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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

Greetings from the Editor(s)

Here is the Summer 2000 edition of the *New York International Chapter News*.

My mission is to encourage everyone to be more active within the Association.

Metaphorically, in the past century, the NYSBA has served as parent to the New York State legal community. We, as legal professionals, have looked toward the NYSBA for advice, insightful information and continuing legal education.

As we close yet another chapter in history, we know that the NYSBA's tradition will carry on into the new millennium and greet another generation of legal professionals. We have moved full steam ahead in our efforts to unite New York's legal community and what better opportunity than during the new millennium.

As an attorney, member of the International Law and Practice Section and the Section's Chair-Elect, I am no stranger to the difficulties that one may encounter when practicing international law. Therefore, will you join me in my efforts to strengthen our Section?

Come share your knowledge and experience! Be part of the Fall Meeting and Annual Meeting. Partici-

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pate by sending in articles for the newsletter. Join a committee or share your opinions and views with our Executive Committee members.

Our Section offers spectacular opportunities, with enormous potential! The Section wants to unite the veteran and rookie members. Together, we could be an even greater Section because, as the International Law and Practice Section, borders do not bind us!

Oliver Armas

Our New Editor

All fruits ripen on the vine; I have gathered so much knowledge and experience as Editor of the *New York International Chapter News* and, now, it is my turn to move on. I will no longer be editing the *Chapter News*. This should not be taken as some form of "abandonment." Instead, this upcoming year, all my energies will be placed in fulfilling my duties as Chair-Elect of the International Law and Practice Section.

I leave you in good hands and congratulations are in order for my successor, Oliver Armas of Thacher Proffitt & Wood. Oliver has been a devoted and active member for many years and I could not imagine anyone more deserving of this honor than him.

Isabel C. Franco, Editor
Demarest E Almeida
New York, U.S.A.

A Word from Our Chair

I am excited and honored to be assuming the leadership of our Section as its Chair.

Our Section has grown steadily since its inception in June 1987. Our first Chair, Lauren Rachlin, foresaw that, as the center of world business, New York is the obvious center for international law. With the active participation of the many foreign members of the Bar, represented through our own Foreign Legal Consultants, we have been at the forefront working on many international legal and business initiatives.

Most recently, we have solidified our Section's strong ties with bar associations and lawyers throughout the world. Our overseas activities through our annual Seasonal Meetings, along with the activities of our overseas chapters, have strengthened our influence in matters as diverse as ongoing trade negotiations, human rights and immigration, and, just as important, in forging personal ties with colleagues throughout the world.

Our Section offers something unique. We are large enough to enjoy substantial influence in matters of real international import, and yet have managed to maintain a relaxed and open spirit. We have all made real friends in our Section's activities, with our colleagues on the Executive Committee and in our general membership, and with the people we have met all over the world. We have not only visited offices and courts overseas—we have also been invited into people's homes. Most of us have developed relationships with people whose worlds we might never have imagined visiting, who speak languages that are foreign, but whose humanity and spirit, and enthusiasm for the practice of law, bind us together.

Our challenge is to maintain and build on our Section's spirit. We have the same problem facing most bar associations: our committees and new members, our lifeblood and future, are not as actively involved as they should be. We all lead busy lives, but we owe it to those who built this Section and those who will follow the present leadership, to remain involved, to inspire our members, and to make the Section an even greater source of professional and personal fulfillment.

I hope to make progress toward that end and continue the good work of my predecessors. I am fortunate to have a friend and lawyer of enormous enthusiasm and talent, Isabel Franco, as my Vice-Chair. I intend to work closely with Isabel and my Section Officers, Michael Galligan, Al Jacobs, and Ken Schultz, as well as Linda Castilla, Audrey Osterlitz and our other friends in Albany, in helping to carry forward the Section's best interests.

Bob Leo and Calvin Hamilton are making exciting progress in preparing for our Seasonal Meeting in Madrid. We hope to arrange simultaneous translation of the event in order to make it more attractive to local lawyers. We are also exploring ideas to make the Section more attractive to law students, building upon the good work of Ron Storette and Allen Kaye in this regard. We also want to make creative use of our foreign chapters, and consider how we may expand their activities.

I call upon all of you to speak up and get involved. Come to our meetings, and help to make the Section's committees places of activity and collegiality.

I am grateful for the opportunity to serve as Chair of the International Law and Practice Section. Let's all enjoy ourselves and have a great year.

Philip M. Berkowitz, Chair
NYSBA International Law and Practice Section
Salans Hertzfeld Heilbronn Christy & Viner
New York, U.S.A.

IL & P Country News

Argentina

Argentine Anti-Trust Law

On August 25, 1999, National Congress passed the new Anti-Trust Law, which was approved by the Executive Branch on September 16th. The Executive Branch must now issue its Regulatory Decree within a 120-day term as of August 25, 1999.

Following the same lines as preceding Law #22,262, this law penalizes all acts or conduct which restrict competition or consist of the abuse of a dominant position in such a way that may be detrimental to general economic interests.

This law states that a dominant position exists when one or several persons become the only party offering or demanding a specific product or service. However, it established that the dominant position consists not only in the predominance in the local market, but also when it exists at international levels, in one or several parts of the world. Moreover, such domination occurs when: (i) whilst not being the only party offering or demanding a product, there is no substantial competition and (ii) when, by reason of the degree of economic integration, whether vertical or horizontal, it is possible to determine the financial viability of a competitor, to the latter's detriment.

The enumeration of the conducts, which might be deemed to comprise anti-competitive practice, does not differ greatly from the former law. Precisely, it refers to tie-up clauses, the imposition of discriminatory conditions, fixed prices, impeding free access to the market, etc.

All corporate and natural persons, whether public or private, with or without a profit-making purpose, who engage in business in Argentina or abroad are governed by this law, to the degree the effect of such activities or agreements is felt in the local market.

A special chapter has been dedicated to concentrations and mergers; precisely in an innovative manner, Chapter III construes economic concentrations, such as the takeover of one or several companies via specific acts to involve: a) corporate mergers; b) transfers of stocks in trade; c) the acquisition of ownership or any right to shares of stock or capital quotas or certificates of indebtedness which grant any kind of right to be converted into shares or capital quota or exercise any kind of influence over the decisions taken by the person who issues them when purchase grants the purchaser the power of control or substantial influence over such person; or d) any other covenant or act, which in fact or in law, transfers the assets of an enterprise to a person or economic group or grants it the controlling power of decision in the adoption of regular or extraordinary corporate resolutions.

When the sum total of the aggregate volume of business in Argentina by corporate groups that are party to such economic concentration is in excess of $200 million or when worldwide it exceeds $2.5 billion notice must be served upon the Enforcement Authority created for the purpose, namely the National Anti-Trust Court, which shall be in charge of examining such economic concentration. Failure to serve such notice shall be penalized by a fine of up to $1 million daily, counted from the expiration of the term set to serve the mandatory notice.

The following transactions are exempt from the mandatory prior notice: the acquisition of companies in which the purchaser already possessed more than 50% of the corporate shares; the acquisition of corporate bonds, debentures, shares without the voting rights or certificates of indebtedness; the purchases of a single foreign company by a single foreign company that did not previously possess assets or shares in other companies in Argentina, and the purchases of liquidated companies that have not done business in Argentina during the last year.

Amongst other powers, the National Anti-Trust Court is vested with the right to authorize the concentrations in question, to subject them to specific conditions or directly to refuse authorization.

Failure to comply with the provisions set forth in the law is penalized by fines ranging from $10,000 up to $150 million.

It is manifest from this summary that the law contains some questionable items which—it is expected—will be explained or improved by its Regulatory Decree. Failing this, the Courts of Justice shall be faced with the arduous task of specifically defining their scope and content in such a way as to ensure that fundamental corporate activities in Argentina are not detrimentally affected nor is the investment of foreign capital discouraged.

Reported by Cecilia Velasco
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Buenos Aires, Argentina

New Amendment to the Argentine Labor Framework

Argentine Law No. 25,250 (the "New Labor Reform Law"), published in the *Argentine Official Gazette* on June 2, 2000, and effective as from June 11, 2000 (Please note that although the New Labor Reform is in force from June 11, 2000, most of its provisions require further regulation by a decree to be issued by the Executive Branch in order to be applicable.) introduces several amendments to the existing Argentine labor legislation.

We shall summarize the most relevant changes introduced by the New Labor Reform Law:

1. Amendments to the Labor Reform Law No. 25,013

   § Labor agreements executed for an undetermined period of time shall be deemed executed as trial labor agreements for the first 3 months. Collective bargaining agreements may extend such period to 6 months. (According to section 83 of the Regulation of Small and Medium Sized Companies Law No. 24,467, small and medium sized companies are those with a maximum of 40 employees and total annual sales up to (i) $2.5 million for companies in the agricultural business; (ii) $3 million for commercial companies; (iii) $4 million for companies in the services industry; and (iv) $5 million for manufacturing companies.) With respect to small and medium sized companies the trial period shall be of 6 months, which might be extended to 12 months by the applicable collective bargaining agreement.

   § The employer who increases the number of employees hired for an undetermined period of time shall receive a 1/3 reduction of the corresponding social security contributions for the new employees. If such employees are (i) under 24 years of age, (ii) males over 45 years of age, or (iii) females who are head of household, the social security contribution shall be reduced by a 1/2 subject to the compliance with certain requirements established by regulation.

2. Amendments to Collective Bargaining Agreements Regulation

   § The New Labor Law Reform amends the Collective Bargaining Agreements Law No. 14,250 and the Collective Bargaining Agreement Negotiation Law No. 23,546 aiming at the decentralization of collective bargaining agreements.

   § The parties executing a collective bargaining agreement can either decide on a limited term of duration or establish the ultra activity. Ultra activity is the labor principle by which a collective bargaining agreement whose term has lapsed, will remain in full force until the execution of a new agreement by the parties. In case the parties did not agree on the ultra activity of the collective bargaining agreement, the agreement shall lapse 2 years after any of the parties gives notice of its termination.

   § A collective bargaining agreement of a minor entity shall prevail over a current or a subsequent collective bargaining agreement of a bigger entity unless otherwise provided by the minor entity agreement.

   § Those collective bargaining agreements executed before November 1, 1988, which are in force due to ultra activity, shall be valid for 2 more years from the date on which the Ministry of Labor calls for a negotiation to replace them. Participation in negotiations to replace a collective bargaining agreement is mandatory.

   § If 2 years have passed since the Ministry of Labor called for mandatory negotiation to replace a collective bargaining agreement in force due to ultra activity without the parties reaching an agreement, the union or both parties may request that the matter be settled by arbitration.

   § Unless ultra activity is expressly provided for by a collective bargaining agreement, those agreements executed after November 1, 1988, whose terms have lapsed, shall continue to be in force for 2 more years from the date on which any of the parties gives notice of its termination. Within that 2-year period, the parties should reach a new agreement, otherwise the parties may voluntarily settle their disputes by arbitration. In case any of the parties refuse to enter into voluntary arbitration, the denounced agreement shall cease to be in effect, provided however that the salary conditions set forth therein shall be applicable to the corresponding individual labor agreements until replaced by the provisions of a new collective bargaining agreement.

3. Amendments to the Collective Bargaining Agreement Negotiation Procedure Law No. 23,546

   § The New Labor Law Reform creates the Federal Service of Mediation and Arbitration which shall participate in collective bargaining agreements negotiations.

   § The unjustified refusal to participate in collective bargaining agreements negotiations, or the causing of delays that hinder the negotiation process, shall be considered unfair practice and a judge may order an injunction against the obstructive conduct and apply fines.

