creating a "level playing field," both within the EU and as between the U.S. and the EU, by increasing disclosure obligations, by requiring structures and measures adopted by a company which could hinder the acquisition and exercise of control by an offeror to be scrutinised by shareholders at least every two years, by enabling the Directive to be regularly revised to reflect market developments and by removing restrictions on the transfer and voting rights which may be attached to (certain) securities—the so-called "breakthrough provision"; and

(iv) it includes clarification on the rights of employees involved in takeover situations.

Whilst the proposed "breakthrough provision" would suspend constitutional and contractual restrictions on transfer and voting rights attaching to offeree securities during the currency of a bid, it would not (as the Commission's commentary on the new proposal makes clear) interfere with tiered voting structures in which some of a company's securities may carry double or multiple voting rights (giving some shareholders weighted voting powers). This could undermine the purpose of removing voting and transfer restrictions.

Comment

The European Commission considers it essential to provide an EU framework for cross-border takeover bids, and the Directive was identified as a priority for the integration of European financial markets by 2005 when heads of government met at the European Council in Lisbon in March 2000.

The new proposal, however, seems very unlikely to gain acceptance without substantial further negotiation. In particular:

(i) the proposed new "breakthrough provision" may not be seen as sufficiently addressing the concerns of the European Parliament as to the existence of an uneven playing field between Europe and the U.S., and in any event it has already become the subject of significant debate. Germany (where special voting rights and restrictions on transfer such as would be prevented by the "breakthrough provision" still exist) would like to include structures including multiple voting rights (which are common in France and Scandinavian countries) among the defensive measures which would be banned during a takeover, and the U.K. has been reported as having agreed for political reasons to support Germany in this stand: together, they would constitute a powerful combination against the proposal; and

(ii) the rather vague requirement to submit defensive structures and measures to shareholder vote every two years (with unspecified consequences if they are not approved) is likely to trouble both member state governments and listed issuers.

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Sources

The text of the new proposal is available at : http://europa.eu.int/eurlex/en/com/pdf/2002/com2002_0534en01.pdf. Two related press releases (including one providing answers to "frequently asked questions") are at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/02/1402|0|RAPID&lg=EN&display; and http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=MEMO/02/201|0|RAPID&lg=EN&display.

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EU Developments in the Financial Field

FSAP

This article discusses three EU directives in the financial field proposed or adopted at the end of 2002: the proposed takeover bids directive, the proposed revision of the investment services directive and the financial conglomerates directive. These directives are part of a comprehensive legislative program, the Financial Services Action Plan. The program (first launched by the European Commission in 1999) contains some 42 measures in the financial field. Its goal is to create "a fully integrated and efficient EU single financial market" by 2005. Other key components of the plan are the proposed EU directives on prospectuses, market abuse, capital adequacy requirements and financial collateral arrangements, and the EU regulation on International Accounting Standards (IAS) that will require EU listed corporations to report in accordance with IAS beginning in 2005.

Legislative Process

The adoption of EU directives and regulations follows a complex process, commencing with a formal proposal by the European Commission. Ultimately, the European Parliament and the European Council of Ministers must agree on a single text. Once a directive is adopted, it must be implemented (usually within 18 months) by the 15 EU Member States into their national laws. Regulations are different from directives in that they are directly enforceable without requiring implementing measures by Member States. The vast majority of the proposals are directives because the particular provisions of the EU Treaty that are the legal basis for EU legislation in this area allow only for the use of directives, not regulations.

Of the three proposals discussed below, only the financial conglomerates directive has so far been adopted by the European Parliament and Council. It is now awaiting implementation by the Member States. The investment services and takeover bids directives are still mere proposals under discussion at the European Parliament and Council. It is not clear when they will be adopted. The proposed takeover bids directive in particular remains controversial, although there appears to be greater consensus than there was on the previous takeover bids proposal, which was never adopted.

1. Takeover Bids Directive

Scope

The proposed directive is intended to harmonize only the essential elements of national takeover rules. It sets out certain common principles, the purpose of which is to facilitate cross-border takeover bids within the European Union. Corporate law remains, to a large extent, a matter of national law. Harmonization (implementation of uniform legal provisions through EU directives) has been very slow in this field, especially in the last 15 years.

The proposal applies to mandatory as well as voluntary takeover bids, but only to bids for voting securities of EU corporations that are listed on an EU-regulated market. The proposal introduces a best-price rule for mandatory bids, squeeze-out and sell-out rights, transparency obligations aimed at disclosure of capital and control structures and defensive measures, an obligation for the board to submit these structures to shareholder "review" every two years, a board "passivity" rule, a limited "break-through" rule and a clarification of obligations toward employees.

Board Passivity

The legal and business context in the European Union is quite different from the U.S. regarding takeovers. In the U.S., the removal of (staggered) boards through proxy contests is a prominent feature of takeover battles, because of the widespread use of poison pills. In Europe, in contrast, the discussion is focused on whether or not to require the target board to remain "idle" in the face of a takeover.

Board "passivity" prevents a target board from taking any frustrating action once a bid has been announced, and also significantly limits a board's ability to implement deterrence measures before the announcement of any bid. The idea is that it should be up to the shareholders (and not the directors) to decide on the merits of any third-party offer. To that end, the directive would do two things. First, whenever a bid is announced the target board would be prevented from adopting any defensive measures without the approval of the shareholders. Furthermore, the proposal contains a "break-through" rule, which would render certain restrictions on the transfer and voting of securities contained in the charter and/or agreements among shareholders and between shareholders and the corporation, unenforceable once a bid is announced. The result would be that, at a shareholders' meeting that a board convenes with a view to obtaining approval of defensive measures, shareholders may vote without being hindered by voting caps, transfer restrictions, or similar measures. Likewise, following a successful bid, the offeror would be able to convene a shareholders' meeting and exercise core control rights, such as the right to appoint and dismiss board members, without being hindered by any such restrictions.

Thus, the directive would generally prevent defensive measures by the target's board during a bid unless authorized by the shareholders' meeting. The board would, for example, only be entitled to do any of the following after it has obtained the shareholders' approval: disposition of "crown jewels" (probably including sales of key assets that are agreed before the announcement of any bid, but conditioned upon the launch of a hostile bid), adoption and continuance of share repurchase programs, and so-called "pacman" defenses (which involve a reverse offer by the target for the securities of the offeror). Share certification techniques, which involve the unbundling of voting and dividend rights and are widely used in the Netherlands, would not be affected.

Multiple Voting Rights

The central outstanding issue in the proposed directive is whether the proposed "break-through" rule should also eliminate multiple voting rights. If they are covered by the directive, then the shareholders would be entitled to exercise voting rights in proportion only to the capital that they hold at any meeting convened to decide on defensive measures after a bid is announced. As the proposal now stands, multiple voting rights are not covered, but this is likely to change.

The issue is contentious because of existing differences among the Member States. Multiple voting rights are prohibited or very rare in the majority of the Member States. In Germany, for example, multiple voting rights have been phased out since 1998. In contrast, multiple voting rights play an important role in Sweden. The most prominent example is the Wallenberg group, which controls corporations such as Ericsson and Electrolux with limited shareholdings. In France, double voting rights are also common. Germany contends that, if corporations in other Member States can retain multiple voting rights when a hostile bid is launched, while its corporations cannot avail themselves of this defense, its corporations will be more vulnerable to takeovers. In other words, the directive would put them at a disadvantage.

This dispute is not new. Indeed, a German-led coalition in the European Parliament rejected the European Commission's previous takeover bids proposal in

July 2001, mainly because of the board "passivity" rule and the resulting greater vulnerability of corporations incorporated in certain Member States or compared to the United States. To address this concern, before submitting its new takeover bids proposal, the Commission requested the advice of a group of company law experts chaired by Professor Jaap Winter. The question referred to the Winter group was: "How can a level playing field be created?" Although some anticipated that the Winter group would devise a compromise position, it actually not only advised keeping the board "passivity" rule, but recommended supplementing it by the "break-through" rule outlined above.

It is not presently clear whether the European Parliament and the Council will find a compromise. The Germans, in coalition with the U.K. on this issue, have made it clear that they would block any proposal that includes board "passivity" and "break-through" rules, but leaves multiple voting rights unaffected. One solution would be to extend the "break-through" rule to cover multiple voting rights, but to provide for "fair compensation" for the loss of multiple voting rights as a result of a takeover bid, in a way similar to compensation for an "expropriation."

Other Elements

The proposed directive further contains the following noteworthy elements.

First, all similarly-situated holders of securities in a target company are to be given equivalent treatment, as a general principle.

Furthermore, a person or entity that gains "control" over a company would be obliged to make a bid for all of the remaining voting securities at an "equitable price"—defined as the highest price paid for the same securities by the offeror, or by the persons acting in concert with it, over a period of between six and twelve months before the bid (to be determined by Member States).

The proposal would oblige corporations to disclose in their annual report detailed information on their capital structure, any restrictions on the transfer and holding of securities and voting rights, special control rights, ESOP control mechanisms, rules on the appointment and replacement of board members and significant agreements that contain change-of-control provisions. A general meeting of shareholders would have to take a "decision" at least every two years on any of these structural aspects and defensive mechanisms that the company then has in place.

Finally, the proposal would introduce squeeze-out and sell-out rights. While the former already exist in most Member States, the latter are more of an innovation. Squeeze-out rights enable an offeror that holds at least 90% of the capital of the target pursuant to its bid to compel the remaining minority shareholders to sell at a "fair" price. Sell-out rights, conversely, grant minority shareholders the right to sell their securities at a "fair" price to an offeror who holds at least 90% of the capital. In both cases, Member States may increase the threshold to 95%.

2. Investment Services Directive

In November 2002, the European Commission submitted its proposal for a revision of the investment services directive (ISD) to the European Parliament and the Council. It deals with regulated markets and investment firms, such as brokers, dealers and broker-dealers.

EU "Passport"

The proposal is to repeal and replace the current ISD, which was introduced 10 years ago to harmonize the conditions under which investment firms can operate throughout the European Union. To that end, the 1993 directive introduced the concept of an EU-wide "passport," which allows a firm that is authorized to provide certain investment services in its home country to render the same services in other Member States on the basis of its home-country license and supervision. This concept was first introduced for banks in 1989.

The system works as follows: first, a firm that complies with certain core licensing requirements (such as those introduced by the 1993 directive) is entitled to provide investment services in its home Member State. If it then wishes to render the same services in other Member States, it simply needs to notify the authorities of its home country, which, in turn, will notify the competent authorities of the host Member States where the firm wishes to operate. The host Member States are (at least in principle) obliged to allow the firm to render services in their jurisdiction without imposing any additional requirements. The idea is that host country authorities should trust that an investment firm from another Member State is adequately supervised, since licensing and supervision in its home country must be in accordance with uniform criteria.

In practice, however, host Member States often impose their own rules and supervision on the services rendered to (retail) clients in their jurisdiction. As a result, investment firms with cross-border operations are subject to *de facto* dual and even multiple supervision and overlapping regulations. In particular, host country authorities tend to impose their own conduct of business rules.

More Efficient Cross-Border Operations

One of the two main purposes of the proposed ISD is to render the EU "passport" more effective. This would be achieved, first, by further harmonizing and updating at the EU level investor protection rules, including conduct of business rules, to obviate the perceived need of individual Member States to apply their own rules. Second, the proposal clarifies that supervision of the investor protection rules is to be an "exclusive" competence of the licensing home-country authorities (this is not entirely clear under the current ISD). The only exception to this rule would be for branch operations, where the Member State in which the branch is established would remain responsible for enforcement.

Under the proposal, "best execution" would become the focal point of investor protection. In addition, the conflicts of interest, client order handling and conduct of business rules applicable to the services provided by investment firms would be further reinforced and spelled out.

Best Execution

The purpose of the "best execution" rule is to ensure that client orders will be executed on the best available terms on the market. Together with the conflicts of interest and order handling requirements, it would ensure that a firm cannot permissibly discriminate against a client order in favor of its own proprietary trading or other client orders. The rule also would require that both the firm itself and the competent authorities regularly review the firm's order routing procedures. The ISD proposal would no longer allow Member States to require investment firms carrying out trades for clients residing in their jurisdiction to do so on a regulated market.

Trade Execution Venues

The second major purpose of the revised ISD is to provide "a comprehensive regulatory regime governing the execution of transactions on financial instruments irrespective of the trading methods used." This is a new concept. The purpose is to address the radical changes in financial infrastructure, which has evolved from national brick-and-mortar exchanges to for-profit electronic trading venues that compete with each other and new types of execution venues for liquidity pools. The proposal divides the spectrum of trade execution venues into three categories: regulated markets, "multilateral trading facilities" (MTFs) (the term used in the ISD to designate what are commonly referred to as "Alternative Trading Systems") and off-exchange order execution (over-the-counter or OTC). In-house matching of client orders by investment firms falls within the category of OTC-execution.

The basic premise of the revised regime is that the ISD should allow competition among execution venues, but impose comparable regulatory requirements on comparable order-execution venues. In that respect, the Commission distinguishes regulated markets and MTFs, which represent the same trading functionality, from off-exchange trade execution. The distinction in treatment mainly manifests itself in the stricter pre-trade transparency rules that apply to the former.

As in the United States, MTFs have emerged in the debt and standardized OTC derivatives markets, where the market has moved from bilateral telephone trading to these more centralized forms of multilateral screen trading. Unlike in the U.S., however, equity trading on MTFs is still very limited in the European Union, amounting to only an estimated 1% of total equity trading. From a regulatory perspective, the issue is nevertheless similar on both sides of the Atlantic: whether and how MTFs can be operated under a broker-dealer license, and to what extent they should be subject to exchange-like regulation. The ISD proposal introduces a specific regime for the operation of MTFs by investment firms. The purpose is to align the requirements for the operation of an MTF with the regime of regulated markets.

In-house Matching

In-house matching of client orders by investment firms has attracted the most attention in the ISD revision process. Although the proposal permits the in-house execution of client orders against a firm's proprietary position or other client orders (something that is still in varying degrees prohibited in several Member States), it would subject investment firms to two sets of rules. Not controversial are the rules on best execution and conflicts of interest that are to safeguard clients' interests. Much more controversial, however, are the proposed pre-trade transparency rules for investment firms that engage in OTC-trading, including in-house matching: the "client limit order display" rule and the "quote disclosure" rule. This pre-trade transparency regime would apply to share trading only.

The client limit order display rule would require investment firms to immediately disclose publicly client limit orders that it cannot immediately execute (in-house or OTC) at prevailing market conditions. In other words, if a firm cannot immediately internally match a client limit order, it must either disclose the order to the market at large or route the trading interest to a regulated market or MTF. Exceptions would be provided for large limit orders, and where the client explicitly requests. The quote disclosure rule would require large dealers and broker-dealers to make firm bid and offer prices for the shares in which they deal. The requirement would be limited to retail-sized transactions in highly liquid shares. Furthermore, firms would be obliged to enter into transactions only if they are with so-called "eligible counterparties," i.e., regulated entities. Large banks and investment firms, which typically put their own capital at risk when matching client orders, are strongly opposed to these rules, arguing that they could put an end to much of the in-house business, and preserve the *de facto* execution monopoly so far enjoyed by regulated markets. It is not clear whether the European Parliament and Council will adopt both rules in their current form or whether they will rather seek to approve them in an amended version.

3. Financial Conglomerates Directive

Purpose

The purpose of the directive is to impose an extra layer of supervision, but only in respect of so-called heterogeneous groups that meet the definition of "financial conglomerates." These are groups that are active in both the banking/investment firm sector and the insurance sector, thus straddling the traditional sector boundaries. The aim is to remedy deficiencies in the current sector-by-sector regulatory regime, which is not suitable for financial conglomerates. In particular, while EU directives already provide for the consolidated supervision of banking and investment firm groups as well as insurance groups, none deals with the group-wide supervision of conglomerates that are active in both sectors.

The directive was adopted at the end of 2002 and Member States have 18 months to implement it. The additional supervision requirements are to apply for the first time for financial years beginning on or after January 1, 2005.

Shortcomings of Current System

The directive is intended to curtail the use in financial conglomerates of the same regulatory capital in two or more entities of a group (multiple gearing) and the use as regulatory capital of funds raised by a parent company as debt and used downstream in a regulated subsidiary as equity (excessive leveraging). It also addresses an increasing tendency toward regulatory arbitrage between the banking and insurance arms of these groups. This arbitrage results in risks being transferred from one arm to the other, thereby altering the risk perception for each but not of the group as a whole. Finally, the directive is to have heterogeneous groups also account for the risks to the group created by the activities of unregulated financial subsidiaries, such as financial leasing, factoring, consumer and mortgage credit and reinsurance undertakings.

Financial Conglomerates

As noted above, the directive applies to "financial conglomerates" only. These are groups that include at least one EU-regulated entity and that have "significant" activities in both the banking/investment sector, taken together, and the insurance sector. Groups will be deemed to have "significant cross-sectoral activities" either if each of the banking/investment firm activities, on the one hand, and the insurance activities, on the other hand, represents more than 10% of the total financial sector activities of the group (in terms of balance sheet total and solvency requirements), or if the smallest financial sector component has a balance sheet total exceeding EUR 6 billion. If the group is not headed by a regulated entity, it falls under the scope of the directive only if the financial sector activities, in addition to being significant in both sectors, also represent more than 40% of the group's total business.

Importantly, both regulated and non-regulated financial sector entities are taken into account for purposes of determining whether a group falls within the definition of financial conglomerates. Consequently, a group that comprises only, for example, a credit institution as regulated entity, may still be deemed to constitute a financial conglomerate if it has a sufficiently big reinsurance arm, an unregulated financial sector activity. Likewise, groups with limited regulated activities, but with important leasing and consumer credit businesses and sufficient cross-sector insurance or reinsurance activities, may become subject to the requirements of the directive.

Moreover, in cases where a group taken as a whole does not constitute a financial conglomerate, but one of its subgroups does, the directive applies to the subgroup. Finally, the term "group" is defined broadly to cover vertical groups as well as so-called horizontal groups (groups that are not characterized by a parent-subsidiary relationship but nevertheless form a group because their constituent companies are managed on a unified basis).

Prudential Requirements

The directive imposes additional prudential supervision requirements on the regulated entities—credit institutions, investment firms and insurance undertakings—that are part of financial conglomerates. The supplementary supervision is organized at the level of the financial conglomerate and covers capital adequacy, risk concentration and intra-group transactions, as well as suitability of shareholders and directors. The purpose is to enable assessment of global solvency and risk position on a group-wide basis. The group is, however, not supervised on a fully-consolidated basis, but rather on the basis of its regulated and, to a certain extent, non-regulated financial components. The directive does not affect the supervision of regulated entities in accordance with sectoral rules, except for a few conforming changes made to the sectoral rules in order to avoid regulatory arbitrage.

Capital Adequacy

The directive requires that the conglomerate as a whole holds capital proportionate to the nature and scale of the risks that it chooses to undertake and thereby poses to consumers and the financial system. Intragroup holdings of regulatory capital are excluded from the assessment at the group level. Moreover, the capital adequacy requirements must be calculated for both regulated and non-regulated financial sector entities of the group. Any shortfall in regulatory capital for unregulated entities is to be made up at the conglomerate level. The directive contains four methods for calculating own funds requirements: the accounting consolidation method, the deduction and aggregation method, the book value/requirement deduction method, and a combination of these three methods. These methods are based on the capital measurement techniques that were developed by the Joint Forum (on Financial Conglomerates) in 1999.

Third-Country Headed Groups

Under the directive, the EU Member State that would otherwise have been appointed to coordinate supervision in the European Union is responsible for verifying whether third-country parent undertakings that operate regulated financial entities in the European Union are subject to "equivalent" consolidated supervision in their home country. An EU financial conglomerates committee, which is expected to be established soon, is to provide general guidance on what constitutes equivalent supervision. The EU financial conglomerates committee is expected to enter into discussions with certain third-country authorities, including the relevant U.S. authorities, to determine whether the regulations of the third country provide for an equivalent consolidated supervision of financial conglomerates. Although the issue still needs to be settled, the expectation is that the applicable U.S. regulations will be deemed to meet the "equivalence" test.

In the absence of equivalent supervision, the supplementary supervision of the directive is to apply "by analogy" to the regulated entities located within the European Union. Alternatively, the competent authorities could require the establishment of a holding company within the European Union.

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Reforms for Foreign Capital in SOEs—A Step Forward

For the purposes of guiding and regulating the acts of reorganization of State-owned Enterprises (SOEs) by using foreign capital and promoting a strategic change in SOEs, the State Economic and Trade Commission, Ministry of Finance, State Administration for Industry and Commerce and State Administration of Foreign Exchange jointly promulgated the Provisional Rules on Reorganization of SOEs by Using Foreign Funds ("Rules").

Under the Rules, "reorganization of SOEs by using foreign capital" includes the following situations:

(i) The title owners of the SOEs transfer all or part of their title or stock rights to foreign investors (i.e., share sale);

(ii) The creditors of the SOEs in China transfer their right of credit to foreign investors;

(iii) The SOEs sell all or the majority of their assets to foreign investors (i.e., asset sale); or

(iv) The SOEs introduce foreign capital through increase in capital and allotment of shares.

Enterprises falling within any of the above will be transformed or reorganized into foreign invested enterprises.

The Rules specify three fundamental conditions that the foreign investors should meet in order to be selected to take part in the reorganization of SOEs. They should possess:

(i) The operational qualities and the level of techniques as required by the SOEs;

(ii) Good commercial reputation and capability of management; and

(iii) Good financial conditions and economic strength.

The Rules require the foreign investors to put forward a readjustment proposal, setting out particulars like the measures for strengthening the enterprise management, the exploration of new products and technological transformation, etc.

The Rules further require that the reorganizers and the reorganized companies provide for proper arrangement of the staff and workers. The reorganized enterprises have to pay off default wages and salaries, loans from employees, social insurance premium and other fees with their existing assets. With regard to the credits and debts of the SOEs, they are required to be carried by the original enterprises in the event of reorganization by asset sale. For reorganization under other means, the credits and debts are assumed by the enterprises after the reorganization.

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New Measures for Foreign Investment in FTCs

The Ministry of Foreign Trade and Economic Cooperation (MOFTEC) recently issued the Interim Measures on the Establishment of Chinese-foreign Joint Venture Foreign Trade Companies ("Interim Measures"), which further remove some of the earlier restrictions on foreign investment in domestic foreign trade companies (generally known as FTCs). With the promulgation of the Interim Measures, which repealed the 1996 temporary regulations on pilot Sino-foreign joint venture trade corporations, foreign investors may invest in foreign trade joint ventures anywhere in China, and not only in Shenzhen and Shanghai's Pudong New Development Area, as was previously the case. Foreign investors are allowed to own between 25 and 49 percent of the registered share capital of the joint ventures.

The Interim Measures require the foreign investors to have attained over US$30 million in trade with China each year on the average for three consecutive years, or US$20 million if the joint ventures will be established in China's less developed provinces or autonomous regions in Central and Western China. On the other hand, the Chinese partner must have foreign trading rights and an average annual volume of import and export business of over US$30 million within the three years prior to the application. In contrast, under the 1996 temporary regulations, the Chinese partner must have an average annual foreign trade volume of over US$200 million with export volume of no less than US$100 million in the three years prior to the application.

Further, a joint venture foreign trade corporation must have a registered share capital of no less than RMB50 million yuan, or RMB30 million yuan for Central and Western regions, as opposed to a much higher requirement of RMB100 million yuan under the 1996 temporary regulations.

Upon obtaining the approval of MOFTEC and undergoing registration and post-registration procedures, the joint venture can be set up to undertake the import and export of goods, technology and relevant services either for itself or on behalf of customers within the approved business scope, and operate domestic wholesale business of the commodities imported by the company.

The Interim Measures will come into effect on 3 March 2003.

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Italy

New Corporate Law System in Italy

With law no. 366 of October 3, 2001, the Italian Parliament delegated the Government to adopt one or more decrees concerning the systematic reform of: (i) the discipline of joint stock corporations (*società per azioni*), limited liability companies (*società a responsabilità limitata*), limited liability partnerships (*società in accomandita per azioni*) and cooperative companies (*società cooperative*); (ii) the discipline of administrative and criminal offenses regarding commercial companies in general; and (iii) the procedural rules of certain corporate law proceedings.

The Italian Government recently enacted some of the decrees required by the above mentioned law; the last of them is Legislative Decree no. 6 (the "Decree") dated January 17, 2003, on the systematic reform of the legislation applicable to joint stock corporations, limited liability companies, limited liability partnerships and cooperative companies (collectively, "Companies").

The reform of the Corporate Law System shall enter into force on January 1, 2004: by such date Companies may no longer be registered with the competent Companies' Register if the articles of association and the bylaws are not in compliance with the provisions of the Decree. The term to adapt the bylaws of existing Companies to the new rules shall be September 30, 2004 (December 31, 2004, for the cooperative companies); during 2003 Companies may already adapt their bylaws with effectiveness as of January 1, 2004.

Amongst the many innovations introduced by the reform, we wish to point out the following:

(a) joint stock corporations may choose among three separate structures of management and control, where the shareholders, the directors and the auditing body(ies) shall have different roles and responsibilities;

(b) joint stock corporations may issue tracking stocks;

(c) in limited liability companies the company's management may be delegated not only to a sole director or jointly to a board of directors, but also, severally, to two or more directors;

(d) limited liability companies are allowed to issue bonds and other debt instruments, provided that the same are destined only to professional investors;

(e) the financial statements of the Companies shall be drafted pursuant to the new rules set forth by the Decree;

(f) with respect to groups of Companies, the Decree provides that a person that, exercising its power of direction and control on a Company, acts in breach of the rules of good management, may be considered liable for the damages that may arise to the other shareholders of the controlled Company as well as to its creditors. Therefore, U.S. corporations having an Italian subsidiary should take into account such new provision of law, in order not to incur any liability for the operations of the latter.

This brief article is intended solely to provide general, summary information and is not intended to be legal advice applicable to specific matters. If you are interested in more details on this important piece of Italian legislation, please contact Tomaso Cenci or Giovanni Marsili of the New York office of Gianni, Origoni, Grippo & Partners at tcenci@gopny.com or (212) 424-9171, or gmarsili@gopny.com or (212) 424-9172.

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Mexico

Mexico's Environmental Law: Recent Changes and Their Implications

Background

Mexican environmental rules have been undergoing changes as a response to the scarcity or abundance of natural resources, and not according to an overall framework of goals and principles. This is due largely to the lax enforcement of laws, given the budgetary restrictions and the fact that Mexico is presently in the process of identifying its most urgent needs in conservation and preservation of natural resources. Society and government both have increasing roles in these areas.

However, in recent years Mexico's environmental rules have responded to worldwide conservation strategies. In 1988, Mexico took a step forward upon passage of the General Law of Ecological Equilibrium and Environmental Protection (Ley General del Equilibrio Ecológico y Protección al Ambiente, or LGEEPA). The law was amended in 1996 and again in 2001, in principle to modify the structure to correct ambiguities under the 1988 Law and thereby strengthen the legal framework of environmental protection in Mexico. In this sense, a constitutional amendment was promulgated in 1998, establishing the guiding principle that "All persons are entitled to an appropriate environment for their development and well-being."

Various provisions are presently pending promulgation, the purpose of which is to promote sustainability while balancing traditional individual needs with state sovereignty and perhaps more importantly with the needs of humanity in general.

Authority in Environmental Matters

Article 27 (and Article 4 as well, under the 1998 reform) of the Mexican Constitution is the legal basis for environmental law, namely the above-mentioned LGEEPA.

This Law establishes the levels of jurisdiction and scopes of enforcement, as follows:

The first level is held by the Federal Government.

The second level is reserved to the states.

The third level corresponds to the municipalities, as provided in Constitutional Article 115.

Recent Advances in Mexican Environmental Law

The recent reforms to Mexico's environmental provisions directly affect certain activities, as described below.

General Law of Ecological Equilibrium and Environmental Protection

The LGEEPA was modified under a December 31, 2001 reform, as follows:

Reformed Articles

The delegation of powers originally exercised by the Federal Government, to the states, municipalities and the Federal District, through Coordination Agreements.

Article 150 provides that the regulations and Official Mexican Standards (Normas Oficiales Mexicanas, or NOMs) on hazardous waste and materials must identify and classify them as such by reason of their degree of hazard, as well as differentiating between high-risk and low-risk materials.

Article 171, setting the penalties that apply in the case of LGEEPA violations, sees a 150% increase in monetary penalties (fines).

Article 173, section I provides that, in addition to existing factors used in determining the seriousness of an offense, the harm that would have or could have occurred to public health shall also be considered. The reform also changes the last paragraph of Article 173, expressly establishing the option for private interests to request that the authority waive the penalty.

Article 109 Bis was fully amended, setting the legal obligation to provide information to the Pollutant

Release and Transfer Register (PRTR), known in Mexico as the Registro de Emisiones y Transferencia de Contaminantes, or RETC.

The wording of the article should be noted:

"The Secretariat, the States, the Federal District and the Municipalities must create a pollutant release and transfer register for air, water, soil and subsoil pollution, materials and waste under their jurisdiction, as well as those substances determined by the corresponding authority. The register information shall be composed of the data and documents contained in the environmental authorizations, certificates, reports, licenses, permits and concessions processed with the Secretariat or with the competent authority of the Government of the Federal District, States or Municipalities, as the case may be.

"Individuals and entities responsible for pollutant sources are required to provide the information, data and documents necessary for purposes of keeping the register.

"The registered information shall be public and shall have the effects of a filing of record. The Secretariat shall allow access to the information pursuant to the Law and all other applicable legal provisions."

The following important points may be derived from the above provision:

The PRTR is established, although it already existed. However, in contrast to the previous Registry, there is now a legal obligation to provide information. (It is important to keep in mind section V of the Annual Operating Certificate (Cédula de Operación Anual, or COA).)

Note that the article states that the information used in the PRTR is not only derived from the voluntary information section of the COA, but also with all information filed with the authority for analysis and review.

As the first paragraph states, the PRTR will be created with data and documents contained in the environmental authorizations, certificates, reports, licenses, permits and concessions processed with the Secretariat or the respective state and local authorities.

Based on the second paragraph of Article 109 Bis as well as Article 159 Bis, we see that all information is compulsory, that it will form part of the PRTR, and that it will be made publicly available to civil society.

The second paragraph also establishes that the Register information will organize data by substance and by source. In this sense, it is understood that the only information in the Register open to the public will be the amount and type of pollutant releases and transfers.

Confidentiality of Information

Confidentiality is complicated and full of legal complexities, although there are various legal provisions that help to overcome the problems, such as:

Environmental Legislation

First, it should be noted that Article 159 Bis 4 of the LGEEPA establishes when environmental information may be denied, as follows:

- When the information is deemed confidential under a provision of law, or when its disclosure is considered to be a matter of national security.
- In the case of information on matters under judicial proceedings or inspection and oversight actions, pending resolution.
- In the case of information provided by third parties, when they are not required by law to provide it.
- When the information deals with inventories, inputs and process technologies, including descriptions thereof.

Industrial Property Law

There are several protection mechanisms under the Industrial Property Law (Ley la de Propiedad Industrial, or LPI) used to protect the original ideas of persons who have made new discoveries that may offer a competitive advantage to the inventor, such as patents, utility models, industrial designs, industrial secrets, trademarks, brands, trade notices and denominations of origin.

In this regard, we refer only to industrial secrets which are considered industrial or commercial information closely guarded by an individual or entity which grants it an economic advantage over third parties, in the performance of economic activities.

Therefore if the information being submitted to the environmental authority for purposes of the RTR constitutes an industrial secret, it will be protected under the applicable provisions—particularly Article 85 of the LPI and Article 159 Bis 4, section I of the LGEEPA.

If the information is deemed an industrial secret, in order for it not to be disclosed the filing in which the information is submitted should state that it is protected under the provisions of LPI and the LGEEPA.