4. Social Report

   § Companies with more than 500 employees are required to prepare an annual social report containing information regarding working conditions, labor costs and social benefits granted by the company. This report must be submitted to the workers' union.

5. Integrated System of Inspection of Work and Social Security

   § The New Labor Reform Law creates the Integrated System of Inspection of Work and Social Security to supervise compliance with labor and social security regulations.

6. Simplification of Registration

   § Pursuant to the New Labor Reform Law labor and social security registration shall be simplified and unified. Registration of employers and employees shall be completed in one act following a sole procedure.

7. Abrogation of Laws and Regulation

   § The New Labor Reform Law establishes the abrogation of any laws and regulations which contradict its provisions.

Reported by Javier Patron, Hernán Slemenson & Florencia Lorefice
Marval O'Farrell & Mairal
New York, U.S.A.

Brazil

Reformulating Discovery For Biotechnology

Abstract

An amalgam of sciences such as biochemistry, genetics and molecular biology, biotechnology can interfere in the creation of new forms of life, food and health. However, the road is not always smooth. From researchers to law makers, all individuals who have been involved with these new techniques are convinced that some issues ought to be examined, not just considering isolated societies but the world society as a whole.

In this article I will discuss how traditional standards governing to protect subject matter should be applied to the inventions of biotechnology that necessarily were initiated from discovery efforts. Although some countries have already firmed their own understanding on the matter, the line of demarcation between unpatented discovery and a patentable invention is still giving rise to doubts and lively discussions among third world countries.

1. Introduction

If the end of the 20th century can be acknowledged as the computer era, then most certainly the 21st century will be the biotechnology era. Being a complex science, a mix of sciences such as genetic engineering, microbiology, biochemistry and others, biotechnology became the target of careful study by the international community.

New forms of life, new types of food never before found in nature, the possibility of discovering diseases years before they appear, genetic therapy, biodiversity of the land, sea, fields, forests, air and soil are examples of what can be reached with the development of this science. However, the use and practice of this new technology in our society needs due attention from the legal community, and by due attention we mean the discussion of its effects, scope and applicability not only from the domestic viewpoint, but also internationally.

2. Interaction Needed

As a behavioral science, the legislation will be responsible for the harmonization and regularization of the acts of men who will possess this new type of knowledge. The scope of biotechnological law does not nor will it hinder the scientific and social development that biotechnology certainly will make possible to the world.

Within this context, property rights over biotechnological products are greatly important for the evolution and development of this technology due to the different characters operating in the area, among which the government, the academic environment, and the private sector, the latter being the one that invests most in biotechnological development and research.

Issues about the ownership of this right, which will be in effect starting from man's intellectual discoveries, will be a must for the future of society, as we now know it.

One of the problems presently faced by those working in this area is adapting the concept of invention to their creations, a *sine qua non* criterion for them to be the object of patent privileges under the Brazilian Industrial Property Law—(Law #9.279/96).

There is still, undoubtedly, a countless number of issues still unclear today about which biotechnological products can be labeled as an invention. In most countries' systems, including the Brazilian one, trying to define an invention is usually telling the difference between an invention and a discovery, the latter being excluded from patent privileges.

Some countries, however, have used both words as synonyms, generating a debate in international jurisprudence. Presently, except for a minority of a few eastern countries, invention is privileged, and not discovery, but the problem of distinction still remains.

3. Novelty in Biotechnology

In the field of biotechnology, certain elements should be taken into account concerning patentability of biotechnological products, as stressed by Joseph Strauss[1]:

a) The new technologies in the field of biotechnology are, in countless cases, based on scientific discoveries; and

b) The basic work material in this area comes from live matter, such as plants, microorganisms and DNA, resulting in an interesting discussion regarding the issue of whether the final altered product was the object of a discovery and juxtaposition or an invention.

We stress that the question is not whether the biotechnological products should be privileged, but rather if the discovery and juxtaposition of natural matters originating something new, unattainable by nature, added to the state of technique, originated from man's intellect and his inventive activity and susceptible of industrial application, can be the object of a patent.

As noticed by Paul Mathély, Brevet d'Inventions, Journal des Notaires et des Avocats, s.d., Paris, to invent is to create what does not exist yet, a formulation of thought concerning anything that appears for the first time.

Being susceptible to industrial application and resulting from human intellectual work and our inventive skills, the problem of granting patent privileges to "scientific discoveries" under the Brazilian legislation is that the only obstacle it faces is novelty.

4. Statutory Law and Case Law

The demand of novelty as a *sine qua non* requirement, as in clause 8, Law #9.279/96, regulating rights and obligations concerning industrial property, should be the object of studies and careful interpretation when facing facts generated by the new sciences and techniques referred to at the beginning of this comment.

In the present context, according to clause 10 of said law, scientific discoveries are not considered inventions, and therefore are not subject to a patent.

What the legislator failed to consider was technological advancement and man's pioneer spirit to explore and alter the reality we do not see, i.e., its operation in the microscopic world.

Applying this concept of absolute novelty within the law, I understand that the legislator levels the unequal by comparing discoveries not less important than others, but which only derive from careful observation and research to discoveries and inventive juxtapositions, originating not only from man's acknowledgment and research, but also from its direct action using appropriate and complex means and environments to disclose a new product, isolated and different from those found in nature until that very moment.

We have found in the international jurisprudence positioning and efforts toward an uniformization of the issue then discussed. The examples addressed by Douglas Gabriel Domingues[2] are very appropriate. The Menthonthiole case in Germany became famous for establishing that the novelty of a product from nature must be acknowledged as long as is confirmed that a complex intellectual effort was necessary to acknowledge the invention.

Also in Germany, in the Antonamide case, the Federal Patent Court set the principle that the mere fact that a substance exists in nature is not enough by itself to hinder the novelty of the invention, so long as the professionals in the field are not aware of its existence. Therefore, according to this understanding, the juxtapositions originating from materials found in nature can be patented as long as the criteria set by law are followed and are proven to have originated something with a high level of inventability, such is the complexity involving biotechnological activities.

5. Conclusion

Adding to the state of technique, the complexity of the environment where we work, man's intellectual skill and creativity would form enough elements to grant the status of novelty to scientific juxtaposition or "scientific discovery," as some authors prefer to say. Therefore, the criterion of absolute novelty in some international laws, as the Brazilian one for example, should be the object of a new debate to avoid setbacks or lack of motivation from those developing in-depth research and high investments—both personal and financial—in the area of new sciences, including biotechnology.

The correct creation, interpretation and application of the law in this area will be part of a strategic policy for the sustainable development of the world community.

The debate is open.

Reported by Claudio Mattos
Demarest e Almeida
São Paulo, Brazil

Endnotes

1. *See* Douglas Gabriel Domingues, "Privileges of Invention, Genetic Engineering and Biotechnology," Forense, Rio de Janeiro, 1989, at 93, 94.
2. *See* Gabriel, *supra* note 1, at 112.

China

Development in the PRC Law

I. Constitution

On March 15, 1999, the National People's Congress, China's top legislature, adopted six Amendments to the Constitution of the People's Republic of China.

Most importantly, the Amendment adds "Deng Xiaoping Theory" as the guiding theory to the country in addition to Marxism, Lenism, Mao Zedong Thought, and "Governing the country according to law and building a socialist country governed according to law" into the Constitution. At the same time, the Amendment changes the status and function of the non-public sector such as self-employed and private businesses in China's economy from being "a complement to the socialist public economy" to "an important component of the socialist market economy."

Compared with the original provisions, the present Constitution contains the six Amendments:

1. The wording "China is currently in the primary stage of socialism" is revised to "China will be in the primary stage of socialism for a long period of time." Further "To develop a socialist market economy" is added into the Constitution.

2. The Amendment added the article "Governing the country according to law and building a socialist country governed according to law" to the Constitution.

3. The Amendment added, "In the primary stage of socialism, the State upholds the basic economic system in which the public ownership is dominant and diverse forms of ownership economics develop side by side. And upholds the distribution-system with the principal of (income) distribution according to work remaining the dominant, while a variety of systems of income distribution coexist."

4. The Amendment also stipulated that "The rural, collective economic organizations follow the two-tier operation system that combines unified and separate operations on the basis of the household contract operations."

5. The Amendment added to the Constitution "The non-public sector, comprising self-employed and private businesses within the domain stipulated by law, is an important component of the country's socialist market economy." The Amendment also added "The state protects the legitimate rights and interests of self-employed and private businesses, while exercising guidance, supervision and management over them."

6. The Amendment revises the wording of "counter-revolutionary activities" in Article 28 to "crimes jeopardizing state security." In the 1997 revision of Chinese Criminal Law, "counter-revolutionary crimes" was revised to "crimes jeopardizing state security." Therefore, it is necessary to revise the wording of "counter-revolutionary activities" in the Constitution as well.

II. Contract Law

On March 15, 1999, the National People's Congress promulgated the Contract Law of the People's Republic of China. It took effect October 1, 1999.

The new contract law unifies the three old contract laws and better adapts to China's growing market economy and international transactions.

In the 1980s, China promulgated three contract laws, each applying to a specific type of contract:

1. The Economic Contract Law (ECL) was effective as of December 13, 1981, amended on September 2, 1993, which applies to domestic commercial contracts;

2. The Foreign Economic Contract Law (FECL) was effective as of March 21, 1985, which applies to international commercial contracts;

3. The Technical Contract Law (TCL) was effective as of June 23, 1987, which applies to contracts related to technology development and transfer.

The three contract laws established a unique tripartite contract system in China, reflecting direct governmental control over transactions within a planned economy. This tripartite contract system, however, is not compatible with a market economy. First, it lacks unified general rules of contract formation and performance. Second, it does not cover every type of contract. Finally, it does not adapt well to international transactions. Parties are often confused by the tripartite classification of contracts. For instance, a contract signed between two wholly foreign-owned enterprises or between a wholly foreign-owned enterprise and a Chinese-owned enterprise may be classified as "domestic" but not "international." In such cases, the foreign parties cannot refer to provisions under FECL that are familiar to international investors.

The unified contract law has made fundamental changes to the contract system of China. It codifies the general rules of contract formation and performance that apply to all types of contracts (with the exceptions of marriage, adoption and tutelage) and to all parties, both Chinese and foreign, regardless of whether the contract is domestic, international or technical. It is intended to be an exhaustive and fully integrated body of law.

The new contract law is comprised of indigenous Chinese rules and customs mixed with both civil and common law principles. While the form of the new contract law has its roots in the civil code (e.g., usage of the term 'contract'), some important rules are derived from concepts and provisions found within common law systems (e.g., the 'offer-acceptance' framework).

Table of Contents of the New PRC Contract Law

General Provisions (Articles 1-129)

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Chapter 3	Contractual Effect
Chapter 4	Contractual Performance
Chapter 5	Contractual Modification and Assignment
Chapter 6	Termination of Contractual Rights and Obligations
Chapter 7	Liabilities for Breach of Contract
Chapter 8	Other Stipulations

Special Provisions (Articles 130-427)

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Chapter 10	Electricity, Water, Gas and Heat Supply Contracts
Chapter 11	Donation Contracts
Chapter 12	Loan Contracts
Chapter 13	Leasing Contracts
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Chapter 18	Technical Contracts
Chapter 19	Deposit Contracts
Chapter 20	Warehouse Contracts
Chapter 21	Mandate Contracts
Chapter 22	Commission Contracts
Chapter 23	Brokerage Contracts

Supplemental Provisions (Article 428)

III. Securities Law

Compared with the stock exchange systems of developed western countries, China's stock market only resumed in late 1980s after Deng Xiaoping's economic reform. In late 1990, both Shanghai Stock Exchange and Shenzhen Stock Exchange were established. In 1993, Chinese companies began to list shares in stock exchanges in Hong Kong, New York and Singapore. Entering the global capital markets has been an instructive and beneficial experiment for these companies.