Legislation on Public Servants' Responsibilities

It is important to note that the information is not only protected as such, but there are also certain responsibilities attributed to persons who handle the information. In this regard, the Federal Law of Responsibilities of Public Servants (Ley Federal de Responsabilidades de Servidores Públicos, or LFRSP) provide as follows:

Article 47, section IV of the LFRSP states that public servants must "watch and care for the documentation and information under their care and to which they have access by reason of their job, position or commission, impeding or preventing the use, removal, destruction, hiding or disuse thereof."

Article 53 of the same Law establishes the penalties that may be applied in the case of noncompliance with the provisions of Article 47, such as warning, suspension, removal from position, fines, and prohibition against public service.

Lastly, Article 77 Bis establishes an important provision on the state's civil liability:

"When the administrative disciplinary proceeding determines that the public servant is liable and that the administrative offense has caused damage and harm to private interests, such private interests may approach the agencies, entities or the Secretariat of the Comptroller and Administrative Development in order that they directly acknowledge the indemnity liability to repair the damage in cash, and thereby order the corresponding payment, without the need for the private interests to appear in court or before any other authority."

Added Articles

The reform adds Article 147 Bis with respect to high-risk activities, establishing that persons who carry on such activities must have environmental risk insurance. For this purpose, the SEMARNAT, with the approval of the Secretariats of the Interior, of Energy, of Economy, of Health, and of Labor and Social Welfare shall create a National Environmental Risk Insurance System.

Transitional Article 4 states that the environmental risk insurance is subject to a special regulation under the LGEEPA, which the SEMARNAT must publish no later than one year following the reform's entry into force.

The reform modifies Article 168 to offer the option that the private interest may agree to undertake the restoration or compensate for the damages, needed to correct the irregularities, before the authority enters its ruling.

A paragraph was added to Article 182, granting the SEMARNAT the authority to assist the Public Prosecutor (Ministerio Público) pursuant to the Federal Code of Criminal Procedures (Código Federal de Procedimientos Penales, or CFPP), regardless of any aid provided by the victim or person directly affected by the illegal act. This addition is intended to facilitate the prosecution of environmental crimes.

Federal Criminal Code

On February 6 of last year, a package of reforms to the Federal Criminal Code (Código Penal Federal, or CPF) was published in the Federal Official Gazette (Diario Oficial de la Federación), incorporating a new approach to environmental crimes in Mexico. An analysis of these reforms appears below.

Environmental Crimes Relating to Industrial Activities

CPF Article 414. This article applies to persons who, illegally or without observing the prevention or safety measures, undertake the production, storage, traffic, importation or exportation, transport, abandonment, disposal, discharge, or any other activity with substances deemed corrosive, reactive, explosive, toxic, flammable, radioactive or with other similar characteristics, or so orders or authorizes, causing harm to natural resources, natural resources, flora or fauna, to water quality, to the ecosystems or to the environment. The same criminal penalties apply to the same activities undertaken with ozone-depleting substances and causing the same risk of harm. The penalty under this article is from one to nine years of imprisonment and from 300 to 3,000 days' fine.

The article also establishes diminished liability when the activities occur in urban areas and involve the handling of used oils or ozone-depleting substances in volumes not exceeding 200 liters, or biological-infectious waste, except in the case of a repeat offense.

CPF Article 415. This article imposes criminal sanctions on anyone who issues, releases or discharges into the atmosphere, or orders or authorizes the release of, gas, smoke, dust or pollutants causing harm to natural resources, flora or fauna, to water quality, to the ecosystems or to the environment, arising from fixed sources under federal jurisdiction as provided in the LGEEPA. Sanctions also apply to anyone who generates noise emissions, vibrations, thermal or light energy from fixed sources under federal jurisdiction pursuant to the LGEEPA, without applying the prevention or safety measures, also causing the described harm. The penalty under this article is from one to nine years of imprisonment and from 300 to 3,000 days' fine.

The crime is deemed aggravated when the aforesaid activities occur in Protected Nature Areas.

CPF Article 416. The basic principle set forth in this article is that any person who illegally discharges, deposits or spills, or who authorizes or orders the discharge, deposit or spill of, wastewater, chemical or biochemical liquids, waste or pollutants into the soil, subsoil, seawater, rivers, basins, waterways and any other body or current of water under federal jurisdiction, causing harm or the risk of harm to natural resources, to flora or fauna, to water quality, to the ecosystems or to the environment. This crime may be aggravated when the aforesaid activities are committed in a Protected Nature Area. The penalty set forth in the article is from one to nine years of imprisonment, and from 300 to 3,000 days' fine.

Other important additions were also made, including the following key changes:

The crime of damage to wetlands or "protected reefs" and the causing of forest fires was added in Article 420 Bis.

A new crime was included in Article 420 Quater, referring to the submission of untruthful information to the environmental authority. Also important is that the concept protected under this provision is not environmental protection itself, but rather proper environmental management.

Article 421 provides new penalties that apply in addition to those established in specific criminal categories.

Article 194 of the CFPP states that aggravated crimes are deemed to exist for the categories set forth in the first and third paragraphs of Article 414, the last paragraph of Article 415, Article 416 and section II of Article 418 (when the volume of tree felling or cutting exceeds two cubic meters of wood), or in the case of the last paragraph of Article 419 and Article 420 of the CPF. As such, when these crimes are committed the alleged perpetrator will not be entitled to bail and will remain in custody during the course of the proceeding when the court so rules.

It should be noted that these are not the only crimes subject to reform, but rather they are the crimes that most directly involve industrial activities.

Draft Law on Hazardous Waste for the Federal District

According to Mexican environmental law, waste is understood to be any material generated in extraction, exploitation, transformation, production, consumption, use, control or treatment processes, which cannot be reused in the process in which it was generated. Article 3, section XXXI provides that such material is divided into two major categories: hazardous and nonhazardous.

One of the innovations of this draft is that it grants economic benefits to companies that carry on prevention, minimization and assessment actions. Such incentives must be allocated to investment in new technology and the use of practices, methods or processes that help to improve the comprehensive management of solid waste.

The law also provides for the possibility that public sanitation services may be concessioned to persons other than public entities, which translates into a new area of private investment available to businesses that perform such services as solid waste collection and the transfer, use, treatment and final disposal thereof. This point should be given special attention because it must be approved by the Federal District Assembly of Representatives and signed by the Head of the Federal District Government. However, for various reasons (perhaps union considerations), Mr. López Obrador, the current mayor of Mexico City, has preferred to veto publication of the law indefinitely and it is unlikely that it will be published prior to the next administration.

General Waste Management Considerations Under LGEEPA

The LGEEPA states: "Responsibility for the handling and final disposal of hazardous waste corresponds to the person who generates it. In the case that hazardous waste handling and final disposal services are contracted with companies authorized by the Secretariat, and the waste is delivered to such companies, responsibility for the operations shall be held thereby, independent of any responsibility held by the generator."

Note that the LGEEPA was first published in the Federal Official Gazette on January 28, 1988, and on December 13, 1996, Chapter VI on Hazardous Materials and Waste was modified. These amendments are discussed below.

Article 151 sets forth that the liability for the handling and final disposal of hazardous waste lies with the person who generates it.

While the LGEEPA issued in 1988 provided that the installation and operation of systems for the collection, storage, housing, reuse, treatment, recycling, incineration and final disposal of hazardous waste required prior authorization from the Secretariat, the 1996 amendments contained in Article 151 Bis require prior authorization from the environmental authority for the same activities.

Article 152 of the Law provides that the SEMARNAT shall promote the programs to prevent and reduce the generation of hazardous waste and to provide incentives for reuse and recycling. The regulations to the Law and the Official Mexican Standards are to establish the mechanisms and procedures enabling environmentally and economically efficient handling.

General Law for Waste Prevention and Comprehensive Management

Since April 2002, when the Chamber of Deputies approved this bill by majority (practically unanimously, except for one abstention), there has been heavy debate in the Senate on the creation of a legal instrument to help solve the waste management problem in Mexico. At present, and based on the draft conference submitted to the Senate by the Chamber of Deputies, the deputies are unsure whether to pass the bill as modified by the Senate or to make the changes they see fit. The next congressional session begins March 15 and ends April 30.

Following is a brief review of the bill's provisions, highlighting the key provisions thereof.

Purpose and Scope

As the draft law is intended to guarantee that all persons have an appropriate environment, the provisions are considered to be in the public and social interest. The scope of the law covers the generation, assessment and comprehensive management of hazardous waste, urban solid waste and special-handling waste, as well as dealing with sites contaminated by such waste and the corresponding remediation.

Competencies

The bill establishes a series of competencies that are different from those currently in place, as the draft grants new waste management authority to the states and municipalities.

Federal Government

States

Municipalities

Waste Classification

The bill categorizes waste in three classes: hazardous waste, urban solid waste, and special-handling waste.

Hazardous Waste

Types of hazardous waste generators

Article 3, section X of the bill makes a distinction as to the type of generator of hazardous waste, as follows:

A waste generator is an individual or entity producing waste in the undertaking of production or consumption processes. Large generators are those individuals or entities that generate a total annual gross weight of waste equal to or greater than 10 tons. Small generators are those that generate a total annual gross weight between 400 kg and 10 tons. Micro-generators are industrial, commercial or service establishments that generate up to 400 kg of waste per year.

Obligations of Hazardous Waste Generators

In general, all hazardous waste generators have the obligation to identify, classify and handle their waste in accordance with the law, the regulations issued thereunder, and the respective Official Mexican Standards.

Large and small generators have the same obligations. They need not submit a waste management plan in all cases, but when it is required, they must register with the SEMARNAT, keep a log of the annual volume of hazardous waste generated and how it is handled, and file a management plan for the authority's consideration.

The plan must be submitted when waste is used or when products are expended, expired or recalled, and such products are listed in Article 31 of the draft Law and classified as such in the corresponding Official Mexican Standard.

Microgenerators of hazardous waste must register with the state or municipal authorities.

With regard to the comprehensive management of hazardous waste, generators and holders may contract with an authorized company for waste handling or transfer it to other businesses to be used as an input in industrial processes, when the SEMARNAT is given prior notice by means of an input handling plan based on risk minimization. This provision is not included in the LGEEPA or its regulations, and thus is a major step forward.

Urban Solid Waste

Urban solid waste is waste generated in residential areas, from the elimination of materials used in household activities, consumption products and the containers and packaging thereof. It may also arise from any other activity carried on within business establishments or in the public way that generate waste with household characteristics, or from street and public-area cleaning, as long as it is not regarded as any other type. Urban solid waste may be further classified as organic and inorganic waste.

Pursuant to Article 99 of the draft law in question, the states are responsible for legislating on the generation, handling and final disposal of urban solid waste. The municipal governments are to undertake the necessary actions regarding the generation, assessment and overall management thereof, in addition to setting the requirements for the performance of waste handling services and the fees that may be charged.

Special-Handling Waste

Waste generated in production processes, meeting the characteristics of hazardous or urban solid waste or otherwise produced by large generators or urban solid waste, is deemed to require special handling.

Authorizations

As regards the authorization of activities in which waste is handled, authorizations for the handling of hazardous waste may be transferred provided that the conditions under which they were originally granted do not change.

Intermediaries (Handling and Final Disposal Businesses)

In order for a company to carry on the transportation, collection, storage, reuse, recycling, treatment and final disposal of waste, it must have authorization to perform such services, as well as sufficient guaranty to cover any damages that may be caused during and after the performance thereof.

Waste Incineration

Another important point in the draft regards the incineration of waste, as it deals with the national and international implications of the potential release of persistent organic pollutants (POPs). It also allows the option to use certain wastes as alternative fuel for energy generation. In this respect, it should be noted that the provision does not seek to limit safe processes at controlled, appropriate temperatures and areas. There is a wide range of international literature on assessing materials for energy use, and there are several sectors and organizations that support the assertion of incineration safety.

Contaminated Sites

With regard to soil pollution and remediation, the draft establishes the obligation of those responsible for the contamination to repair the damage through site remediation.

Furthermore, the draft provides the innovative prohibition against transferring a site contaminated by hazardous waste or materials, unless the SEMARNAT so expressly authorizes.

If the site is abandoned and the owner or holder is unknown, the SEMARNAT and the state and municipal authorities are required to undertake the remediation efforts for site recovery and reestablishment.

Law on Civil Liability for Environmental Damage and Deterioration

On November 9, 2000, a bill was presented to Congress by legislators from the Mexican Green Ecological Party, intended to establish the legal framework for the application of penalties against persons or groups of persons whose acts or omissions cause harm to the environment. The most important aspects of this bill include:

The law is aimed at individuals, entities and public agencies whose activities have a negative impact on the environment.

The conducts leading to objective liability include both acts and omissions that cause serious harm to persons or the environment. The aim of the law is to penalize the risk without regard to the intent or negligence of the person who causes the environmental damage or deterioration. The bill also considers certain conducts to be minor infractions, which may be tolerated according to local uses and be subject only to preventive measures.

At the affected person's option, the reparation of the damage may consist in reparation in kind when possible, or in other cases with the payment of an amount established as indemnification, the payment of damages, and the repayment of expenses incurred by the affected person in the containment of the damage.

In the case of environmental damage caused to persons, resulting in death or disability, the draft law provides that the reparation shall be determined on the basis of four times the highest daily minimum salary in effect in the region, multiplied by the number of days set forth for each such disability under the Federal Labor Law (Ley Federal del Trabajo).

The statute of limitations for the reparation of environmental damage and deterioration is generally five years, as from the time that the person empowered to seek reparation learns of the respective act or omission.

It is important to note that the statute of limitations does not apply when the damage is deemed to have not yet produced its major effects. In this case, the reparation liability expires in 25 years, as from the day on which the act or omission that causes the environmental damage or deterioration takes place.

The bill provides that certain industrial activities considered to have a major impact on the environment must procure a financial guarantee or insurance policy.

Any collections made under the above-mentioned provisions will be allocated to the so-called "Environmental Deterioration Reparation Fund."

It should be noted that the draft in question is presently being considered for passage in the Senate.

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Netherlands

New Netherlands Antilles Exempt Company as Low Cost SPV in Financial Transactions

Introduction

The Netherlands Antilles recently introduced a tax exempt corporation that may very conveniently be used as an SPV for a number of financial transactions, such as repackaging and securitization transactions, cross-border leases and project finance. This new entity, the *Netherlands Antilles Besloten Vennootschap* or *NABV*, provides a good alternative to SPVs of tax-free jurisdictions such as the Cayman Islands, Gibraltar and Jersey. The NABV may also be used as a group finance company, a mutual fund or a holding company.

The tax exempt NABV has been introduced as part of a major overhaul of the Netherlands Antilles tax regime, commonly referred to as the New Fiscal Regime. This overhaul was a result of Netherlands Antilles' commitment to the OECD and the European Union to eliminate harmful tax elements in its fiscal regime. The New Fiscal Regime has introduced a general corporate income tax rate of 34.5% and has thereby abolished the distinction between offshore and onshore companies. The new regime provides for a general corporate tax regime that is comparable to, for instance, the corporate tax regime of the Netherlands. The Netherlands Antilles is not on the OECD blacklist of tax havens and the Netherlands Antilles will now start negotiations with both OECD members and non-OECD members to enter into double tax treaties. In order to be able to compete with tax-free jurisdictions, however, the new Netherlands Antilles tax regime introduced the possibility of a tax exemption for a qualifying NABV.

Main Features of the NABV

The NABV is a very flexible entity, very much geared toward the requirements of Anglo-Saxon jurisdictions. The main features of this entity are:

- Limited liability
- No minimum capital requirement
- Free choice of language of corporate documents
- Capital may be in one or various currencies
- No prior ministerial approval required for incorporation
- No bearer shares
- Possibility of different classes of shares
- Shares may be with or without nominal value
- Shares may have full, limited or no voting rights
- Shares may have full, limited or no profit rights
- Choice of one-tier board or two-tier board
- Merger possibilities
- Possibility of conversion into a foreign entity or an Antilles NV and vice versa

The NABV is, in principle, subject to corporate income tax. However, it may opt to be exempted if it meets the following requirements:

- Its activities and statutory purpose are limited to entering into finance transactions and investments in debt instruments, securities and deposits;
- The company keeps a (non-public) register with the name and address of any holder of 10% or more of the issued share capital;
- The management board consists solely of Antilles residents (either persons or certified trust companies);
- The company is not considered a bank or other financial institution that is subject to supervision of the Netherlands Antilles Central Bank as a bank;
- The annual accounts of the company are approved by an independent expert. This expert is, however, not necessarily a CPA, and a full audit is not required.

NABV as Alternative to, for Instance, Cayman Island SPVs

The tax-exempt NABV is a very suitable entity to be used as SPV in various types of transactions. It provides a good alternative to SPVs of other tax-free jurisdictions such as, for instance, the Cayman Islands. The main arguments for using an NABV are:

- There will not be any taxes due in the Netherlands Antilles, since the NABV is exempt from corporate income tax, and there are no withholding taxes on interest in the Netherlands Antilles. Similar to, for instance, Cayman, Jersey and Gibraltar entities, the exempt NABV will, however, not be entitled to the benefit of any double tax treaty relief and is therefore suitable in transactions where the debtors are located in a jurisdiction that does not levy withholding taxes;
- The costs of setting up and maintaining the NABV are generally lower than those of companies in the other zero-tax jurisdictions that are currently used in these type of transactions;

- The NABV may be set up, if necessary, within a few days;
- Netherlands Antilles corporate law governing the NABV is very flexible. If desired, the corporate documents of the NABV may be set up similar to those of, for instance, a Cayman, Jersey or Gibraltar entity;
- The quality of service of both legal counsel and local administrators is high given the fact that the Netherlands Antilles has a long history as an offshore jurisdiction, which started after World War II. The administration of the NABV will be dealt with by local Curaçao trust companies (for example ABN AMRO Trust, MeesPierson Trust, Citco, TMF) which have an excellent reputation with highly qualified, often Dutch-trained, service providers;
- If off-balance sheet treatment is important, a Netherlands Antilles Private Foundation may be set up as sole shareholder of the NABV, in order to create a so-called "orphan" structure. The Private Foundation is a tax-free entity with no shareholders. The costs of setting up and maintaining the Private Foundation are low. A local trust company would form the board of the foundation.

Conclusion

The NABV will provide a good alternative to the SPVs that are currently used in various financial transactions, such as repackagings and securitizations, cross-border leases, project financings, etc., when no tax treaty protection is required. In addition, the NABV may be used as holding company, group finance company or mutual fund. The NABV is a cost-efficient, time-efficient and flexible vehicle in a highly developed, non-blacklisted jurisdiction.

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Developments in Netherlands Antilles Tax Law

The tax regime of the Netherlands Antilles has undergone a complete revision during the last two years. An important part of the reform was the abolishment of the offshore regime. The objective of this abolishment was to ensure that the Netherlands Antilles would no longer be characterized as a tax haven and that its tax regime would no longer be considered a harmful tax regime under the OECD rules and the EU code of conduct for business taxation.

The tax reform comprises the introduction of the New Fiscal Regime (NFR), a revised Tax Arrangement for the Kingdom of the Netherlands and a new tax ruling policy (including model rulings).

Although the reform has not been finalized yet, i.e., the model rulings have not been officially published, it is expected for the tax reform to improve the attractiveness of the Netherlands Antilles, especially for U.S. outbound investments and asset-backed finance transactions.

NFR—Participation Exemption

Under the NFR, Netherlands Antilles resident companies are subject to a standard profit tax rate of 34.5%. The NFR has also introduced a participation exemption on the basis of which 95% of the dividends and capital gains are exempt from taxation. However, dividends and capital gains realized on shares in another Netherlands Antilles company, or a Dutch qualifying shareholding, are fully exempt. In order to qualify for the participation exemption the Netherlands Antilles company should generally hold at least 5% of the paid-up capital (or the voting power) or an interest with an acquisition price of at least ANG 1,000,000 in the relevant participation. In order to obtain the full exemption for a Dutch subsidiary, the Netherlands Antilles company should hold at least 25% of the paid-up capital.

New Tax Arrangement for the Kingdom of the Netherlands

According to the revised Tax Arrangement for the Kingdom of the Netherlands the statutory 25% Dutch withholding tax rate on dividends paid by a Dutch company to a Netherlands Antilles company is reduced to 15%. However, dividends paid to a Netherlands Antilles resident parent company that owns at least 25% of the shares in a Dutch subsidiary are subject to 8.3% dividend withholding tax.

Structure for Outbound U.S. investments

With these new rules the Netherlands Antilles-Dutch investment structure, frequently used for outbound U.S. investments in Europe, becomes even more attractive. Under the old offshore regime the combined Netherlands Antilles-Dutch tax burden on dividend distributions amounted to 10.3% while the combined tax burden under the new regime will be limited to 8.3% (e.g., the Netherlands dividend withholding tax only).

Capital gains realized upon a disposal of the Dutch shareholding by the Netherlands Antilles company are fully exempt from Netherlands Antilles (and Dutch) taxation.

Model-rulings

The Netherlands Antilles also published a new tax ruling policy within the scope of the NFR and the abolishment of the offshore regime. The new policy provides for the issue of rulings by the Netherlands Antilles tax revenue which are based on one of a number of models (or a combination thereof).

The new ruling policy is applicable to all companies that are subject to the National Ordinance on profit tax 1940 (in Dutch: *Landsverordening op de Winstbelasting 1940*). It is not applicable to companies that are subject to the grandfathering rules for old offshore companies.

The Model-rulings have not been officially published yet. However, drafts of the Model-rulings have been circulated. Based on the drafts it is to be expected that there will be Model-rulings for the following categories:

- auxiliary activities within the group;
- administrative management of investment trusts and funds;
- holding activities;
- financing activities;
- licensing activities;
- branch activities;
- informal capital contributions in respect to financing and trading activities;
- hybrid financing;
- certain financial services.

Since the Model-rulings have not been officially published yet, the final contents of the rulings remain subject to change. The final Model-rulings will have to prove their value in practice, but based on the current drafts it is expected that they will improve the attractiveness of the Netherlands Antilles, especially for U.S. outbound investments and asset backed finance transactions.

Entering into Force

The NFR and the revised Tax Arrangement for the Kingdom of the Netherlands are already in force. Although the new tax ruling policy has also been officially published, the revision of the Netherlands Antilles tax regime will only be finalized with the official publication of the Model-rulings.

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Spain

The New Regulations of Tender Offers in Spain

Background

The Spanish takeover statute is currently regulated by the Securities Market Law (Law 24/1988, "*Ley del Mercado de Valores*") and by Royal Decree 1197/1991 on Takeover Bids ("*Real Decreto sobre régimen de las ofertas públicas de adquisición de valores*").

Under the current regime, in general terms the mandatory launching of a takeover bid is triggered in the following situations: acquisition of a shareholding interest above certain thresholds (25% to 50%, as further explained below); de-listing of the company; and certain amendment of the bylaws of the company. Therefore, apart from de-listing takeover bids and takeover bids required for the amendment of the bylaws, mandatory bids are exclusively linked to the surpassing of a certain stake threshold, regardless of other facts which affect the effective obtainment of control of a company.

The minimum threshold for mandatory bids is presently established at 25% of the target company's share capital, lower in general than that of other European countries. However, recent market practice has revealed that such a low threshold has not impeded acquisitions of the *de facto* control of listed companies outside the scope of the takeover regulations.

During 2002, three controversial high-profile takeovers in the construction-real estate sector, have put the current system into question and led to a demand for a reform of existing takeover regulations. These operations have involved the acquisition of a 23.5% stake in *Grupo Dragados* by its rival *ACS* ("*Actividades de Construcción y Servicio*"), followed by *Sacyr*'s acquisition of 24.5% of *Vallehermoso* and *Bami*'s acquisition of 23.9% of *Metrovacesa,* all at a premium substantially above market prices. Each of these transactions have resulted in changes in the target's management, but as the stake transferred was slightly below the minimum 25% threshold, the acquisition of control of the target did not trigger mandatory bid obligations and consequently, the seller was not required to share the control premium with other shareholders.

The Spanish government is currently finalising a reform of the existing regulations for takeover bids. This reform is expected to introduce significant changes to reinforce the protection of minority shareholders in cases of acquisitions of large stakes in listed companies. The main reforms envisaged by the government may be summarized as follows:

1. Extension of mandatory bid obligations to offers where the bidder has gained control *de facto* of

the target's management, even if the bidder intends to acquire below the 25% threshold.

2. Extension of the scope of mandatory bids in cases of acquisitions over the 50% threshold, imposing on the bidder the obligation to acquire all of the securities of those shareholders who accept the offer, instead of the minimum 75% currently required.

3. Authorisation and regulation of takeover bids subject to a condition.

4. Removal of the requirement of a 5% improvement on the price of competing takeover bids and establishment of a "bidding process."

5. Extension of deadline for bank guarantees in order to preserve confidentiality.

Each of these features will be further analysed below.

The Redefinition of the Concept of "Control": Mandatory Takeover Bids Linked to Board of Directors' Control

According to the regulations currently in force, the direct or indirect acquisition or the increase of a stake in a listed company representing 25% or more—but below 50%—of its voting stock is deemed a *significant shareholding interest* and triggers the obligation to launch a takeover bid for at least 10% of its share capital (excluding its own shareholding interest, i.e., if the bidder already holds shares representing 20% of a listed company and wishes to reach 25%, it will have to launch a bid for an additional 10% of the target company's share capital). Acquisitions below that threshold are not currently subject to a mandatory bid, even if the bidder has obtained effective control of the target company. Likewise, the current statute does not prevent or restrict the bidder from acquiring securities just before the takeover bid is launched (or even accumulate a number of shares slightly below the 25% threshold).

In addition to the 25% minimum threshold, if the bidder already holds a stake of between 25% and 50% of the voting stock of the target company, and intends to increase that stake by at least 6% during a twelve-month period, it shall launch a bid over at least 10% of the share capital of the target company; and when the bidder intends to reach a stake equal to or higher than 50% of the share capital of the target company, regardless of its prior shareholding interest, it shall launch a bid over 75% of its share capital.

In response to the latest market transactions, the new regulations will introduce a new rule under which the mandatory launching of a takeover bid is linked to the bidder's gaining of control over the board of directors of the target company, regardless of the percentage of voting stock acquired. This provision will establish two different thresholds:

- if the acquirer intends to nominate between one third and half of the directors of the target company's board, it will be required to launch a takeover bid over shares representing 10% of the voting stock of the target company (regardless of the percentage of voting stock acquired).
- if the acquirer intends to nominate more than half of the board members of the target company, it will be bound to launch a takeover bid for all of the voting stock of the target company (in identical terms to acquisitions of voting stock in excess of 50% under the new regulations).

What is more remarkable, the new regulation will impose the mandatory launching of an *ex-post* bid if the above-mentioned changes in the target's management are discovered during the two years following the acquisition of a certain stake. Currently, regulations do not contain a time frame during which the effects of the acquisition may be reviewed; the system only requires the prior launching of a takeover bid if certain thresholds are met, but if those thresholds are not met, there is no potential risk that the transaction will be "reviewed" in the light of the existing board structure.

The Extension of the Scope of the Offer: The Spanish "Partial-Offer" System

The current Spanish takeover statute establishes a "partial-offer" system: although mandatory bids must be addressed to all shareholders and holders of other relevant securities, the offeror may, as a general rule, limit the maximum number of securities which it is bound to acquire. In particular, an offeror intending to acquire a stake equal to or exceeding 50% of the quoted share capital of a company is forced to launch a takeover bid over 75% of its share capital, but need not exceed that threshold. If the bid is accepted in respect of a number of securities exceeding such maximum limit, the statute provides for the application of pro rata mechanisms for the allocation of the shares.

The new regulation will substitute the current partial-offer system for a full-offer system. As a result, those bidders who intend to acquire a stake equal to or exceeding 50% of the voting stock of a listed company or who, even if acquiring less than 50%, intend to nominate more than half of the members of the board of directors of the target company, will have to acquire all the securities of those who accept the offer. This provision will allow all shareholders to abandon the company without being subject to pro rata rules.

Takeover Bids Subject to a Condition: The Passivity Rule

It is common practice in large Spanish listed companies to put in place *ex-ante* takeover preventive measures for hostile bids, which may act as a disincentive for those seeking control of a company, potentially making the bid economically unattractive. It is important to mention that under Spanish Law, a wide variety of *ex-ante* defensive measures are permitted. These mechanisms will most likely be contained in the articles of association (e.g., reinforced quorum requirements, supermajorities, qualifications necessary for board membership, or limitation on the exercise of voting rights), or in contractual arrangements that include change-of-control clauses or prohibition of share transfers to a bidder or, in particular, directors' "golden parachutes" often linked to stock options.

The reason for these defensive measures is the restrictions imposed on the target's management conduct during the offering period of a takeover, and the impossibility of setting up *ex-post* defensive devices intended to frustrate the offer once a takeover bid has been launched, under what is called the "Passivity Rule." In particular, during the offering period of the takeover between the publication of the order which suspends the trading of the securities of the target company affected by the offer and the publication of the result of the offer, the managing body of the target company must refrain from carrying out or entering into any transactions outside the ordinary course of business of the target company or intended to disrupt the offer. This rule (as opposed to the laws of many U.S. states which are permissive with such management defensive practices) aims to guarantee that the managing body—potentially affected by a conflict of interest—will not obstruct or frustrate the bid unless previously authorised by the shareholders, and will at all times act in the interests of all the shareholders who will freely decide on the offer.

The present law does not specifically prohibit the launching of takeovers which are conditional upon the occurrence of certain circumstances—particularly, the removal of statutory provisions limiting the exercise of voting rights. However, the practice in recent years has revealed that the CNMV (the Spanish regulator in charge of the supervision and control of takeover bids, equivalent to the U.S. SEC) has been reluctant to approve the launching of conditional takeover bids, and this has allowed large shareholders to thwart hostile bids and perpetuate their control over listed companies via the above mentioned measures.

The proposed regulation will expressly authorise and regulate the launching of takeover bids subject to conditions, as a mechanism to avoid defensive measures.

Competing Takeover Bid Requirements

Under the existing regime, competing takeovers are subject to certain requirements which in fact favor the initial offeror. In particular, competing takeovers must improve on the previous offer either by offering a price at least 5% higher than the immediately preceding offer or by extending the offer to at least 5% more securities. Additionally, competitors are only entitled to submit a single bid, while the initial offeror may submit an additional bid in order to improve on the terms set by competitors. It has been long argued that both limitations on competing bids result in unequal and unjustified treatment for competitor bidders, and hinder the filing of subsequent bids, which is clearly not in the interests of shareholders.

The new regulations are expected to remove the requirement of a minimum 5% increase on the offering price and also allow competitor bidders to submit several bids during one month, after which all bidders may submit a final counter-takeover within the following five days. This bidding process should increase the transparency of the system and should allow shareholders of the target company to benefit from the highest price the market is prepared to offer to acquire control.

Measures Designed to Prevent the Leaking of Confidential Information

Upon submitting a bid application with the CNMV, the offeror is bound to file the necessary guarantees for the settlement of the bid; this requirement involves the risk that the bid is "leaked" and therefore proves unsuccessful, since a key factor for a bid's success is that the transaction is kept secret. Should the bid be leaked, the CNMV will normally request the relevant companies to disclose the transaction to the market (prior to the filing of the offer), and this will carry the risk of an increase of the market value of the shares, and thus reducing the effect of the premium that the bidder is prepared to offer or the risk of a competitor filing an offer in advance and thus benefiting from the current advantages of the first offeror.

To avoid these risks, the period for submitting the necessary guarantees for the settlement of the bid (most likely, a bank guarantee if the consideration offered consists totally or partially of cash) will be extended up to forty-eight hours after the filing of the bid application, i.e., once the bid has been publicly and officially announced by the CNMV. This measure will reduce significantly the number of insiders involved in the transaction (directors, employees, lawyers and financial advisors) and thus minimise the risk of the bid being leaked.