By the end of 1998, the total market capitalization was US$235 billion[1] equivalent to 24.46% of GDP; the outstanding capitalization US$69.2 billion, 7.2% of GDP; and the annual turnover was US$283.7 billion.

Additionally, by the end of 1998, China's listed companies had issued a total of 74.61 billion shares in the markets and had raised a total of US$42.8 billion.

By the end of July 13, 1999, the total number of China's listed companies at Shanghai and Shenzhen Stock Exchanges had increased to 900.

Until July 1, 1999, there were only a few specific laws and regulations regarding securities within the People's Republic of China, which could not meet the rapid development of stock market or the current situation of today's economy.

So, on December 29, 1998, the National People's Congress promulgated the Securities Law of the People's Republic of China, effective as of July 1, 1999.

The newly promulgated Securities Law governs the issuing and exchange of shares of stock, debenture bonds and other bonds designated by the State Council pursuant to the law within the People's Republic of China. The structure of the Securities Law is very much similar to those of the securities laws and regulations of western developed countries.

Exchange Rate: 8.3

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Chapter 12	Supplemental Provisions (Article 211-214)	

Reported by Liu Chi
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Memorandum of Understanding on Mutual Enforcement of Arbitral Awards between Mainland China and Hong Kong ("Memorandum")

Prior to 1 July 1997, both Hong Kong and Mainland China were parties to the New York Convention. Awards made in the jurisdictions of Hong Kong and Mainland China are reciprocally enforceable in the other. After the handover, however, it appeared that the New York Convention should no longer apply to enforcement of such awards as the convention is an international treaty which has no application regarding arbitral awards made within the same country. Uncertainty as to reciprocal enforceability of arbitral awards in the two jurisdictions thus prevailed until the Memorandum was entered into between the Mainland and the Hong Kong governments last year.

Under the Memorandum and its annexures, Hong Kong courts can now enforce awards made pursuant to the Arbitration Law of the PRC by recognized arbitral authorities in the Mainland. The list of the recognized arbitral authorities is supplied by the Legislative Affairs Office of the PRC State Council through the Hong Kong and Macau Affairs Office of the PRC State Council. Subsequent to updating from time to time, the list will be published in the *Hong Kong Gazett*e by the Hong Kong Secretary for Justice. The current list contains the names of over 100 arbitration commissions in PRC. Among others are CIETAC and CMAC.

Likewise, with the signing of the Memorandum and promulgation of the relevant judicial interpretation or directions, the People's Courts of Mainland China can also now in Mainland China also enforce arbitral awards made in Hong Kong.

Salient aspects of the Memorandum and its annexures include:

- Application for enforcement of the arbitral award in the Mainland and Hong Kong at the same time is prohibited. Thus, an application for enforcement to another court can only be made should enforcement in one place fail to satisfy the award.
- An application to enforce has to be made within the limitation period of the place of enforcement.
- In applying to the relevant court for enforcement of an award, made either in the Mainland or in the HKSAR, the applicant is required to submit:
  - An application for enforcement;
  - The arbitration agreement;
  - A duly authenticated original copy of the arbitral award.

If an application is made in Mainland China, it has to be in Chinese language. If the arbitral award or arbitration agreement is not in the Chinese language, the applicant is further required to submit a duly certified Chinese translation of the document(s).

Reported by George Ribeiro
Chapter Chair of Hong Kong
Vivien Chan & Co.

Cuba

Cuban Sanctions Amended

In accordance with a policy announced in January by President Clinton, the Office of Foreign Assets Control (OFAC) has issued amendments to the Cuban Assets Control Regulations, effective May 10, 1999. The changes include expansion of remittances allowed to be sent to individuals in Cuba, other than communist party officials, and to organizations independent of the Cuban Government. Any U.S. resident aged 18 or older may now send remittances, which previously could only be sent by Cubans to their relatives. The money transfers are still restricted in amount and must be licensed by OFAC.

Numerous changes were also made in travel-related restrictions to cover activities connected with humanitarian projects and certain other transactions, which have been generally or specifically licensed. Finally, the regulations were amended to exclude from an existing general license any transaction or payment with respect to a mark, trade name or commercial name that is the same as, or substantially similar to, one used in connection with a business or assets that were confiscated, unless the original owner or bona fide successor-in-interest has expressly consented.

A final rule issued by the department of Commerce's Bureau of Export Administration, also effective May 10 1999, further implements the Administration's policy of support for the Cuban people by authorizing licenses for exports of food and certain agricultural commodities. Exports so licensed by BXA will not require additional specific authorization from OFAC for shipping, obtaining payments or other financial transactions.

Reported by Joel B. Harris & Oliver J. Armas
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England

An Introduction to the Civil Procedure Rules

Introduction

In March 1994 the (then) Lord Chancellor appointed Lord Woolf to conduct a detailed review of the civil justice system in England and Wales. The results of this review, and his recommendations for reform, were pub-

lished in June 1995 (interim report) and July 1996 (final report with draft rules). In these reports, Lord Woolf identified two principal evils in the way in which civil litigation was conducted in England and Wales, namely, excessive costs and delay.

Following publication of the final report, the Lord Chancellor's department started work, in consultation with the profession, on redrafting the rules of civil procedure for the High Court and the County Court. The new civil procedure rules (the "Rules"), together with relevant practice directions, were published on January 29, 1999.

In this article I provide a brief outline of the principal features of the Rules and the changes they will make to the practice of commercial litigation in England and Wales. This is not intended to be a comprehensive guide to the Rules but is hoped that it will provide the U.S. legal practitioner with a better understanding of the Rules and the impact they are likely to have for any client involved in civil litigation in England and Wales.

A New Set of Rules Across the Board

The Rules apply to all proceedings in the County Court, the High Court (with the exception of certain specialist proceedings, such as insolvency and probate) and the Civil Division of the Court of Appeal.

Key Features of the Rules

The key features of the new system are:

- one rule book for the High Court and the County Court;
- the assumption of responsibility by the court for the control and management of litigation;
- a three-tier system of claims;
- new procedures designed to reduce the time and costs of litigation;
- an increased emphasis on settlement and ADR.

I will discuss each of these below.

One Rule Book for the High Court and the County Court

Under the old system there had been a distinction between the High Court and County Court rules. This is no longer the case. The Rules apply in both jurisdictions. The difference in the two jurisdictions will lie solely in the type and value of cases which will be heard: the High Court will principally deal with multi-track cases above a certain level (see below, but broadly speaking cases where the claim is for £50,000 or more) and specialist jurisdictions. The County Court will deal with claims for less than £50,000.

The Status of Existing High Court (RSC) and County Court (CCR) rules

Certain areas have not been covered by the Rules. These include service out of the jurisdiction, enforcement of judgments, appeals, security for costs and partnership actions. In these cases, the existing RSC and CCR, supplemented, in some cases, by new Practice Directions, apply. Subject to those exceptions, and to the transitional provisions (which I have not discussed in this article), the RSC and the CCR will have no effect.

The Three-Tier System of Claims

Part 26 of the Rules provides for the allocation of defended cases to case management "tracks." When the defense is filed, the court will send the parties an allocation questionnaire on the basis of which it will allocate the case. There are three tracks:

- **The small claims track**

  Claims of not more than £5,000 (with specific provisions about personal injury claims and housing claims) will be allocated to the small claims track.

- **The fast track**

  Claims for more than £5,000 but not more than £15,000, where the trial is likely to last no longer than one day with limited expert evidence, will be allocated to the fast track.

- **The multi-track**

  All cases not allocated to the small claims or the fast track will be allocated to the multi-track. The track allocation dictates the pace at which the case will proceed to trial, and also the application of various other rules such as those relating to expert witnesses.

The Court Assumes Responsibility for the Control and Management of Litigation

The Overriding Objective

The Rules open with a statement of their overriding objective. This is to enable the court "to deal with cases justly" (Rule 1.1(1)), and includes:

- ensuring that the parties are on an equal footing;
- saving expense;
- dealing with the case in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party;
- ensuring that the case is dealt with expeditiously and fairly; and

- allotting to each case an appropriate share of the court's resources.

The court is required to give effect to this objective when interpreting the Rules and when exercising its discretion. Therefore, it is essential to bear this objective in mind throughout any litigation in England and Wales.

Case Management

The onus is placed on the courts by Rule 1.4(1) to further the overriding objective by actively managing cases. Active case management is said to include (Rule 1.4(2)):

- encouraging the parties to co-operate with each other in the conduct of the proceedings;
- identifying issues at an early stage;
- summarily disposing of issues;
- encouraging the use of ADR;
- helping the parties to settle the whole or part of the case;
- the use of information technology (although the IT support for the courts will not be in place this year); and
- giving directions to ensure the case proceeds to trial quickly and efficiently.

The parties have a duty to assist the court in furthering the overriding objective and hence in the active management of cases. They will be expected to co-operate with each other and with the court, to a much greater degree than under the old rules.

General Case Management Powers

The court's case management powers are listed at Rule 3.1(2). These include:

- extending or shortening the time for compliance with any rule, practice direction or order;
- adjourning or bringing forward a hearing;
- requiring a party or its legal representative to attend at court;
- holding a hearing and receiving evidence by telephone;
- directing a separate trial of any issue;
- excluding issues from consideration; and
- giving judgment on a preliminary issue.

In addition, at Rule 3.4, the court is given the power to strike out a statement of case if it appears that it discloses no reasonable grounds for bringing or defending the claim. It can do this without notice to the party concerned and without a hearing.

It is interesting to note that many of these powers were available to the court under the old rules, but that they tended to be exercised only when a party made an application. The courts now have a duty actively to manage cases, and we can expect to see these powers being used on the court's own initiative.

It is intended that the first case management conference will occur early in the case. At this conference, the parties will have to provide an indication of the witnesses—including experts—they wish to call, the type of disclosure required, the likely length of the trial and the likely cost of each stage. The court will also expect to hear about the steps taken to settle the case and may at any time stay the case to allow for mediation (see below).

It is clear that one consequence of case management regime, which requires the parties to prepare for trial from the first step in the action, will be significant increase in pre-action costs. Before issuing a claim, a claimant will have to prepare a strategy for the case, covering witnesses, both of fact and expert, disclosure of documents, issues which are likely to be agreed, and so on. Before the first case management conference it will be advisable to try to agree these matters with the other party or parties.

Time Limits

One of the key aims of the new Rules is to reduce the time taken to get cases to trial. I expect time limits to be more strongly enforced—it is salutary to note that, unlike under the old Rules, there is no specific provision for the parties to apply to court for extensions of time, although the court has a general power to extend the time in which a step must be taken and the parties can agree to do so by written agreement. They cannot agree to extend time, however, where that would have the effect of putting back the trial date or other hearings. The basic time period is similar to that under the old rules, but now the parties can agree to extend this by no more than 28 days. In major commercial litigation this may produce significant pressures—clients who become aware of possible claims against them should therefore seek legal advice at the earliest possible opportunity on how to prepare for litigation given the tight timetable once it has started.

New Procedures to Reduce the Time and Costs of Litigation

Statements of Case

This is the new term for pleadings. An action started by the claimant with a claim form, which will be served by the court, unless the claimant wishes to serve it him-

self, with particulars of claim annexed or to follow. Within 14 days the defendant must either file an acknowledgment of service, followed by a defense, or just serve a defense. The claimant may file a reply but no further statements of case may be served without the permission of the court.

The Rules aim to keep statements of case simple yet comprehensive. Evidence can be included and any key documents on which the party relies should be annexed. If the defendant disagrees with the claimant's version of events, he must set out his own version and not just deny or not admit the allegations made by the claimant. If a party requires further information or clarification about his opponent's case he can serve a request for further information, either by letter or by separate document. The court can also require a party to provide further information or clarification, whether or not the issue concerned is pleaded in the statement of case. All statements of case must contain a Statement of Truth signed by the party if an individual or by a person holding a senior position in a corporate entity.

Pre-action Protocols

A theme of the new Rules is the requirement for the claimant to prepare his claim thoroughly, and even for matters to be agreed between the parties, before the action starts. Pre-action protocols are intended to achieve a degree of co-operation between the parties by setting out guidelines for the conduct of cases before litigation is started. They provide for a standard letter before action and procedures for the exchange of information and the narrowing of issues. Protocols have so far been prepared only in personal injury and clinical negligence actions, although they are being developed for road traffic accident claims and also in relation to the use of expert witnesses.

Although the majority of commercial litigation will not yet be covered by a protocol, litigants and lawyers should be aware of paragraph 4 of the Practice Direction on Protocols. This states that the court will expect parties, in cases not covered by any protocol, to act reasonably in exchanging documents and information and generally trying to avoid the necessity for proceedings.

Disclosure

This is the new term for discovery of documents, a process that was viewed as one of the major contributors to delay and costs under the old regime, particularly in large commercial cases. Lord Woolf's original proposals would have reduced dramatically the scope of disclosure, but it is arguable whether the Rules as enacted will have that effect.

The basic requirement is that of standard disclosure. This encompasses:

- the documents on which a party relies;
- the documents which:
  - (i) adversely affect his own case;
  - (ii) adversely affect another party's case;
  - (iii) support another party's case; and
- the documents he is required to disclose by a relevant practice direction.

This is narrower than the requirement under the old rules, in that there is no need to disclose the so-called "train of enquiry" documents, which might lead the opposing party to discover further information that might assist his case. However, there is no qualification of materiality, as there was in a previous draft of the Rules. Much will depend on the court's interpretation of Rule 31.7(1), which requires the party giving disclosure to make a "reasonable search" for documents.

Rule 31.7(2) lists the relevant factors in deciding the reasonableness of a search. These are:

- the number of documents involved;
- the nature and complexity of the proceedings;
- the ease and expense of retrieval; and
- the significance of any document likely to be located.

Two further provisions will operate to limit the scope of disclosure; first, that only documents which are, or have been, in a party's control, need be disclosed (Rule 31.8(2)) and, second, that only one copy of a document needs to be disclosed, unless a second copy contains a relevant marking (Rule 31.9).

Note that the parties can agree, or the court can order, that standard disclosure should be limited or even dispensed with. An agreement to limit disclosure must be in writing and lodged with the court.

Procedure for Standard Disclosure

The procedure is similar to that under the old rules, namely that each party prepares and serves a list of documents. A feature of the new form is the disclosure statement in which the disclosing party sets out the extent of the search undertaken to locate documents and any limitation on the extent of the search such as a start date.

Specific Disclosure

Rule 31.12(1) allows the court to make an order for specific disclosure or specific inspection. This is an order for disclosure of additional documents or classes of documents, or for a further search to be carried out for relevant documents. The court will only make an order if

satisfied that the party against whom the order is sought has failed to comply with the obligations imposed by an order for disclosure. It is likely that such applications will be more frequent while the scope of the Rule is being established.

Pre-action Disclosure

Under the old rules it was possible only in limited circumstances (principally personal injury claims) to obtain disclosure of documents before an action had started. It will now be possible to obtain pre-action disclosure in every type of case, where that would assist in the disposal of the anticipated proceedings, assist the parties to resolve the dispute, or save costs.

Non-Party Disclosure

The court's power to order someone who is not a party to disclose documents has also been extended across the board. An order will be made where documents held by a third party are likely to support the applicant's case or adversely affect another party's case, and where disclosure is necessary to dispose fairly of the claim or save costs.

Evidence—Witnesses of Fact

Part 33 deals with the evidence of witnesses of fact. At trial, as under the old rules, a witness must give evidence orally, with his witness statement, which must be served in advance, standing as evidence-in-chief. He may be cross-examined on his witness statement.

At hearings other than trial, the general rule is that witnesses give evidence in writing, by way of witness statement, rather than by affidavit.

Evidence—Expert Evidence

This is an area where some of the most radical changes are found. Their purpose can be seen in the first Rule of Part 35 headed "Duty to restrict expert evidence." Expert evidence is to be restricted to that which is "reasonably required to resolve the proceedings." The duty of the expert is also spelled out at the start: his overriding duty is to help the court on the matters within his expertise, and this overrides any obligation to those instructing him or paying him. The expert's report must be addressed to the court and not to the party who instructed him. As before, the court's permission is required to call an expert or put in his report. However the presumption of Rule 35.3(1) is that experts will give evidence by written report, not orally. In the fast track the court will not ordinarily direct an expert to attend a hearing. Instead, as the multi-track, the opposing parties may put written questions to the expert, for the purpose only of clarifying his report, and within 28 days of its service. Thus in the majority of cases there will be no opportunity to cross-examine the opposing party's expert.

Even more radical, perhaps, is the court's power to direct that a single joint expert should be appointed where two or more parties want to call evidence on a particular issue. This will be the presumption (except in the Commercial Court) if the court gives directions on its own initiative without a case management conference. Where an order for a joint expert is made, and the parties cannot agree on the choice of expert, the court may make its own appointment. Each party may give instructions to the expert provided that copies are given to the other instructing parties. The court may even limit the amount of fees which can be paid to the expert—for which the instructing parties are jointly and severally liable.

Consistent with the policy of openness in dealing with experts is the provision that the expert's report must list the substance of all material instructions, written or oral, on the basis of which the report was written. Those instructions are not privileged—although their disclosure will not be ordered unless there are reasonable grounds to consider the statement of instructions to be inaccurate or incomplete.

Summary Judgment

Part 24 is described as setting out a procedure by which the court may decide a claim or a particular issue without a trial.

This is distinct from the court's powers under Rule 3.4 to strike out a statement of case if it discloses no reasonable grounds for bringing or defending the claim. The novel feature of Part 24 is that it allows the defendant to apply for summary dismissal of a claim on grounds other than a point of law, as well as for the claimant to apply for summary judgment.

Judgment will be given if the claimant has no real prospect of success on the claim or issue, or if the defendant has no real prospect of successfully defending it. In addition, there should be no other reason why the case or issue should be disposed of at trial.

Increased Emphasis on Settlement and ADR

The promotion of settlement is one of the elements of active case management set out in Rule 1.4(2). The court is to encourage the use of alternative dispute resolution (sub-rule (e)) and to help the parties to settle the case (sub-rule (m)). This is a radically different approach to resolving disputes through the courts. Although there were pilot schemes in place in the courts for the referral of cases to mediation, this is the first time that the court's duty to assist in the settlement of cases has been enshrined in its rules. In addition, the court now has the power to order a stay of the action to allow settlement negotiations or mediation to take place (Rule 26.4). The parties will be expected to report back to the court on the progress of settlement negotiations at the next case management conference.

The emphasis on ADR is reinforced by the rules on costs: litigants will be at risk on costs if they do not make serious efforts to settle cases before or during proceedings.

Offers to Settle and Payments into Court

Part 36 sets out further mechanisms designed to promote settlement of claims before trial. It adopts and expands the familiar procedure by which a defendant could make an offer to settle the case by making a payment into court. The costs consequences make the practice a powerful incentive to settle.

Costs

The overriding rule is that the court has a discretion as to whether, and if so, how much and when, costs are payable by one party to another. If an order is made about costs, this will usually be that the unsuccessful party is to pay the costs of the successful party. When making decisions on costs the court must take into account the conduct of the parties (including pre-action conduct), whether a party has been successful, and any payment into court or offer to settle (whether or not made in accordance with Part 36).

The general framework on costs is therefore similar to that under the old rules. There are three major differences under the Rules. First, under its case management powers, the court is expected to make many more costs orders during the course of an action and to make those costs orders payable immediately, rather than, as is often the case under the old rules, leaving everything to the end of the case. In the case of interlocutory hearings lasting not more than a day the court is required to do so, and a party seeking an order for costs to be paid "in any event" must prepare and supply a detailed estimate in advance. Second, the court is likely to limit the amount of costs which can be expended by the parties. For instance, we have seen that, when a joint expert is appointed, the court can limit his fees. The court is likely to regulate the expenditure of the parties at each stage by requiring costs estimates, in an attempt to achieve a balance of power between them.

Third, in the fast track, the Rules prescribe fixed costs for various stages up to and including the attendance of the advocate at trial.

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France

Deposing French Nationals or Foreigners Residing in France

When deposing French nationals or foreigners residing in France, there is no obligation to go through The Hague Convention procedure on the Taking of Evidence Abroad in Civil and Commercial Matters.

Article 2-II of the French law N 80-538 dated July 16, 1980 provides that *"subject to the international treaties or conventions and of the laws and regulations currently in force, it is prohibited to request, seek or communicate in writing, orally or under any other form, any documents or information having economic, commercial, industrial, financial or technical nature in order to take evidence in anticipation or within the framework of judicial or administrative proceedings initiated abroad."*

However, this prohibition is only directed at French nationals and French companies that are subpoenaed in court proceedings abroad.

Accordingly, irrespective of the Hague Convention and of the French law of July 16, 1980, any foreign lawyer is free to come to France in order to depose any French national of foreigner residing in France, provided that they have consented in advance to be deposed.

If they refuse or do not reply to such a request and if the State where the court proceedings are pending is a contracting State to the Hague Convention, then the strict requirements and procedure of the Hague Convention must abided by, i.e.,

- either Article 16, i.e., the deposition must be conducted by an authorized agent (i.e., a diplomatic officer or a consular agent) of the foreign Embassy or Consulate in France; or
- Article 17, i.e., the deposition must be conducted by a Commissioner properly appointed by the Ministry of Justice of the foreign State (who cannot be an attorney involved in the court proceedings pending abroad).

In both cases, the deposition must comply with the relevant provisions of the reservations, which France stated when ratifying the Hague Convention.

Deposition on the Basis of Article 16 of the Hague Convention

Pursuant to the French reservations:

- the agents of foreign Embassies or Consulates conducting the deposition are authorized, on a case by case basis, by the French Ministry of Justice, *Bureau de l' Entraide Judiciaire internationale;*

- the deposition must take place in the premises of the foreign Embassy or Consulate;
- the date and the schedule of the deposition must be timely notified ("en temps utile") to the Bureau de *l'Entraide Judiciaire Internationale* so that one of its representatives may attend the deposition;
- the person to be deposed must be summoned by an official notice in French. If the notice is not in French, it must be sent with a translation into French;
- the summon must state that the person to be deposed cannot be prosecuted as a consequence of his/her failure to make a deposition;
- the individual to be deposed may be assisted by a lawyer.

Deposition on the Basis of Article 17 of the Hague Convention:

According to the French reservations, the Commissioner appointed by the Ministry of Justice of the foreign State must be authorized by the Bureau de l'Entraide Internationale. The other requirements of Article 16 of the Hague Convention (see above) are applicable as far as Article 17 is concerned.

To summarize, it is generally recommended to contact the individuals or their lawyers in order to know first of all whether they would accept to be deposed irrespective of the Hague Convention. In a second step, if the answer to step 1 is negative, it could proceed in accordance with article 16 or article 17 of the Hague Convention.

If the route of Article 17 is accepted by the individuals to be deposed, the Ministry of Justice of the foreign State should appoint the Commissioner who will conduct the deposition in France.

As soon as the decision appointing the Commissioner is rendered, it should be delivered to the French Ministry of Justice. Thereafter, the French Ministry of Justice will contact directly the Commissioner in order to provide assistance in the organization of the deposition.