Conclusions

The reforms envisaged by the Spanish government have been well-hosted by specialists and market players. There is a manifest need for an in-depth review of the current regime and a redefinition and enlargement of the concept of change of control. What is not so clear is how to establish universal rules applicable to all listed companies in respect of the existence of a change of control, since this will depend on many other factors (e.g., shareholding structure, statutory or contractual limitations on voting rights). Moreover, the borderline between independent directors and directors representing shareholders is very thin, and it will be difficult for the CNMV to ascertain whether an offeror has gained effective control over the target's board, introducing some legal uncertainty.

In any event, it is important to mention that as a result of the political discussions, some of the above-mentioned reforms may not eventually be included in the new regulation to be enacted, or may be included in terms significantly different to the current ones.

Additionally, similar reforms need to be approached from the perspective of company law and securities market regulations, including listed companies' self-regulation through internal codes of conduct of the managing body. These measures should increase and facilitate minority shareholders' participation at shareholders meetings, impose on listed companies the obligation to fully disclose their capital and control structures, and establish specific penalties to be applied to directors of listed companies as a result of non-compliance with their fiduciary duties.

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United States

Dual Allegiance or Double Agent? A Comparison of Attorney-Client Privilege Under the New York Code of Professional Responsibility and the Sarbanes-Oxley Act of 2002

Introduction

When I recently asked a former college friend, whom I met again after many years, why he had gone into politics, he looked at me incredulously and said, "To help others!"

The answer was so sincere that it made me ashamed of my question and the thoughts of some shady politicians that had prompted it. Had I allowed the occasional rogue politician to make me cynical about the sincerity of others?

My friend's answer could well have been my own had he asked me, "Why did you become a lawyer?" Incredible as it may sound to some, many of us chose to become lawyers to help others.

In so doing, we start out from the premise that most people are honest and want to do the right thing. But they don't always know what the right thing is. Certainly, the arcane language and multi-layers of the securities laws don't exactly make it obvious.

Accordingly, we consider it our task to guide our clients through the minefields of the securities laws.

And minefields they are. How would an executive know not to sell her company shares five months after their purchase or during an employee pension blackout period, unless an attorney tells her? Perhaps people are born with an instinctive understanding that murder is illegal. But no one is born with intuitive knowledge of section 16(b) of the Securities Exchange Act of 1934.

Many of us lawyers have struggled for years to uphold the integrity of our clients even as they would rather brush it aside in their frenzied race to the bottom line.

With dogged tenacity we have urged and encouraged our business clients to keep on the right side of the law even when the pot of gold sparkles on the other side.

This has not always made us popular. We have weathered all sorts of epithets. We have been dubbed the sales prevention force, the deal killers, the naysayers, the scriveners and much more. Through it all, most of the time, we have succeeded in educating our clients to understand that respecting the law is good business and that breaking it may shut business down overnight.

The key to this success has been gaining the confidence of our clients. It takes time and trust for the client to follow the lawyer's advice. This is particularly the case when the advice is to pursue the longer road to legal profits rather than the shorter road to illegal profits.

And what is the hallmark of trust? It is, "I can trust you with my secrets. I can tell you everything. You will never betray my confidence. Therefore I will never tell you less than the whole truth, warts and all."

This is what the Supreme Court of the United States said in so many words in the case of *Swidler & Berlin v. United States.*[1] In that case, the court stated that the purpose of confidentiality between attorney and client is "to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice."[2]

By listening to their clients, lawyers are often able to prevent potential violations of law. Sometimes, the client is not even aware of the dire consequences of what she plans to do because she may not know that the plan of action is illegal. The client comes to the lawyer for a full and frank discussion, just like she goes to the doctor for a full and frank diagnosis.

But would one go to the doctor with the worry of a terminal disease if there were any chance that the doctor would betray such a confidence to one's employer? Of course not. So why would one go to one's lawyer when one may have done, or be contemplating doing, something possibly illegal if the lawyer is going to betray one's confidence to the police, the government or the Securities and Exchange Commission?

If lawyers were required to betray such confidences, they would become the business persons' pariahs. They would be transformed from the constant friendly presence that keeps the client from breaking the law into the double agent who reports "suspicious" conduct.

It may be that some lawyers have made mistakes. But that does not mean that all of us have abandoned the oath to uphold justice.

Neither does it mean that education by persuasion should be replaced with the threat of betrayal, handcuffs and perp walks.

Yet, on November 21, 2002, the Securities and Exchange Commission (the "Commission"), prompted by section 307 of the Sarbanes-Oxley Act of 2002 (the "Act") issued proposed Standards of Professional Conduct for Attorneys which would, under certain circumstances, require attorneys to notify the Commission of their suspicions regarding the illegal conduct of their clients (the "Proposed Noisy Withdrawal Rules").[3]

The Commission's Proposed Noisy Withdrawal Rules

Under the Commission's Proposed Noisy Withdrawal Rules, an attorney who reported evidence of a material violation of law "up the ladder" to the company's board of directors and did not receive an appropriate and timely response would be required to take the following actions. If the attorney believes that the violation is ongoing or about to occur (as opposed to a violation that has occurred and is not ongoing) and is likely to cause substantial injury to the company or investors, the attorney must immediately withdraw from representing the issuer, indicating that the withdrawal is for professional considerations. Then the attorney must notify the Commission of such withdrawal within one business day and disaffirm to the Commission anything that the attorney has been instrumental in submitting to the Commission that is materially misleading.[4]

On January 30, 2003, the Commission issued final rules (the "Final Rules")[5] which will take effect on or about July 30, 2003, 180 days after their publication in the Federal Register.

In the Final Rules, the Commission substantially adopted its November 2002 proposals with regard to "up the ladder reporting," with two important changes from the attorney-client privilege point of view. One relates to the elimination of the requirement, included in the November 2002 proposed rules, that attorneys document all of their communications in connection with the evidence of misconduct.[6] The other relates to the definition of the term "appropriate response" that a company is required to make to a report of misconduct. Under the Final Rules, it is an "appropriate response" for the chief legal officer of the company to advise the attorney who reported the evidence of misconduct that the independent directors of the company have instructed another attorney to investigate the matter and that the company has either implemented the remedies recommended by such attorney or has been advised by such attorney that a colorable defense to the misconduct can be asserted on behalf of the company.[7] This means that the Commission has allowed a second review of the evidence of misconduct by an attorney other than the attorney that initially reported the misconduct, before such attorney is required to report further up the ladder or outside the company. Both of these amendments should go a long way in alleviating the bar's attorney-client privilege concerns.

In its January 30, 2003, release adopting the Final Rules, the Commission extended the comment period on the Proposed Noisy Withdrawal Rules until April 7, 2003, and offered an alternative to the Proposed Noisy Withdrawal Rules.[8]

Under the Commission's proposed alternative noisy withdrawal rules (the "Proposed Alternative Noisy Withdrawal Rules"), an attorney who reports up the ladder to the company's board evidence of ongoing or imminent misconduct likely to cause substantial injury and does not receive an appropriate timely response, must withdraw from representing the client. The attorney must then notify the company that the withdrawal is for "professional considerations."[9] Within two business days after receiving such notification, the company must report such notice of withdrawal to the Commission on a current report on Form 8-K.[10] If the company fails to do so, the withdrawing attorney may, herself, inform the Commission that she has withdrawn her representation of the client for professional considerations.[11]

It is important to note that the Commission has stated that its actions on the Proposed Alternative Noisy Withdrawal Rules may lead it to change the Final Rules that were issued on January 30, 2003. That effectively means that until late July 2003, any of the following might occur. The Commission may (i) adopt the original Proposed Noisy Withdrawal Rules proposed in November 2002, (ii) adopt the Proposed Alternative Noisy Withdrawal Rules proposed in January 2003, in which case it may also change the Final Rules adopted in January 2003 or (iii) decline to adopt either the Proposed Noisy Withdrawal Rules proposed in November 2002 or the Proposed Alternative Noisy Withdrawal Rules proposed in January 2003 and remain with the Commission's Final Rules as adopted in January 2003.

Why has the Commission proposed inroads into the hallowed preserve of attorney-client privilege and on what legal grounds?

Another question that needs to be answered is whether the Commission's Proposed Noisy Withdrawal Rules, or the Proposed Alternative Noisy Withdrawal Rules would create greater inroads into the attorney-client privilege rule than the existing Rules of the New York Code of Professional Responsibility (the "New York Rules").

Comparing Exceptions to the Attorney-Client Privilege Rule Under the New York Rules and the Proposed Noisy Withdrawal Rules

In comparing the New York Rules with the Proposed Noisy Withdrawal Rules, or the Proposed Alternative Noisy Withdrawal Rules, we focus on two principal questions. The first is, how certain must the attorney be of the existence of misconduct before she is obliged to report up the ladder? In considering this question one should bear in mind that the higher up the ladder the attorney is required to report an unsubstantiated suspicion of misconduct, the greater the danger that it will leak out to the press. The risk here is that even if the company's board, after due investigation, arrives at the conclusion that there was no misconduct, the damage to the share price of the company will already have been done.

The second question is whether an attorney is ever *required*, rather than permitted, to report outside the company if this means breaching the attorney-client privilege?

What the Attorney Must Know Before Reporting Up the Ladder Under the New York Rules

Under New York Rule DR 5-109(B),[12] a lawyer has no duty to report up the ladder all the way to the board of directors unless she knows, not just believes or suspects, that there is a violation of law that is likely to result in substantial injury to the company. Above all, the attorney may not take any actions that might cause disruption to the company or risk revealing information to persons outside the company. The lawyer must caution everyone involved that they must reveal nothing about the matter to the outside world unless and until the lawyer advises them otherwise as required by law. Accordingly, the lawyer may want to begin with the least disruptive measures such as asking the wrongdoer to cease the activity. Next, the attorney may request a second opinion from another attorney and if the wrongdoer will not desist, the lawyer may report the matter to the board of directors. If the lawyer has gone all the way up to the top of the company and received no response that will put an end to the misconduct, the lawyer's ultimate recourse is to resign silently in accordance with DR 5-109(C)[13] without disclosing the wrongdoing to anyone outside the organization.

In short, the New York Rules require the lawyer to see the fire before she calls in the water hoses and even then to be careful not to damage the company.

What the Attorney Must Know Before Reporting Up the Ladder Under the Commission's Final Rules

By contrast, the Commission's Final Rules and its Proposed Noisy Withdrawal Rules would oblige the attorney who becomes aware of evidence of a possible ongoing or imminent, material violation of law to immediately report the matter to the company's chief legal officer, up the ladder to the board of directors and in certain circumstances withdraw for "professional considerations," report the withdrawal to the Commission and disaffirm any materially misleading document.

The term "evidence of a material violation" which triggers the attorney's reporting obligation described above means "credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is *reasonably likely* that a material violation has occurred, is ongoing or is about to occur."[14] To be "reasonably likely" a material violation must be more than a mere possibility but it need not be more likely than not.

While adopting the objective standard, this formulation, according to the Commission, gives the attorney some latitude, within reason, to conclude whether or not there is evidence of a material violation.

The Difference Between "May" and "Must"

Whereas the New York Rules *permit* an attorney that knows of misconduct to take a number of actions similar to those mandated by the Proposed Noisy Withdrawal Rules, they do not *require* the attorney to do so. They leave it to her discretion. In this way, the attorney, based upon her knowledge of the client and past experience working with it, can determine whether or not such actions are advisable.

Thus DR 4-101(C)(2)[15] of the New York Rules *permits* a lawyer to reveal confidences when required by law or court order. This rule would permit compliance with the Proposed Noisy Withdrawal Rules if adopted.

DR 4-101(C)(5)[16] *permits* the lawyer to reveal confidences to the extent implicit in withdrawing a written or oral opinion previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the opinion or representation was based on materially inaccurate information or is being used to further a crime or a fraud.

DR 4-101(C)(3)[17] *permits* the lawyer to reveal the intention of a client to commit a crime and the information necessary to prevent the crime. Unlike Rule 1.6 of the American Bar Association Model Rules (the "ABA Rules"), which permits a lawyer to reveal information necessary to "prevent reasonably certain death or substantial bodily harm," DR 4-101(C)(3)[18] refers to a "crime" without limiting it to a physical crime. Under the New York Rules, a colorable argument could certainly be made that misleading disclosure in a document on file with the Commission, upon which the public relies to its substantial detriment, is a crime under the securities laws which the lawyer may reveal outside the company. Under the ABA Rules, this is not so clear.

The closest the New York Rules come to *requiring*, rather than permitting, an attorney to reveal client confidences in connection with a crime is in DR 7-102 (B)(1).[19] This Rule provides that "A lawyer who receives information clearly establishing that the client has, in the course of the representation, perpetrated a fraud upon a person or tribunal *shall* promptly call upon the person to rectify the same, and if the client refuses or is unable to do so, the lawyer *shall* reveal the fraud to the affected person or the tribunal, *except when the information is protected as a confidence or secret*."[20]

New York Rule DR 4-101(A)[21] defines the term "Confidence" as "information protected by the attorney-client privilege under applicable law . . . that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."

Clearly, the proviso at the end of New York Rule DR 7-102(B)(1),[22] which prohibits disclosure when the information is protected as a confidence or secret, renders the requirement to reveal the fraud to third parties inoperative and meaningless. Information about a fraud perpetrated by the client will always be information that would be embarrassing or detrimental to the client.

It is clear, therefore, that in requiring the attorney to report smoke instead of fire, outside the company in addition to inside the company, the Final Rules and Proposed Noisy Withdrawal Rules go beyond what is permitted under the New York Rules.

The Commission is going farther than it ever went before. In the past, the Commission has respected the no-entry signs into client-attorney privilege. For example, in the case of *In Re Gutfreund*, [23] dealing with the Solomon Brothers treasury bond scandal of the nineties, the SEC laid down the law regarding steps that a person in a supervisory position is required to take upon learning about misconduct. Included in these steps was the requirement to disclose the misconduct to regulatory authorities. But, as the Commission cautioned in that opinion, this was subject to the applicable Code of Ethical Responsibility and the Canons of Ethics.

What has propelled the SEC to enter the forbidden territory?

Arguments for Noisy Withdrawal

The proponents of the Proposed Noisy Withdrawal Rules argue that if a lawyer is not obliged to make a noisy withdrawal when a company insists on continuing an ongoing fraud, the perpetrating company will be free to continue cheating investors until the next lawyer silently withdraws. Then the fraud will begin again. Obliging the first lawyer who has detected the fraud to make a noisy withdrawal to the Commission gives the client perpetrating the fraud, every motive to obey the law in order to silence the noise.

As for the duty to report smoke rather than fire, the proponents of the Proposed Noisy Withdrawal Rules argue that lawyers should not be the ones to decide whether there has in fact been a material violation of law. Outside lawyers, the argument goes, do not have sufficient information about the internal affairs of the company to make such a determination. Moreover, argue the proponents, even a high degree of concern that illegalities are ongoing has not been enough to persuade the lawyers involved in the recent financial scandals to report their suspicions up the ladder. The grayness of the law, including the difficulty of applying complicated facts to arcane securities laws in real time, has become an excuse for ignoring evidence of illegality no matter how substantial the evidence.

For this reason, the proponents argue, the function of the lawyer should be to report to the highest authorities in the company suspicions of misconduct rather than proven misconduct. Evidence of a material violation should not be investigated at the lowest rungs of the ladder where it is likely to be swept under the carpet, but at the board level where it is likely to be thoroughly investigated. Finally, the proponents point out that the ultimate step of noisy withdrawal will be taken only in the very rare situations in which the company, having been put on notice of the illegality, refuses to comply.

Arguments Against Noisy Withdrawal

The opponents of the Proposed Noisy Withdrawal Rules argue that, in the tug of war between the need to protect investors from fraud, and the need to maintain open channels of communication between the lawyer and the client, the Commission cannot be the referee. Under Rule 501 of the Federal Rules of Evidence,[24] the federal attorney-client privilege can be modified only by a judicial constitutional ruling, by an act of Congress or through the Supreme Court's rule-making authority. It cannot be modified by the Commission's rule-making authority under section 307 of the Act.

As for the argument that the threat of a noisy withdrawal would keep companies from breaking the law, the opponents of the Proposed Noisy Withdrawal Rules offer many of the arguments set out in the introduction to this article. In particular they stress that officers and directors are often unaware that they may be treading on thin legal ice. Accordingly, encouraging executives to eliminate their legal advisors from their circle for fear of having their discussions reported to the government leaves the executives free to trample upon the very laws that the attorneys would have protected. Furthermore, obliging the attorney to abruptly withdraw her representation undermines the educative process that attorneys with long-standing relationships can often bring to bear on their clients. To pull a long-standing attorney from the client just because the client did not understand or even agree with the lawyer's message as quickly as the regulators would have liked, kills the very relationship that vouchsafes compliance.

As to the argument that lawyers are not the best people to investigate suspicions of misconduct and should therefore report such unsubstantiated suspicions to the board, the opponents argue that the point of "up the ladder reporting" and the "noisy withdrawal" is to protect shareholder value. Shareholder value not only suffers as a result of confirmed corporate misconduct but suffers also as a result of rumors. When the press gets hold of the rumor, as it will do once it is reported up the ladder, the value of the stock will take a tumble from which it will, likely, rarely recover. Months or years after being dragged through investigations, class actions and bad press, the company may be vindicated, but the stock may be lifeless.

Consider the attorney who is asked to advise her client about the legalities of a particular transaction that the company is eager to close ahead of its competitors. "It has to be done by yesterday," is the familiar refrain of the day. Given the Act's threat of disbarment and fines against attorneys who do not report evidence of possible violations of law, attorneys in such situations may be tempted to protect themselves rather than the companies they advise by reporting up the ladder and out, simply because they are pressed for time. Many attorneys will say that the greatest risk of a serious mistake is present when time is too short to think through the alternatives.

Preemption

The debate about whether federal authorities or state authorities should govern the professional conduct of securities lawyers has been resolved. So, too, the question of what happens in the event of a conflict between the two sets of rules, has been settled, at least for now, by one word in the Final Rules. That word is "preemption." Accordingly, if the federal rules require an attorney to divulge client-attorney confidences, the attorney will be obliged to do so, even if this would violate state rules.

Indeed, it is not unprecedented for the federal authorities to govern attorneys. The bankruptcy bar, the patent bar and the tax bar are already governed by federal rules.

Some have criticized the Proposed Alternative Noisy Withdrawal Rules on the grounds that once the attorney starts the ball rolling by withdrawing and notifying the company, it does not matter whether it is the attorney or the company that actually notifies the Commission. If an attorney knows that the company notification trigger is linked to the Commission notification trigger, pulling the company trigger is tantamount to pulling the Commission trigger.

On the other hand, the Proposed Alternative Noisy Withdrawal Rules may actually make the attorney's task of controlling her client easier because disregarding the attorney's advice may oblige the client to turn itself in.

Conclusion

Arguably, the Final Rules are so close to the current situation under the New York Rules that there is little reason to object. The Proposed Noisy Withdrawal Rules are problematic for the reasons described above. The Proposed Alternative Noisy Withdrawal Rules appear to be a cosmetic fix but not a real answer to the attorney-client privilege concerns.

Accordingly, we would recommend that the Commission decline to adopt either the Proposed Noisy Withdrawal Rules or the Proposed Alternative Noisy Withdrawal Rules and adhere to the Final Rules adopted in January 2003.

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Endnotes

1. 524 U.S. 399 (1998).
2. 524 U.S. 399, 403 (1998).
3. Release Nos. 33-8150, 34-46868.
4. Proposed Section 205.3(d)(1).
5. Release Nos. 33-8185, 34-47276.
6. Proposed Section 205.3(b)(2).
7. Section 205.2(b)(3).
8. Release Nos. 33-8186, 34-47282.
9. Proposed Section 205.3(d).
10. Proposed Section 205.3(e).
11. Proposed Section 205.3 (f).
12. N.Y. Code of Prof'l Responsibility DR 5-109(B), New York Comp. Codes R. & Reg. tit. 22, § 1200.28[B] (2003) (N.Y.C.R.R.).
13. N.Y. Code of Prof'l Responsibility DR 5-109(C), 22 N.Y.C.R.R. § 1200.28[C] (2003).
14. Section 205.2(e).
15. N.Y. Code of Prof'l Responsibility DR 4-101(C)(2), 22 N.Y.C.R.R. § 1200.19[C][2] (2003).
16. N.Y. Code of Prof'l Responsibility DR 4-101(C)(5), 22 N.Y.C.R.R. § 1200.19[C][5] (2003).
17. N.Y. Code of Prof'l Responsibility DR 4-101(C)(3), 22 N.Y.C.R.R. § 1200.19[C][3] (2003).
18. *Id*.
19. N.Y. Code of Prof'l Responsibility DR 7-102(B)(1), 22 N.Y.C.R.R. § 1200.33[B][1] (2003).
20. *Id.* (emphasis added).
21. N.Y. Code of Prof'l Responsibility DR 4-101(A), 22 N.Y.C.R.R. § 1200.19[A] (2003).
22. N.Y. Code of Prof'l Responsibility DR 7-102(B)(1), 22 N.Y.C.R.R. § 1200.33[B][1] (2003).
23. 51 S.E.C. 93 (Dec. 3, 1992).
24. Fed. R. Evid. 501.

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A Global Code of Conduct May Suit Your Multinational Company

Employers have more to worry about than they used to—especially from the labor and employment law perspective. From non-discrimination and anti-harassment to recordkeeping and privacy, employers have a lot to keep in mind. Those worries are compounded when employers maintain offices in various countries throughout the world. Multinational employers must stay current with the labor and employment laws and requirements in their home countries, but also with those of every other country in which they maintain offices.

In the past, because of differing laws and cultures, companies with offices in various countries worldwide often ran each of their foreign offices as a separate company. Now, however, with the increased mobility of employees and improved technology, employers often wish to maintain continuity among all of their offices worldwide. While the maintenance of a single compensation program, benefits plans, and other employment policies may be desirable, this goal may be impossible.

What, then, can employers do to balance a desire for continuity with the differing legal requirements and cultures in the various jurisdictions in which it operates?

One approach that many multinational employers are adopting is the development of a global code of conduct. A global code of conduct can outline a company's overall philosophy and/or employment outlook. In some cases it may expand beyond what is legally required in certain countries where the employer maintains offices. Global policies may address expatriate assignments, ethics, workplace privacy, the prevention of workplace harassment and discrimination, as well as performance management and employee recognition and motivation—through, for example, a global rewards program. These issues are addressed in turn.

Expatriate Issues

Although legal requirements for employing and compensating expatriate workers vary throughout the world, an employer may wish to maintain a consistent expatriate policy throughout all of its offices. To encourage employees to make themselves available for expatriate service, employers may consider a comprehensive expatriate policy and/or program which includes the following:

- updated descriptions of the types of assignments available and the countries in which the positions exist,
- explanations of the similarities and differences in compensation packages from office to office,
- a comprehensive explanation of visa and immigration issues that are implicated when employees become expatriates,
- guides to the logistics of moving internationally,
- any applicable security issues,
- an explanation of the company's repatriation process,
- any spouse career assistance the company provides, and
- any other logistical issues surrounding a temporary international move, such as home country

housing and automobile, temporary living expenses, education, vacation, and home leave visits.

This type of consistent expatriate policy could encourage employees to make themselves available for expatriate service. It could also lessen the likelihood that an employee may claim that expatriates of certain national origins are treated more favorably than others. When the policies and procedures associated with expatriate employment are well known and available to all employees, the number of employees volunteering for such employment generally rises.

Company Ethics

One way to ensure commonality among offices is to create a global code of ethics. The code of ethics may define acceptable behavior, promote consistent standards of practice and performance, establish frameworks for professional responsibility, and define an organization's identity. Codes of ethics can be used to regulate behavior and to inspire certain types of attitudes throughout the workplace.

A code of ethics often includes a goals section that outlines the ambitions of management, and what employees are expected to aspire to, as well as a list of rules and/or principles to which employees are expected to adhere. Global codes of ethics, as opposed to codes in effect for only one office in one location, often include general mission statements and overarching rules instead of specific day-to-day rules, which may change from time to time or office to office.

Codes of ethics should be audited, updated, and followed. Codes should include reporting mechanisms and lines of communication. Some companies also include confidential means for reporting breaches of the code. In light of the recently enacted Sarbanes-Oxley whistleblower protections, a policy addressing these issues is crucial. Obviously, for employees to take the code seriously, consequences must attach to breaches. Such consequences will most likely be determined on a case-by-case basis, depending on the severity of the breach.

Non-Discrimination and Anti-Harassment

One of the most challenging issues employers face is in the area of equal employment opportunity. U.S. anti-discrimination laws—such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, and the Americans with Disabilities Act—apply to U.S. citizens who work for companies owned or controlled by U.S. multinational corporations. Employees who are not U.S. citizens are not covered. Thus, U.S. employers face the potential challenge of having employees working side-by-side in overseas offices with different legal protections. For example, while one employee maintains the right to be free from harassment and the right to be reasonably accommodated with respect to her disabilities, her coworker may not legally have those protections.

Apart from the legal and employee relations issues attendant to having distinct personnel policies, global employers must consider whether to commit to their employees that as a matter of Company policy, regardless of the laws of the jurisdiction where they are employed, there are certain fundamental protections afforded to all employees including the right to be free from harassment or discrimination based on their race, religion, sex, etc. Many multinational employers have made such a commitment, including the implementation of an internal complaint procedure so that employees may seek internal redress for inappropriate conduct.

Workplace Privacy

A workplace privacy policy may be included in a global code of conduct. Prior to making such a policy part of a global code of conduct, employers must become familiar with the privacy laws of the jurisdictions in which they maintain offices. Privacy laws are generally much stricter in countries other than the United States, particularly in the EU. Although much of the privacy legislation abroad was originally targeted at consumer protection, it affects personnel information of employees, particularly the transfer of employees' personal information outside the country of his or her employment. European Directive 95/46/EC, for example, was passed in 1995 to protect privacy rights with respect to the processing of personal data. The same philosophy of privacy and confidentiality often attaches to surveillance and workplace search policies (including the monitoring of e-mail and Internet usage).

Thus, employers must ensure that any global workplace surveillance and privacy policies pass muster in all jurisdictions in which they maintain offices. A privacy policy that might pass muster worldwide may include a general policy of minimizing data collection with respect to employee personal information, increasing confidentiality measures, and limiting the use of certain types of data.

Benefits and "Global Rewards"

Although significant differences exist among the world's benefits laws, multinational employers may take steps toward the globalization of compensation and benefits by articulating global rewards philosophies and by implementing such philosophies through global rewards programs. For example, multinational employers may implement international stock option programs or worldwide employee ownership incentive programs.

Additionally, share plans are becoming increasingly popular. Employers utilize share plans to extend stock ownership to employees. Through share plans, employers allow employees to purchase shares in the company at discounted rates or allow employees to gain from appreciation in the company's stock with little or no financial outlay. Many employers structure share plans so that they meet employer objectives, such as employee retention, production and performance. The most common types of share plans include stock option plans, restricted stock awards (free shares), and stock purchase plans. Again, although benefits laws differ from country to country, a consistent policy of employee ownership and the provision of employment benefits may add to a more "global" workplace.

Conclusion

Maintaining a multinational organization is difficult in many respects. Employers must be aware of differences in laws, attitudes and behaviors in each of the countries in which they operate. Although it may be virtually impossible to maintain identical employment policies in each of a multinational company's offices, overarching goals and ideals can be rolled into a global code of conduct. Such codes help multinationals to create one "team" out of several thousands of employees in several offices worldwide.

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Cash Debt Tender Offers: A Valuable Restructuring Tool

Foreign companies in need of financing have in the past often looked to the U.S. public debt markets as a source of inexpensive long-term capital. During this period of low interest rates and with the expansion and globalization of the European and other world markets, many foreign companies are in fact now seeking to refinance their indebtedness and update and adjust their capital structure. Unfortunately, the ability to amend the terms of such indebtedness or to refinance does not rest with a single lender or syndicate of lenders. As U.S. public debt securities are one of the most permanent financing alternatives available, they are also one of the most difficult to refinance. Making a tender offer for outstanding U.S. public debt securities, however, can be used to overcome many of these difficulties. A debt tender offer can be a valuable tool for taking advantage of the current conditions and can give companies desiring to restructure the flexibility to do so.

This article will discuss the various options, rules and other features relating to a tender offer for non-convertible debt securities using cash as consideration (a "Cash Debt Tender Offer").[1]

Qualifying as a Cash Debt Tender Offer

The preliminary question that must be addressed before commencing purchases of debt securities is whether such purchases must be qualified as a tender offer. Unfortunately, the term "tender offer" is not defined in the Securities Exchange Act of 1934. However, in *Wellman v. Dickstein*,[2] the SEC proposed an eight-factor test which has become the generally accepted guideline for determining whether a tender offer has been made. The eight factors that would suggest that a tender offer is being made are: (1) active and widespread solicitation of public securityholders; (2) solicitation of the holders of a substantial percentage of the issuer's securities; (3) an offer to purchase made at a premium over the prevailing market price; (4) an offer containing terms which are firm, rather than negotiable; (5) an offer contingent on the tender of a fixed number of securities, often subject to a fixed maximum number to be purchased; (6) an offer open only for a limited period of time; (7) offerees being pressured to sell their securities; and (8) whether the public announcement of a purchasing program concerning the target precedes or accompanies rapid accumulations of large amounts of the target's securities. Not all factors would need to be present in any case, and the weight accorded to each factor would be determined in each case.[3]

Consequently, by avoiding some of the *Wellman* factors listed above an issuer can avoid the characterization of its purchases as a tender offer. For example, open market purchases or privately negotiated purchases that are independent of one another, separately negotiated and priced with no advance announcement of an intention to make such purchases would not constitute a tender offer. On the other hand, the existence of many of the *Wellman* factors when making cash purchases of debt securities may require that such purchases be characterized as a Cash Debt Tender Offer.

Pricing a Cash Debt Tender Offer

There are two methodologies for pricing Cash Debt Tender Offers. A "fixed price," where a specified price is fixed at the outset of the tender offer period, is the simplest and most straightforward method. A holder knows exactly what the amount is being offered. However, the disadvantage to an issuer of a fixed price tender offer is that interest rates may fluctuate during the tender offer period. Consequently, the fixed price set at the beginning of the tender offer period may turn out to be too high or too low based on the direction of the interest rate movement, resulting in either overpayment or undersubscription.

An alternative to a fixed price tender offer is a "fixed spread" tender offer. In a fixed spread tender offer, the price to be paid for the securities being sought is calculated based on a fixed number of basis points over the then current yield of a specified U.S. Treasury security. A fixed spread tender offer has the advantage of reducing the interest rate risk to both the issuer and the holders who tender.

Within the fixed spread pricing methodology there are a number of different pricing variations that could further reduce the interest rate risk. The tender offer could be structured so that the yield is measured for all holders a specified number of days prior to the expiration of the tender offer period. On such price determination date, the price would be set based on a fixed spread over the then current yield on the specified benchmark security as reported by a designated reporting service. Holders would have the opportunity to calculate the hypothetical price to be paid per security over the course of the tender offer period and the issuer would announce the final price on the price determination date. To further reduce interest rate risk, a fixed spread tender offer could also be structured so that the price to be paid to each purchaser would be calculated separately based on the current yield on the date of or date preceding such holder's tender (daily fixed spread pricing) or even at the exact time of such tender (continuous fixed spread pricing). Using these structures, each holder tendering securities would receive a different price.

A disadvantage to the fixed spread pricing methodology is that the price is based on a complex formula to determine the present value of a benchmark security based on a constantly changing yield. Furthermore, depending on the type of fixed spread pricing used, the actual price is set at the time a tender is made or shortly before the expiration of the tender offer period. Thus, holders are afforded little time to properly assess the tender offer price. To address this concern, some issuers have set a minimum price so that holders will at least be aware of the lowest dollar amount being offered for their securities.

If an issuer intends to purchase less than all of the outstanding securities of a class or series, a "dutch auction" or a "modified dutch auction" structure may also be used. In a pure dutch auction, an issuer invites holders to tender their securities at prices specified by the holders. The issuer then proceeds to purchase securities, starting with those tendered at the lowest price and continuing with those tendered at increasing prices, until it has accepted all the securities it desires, purchasing the securities at the varying prices at which they were tendered. In a modified dutch auction, the holders tender securities at a price within a preset price range. The issuer pays the single lowest price within that range that will enable it to purchase the amount of securities sought in the tender offer to each holder that has tendered their securities at or below such set price. These structures have the added advantage to an issuer of not paying more than the amount at which the holders are willing to sell.