If the individuals to be deposed are not willing and consenting, the foreign judicial authorities should issue and send directly to the French Ministry of Justice letters rogatory requesting the French judicial authorities to depose the French nationals and foreigners residing in France.

As provided by Article 1 of the Hague Convention "*in civil or commercial matters, a judicial authority of a contracting State may, in accordance with the provisions of the law of that State, request that competent authority of another contracting State, by means of Letters Rogatory, obtain evidence, or perform some other judicial act.*"

There is no particular reservations for France as far as letters rogatory are concerned, with the exception of the procedure relating to pre-trial discovery of documents.

Accordingly, as far as the conditions of validity and of performance of the letters rogatory are concerned, one should refer to the applicable provisions of the Hague Convention.

It should also be noted that the rogatory letters must be sent by the competent foreign judicial authorities to the French Ministry of Justice at the following address: Bureau de l' Entraide Judiciaire, 13 place Vendome, 75042 Paris Cedex 01, France.

France allows judges, if the foreign requesting judicial authority, to attend the deposition conducted on the basis of rogatory letters.

Switzerland

Remote Membership of the Swiss Exchange

1. Regulatory Background

The Swiss Federal Act on Stock Exchanges and Securities Trading (SESTA) and its implementing Ordinance (SETO), which both came into force in 1997, have made remote membership of a Swiss stock exchange subject to regulatory approval. In the spring of 1998, the Swiss Exchange (SWX) opened its doors to foreign members. Given the fact that Switzerland is not part of the European Union, SWX first had to obtain the necessary licenses to recruit potential new members in Europe. Authorizations were obtained in 1998, both Germany and in the UK (where SWX was granted the status of "Recognized Overseas Investment Exchange"). Swiss tax laws were also amended to make access attractive and non-discriminatory.

2. Application to the Federal Banking Commission

The application for authorization to act as a remote member of the SWX is governed by article 10.4 SESTA and articles 37 and 53 SETO. Accordingly, the foreign institution must apply to the Federal Banking Commission for an authorization. The application must be submitted in one of Switzerland's official languages (German, French, Italian) and comprise information including the following: description of activities planned in Switzerland; activity, structure and organization of the foreign institution, with organigram and last annual report; information on supervision in the home country, with confirmation by the supervisory authority that they have no objection to the activities of the foreign institution in Switzerland and that they will provide the Federal Banking Commission with the necessary administrative assistance; information on reciprocity in the foreign institution's home country, i.e., possibilities for Swiss

institutions to access local stock exchanges on a remote membership basis; information on rules of conduct applicable to the foreign institution, together with an explanation of daily record and reporting requirements.

3. Application for SWX Membership

Once the Federal Bank Commission has granted permission, the foreign institution can apply to SWX for membership. The application must include in particular: recent registration certificate from the Register of Companies; articles of association; latest annual report; latest annual accounts with auditors report; license to act as a trader in the home country; authorization by Federal Banking Commission.

4. Technical Conditions

The Swiss Exchange will provide the trading system software for the new member, as well as the production and test gateways, including the necessary telecommunication lines needed to operate these gateways. Upon request and against a one-off charge, the SWX will also deliver an additional production gateway as a safety installation. The member is responsible for installation of additional hardware and access to the in-house network, as well as the operation of the trading systems and all applications connected thereto.

5. Swiss Stamp Duty

The Swiss Parliament enacted an amendment to the Federal Stamp Duty Act in the spring of 1999 whereby remote members became subject to the same duties as Swiss members of the Sock Exchange. In other words, foreign members are exempt from Stamp Duty when engaging in transactions for their own account. However, they have to pay the tax when executing orders for customers or conducting transactions for securities dealers abroad. The Swiss Exchange will be responsible for collecting the stamp duty.

Transactions in Eurobonds for foreign customers are exempt from stamp duty. This measure was aimed at recovering Eurobond business for Switzerland.

Reported by Didier de Montmollin
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U.S.A.

Supreme Court Blocks Injunctive Asset Freezes For Creditors

In one of its last opinions this term, the U.S. Supreme Court explicitly rejected an attempt by a U.S. District Court to issue a *Mareva*-type preliminary injunction freezing a Mexican debtor's most significant asset. The Court held that a preliminary injunction freezing a debtor's assets before judgment was invalid.[1] Writing for a 5-4 majority, Justice Scalia concluded, for historical reasons, that a preliminary injunction freezing a debtor's assets in favor of a *pre-judgment* general creditor is beyond the equitable powers of the federal district courts.

In this case, holders of approximately $75 million worth of interest-bearing, unsecured, guaranteed notes due in 2001 sued Grupo Mexicano de Desarrollo ("Grupo Mexicano") for breach of contract when it became clear that the debtor would be unable to satisfy all of its outstanding obligations. The plaintiff note-holders sought to prevent Grupo Mexicano from transferring its interest in its most significant asset, an estimated $309 million in Mexican government notes, after Grupo Mexicano announced that it had transferred its right to receive $100 million in the government notes back to the Mexican government, apparently to pay back taxes, and was planning to place another portion of its rights in trust to cover employee compensation payments.

According to the Supreme Court, since the creditors were unsecured and were suing for breach of contract, they were not entitled to a pre-judgment preliminary injunction aimed at preventing the disposal of assets. The majority opinion suggested, however, that if the creditors were suing solely for an *equitable* remedy, such as rescission and restitution, the outcome might be different. The opinion further suggests that a *secured* general creditor might also be able to obtain such injustice relief.

Rejecting *Mareva*

The Court explicitly rejected the practice of English courts in awarding so-called *Mareva* injunctions that freeze debtor assets before judgment. Since two 1975 English Court of Appeal decisions, courts in England have frequently granted injunctions to protect pre-judgment creditors where (1) the creditors have established a strong prima facie case that the debt is owing, and (2) there is a danger that the debtors may improperly dispose of assets prior to judgment.[2] In 1988, the Court of Appeal expanded the *Mareva* injunction power beyond England's borders to permit, under certain circumstances, freezing of assets held in foreign jurisdictions.[3] The U.S. Supreme Court refused to adopt this English practice, stating that to allow a creditor, "before his claim was definitely established by judgment . . . to . . . impeach transfers [of assets] . . . would manifestly be susceptible of the grossest abuse." Rather, the Court found the law of fraudulent conveyances and bankruptcy provides adequate protection for creditors faced with a debtor's scurrilous disposal of assets.

New York State Law Appears to Follow *Grupo Mexicano*

New York state law was already in accord with the *Grupo Mexicano* decision. While New York courts may grant interim injunctive relief restraining a defendant creditor from transferring assets, they will not do so in actions for money damages. *Daley v. Related Cos., Inc.*, remedy to a threat of improper removal or disposal of assets in such cases.

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Current Developments

Certain recent tax developments involving new legislation and new regulations warrant the close attention of taxpayers in the real estate industry and their advisors. In many situations, these developments will be of great relevance to taxpayers in other industries as well.

New Legislation

On December 17, the president signed the Ticket to Work and Work Incentives Improvement Act of 1999 (the "Act"), which contains a number if significant tax provisions. Among them are changes affecting installment sales and real estate investment trusts.

Under the installment sale provisions, taxpayers have historically been permitted to defer the reporting of gain in seller-financed transactions until the time at which cash is actually received. Effective for sales on or after December 17, 1999, installment sale treatment will be denied in the case of property by a taxpayer that uses the accrual method of accounting. However, sellers of interests in accrual method entities are still entitled to installment treatment upon sales of interests in those entities, if those sellers use the cash, rather than the accrual method. Accordingly, there are continuing opportunities for tax planning to secure installment sale treatment on the sale of interests in partnerships, limited liability companies and corporations.

Another set of changes grants benefits to real estate investment trusts (REITs), by removing certain restrictions that have limited their operating activities. For example, commencing January 1, 2001, REITs will be allowed to provide a variety of services to their tenants and others through a new entity called a "taxable REIT subsidiary," which will, however, be subject to corporate-level tax and various restrictions.

New Partnership Regulations

A partnership may make a "section 754 election" which entitles it to adjust the basis of its property to reflect the amount paid by a purchaser of an interest in the partnership. On December 14 1999, the IRS released final regulations governing such basis adjustments. Among the provisions of the new regulations are certain reporting-related changes, most of which can be dealt with in the ordinary course of return preparation, but the following may be easy to overlook:

1. A transferee that acquires, by sale or exchange, an interest in a partnership that has a section 754 election in effect must notify the partnership, in writing, within 30 days of the acquisition. The notification must be made under penalties of perjury and must contain information regarding the amount paid for the interest (so that the partnership can compute the transferee's basis adjustments).

   This requirement is effective for transfers of partnership interests occurring on or after December 15, 1999. In other words, if you purchased a partnership interest on December 15 or thereafter, a filing with the partnership is due within 30 days of the purchase.

2. Permission has been granted to revoke existing section 754 elections without obtaining permission from IRS. This is a one-time opportunity that will be available only on 1999 returns, so accountants and taxpayers should carefully consider this option in appropriate cases.

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Endnotes

1. *Grupo Mexicano de Desarrollo v. Alliance Bond Fund*, ___ U.S. __, 67 U.S.L.W. 4490 (June 17, 1999).
2. *Mareva Compania Naviera v. International Bulkcarriers*, 2 Lloyd's Repts. 509, 510 (1975); *Nippon Yusen kaisha v. G. and J. Karageorgis*, 2 Lloyd's Repts. 137, 138 (1975).
3. *Babanaft Int'l Co. S.A. v. Bassatne*, 1 Ch. 13 (CA 1988).

Venezuela

Legal Report

New Customs Law

The new Customs Law (O.G. 5.353 of June 17, 1999) facilitates the handlings of imports and provides certain security devises to improve the market. The Administration may grant concessions for monitoring imports of X and gamma rays and shall provide the collection of duties and fines through the monetary correction system known as Tax Units (unidades tributaries). Fifty percent of all receipts shall go to cover the Customs require-

ments. Clearance of intellectual property rights will also be required (as conforming with the GATT-TRIPS Agreement). Import duties are scaled from 0,005 12 Tax Units, and fines stretch from 1 to 1000 Tax Units. It is of interest to add that because Customs Brokers shall now be subject to periodic evaluations, it is reported that 150 agents have filed for a court restraint order against the application of the law. The law becomes the legal basis for a number of specialized Regulations.

Compulsory Pre-Military Education

A joint Resolution of the Ministries of Education and Defense (O.G. 36.728 of June 22, 1999) orders the introduction of the subject of compulsory pre-military education in both public and private schools of intermediary level, within a maximum term of three years.

U.S.–Venezuela Non-Double Taxation Treaty

The approval of this significant piece of legislation was adjourned by the House of Representatives, without approval, pending the internal resolution of differences of opinion within the government, it is reported.

Tourist Hotel Regulated

A partial Ruling of the Tourism Law (O.G. 36.607 of December 21, 1998) subjects the operation and classification of tourist hotels to a prior registration with the official Venezuelan Corporation. Registration entitles the hotels to incentives, benefits and exonerations provided in the Law.

Control of Health Services

A Ruling of the Superintendency of Pensions functioning as part of the Treasury Department (O.G. 36.628 of January 25, 1999) allows the issuance of further regulations designed to regulate, inspect and control all health services lent in the country, either by the State or private practitioners. Another Ruling of the same agency allows the inspection, supervision and control of all funds designed to improve the level of incomes and quality of services lent after retirement. An additional ruling allows one of the funds to complete the income or retired persons in order to match the minimum legal level (O.G. 5301 Extra of January 29, 1999).

Free Port of Margarita

A Decree (O.G. 5293 Extra of January 26, 1999) regulates the exoneration of import duties and sales tax of all goods imported to both, Margarita and Coche islands, with the exception of certain drugs and defense or security equipment. In the case of vehicles, they may only circulate within the territories indicated.

New Labor Law Ruling

A new Labor Law Ruling (O.G. 5292 Extra of January 25, 1999) provides that employees may not bind their employers without express authorization, and responsibility may be claimed up to six months after termination of the employment. Non-competition clauses after termination of the employment entail a minimum remuneration. Four breaches of the time schedules of work within one month becomes a lawful ground of dismissal. The Ruling also expressly derogates seven prior Rulings of the same law.

Insurance and Reinsurance Regulations

The new regulation (O.G. 5339 Extra of April 27, 1999) subjects not only all operators but also all insurance-related operators (appraisers, risk inspectors and adjusters) to a prior registration with the Insurance Agency, and liberates all restrictions imposed on foreign companies or individuals in order to acquire shares of insurance, reinsurance brokerage companies.

Tax on Banking Transfers

A new Decree (O.G. 36.693 of May 4, 1999) establishes a 50% tax to be levied by the Bank on all debits or withdrawals effected in current accounts, savings, custody deposits, sight deposits, liquid asset funds, trusts or other funds of the financial market. The tax shall be levied on the gross amount of the transaction without deductions. Tax exemptions are provided for official Agencies, financial deposits with the Central Bank, mortgage payments designed for the purchase of homes, transfers among the same account holders within one given Bank, accounts of diplomatic agents, and interbank compensations. The Decree shall be valid one year.

Sales Tax Ruling

From June 1, 1999 (O.G. 5341 Extra of May 5, 1999) the following activities are subject to Sales Tax: chattel sales, definitive import of chattels, independent paid services performed in the country, the consumption of services, chattel exports, service exports. The tax shall be yearly established in the Budget Law between 8% and 16.5%, being at present 15.5%. Excepted are imports in the free port of Margarita where the tax shall be 8%.

Reported by Victor Bentata
Estudio Bentata Abogados & Victor Bentata & Asociados
Caracas, Venezuela

Chapter Chair News

London Chapter Chair—Randal Barker

On March 24, 1999, our London Chapter Chair, Randal Barker, was admitted as a solicitor of the Supreme Court of England and Wales.

In addition, on that same day, the London Chapter held an official meeting. At that meeting, Geoffrey Yeowart, a partner of Lovell White Durrant, who is a legal expert on the euro, gave a presentation on how the launch of the euro is affecting United Kingdom companies and the strategic legal issues that need to be considered.

Berlin Chapter Chair—Cord-Georg Hasselmann

On July 14, 1999, the Berlin Chapter invited members and friends of the Section, German and American lawyers residing in Berlin and representatives of domestic and foreign companies to attend a speech by Mrs. Annette Fugmann-Heesing, the State Secretary of Finance and Deputy Lord Mayor of Berlin. The topic of her speech was "Privatization as an Instrument of Creative Politics." Privatization has been one of the cornerstones of the politics pursued by Mrs. Fugmann-Heesing since she took office three and a half years ago. Among others, she privatized the electricity company BEWAG (to, inter alia, Southern Company, Atlanta), the gas supplier GASAG and, lately, the water and sewage company, BWB. In her lecture, she explained that privatization is much more than the mere reduction of budget deficits, and that—even today—it is possible for a single person to have a significant influence on state politics. The speech was followed by a vivid discussion with the audience.

Israel Chapter Chair—Mitchell Shelowitz

The New York State Bar Association's International Law and Practice Section has established an Israel Chapter—the Section's first chapter in the Middle East. The Israel Chapter joins over 30 other international chapters in Europe, Asia, North America and South America.

The Israel Chapter is co-chaired by Eric S. Sherby of the law firm of Yigal Arnon & Co. and Mitchell C. Shelowitz, Legal Counsel for Gilat Satellite Networks Ltd. More than 50 members of the NYSBA reside in Israel.

The Israel Chapter was established in recognition of Israel's emergence as a center for international trade and commerce, especially in the high-tech arena. Israel's legal system, like those of England and the United States, is based to a large extent upon English common law. Interestingly, U.S. case law is often considered persuasive authority before Israeli courts and administrative bodies. Because Israel is a signatory to many international trade, judicial and tax treaties, the Israeli commercial environment is similar in many respects to those of the U.S. and Western Europe.

The Israel Chapter's plans for the year include

- seeking clarification of the new continuing legal education requirements for New York lawyers residing in Israel;
- organizing lectures by leading Israeli businesspeople, lawyers and jurists; and
- organizing meetings and events with New York and U.S. delegations to Israel.

Member News

We would like you to join us in welcoming Hernán Slemenson, of Marval O'Farrell & Mairal, to New York. Hernán advises clients on issues related to Argentine Law and is also responsible for the management of the New York office. He has informed us that he is looking forward to rolling up his sleeves and working with the NYSBA. It seems that Hernán is planning to be a true team player. Our warmest welcome and well wishes to you!

Firm News

Meeks & Sheppard

Robert J. Leo, the resident partner of the New York office and Vice-Chair—CLE for the Section, has informed us that Meeks & Sheppard, a customs and international trade law firm, has opened a new office in Fairfield, Connecticut (U.S.A.). Jeffrey Meeks is the partner who is at the Connecticut location. In addition, Meeks & Sheppard has affiliated with Wendt & Temples, a customs and international trade law firm, in Atlanta. Lynne Wendt is the resident partner at the Atlanta location.

Berg & Duffy

Monaco's recently enacted Financial Services Law has now become fully effective, and all firms doing business in Monaco that offer financial services must now be registered with the government as such. Berg & Duffy assisted Hobbs Melville Financial Services SAM and its affiliate Hobbs Melville Securities Corp., a member of the NASD, in complying with this new law.

Erin Sarret, a member of the California bar, has joined Berg & Duffy's Monaco office as the attorney in charge. Ms. Sarret is a U.S. citizen, but she has spent extensive time in France and speaks French fluently. Ms. Sarret has also studied law in France and has clerked with a French law firm.

Formation of Linklaters & Alliance

Linklaters & Alliance is pleased to announce its formation by five law firms, namely:

De Bandt, Van Hecke & Lagae (Brussels)

De Brauw Blackstone Westbroek (Holland)

Lagerlöf & Leman (Sweden)

Linklaters & Paines (England)

Oppenhoff & Rädler (Germany).

In New York, Linklaters & Alliance has two offices, one at 1345 Sixth Avenue and one at 712 Fifth Avenue, to be combined into one office during the summer of this year.

The Rogers & Wells and Clifford Chance Merger—Effective January 1, 2000

Effective January 1, 2000, Rogers & Wells will be merging with the international firm Clifford Chance, and the combined firms have agreed in principle to merge with the leading German law firm of Pünder, Volhard, Weber and Axster. The merger creates the first top-tier, global law firm, with full-service capabilities in each of the world's financial centers. It will also be the world's largest firm, with 2,700 lawyers in 30 offices across the globe.

Committee News

Philip M. Berkowitz, Isabel C. Franco, John F. Zulack, Gerald J. Ferguson, and members of the executive committee, along with Terry Brooks of the New York State Bar Association, have put together a steering committee that is responsible for the formulation of a program entitled "Cross-Border and International Internet Law." This program intends to offer CLE (Continuing Legal Education) credits and is expected to focus on cross-border and international aspects of Internet law across four categories:

(A) Commercial activity, including financial services, commercial contracts and consumer sales;

(B) Rights to intellectual property;

(C) Individual rights, including the rights of privacy and freedom of speech; and

(D) Governmental activity, including taxation and regulation.

More information will be furnished on a later date. If you have any questions please contact the program chair, John F. Zulack.

Awards

The Recipient of the 1999 NYSBA Public Interest Law Award

In June, the Public Interest Law Committee awarded the 1999 Public Interest Law Award to Carla M. Palumbo. Carla M. Palumbo has worked for the Legal Aid Society of Rochester since 1984. Throughout her career, Ms. Palumbo has been committed to working for those who would ordinarily be denied access to attorneys and the legal process.

As an attorney with the Legal Aid Society, Ms. Palumbo directly represents low-income individuals in contested litigation regarding domestic violence, divorce, custody, child support and housing matters.

Most notably, Ms. Palumbo developed the agency's Domestic Violence Program, which currently employs four full-time attorneys and three full-time legal assistants. Last year this program assisted over 600 victims of domestic violence with Alternatives for Battered Women (ABW). Ms. Palumbo developed and implemented the Domestic Violence Court Program, a pioneering collaboration that provides court accompaniment, legal representation, emotional support, and linkages to ABW and other agencies that can assist domestic violence survivors and their children.

Ms. Palumbo was recently promoted to Director of the Civil Legal Services Unit at Legal Aid, which includes the youth advocacy, child support, immigration, domestic violence, limited means and tenant advocacy programs.

In addition to her legal services work, Ms. Palumbo is actively involved in many community-based and professional organizations, which also provide services to the underserved and disenfranchised.

Once Again—NYSBA/OAB

After the great success of the 1998 New York State Bar Association (International Law and Practice Section—NYSBA) Fall Meeting in Miami, when the NYSBA and the Brazilian Bar Association (Ordem dos Advogados do Brasil—OAB) joined forces and held a plenary session, which covered financing of infrastructure projects in Latin America, they meet again!

This time the venue was New York City, New York, and continued on to Harvard Law School, in Cambridge, Massachusetts. The OAB put together a briefing program entitled "Law in the Global Arena," which primarily focused on legal updates. Pressing legal issues such as e-commerce, integrating and harmonizing laws in the global economy, international labor law, capital markets law, international tax law, constitutional law and human rights law were encompassed.

(l-r) Juliana Teixeira, Demarest e Almeida; Soraya E. Bosi, Demarest e Almeida; Rubens Approbato Machado, President of the São Paulo Bar Association;Thomas Rice, NYSBA President; Philip M. Berkowitz, Chair of NYSBA's International Law and Practice Section; Isabel C. Franco, Chair-Elect of NYSBA's International Law and Practice Section; Kenneth A. Schultz, Executive Vice Chair of NYSBA's International Law and Practice Section; and Flavio M. Perri, Consul-general of Brazil in New York.

(l-r) Flavio M. Perri, Consul-general of Brazil in New York; Rubens Approbato Machado, President of the São Paulo Bar Association; Philip M. Berkowitz, Chair of NYSBA's International Law and Practice Section.

In honor of the OAB and Rubens Approbato Machado, President of the São Paulo Section of the OAB, Philip M. Berkowitz, NYSBA Chair of the Section of International Law and Practice, Isabel C. Franco, ILP Chair-Elect and the ILP Section Executive Committee hosted a cocktail reception at the Harvard University Club, on May 16, 2000 for almost 150 OAB participants.

Once again, the power of connection was immeasurable. The reception was honored by the presence of Thomas Rice, the President of the New York State Bar Association; Flavio Perri, Consul-general of Brazil in New York; Antonio Carlos Rodrigues do Amaral, President of the Harvard Law School Association of Brazil; Kenneth A. Schultz, Executive Vice-Chair; Robert J. Leo, Co-Chair of the Seasonal Meeting; Michael W. Galligan, Treasurer; and Jeffrey C. Chancas, Executive Committee Member.

Robert Leo, Chair of the 2000 Seasonal Meeting in Madrid, personally invited our Brazilian friends to attend the Seasonal Meeting by way of a flyer in their native Portuguese language. Also, since Brazil has been playing such a critical role globally, the Section has decided that in the year 2001, under the chairmanship of Isabel C. Franco, of Demarest e Almeida, and Seasonal Meeting Chair Joel Harris, of Thacher Proffitt & Wood, the Section will be traveling to Rio de Janeiro for their Seasonal Meeting.