Laws Governing a Cash Debt Tender Offer

The rules regulating Cash Debt Tender Offers are fairly sparse. The forms and filings mandated for domestic equity tender offers are not applicable to Cash Debt Tender Offers. No SEC filings are required and the rules for domestic equity tender offers, such as the requirement that all holders receive the same consideration for their securities, are not applicable. As such, daily and continuous fixed spread pricing (in the case of investment grade debt securities)[4] as well as the dutch auction structures discussed above (where each holder receives different consideration for their securities) are permitted.

Basic antifraud rules such as Rule 10b-5 do, however, still apply. Consequently, while no detailed information needs to be provided to holders other than the most basic terms of the tender offer, such as the price to be paid, the number of securities being sought and the expiration date of the offer, in order to avoid any potential Rule 10b-5 claims, accepted practice has become to provide or incorporate by reference additional information about the offer and the issuer in an offer to purchase document.

In addition, Regulation 14E, applicable to any foreign or domestic tender offer, including Cash Debt Tender Offers, requires, among other things, that an offer be kept open for a minimum of 20 business days and for least 10 business days following any increase or decrease in the percentage of the class of securities being sought or the consideration offered.

Notwithstanding Regulation 14E, in a series of no-action letters, the SEC relaxed certain time period restrictions for tender offers for investment grade debt securities.[5] Subsequently, the SEC has also orally granted similar no-action relief for tender offers for certain non-investment grade debt securities which are widely followed and traded in established markets based on their yield in relation to benchmark U.S. Treasury securities of similar maturities. As part of this no-action relief, the SEC permitted the use of the fixed spread pricing methodology discussed above without complying with the rule requiring the extension of a tender offer for 10 business days following the adjustment or setting of a price to be paid for the securities being sought.[6] The SEC also granted no action relief for investment grade debt securities by only requiring a tender offer to remain open for as little as 7–10 days instead of the 20 business days required by the rules.[7] Without the reduced interest rate risk offered by the fixed spread pricing methodology, the SEC feared that many issuers would have to forego the tender offer route and use other strategies to refinance. As a result individual non-institutional investors would not be afforded the opportunity to receive a repurchase premium.[8]

Furthermore, since Cash Debt Tender Offers usually offer only modest premiums and many issuers as part of a refinancing effort wish to effect such refinancing during short interest rate windows of opportunity, the SEC concluded that participation by individual non-institutional investors would not materially increase if the offer were kept open for the full 20 business days.[9]

While, as noted above, the SEC has reduced certain minimum time periods, it has set certain conditions when conducting a fixed spread tender offer to preserve the integrity of the repurchase process. Generally speaking, a fixed spread cash tender offer for non-convertible debt securities is permissible if: (i) the offer is open to all record and beneficial holders of that class or series of debt; (ii) the offer identifies the specific benchmark Treasury security to be used in calculating the purchase price and the daily newspaper of national circulation to be used as a source of daily yield data (and the specific quotation service in a continuous fixed spread offering); (iii) the offer discloses the fixed spread to be added to the yield on the benchmark Treasury security; (iv) the offer describes the assumptions and methodology to be used to calculate the purchase price; (v) the offer discloses the nominal fixed price based under the applicable reference yield prevailing immediately preceding the commencement of the offer; (vi) in the case of an offer for non-investment grade debt securities, the nominal price is set prior to the second day preceding the expiration of the offer; (vii) the offer is conducted in a manner designed to afford all record and beneficial holders of that class or series of debt a reasonable opportunity to participate in the tender offer; (viii) the offeror pays promptly for tendered securities after such securities are accepted for payment; and (ix) the offer is not made in anticipation of or in response to other tender offers for the issuer's securities.[10]

Conclusion

A foreign or domestic company wishing to refinance or restructure its outstanding U.S. public debt can benefit from undertaking a Cash Debt Tender Offer. A Cash Debt Tender Offer has the advantage of speed, efficiency and little regulation. It can be used to bypass the constraints resulting from the fact that U.S. public debt is generally widely held and can be structured to reduce interest rate risk as much as possible. Accordingly, a Cash Debt Tender Offer should be viewed as a valuable tool for adjusting or updating the capital structure of a company to fit its then current needs.

Eliezer M. Helfgott
Friedman Kaplan Seiler & Adelman LLP
New York, N.Y.

Endnotes

1. Tender offers using securities as consideration, or exchange offers, may be subject to registration requirements of the Securities Act of 1933 and are beyond the scope of this article.
2. *Wellman v. Dickstein*, 475 F. Supp. 783 (S.D.N.Y.), *aff'd*, 682 F.2d 355 (2d Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983).
3. *Wellman*, 475 F. Supp. at 824.
4. Salomon Brothers Inc., SEC No-Action Letter, Sept. 1990; Goldman, Sachs & Co., SEC No-Action Letter, Dec. 3, 1993.
5. *See* Salomon Brothers Inc., SEC No-Action Letter, Mar. 11, 1986; Shearson Lehman Brothers Inc., SEC No-Action Letter, Dec. 2, 1986; Merrill Lynch Pierce Fenner & Smith Inc., SEC No-Action Letter, July 2, 1986; Kidder, Peabody & Co. Inc., SEC No-Action Letter, May 5, 1986.
6. *Id*.
7. Goldman, Sachs & Co., SEC No-Action Letter, Dec. 23,1993.
8. *See* Salomon Brothers Inc., SEC No-Action Letter, Mar. 11, 1986; Shearson Lehman Brothers Inc., SEC No-Action Letter, Dec. 2, 1986; Merrill Lynch Pierce Fenner & Smith Inc., SEC No-Action Letter, July 2, 1986; Kidder, Peabody & Co. Inc., SEC No-Action Letter, May 5, 1986.
9. *Id*.
10. Goldman, Sachs & Co., SEC No-Action Letter, Dec. 23, 1993.

Firm News

NautaDutilh Opens Luxembourg Office

NautaDutilh is pleased to announce that it has opened an office in Luxembourg. Tax partner Derk Prinsen has relocated from Rotterdam. He will be working with Werner Heyvaert, who is based in Brussels. As a result of its having an office in Luxembourg, NautaDutilh expects to expand its existing Luxembourg tax practice. The Luxembourg office will work closely with the tax teams in New York, Brussels and The Netherlands and with local lawyers. As before, Derk Prinsen (1969) will focus on international tax structuring.

About NautaDutilh

Home-based in Amsterdam, Brussels, and Rotterdam, NautaDutilh is one of continental Europe's leading law firms. NautaDutilh has clearly and publicly chosen to remain independent and it has close but non-exclusive relationships with other market-leading (or specialist) law firms in all major jurisdictions throughout the world, in particular in the U.S. and the U.K. The offices in New York, London and Luxembourg play an important role in the expansion and support of our core practice. Our core businesses are corporate, banking, finance and tax law, but we have chosen to maintain a broad commercial practice with a variety of departments and cross-departmental specialist groups. Our range of skill is recognized by European Legal 500 and Chambers Global, who recommend us in every category in The Netherlands and in eight categories in Belgium. The firm has close to 500 lawyers, civil law notaries and tax advisers—including many internationally recognized experts.

About the Tax Practice

Our tax group in Amsterdam, Brussels, and Rotterdam and its extensions in New York, London and Luxembourg, is active in many areas of tax law. The tax group works closely with other groups within the firm in order to provide an integrated service on M&A, and capital markets transactions of all kinds including structured finance, project finance, and asset finance. In addition the group advises on corporate reorganizations (including debt restructuring), holding companies, transfer pricing, employee benefits, VAT and customs duties.

Additional information may be obtained from:

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Davis Wright Tremaine LLP

Davis Wright Tremaine LLP (DWT) set up its law office in Shanghai, China, in January 1994. It was the first U.S. law office in Shanghai that had been approved by China's Ministry of Justice. Among others, the firm has a China Practice Group consisting of mostly bi-lingual U.S. lawyers who received legal training in the U.S. or in both the U.S. and China, as well as bi-lingual legal consultants and assistants who are legal professionals trained in China. Several U.S. lawyers in the firm's China Practice Group split their time between their home-base offices in the U.S. and the Shanghai office. Last September, two partners of DWT's China Practice Group relocated from their home base office in Seattle to the firm's New York office—Jerry Zhu, the founder of the firm's Shanghai office, and Margaret Lu. Both Jerry and Margaret will continue to divide their time between the firm's New York office and its Shanghai office.

Working within the rules governing foreign law offices in China, Jerry, Margaret and other members of DWT's China Practice Group provide a wide range of legal services to mostly U.S. clients, assisting them in their efforts to accomplish their business objectives in China. Such services typically start from determination of an appropriate and desirable form of investment. Because of the requirements and restrictions imposed by Chinese laws on foreign investment, sometimes the form of an equity joint venture may serve one client's business objectives, whereas the form of a cooperative joint venture may be a better choice for another. Oftentimes, to the extent permitted by China industry policies and laws, a wholly foreign-owned subsidiary may serve to avoid much of the headaches of a joint venture in having to deal with one or more Chinese partners. In many cases, a representative office may be the least expensive way of getting a foot into the door.

Due to the huge differences between the laws, legal systems, business practices and cultural backgrounds of China and the U.S., it is all but natural that U.S. investors are often frustrated in the course of feeling their way through a maze of policies, laws, regulations or rules (published or unpublished, and sometime enforced and sometimes not strictly enforced), governing such matters as the formation, operation, restructuring, merger and acquisition, dissolution and liquidation of their different forms of entities in China, including acquisition of land use right, construction, employment, distribution and sales of goods, import and export, taxation, intellectual property rights, equipment leases, not to mention possible lawsuits, arbitration or government investigations.

With the knowledge and experiences accumulated over the past nine years regarding the laws, legal systems, business practices and cultural aspects of both countries, DWT China Practice Group feels confident that it can effectively "bridge" the differences, and provide clients with the protection desirable and attainable under the environment of China's legal system through in-depth legal analysis and drafting.

DWT's China Practice Group also represents many Chinese companies doing business in the U.S. in areas such as timber, fishery, shipping, newspaper and airline services.

DWT's China Practice Group is uniquely and fully integrated with its eight U.S. offices and its office in Shanghai, China. Through computer and telecommunications systems, clients served by the Shanghai Office have ready access to the full range of legal expertise and staff support of the entire firm. Projects are often staffed with both U.S.-based and China-based attorneys. The full integration of DWT's U.S.- and China-based practices allows the firm's North America clients the flexibility and convenience of working at all times with lawyers in their own time zones.

The recent relocation of Jerry Zhu and Margaret Lu from the firm's Seattle office to its New York office truly attests to the firm's commitment to providing such flexibility and convenience to its clients located on the East Coast and in the Midwest region of the United States.

Gianni, Origoni, Grippo & Partners

On the occasion of the opening of the new Bologna office in the North of Italy, Gianni, Origoni, Grippo & Partners organised a round table on "Growth models: the choice businesses must make between local and global realities."

The aim of the event was to raise our profile amongst key representatives of the local economic and financial communities. The region where Bologna is located is very wealthy, and is home to numerous fast-growing and international-oriented companies.

Speakers at the conference were well-known local businessmen and bankers, such as Luca di Montezemolo (Chairman of Ferrari), Guido Barilla (Chairman of Barilla, Italy's leading pasta-makers). Popular anchorman Alan Friedman introduced the subject and shared his knowledge, stimulating the debate.

The discussion covered topics including international scenarios and economic trends, and their impact on the local economy. It served as a forum for an exchange of ideas and experiences on emerging economic issues and current problems.

Over 200 people representing the business community attended the conference, which also received much attention from the press.

The conference was held in a historical mansion dating from the 16th century. The magnificent rooms provided the perfect venue for a lavish reception which followed the conference. Feedback was excellent, indicating that the event went down very well.

Based on the number of lawyers, Gianni, Origoni, Grippo & Partners is today the largest firm in Italy, with 245 fee earners. Although Italy's M&A markets are quieter, as indeed are those elsewhere in the world lately, our relative position remains strong. We have topped the M&A Thomson Financial league tables in Italy for the last two years.

Bologna is our fourth office in Italy, and sixth worldwide. With this opening we are continuing to expand in Italy and develop our services, by ensuring we are physically close to our clients.

Member News

James R. Silkenat, a partner at the Arent Fox firm in New York City and a member of the NYSBA House of Delegates, was recently re-elected as the ABA State Delegate from New York and Chair of the New York Delegation to the American Bar Association House of Delegates.

Section Meetings and Programs

Our Section is fortunate to have very active members who give freely of their time and talents to enable our Section to offer some outstanding programs to its members and the general bar.

Last October, we had our Fall Meeting in Rome. One of the major themes of this meeting was the impact of Sarbanes-Oxley on international practitioners, with an emphasis of how this startling new legislation would affect non-U.S. practitioners. We offered some very timely and topical panels, including a panel with Giovanni Prezioso, the General Counsel of the Securities and Exchange Commission, who presented the Commission's views on this important new legislation.

We continued this theme at our Annual Meeting that is held in New York City in conjunction with the Association's Annual Meeting this past January. Our entire program was devoted to Sarbanes-Oxley, and we offered three exceptional panels with highly qualified speakers from the United States and Europe who focused on the practical problems Sarbanes-Oxley would likely pose to the international practitioner who is not necessarily a New York lawyer, or even a member of a U.S. bar.

Our Section is continuing this theme in a somewhat broader perspective in Amsterdam this coming October when we will focus more broadly on the extraterritorial effect of laws. This will, of course, include further discussion of Sarbanes-Oxley, but it will also embrace numerous other laws that transcend borders, as well as practice issues that cross borders. Thus, we will offer panels that treat environmental laws, competition laws, trans-border practice of law, and international litigation, to mention a few of the very interesting panels we have planned.

Our Section is determined to be a leader in critical thinking about international legal transactions and laws and the practices that affect those transactions and laws. We are particularly well suited to that role, because of the large number of New York law firms that have branch offices around the world and the large number of foreign law firms that have branch offices in New York. Thus, we have the ability to see first hand how law is practiced around the world and the strengths and weaknesses of many other important legal systems.

Despite today's problems with international terrorism, SARS, and other issues that inhibit international trade and commerce, it seems clear, we will increasingly be confronted with a world in which people are no longer willing to do business in their own backyard. Business is increasingly viewing the entire world as its marketplace, and our profession is recognizing that trend in its initiatives to facilitate the trans-border practice of law and improve practice standards for international practice. We are also seeking ways to assure that legal consequences are foreseeable and predictable without regard to the accident of where the contracting parties may happen to be located at the time they reach agreement.

These are exciting times to lead our Section, and I am particularly grateful that my predecessors had the foresight to see the importance of our Section's having International Chapters. One of the initiatives I have established for my administration is recognizing the importance of our International Chapters and involving them more fully in the day-to-day life of our Section. Toward that end, I hope to find ways to draw more fully on the talent we have in our International Chapters and make sure International Chapter leadership is fully informed of the activities of our Section.

We have an International Chapter Chairs listserve as well as an Executive Committee listserve. These two listserves have been combined so that it is possible to send a single message to both the Executive Committee and the International Chapter Chairs. Many of you have noticed that we are making much larger use of our listserves this year, and we would encourage our International Chapter Chairs to participate in the discussions of Section business that occur there. We are particularly interested to have your input whenever there are important differences between New York law or the way things are done in New York versus elsewhere.

We will also be making a special effort to have special events for the International Chapters at this year's Fall Meeting in Amsterdam. This is the subject of a separate message later in this newsletter. Thus, you should mark your calendars for October 22nd through the 26th in Amsterdam. We hope to see you there.