We would also like to give special thanks to Linda Castilla of the New York State Bar Association and Soraya E. Bosi, of Demarest e Almeida, for their hard work.

NYSBA President Thomas Rice (second from left) with the OAB participants.

Attendees socializing at the Fall Meeting in Budapest.

(l-r) Valerie Solomon, Jeff Chancas; and Harold Solomon.

(l-r) Jim Duffy; Michael Galligan; and Jeff Chancas.

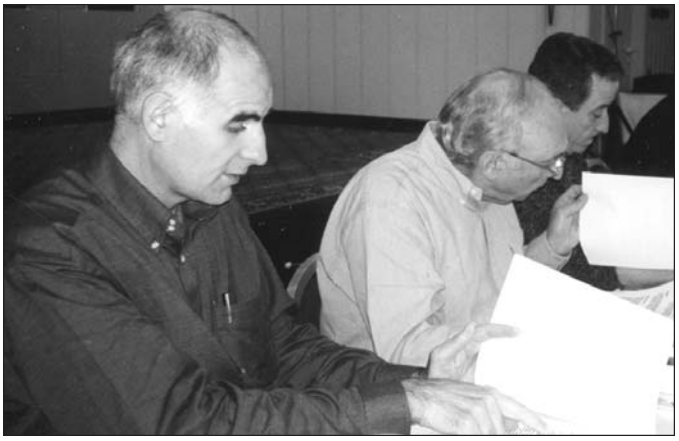
Fall Meeting

Budapest, October 20-24,1999

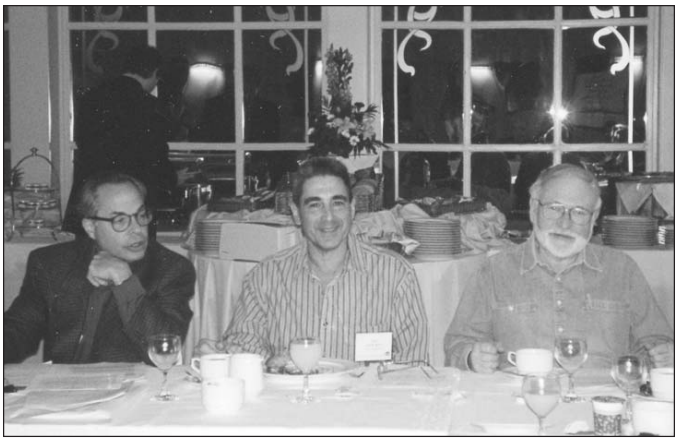
The International Law and Practice Section had an extraordinarily successful Fall Meeting at the Budapest Marriott Hotel in Budapest, Hungary, on October 20-24 1999.

The Program, entitled "Opportunities and Concerns for United States Lawyers: Central-Eastern Europe—2000," focused on foreign investment in central-eastern Europe, raising capital or loan financing for foreign investment, ethical dilemmas across borders and intellectual property protection and enforcement.

The Budapest Marriott Hotel proved a hospitable location for the Meeting. A beautiful hotel, it provided



(l-r) L. Donald Prutzman; Lauren Rachlin; and Tom Bonner.



(l-r) Ken Schultz; Joel Harris; and Donald Mawhinney.

Meeting News

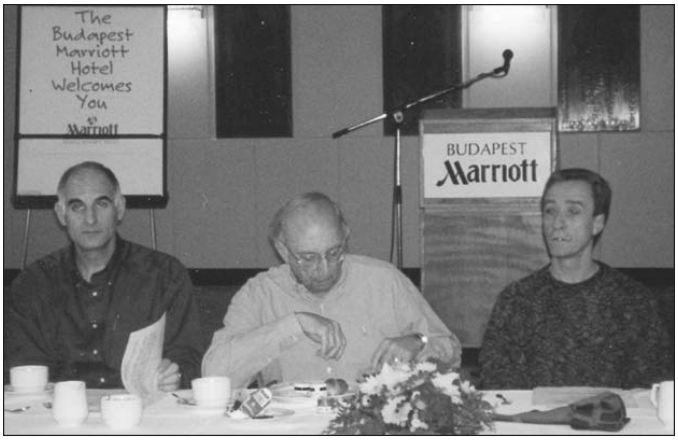
(l-r) Jim Duffy; Paul Frank; and Michael Galligan.

Attendees enjoying the Conference.

an ideal spot for lawyers to work together on different panels and socialize. The highlight of the program was the gala dinner at the Royal Castle in Gödöllö.

The Section Chair was Thomas J. Bonner, Sullivan & Donovan, LLP, New York City. The Program Co-chairs were André H. Friedman, Nagy & Trócsányi LLP, New York City and Budapest, and Albert L. Jacobs, Jr., Graham & James LLP, New York City. Special thanks go to Linda Castilla for her hard work.

The International Law & Practice Section has been one of the fastest growing sections in the New York State Bar Association. We welcome you to join us for the 2000 Fall Meeting being held October 25-29 in Madrid, Spain, at the Palace Hotel.



(l-r) L. Donald Prutzman; Lauren Rachlin; and Tom Bonner.

(l-r) Michael Galligan; Jeff Chancas; Al Jacobs; André Friedman; and Aureliano González-Baz.

(l-r) Jaime Malet; David Doubilet; and Larry Shoenthal.

(l-r) Phil Berkowitz; Ron Storette; Joel Harris; Bob Leo; Isabel Franco; and Andre Jaglom.

(l-r); Howard Rubenstein; Phillippe Xavier Bender; and Philip Quaranta.

NYSBA's 122nd Annual Meeting

Marriott Marquis, January 25-29, 2000

The International Law and Practice Section had an extraordinarily successful Annual Meeting at the New York Marriott Hotel in New York, on January 26, 2000. What better way to enter the millennium than with a bang of a program! Despite Mother Nature's harsh winter snow, the Annual Meeting was well attended and this year the attendees were granted four CLE credits for their participation!

This year's Program was entitled "Hot Tips for Greeting the New Millennium: Reflections, Projections and Challenges," which focused on several important issues facing practitioners in the new century. This year's program gave those who were in attendance a cutting edge on pressing issues facing legal experts.

The Annual Meeting joined leading experts from corporate, academic and the legal sectors, as they shared their extensive knowledge and experience in the area of international development. Our Section's millennial program highlighted the new and existing legal climate, and focused on devising techniques and strategies to maximize and successfully manage foreign transactions.

Phillipe Xavier-Bender, of Gide Loyrette Nouel, Philip Quaranta, of Wilson Elser Moskowitz Edelman Dicker, LLP, and the king of public relations, Howard Rubenstein,

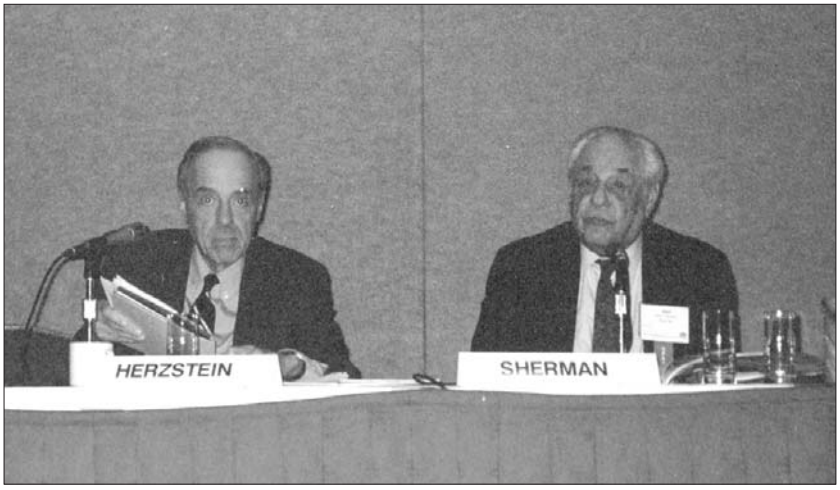
(l-r) Oliver Armas; Gerald Ferguson; Tony Burke; and Isabel Franco.

of Rubenstein Associates were the opening speakers. Their spectacular program focused on "Beyond the Barrister: Planning for and Managing Corporate Crises." Then, our very own Gerald Ferguson and Oliver J. Armas, of Thacher Proffitt & Wood, along with Anthony Burke, of Mason Hayes & Curran, gave an extremely informative program titled "Enforcing International Contracts Formed through Web Site Activity." Followed by three experts, Joyce M. Hansen, of the Federal Reserve Bank of New York, James P. Duffy, of Berg & Duffy and Eberhard Rohm, of Fulbright & Jaworski who addressed different issues facing "The Euro: A Year Later." And for the grand finale, Saul L. Sherman, of Sherman Law Office, Robert E. Herzstein of Miller & Chevalier and Alan M. Dunn of Stewart & Stewart did a wonderful job by wrapping the meeting up with "China, Seattle and the WTO—Implications for the U.S. Economy."

As always, the New York Marriott Hotel proved a hospitable location for the Meeting and an opportunity to mingle amongst our colleagues. Attendees included Thomas Bonner, our immediate past Chair, Philip M. Berkowitz, Section Chair, and Isabel C. Franco, Partner of Demarest e Almeida and the Section's Chair-Elect, chaired the program.

Isabel would like to give a very special thanks to Carole Basri, of Deloitte & Touche LLP, for all her support. In addition, she would like to thank Linda Castilla, of the NYSBA's Meetings Department, for her hard work.

(l-r) Isabel Franco and Phil Berkowitz.



(l-r) Robert E. Herzstein and Saul L. Sherman.

(l-r) Jim Duffy; Joyce Hansen; and Eberhard Rohm.

Executive Retreat—May 16, 2000—The Sagamore, Bolton Landing, NY

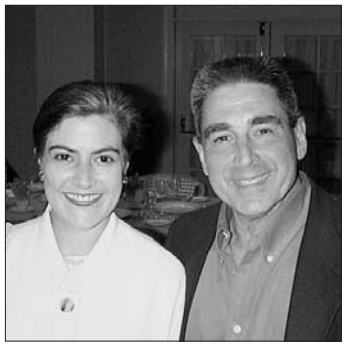
(l-r) Jerry and Heidi Ferguson.

(l-r) Sue and Mike Maney.

(l-r) Elliot and Ken Schultz.

(l-r) Carole Basri and Leon Sutton.

(l-r) Phil Berkowitz and his wife, Mary Ann Quinn.



(l-r) Marcia Haddad and Joel Harris.

(l-r) Linda Castilla and Audrey Osterlitz, Section liaisons.

(l-r) Jack Zulack and Isabel Franco.

(l-r) Phil Berkowitz; and Dale and Joyce Hansen.

(l-r) Ken Schultz and his son, Elliot; with Jim Duffy.

(l-r) Arlene Santangelo; Jerry Ferguson; Ron Osterlitz; Isabel Franco; and Bob Leo.

(l-r) Friedrich Hey; Larry Shoenthal; Jeff Chancas; and Barbara Shoenthal.

NYSBA INTERNATIONAL LAW AND PRACTICE SECTION

SEASONAL SECTION MEETING 2000

MADRID

OCTOBER 25-29, 2000

"Bridging the Atlantic: Impact of Recent Trade Agreements On International Practice"

The NYSBA International Law and Practice Section cordially invites you to attend its Seasonal 2000 Section Meeting in Madrid, Spain at the "essence of Spain," the Palace Hotel centrally located across from the Prado and Thyssen museums and a stone's throw from the city's Retiro Park.