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

International Law and Practice Section
Fall Meeting

Rome, Italy • October 16–19, 2002

The International Law and Practice Section of the New York State Bar Association's annual conference was held at the Grand Hotel Plaza on the Via del Corso in Rome from October 16 through 19, 2002. Almost 200 persons, including judges, professors and government officials, as well as lawyers from 15 countries in Europe, Latin America and the United States participated in the Fall Meeting. In addition to the presentations and panel discussions on European and United States legal topics, the participants in the Meeting enjoyed private tours of the Galleria Borghese, the Sistine Chapel and the Vatican Museum, as well as festive receptions and dinners at the Palazzo del Drago, the Villa Borghese and the Villa Giovanelli Fogaccia, outside of Rome, and at restaurants on the Via Veneto and on Monte Mario. Spousal tours included visits to the Vatican Gardens, including St. Peter's Basilica, Hadrian's Villa and the Tivoli Gardens, and an Imperial Rome tour.

The United States Ambassador to the Holy See, Jim Nicholson, and the Deputy Chief of Mission of the United States Embassy in Rome, Emil M. Skodon, each addressed the opening reception on their recent activities representing the United States to the Vatican and Italy, respectively. Luncheon speakers included the Counselor for Political-Military Affairs of the Embassy, Gary D.M. Robbins, who presented the United States position on the International Criminal Court, and the President of the Privacy Authority of the Italian Government (and Chief of the European Group of Authorities for the Protection of Privacy), Stefano Rodotá, who urged the United States to reconcile its laws and regulations relating to the

Del popolo.

The view from the Spanish Steps.

Patricia and Jon Johnson, John Hanna, Cathi Hession, Manuel Campos-Galvan and Alejandra Jaramillo.

Elliot Schultz, Marco Blanco and Jaylin Schultz.

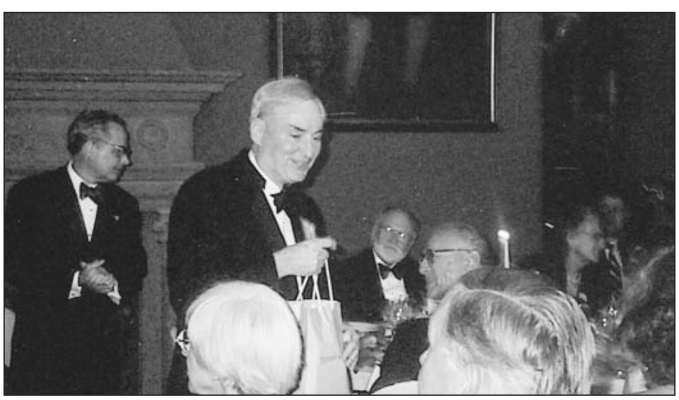
Lorraine Power Tharp and Ken Schultz.

The Vatican courtyard.

protection of privacy rights with those of the European Union. Welcoming remarks at the conference also were given by Frederico Bucci, President of the Rome Bar Association; Lorraine Power Tharp, President of the New York State Bar Association; and Kenneth A. Schultz, Chair of the International Law and Practice Section.

Paul M. Frank of the New York Office of Alston & Bird, and Franceso Gianni of Gianni, Origoni, Grippo & Partners in Rome were Co-Chairs of the Meeting, which was held in cooperation with the Rome Bar Association, the International Bar Association, the Union Internationale des Avocats and the American Bar Association Section of International Law and Practice.

The conference included two plenary sessions and thirteen programs, satisfying 19.5 hours of New York State MCLE Board requirements, up to 18 hours in areas of practice management and up to 5.5 hours in ethics, depending on the panels selected. The first plenary session on "Takeover Laws in Europe and the United States" included German, Italian, French, Irish, English and American lawyers; the second was



Section Chair Ken Schultz and Program Chair Paul Frank.

Manuel Campos-Galvan, Alejandra Jaramillo, Carl A. Ruggiero and Sue Maney.

Outside the Vatican.

John Hanna, Cathi Hession, Elliott Ruga and Manuel Campos-Galvan.

"Fighting the Exploitation of the Financial and Corporate Systems by Terrorism, Bribery, Money-Laundering—The Collaboration of the Private Sector, International Organizations and Governments," and was co-chaired by Joyce M. Hansen of the Federal Reserve Bank of New York and featured Miguel Schloss of Transparency International of Washington, D.C., and Edouard Fernandez-Bollo of the Banque de France, as well as lawyers from Milan, New York City and Washington, D.C.

The thirteen programs covered a wide range of legal topics, from "Family Owned Business Enterprises; Governance, Tax and Financial Aspects" featuring Alberto Falck, Chairman of the Associazione Italiana delle Aziende Familiari of Italy and lawyers from Lugano, Munich, Barcelona, Rome and New York City; to "Bioethics & Law" with a panel that included Professors Stefano Rodotá of the University of Rome (La Sapienza), William K Kelley, University of Notre Dame and Thomas Williams of the Pontifical University Regina Apostolorum in Rome. Other programs of note included one presenting the views of eight former Section Chairs on "Practical Issues And Ethics Of Multijurisdictional Practice"; another

Sue Maney, Shashi Rajani and Lynn Quigley.

Jon Johnson and Len Quigley.

Lynn and Len Quigley.

Cathi Hession, Elliott Ruga, Manuel Campos-Galvan and Alejandra Jaramillo.

The Vatican courtyard.

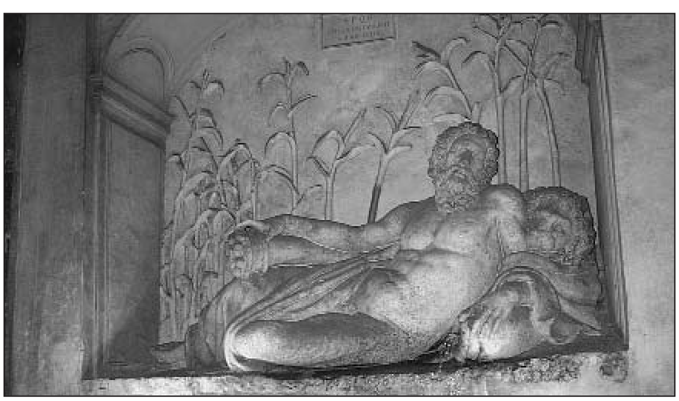
The Vatican courtyard.

on "Taxation of Cross-Border Investments," with lawyers from Brussels, Frankfurt am Main, Paris, Rome and New York; a third on "Choosing Arbitral Institutions or Not, a Menu of European Choices," with representatives from arbitration courts, associations or institutes in Sweden, Russia, France and the United States; and a fourth on "Ethical Issues Beyond Enron/Anderson/WorldCom And What The Legal Profession Must Do To Avoid Similar Problems" that featured Giovanni P. Prezioso, General Counsel of the Securities And Exchange Commission, by video conference from Washington, D.C.

In addition to the many lawyers from significant international law firms in Europe, the United Kingdom, the United States and Latin America, the panels included Michael Joachim Bonell (Director of UNIDROIT and Professor at the University of Rome (La Sapienza)), Steven M. Kahaner (Executive Director of Juriscribe), Hans-Ueli Vogt (the Jean Monnet Fellow at the European University Institute in Florence), John Clarke (Depute Head of Unit D1, Coordination of WTO and OECD Matters, GATT, Directorate General for Trade of the European Commission and Michael Garrote, Migration/Fraud Prevention Officer, United States Consulate General in Rome. The remaining programs compared recent legal developments in the European Union and the United States relating to corporate governance and compliance, intellectual property, aspects of international product liability, restructuring of troubled companies, trade issues, international estate and tax planning, dispute resolution, real estate funds and foreign investment in real property, financial issues in international disputes and online privacy regulation and e-commerce.

Via del corso.

Paul Frank
New York



Quarto Fontana at the Vatican museum.

Roman mosaic at the Vatican museum.

Fall Meeting October 22–26, 2003, in Amsterdam

The Section has Chapters in over 40 foreign cities throughout the world, and, by any measure, these Chapters are an important Section resource that should be developed and utilized to support our Section's activities. Accordingly, this year, your Section is going to try something new to encourage more attendance from our International Chapter Members at our Fall Meeting that will be in Amsterdam from October 22nd through the 26th.

The night of October 21st, the evening before the official start of our meeting on Wednesday evening, October 22nd, your Section will offer a special reception and dinner for International Chapter Members. The morning of Wednesday, October 22nd, we will have special programs for Chapter Members that we hope will be of particular interest to them. While non-Chapter Members may attend these programs on a space available basis, they are primarily for Chapter Members.

I am also going to reserve some special time for meetings with small groups of our International Chapter Chairs so I can hear firsthand what concerns them and what our Section could be doing better to make our Section more useful to them and their Chapter Members. I also intend to use some of this time to acquaint our Chapters with some important initiatives our Section is leading in the area of the trans-border practice of law and try to get our Chapters better integrated into these efforts. Our Chapters are our Section's eyes and ears around the world. We need this input to understand better the problems New York lawyers and other international practitioners face about the globe.

The formal pre-meeting programs will be without charge for Chapter Members in good standing who register for the balance of the Amsterdam Meeting Program. We hope this will encourage a large turnout from our Chapter Members and that they will, as a consequence, get to know our Section better and participate more fully in its activities not only during the Amsterdam Meeting but throughout the year.

Chapter Members should feel free to contact me or any other Section officer about any matter that they feel important. Our Section is capable of mobilizing high-level resources to address appropriate problems. In fact, in an appropriate case, we can involve the weight of the entire New York State Bar Association. We want to know about problems that concern you and your Chapters and address them where possible. To do that, we need your input to help us identify areas where your Section's input is important and can make a difference.

Our Section wants to be recognized as an important voice in the international legal community. You can help us achieve that objective by being more active and keeping us informed about important international legal issues around the world. Please, therefore, plan to join us in Amsterdam this October. In the meantime, I look forward to hearing from you.

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

Request for Contributions

Contributions to the *New York International Chapter News* are welcomed and greatly appreciated. Please let us know about your recent publications, speeches, future events, firm news, country news, and member news.

Oliver J. Armas
Richard A. Scott

the new york state bar association
international law and practice section

cordially invites you to attend our

fall 2003 meeting in amsterdam

"national legislation and extraterritorial effects"

october 22 -26 2003

amstel inter-continental amsterdam hotel

co-sponsors

union internationale des avocats

international bar association

For ongoing updates, please visit:
www.nysba.org/amsterdam2003

Sunflowers, Vincent van Gogh, 1889
Reproduced with the kind permission of Van Gogh Museum, Amsterdam (Vincent van Gogh Foundation)

Working Within a Fragile Business Climate

Globalisation affects us all and, as a direct result of the current global business climate, there has perhaps never been a greater demand on the legal profession to broaden its knowledge. In essence, a broad knowledge base provides flexibility, and flexibility has become the key to a successful practice.

The global business climate is in poor health. Beginning in September 2001 with the terrorist attacks in New York and Washington, D.C., investor confidence has been waning. The major corporate scandals of 2002, such as the bankruptcy of Enron and the collapse of WorldCom, added salt to the wound. The U.S. Securities and Exchange Commission's decision at the beginning of this year to open 63 investigations into financial reporting irregularities has left investor confidence at a low level. And there is no sign of any certainty returning, particularly while (at the time of writing) the possibility of military conflict with Iraq continues to loom.

The main consequence for lawyers around the world is that some once-lucrative areas of practice have all but dried up—mergers and acquisitions, and project and asset finance for example. For the foreseeable future, commercial lawyers will do well to become flexible by broadening their knowledge of other practice areas that are experiencing a surge as a result of the current global condition, and keeping a watchful eye on developing regulations worldwide. For instance, besides an increase in the number of insolvencies in the wake of the events of 11 September, there has been heightened awareness of the insidious threat that is posed by money laundering and financial crime. In a bid to choke off the funds of the terror networks, the U.S. government has pushed through emergency anti-money laundering legislation, and other administrations around the world have quickly followed suit.

The U.S. accounting scandals have also increased the awareness of the need for true and fair corporate governance, as well as the rapidly developing, broader topic of corporate social responsibility (a topic which will feature heavily at the Conference). This will have a knock-on effect for lawyers in private practice, as in-house counsel often require the advice of specialists on matters such as human rights, labour and environmental obligations.

In order to understand the full implications of these and other recent legislation reforms, particularly with regard to legislation that purports to be extra-territorial, lawyers worldwide must consult and learn from one another, for without that knowledge it will become increasingly difficult to practise in today's legal environment. As the world's largest gathering of commercial lawyers, the International Bar Association's (IBA) Conference in San Francisco 14-19 September is tailor-made for these purposes.

Whether or not you are a member of the IBA, this year's Conference is also the ideal forum for influencing the development of international law reform. Its international membership—comprising over 16,000 lawyers from 183 countries—places the IBA in a special position to work toward streamlining commercial laws across the globe, with the aim of reducing transaction costs for international clients and improving public policy.

The Conference will bring together all the IBA's resources in a week-long intensive programme which will be attended by more than 3,000 of the world's commercial lawyers. Through the IBA's Sections, Committees, regional and special interest groups, those attending will have the opportunity to discuss subjects and projects of direct relevance to their own practice, learn from over 800 expert speakers, and take part in valuable networking activities.

The IBA occupies a unique role as a global meeting point for lawyers of all descriptions and specialties. I have had the pleasure of attending recent IBA Annual Conferences in Durban (2002), Amsterdam (2001) and Barcelona (2000). Participating in these events has given me the opportunity to gain knowledge in new important practice areas, to keep up to date with new regulation and case law in areas I am unfamiliar with, and to develop excellent contacts and lasting relations with lawyers from all over the world.

There is something here for every lawyer who has dealings with the law in a jurisdiction other than his or her own. In addition to the subjects I have mentioned above, sessions will examine cutting-edge legal issues like the ongoing debate about multidisciplinary partnerships and the place of lawyers within them, the challenges posed by the continuing progress of technology, and improving the understanding of conflict of laws and cooperation across national boundaries.

In today's fragile business climate, lawyers need to consult more frequently with lawyers in other practice areas and from other countries. Developing the flexibility to move into areas where business is being done is essential. This may be the most valuable time you spend away from the office this year.

To register, or for more information, visit www.ibanet.org.

Shane Sorenson

Shane Sorenson is a U.S. lawyer and the Managing Editor of U.K.-based international law specialists, Globe Business Publishing Ltd.

International Law and Practice Section

New Section Members

Shara Abraham
Jason Todd Abrams
Elena A Agarkova
Dukgeun Ahn
Charles Ford Aiken
Hussein S. Akeil
Carlos T. Albarracin
Nilesh Yashwant Ameen
James E. Andrik
Caroline Antonacci
Okay Hyacinth Anyadiegwu
Richard Arnholt
Parya Renee Badie
Paula J. Bailey
Michael Ballman
Jeffrey A. Barnes
Matthias Gunter Baudisch
Julie Bedard
Ayesha C. Blackwell
Juan Carlos Blanco
Tomas Bliznikas
Dimiter N. Blyangov
David Bowden
Jason Bowman
Michel A. Brunet
Andrea Robin Burgess
Pablo Esteban Bustos
Cynthia Cameros
Jeanne Anne Campbell
Joseph M. Carasso
Sharon Chaitin
Sudwiti Chanda
Irene Chiu
William Y. Chua
Ellen H. Clark
Anderson Edward Clipper
Sydney M. Cone
Luis E. Cordova
Cathleen Ann Coyle
Brian T. Crowley
Roderick J. Cruz
Joel M. Cullin
Pascal A. Dadoun
Leslie K. Danks Burke
Wolfgang A. Dase
Kerri Marie De Ruyter
Michael Dinkes
Geraldine Donovan
Richard R. Eckman
Bruce E. Fader
Susan Lee Ferrucci
Christopher Fickes
Roberto L. Figueroa
Patrick Nathaniel Findlay
Jonathan David Maclachlan Fine
Christian Adrian Fletcher
Derrick Wayne Freeman
Douglas Kenji Freeman
Benjamin D. Friedman
Loni Stewart Gardner
Jordan A. Goldstein
Maytal Gongolevsky
Geoffrey M. Gordon
Krista Gottlieb
Tamara Greeman
Amy C. Gross
Glenn Guszkowski
Ralph Habib
Jonas Noah Hagey
Monica Rachel Hakimi
Evan Charles Hammerman
Raymond Nicholas Hannigan
Craig A. Hart
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