The meeting will feature a diverse program touching many areas of practice that are becoming increasingly international. In addition, the recent signing of the EU-Mexico Trade Agreement, effective in July 2000, will have a major impact on the practice of law in, and conducting business with, countries on both sides of the Atlantic, including Canada (NAFTA), Argentina, Brazil, Chile, etc. (MERCOSUR), Central American and Caribbean countries (CARICOM) and North African countries (MAGREB). The meeting will examine that effect and its implications for your clients and the legal profession.

We are seeking the cooperation of Spain's National Bar Association and the Madrid Bar Association, and speakers and participants are expected from Europe, Mexico, and Central, South, and North Americas.

In addition, activities will be offered to take full advantage of Madrid's unique culture. Participants will have opportunities to visit nearby cities, including Toledo, Segovia, Avila and Chinchon. A side trip to Barcelona is also planned prior to the meeting.

We look forward to seeing you in October, mark your calendars!

Language Tips

By Gertrude Block*

Question: In the phrase *whether or not*, are the words *or not* necessary, or are they redundant?

Answer: This New York lawyer's question has to do with style, not grammar. The words *or not* in the phrase *whether or not* are redundant, but their redundance may not bar their use. Many English phrases contain redundant language that is stylistically permissible. How about the question, "Is this satisfactory to you?" It could be argued that the phrase *to you* is redundant, but it is acceptable.

Phrases such as *several books* contain a "redundant" plural marker—the *s* in *books*. After all, when we talk about *many sheep* we manage to convey the plural idea without an *s*, but English attaches the *s* to most plurals. In the expression *all of the above, of* is redundant and so is the word *all*. You can probably think of many other acceptable redundancies.

On the other hand, *the reason is because* is criticized, for the redundant *because* is not considered acceptable. How about the statement, "I had only one option?" Readers of this column have argued that in order to have one option, there must be two possible choices; therefore, *one option* is an impossibility. Redundancies such as *null and void* and *nominate, constitute and appoint* have been roundly attacked by legal critics.

With respect to *whether or not*, that redundance is considered acceptable, although not when an additional redundance is tacked on (as it was in a recent news item): "The defendant's attorney could not decide whether or not to allow his client to testify or not."

Interestingly, neither *the Random House Dictionary of the English Language,* Second Edition, Unabridged 1987, nor *The American Heritage Dictionary*, Second College Edition, 1985, lists the phrase *whether or not*. Both, however, list as idiomatic *whether or no*, more a British than an American idiom.

Whether derives from the Old English "hwaether," meaning "which of two." *Webster's Third New International Dictionary* says that it introduces an indirect question referring to alternatives: "He asked the court whether he could return later for questioning." (Note, too, the acceptable redundance in the phrase *return later*.) *Webster's* also lists as acceptable the statements, "I will go, whether or not"; and "whether a man is the best judge of his own life work or not."

So feel free to add or omit *or not* to *whether* in indirect questions or statements. But you will probably add *or not* when you ask a direct question, because that usage is idiomatic in this country. Either of the following statements probably "sounds" right:

- Will you go whether or not I go?
- Will you go whether I go or not?

If you omit the *or not* in these sentences, they probably will not sound right.

From the Mailbag

In the February issue of the *Journal*, in a discussion of word-pairs that look like antonyms but are really synonyms, attorney David B. Howorth was quoted as saying that *inflammable* was coined to avoid the perceived ambiguity of *flammable*, when in fact he said the opposite: *flammable* was coined to avoid the perceived ambiguity of *inflammable*. I apologize for the error.

Another reader writes that in his childhood the word *flammable* meant "capable of being flamed," while *inflammable* meant "not capable of being inflamed." He also points out that *non-flammable* was coined to resolve the problem that both *flammable* and *inflammable* had the same meaning.

Attorney Barney Molldrem of Syracuse submitted a suggestion related to word-pairs. He suggested that readers submit words that have a negative, but no positive, form—that is, words that are what one might call one-half of a pair in which the other half is missing. To start the ball rolling, he listed *demolish*, *disheveled*, *unkempt*, *inert* and *nonplussed*. I can think of only one addition to this list, *discomfiture*, but there are probably others. If you can think of any, send them in.

Mr. Molldrem also wanted to know if I knew where the term *hardball* comes from. I didn't but after some extensive research (consisting entirely of asking my husband), I can report that the term contrasts a hard ball used in baseball with the larger, softer ball used in the version of baseball known as softball. (It will not surprise me if readers send mail disagreeing with that statement.)

Finally, an apology to attorney Earl M. Bucci of Schenectady. I inadvertently misquoted him in the November *Journal* by saying he was incorrect when he commented that "who reads as he runs" is an adjectival clause in the context "assistance for him who reads as he runs." The relative clause "who reads as he runs" does indeed modify *him*, and Mr. Bucci, in calling the clause "adjectival," should have been credited for that observation.

***Writing specialist emeritus and lecturer at Holland Law Center, University of Florida, Gainesville, FL 32611, and consultant on language matters. She is the author of *Effective Legal Writing*, fourth edition (Foundation Press, 1992), and co-author of *Judicial Opinion Writing Manual* (West Group for ABA, 1991). The author welcomes the submission of questions to be answered in this column. Readers who do not object to their names being mentioned should state so in their letters. E-mail: Block@law.ufl.edu**

Reprinted from the May/June 1999 *New York State Bar Association Journal.*

Intenational Law and Practice Section

New Section Members

On behalf of the International Law and Practice Section and as Editor of the New York International Chapter News*, I would like to take this opportunity to welcome all the Section's new members.*

Isabel C. Franco

Richard Agins
Brian D. Alexander
Andrew S. Alitowski
Virginia Allan
David M. Allen
Veriozka Altagracia Cabr
Stella Aminov
Claire S. Ancona-Berk
Tawia Ansah
Kofi Appenteng
Nelson Arce
Michelle Auletta
Michael O. Bamidele
Astrid R. Baumgardner
Martin Behagg
Robert D. Benton
Joseph F. Bergh
Mani Bhatia
Carol S. Blatt
John R. Bloise
Annie Borello
Christopher Joseph Borgen
Yoel Borgenicht
Sokol Braha
Jon S. Brooks
Kyle D. Brown
Erasmo S. Bruno
Jeffrey W. Cameron
Matthew Caudill
Maria E. Celis
Geoffrey A. Chandler
Jane Chang
Aliette-Marie Charles
Galal Chater
Theodore J. Chiacchio
Lilin M. Ciccarone
Jacob K. Cogan
Kevin Colby
Leigh Polk Cole
Martha Traudt Collins
Michael T. Cone
Deirdre Ann Connolly
Sha-Shana N. L. Crichton
John C. Crucs
Jennifer Culver
Sebastiano D'Acutno
Aleksander Dardeli
Patrick L. Davis
Rachelle DeGregory
Serge Debrye
Kimberly E. Diamond
Brian K. Duck
Denise C. Dyce
Richard S. Egosi
Wendy Ejiogu
Haseena J. Enu
Sabrina V. Eshaghian
Richard J. A. Farnhill
Laura Fernandez
Jonathan G. Filas
Bobbie Anne Flower
Raymond V. Ford
Olga I. Frolova
Martine Funston
Eleftherios Georgiou
Carole M. Gilchrist
Paul A. Gilmore
Tara R. Gingerich
Ronald J. Gizzi
Aaron A. Goach
Jacob L. Goldfinger
Christopher R. Gonzalez
Aureliano Gonzalez-Baz
Jeffrey B. Gracer
Andrew Griffel
Stefan Guttensohn
Donnie R. Hachey
Julia A. Hall
Daniel Halloran
Constantine D. Haloulos
Gretchen Henninger
Starla V. Henrichs-Cohen
Mirta S. Hess
Gretchen Hohenstein
Alysse D. Hopkins
Pamela Horan
Federico Jenkins
Noreen C. Johnson
Todd L. Kammerman
Adam Kanarek
Amy H. Keane
Maurya Crawford Keating
Robert Kestelik
William S. Kibler
Daniel Kikel
Jae-hyun Kim
Jenny Kim
Julia Y. Kim
Sang Goel Kim
Alyson R. G. King
John H. Kirkley
Victor Hing Yeung Koong
Fabian A. Krause
Takashi Kume
Thomas W. LaBarge
J Mark Lane
Randy S. Laxer
Hong-Hsiang Lee
Seth R. Leech
Laura B. Lehman
Varvara M. Lesu-Gokea
Helayne B. Levy
Lillane G. Mair
Anna Linda Marciano
Amy C. Martoche
Twayler I. Matasi
Nancy A. Matos
Elizabeth Matthews
Sigal McCarley
James A. McDonald
Kathryn E. McDonnell
Philip R. McDougall
Peter Meadow
Katherine Mogg
Emel Nesli
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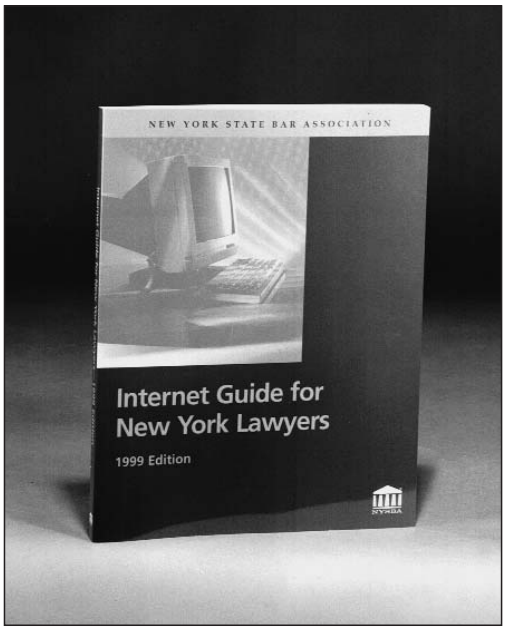

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A Special Thank You to Isabel

We, at Demarest e Almeida, would like to take this opportunity to congratulate you on your numerous successes during your tenure as Editor of the New York International Chapter News. *Your exceptional pro bono efforts and generous involvement with the New York State Bar Association are particularly commendable.*

You are highly praised in the legal field and one of our most inspirational role models. We publicly and personally thank you for all of your outstanding accomplishments.

Demarest e Almeida

Isabel's energy and enthusiasm are an inspiration to me and the Executive Committee as a whole. It's terrific to have her as Executive Vice-Chair, and we are all grateful for her hard work on the New York International Chapter News.

Philip M. Berkowitz
Salans Hertzfeld Heilbronn Christy & Viner

Isabel: As a member of the Section and Executive Committee, thank you for all your hard work and effort on the New York International Chapter News *and all the other tasks you were crazy enough to volunteer for. I look forward to your future successes.*

Robert Leo
Meeks & Sheppard

The International Law and Practice Section has reaped enormous reward from Isabel's tireless effort on its behalf and we are very grateful. Isabel's professionalism and accomplishments set a high standard for the Executive Committee and we can only hope to measure up.

Kenneth A. Schultz
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Isabel has been an exceptionally insightful, enthusiastic and helpful team member of the Executive Committee. It has been a special pleasure and privilege to work with her. As she moves to Executive Vice-Chair, she will be fully appreciated, but missed sorely on the New York International Chapter News.

Albert L. Jacobs, Jr.
National Director of Intellectual Property
Graham & James LLP

Isabel: As a former Section Chair and long-standing member of the Executive Committee, I want to personally thank you for all the hard work you have done for the Section. I look forward to working with you in the future, particularly in regard to our Section meeting in Rio in 2001!

Joel B. Harris
Thacher, Proffitt & Wood

Thank you, Isabel, for your cheerful dedication and unflagging spirit in the service of our Section. We are all looking forward to your leadership of the Section and thank you enthusiastically for your efforts for the New York International Chapter News.

Michael Galligan
Whitman, Breed, Abbott & Morgan

Isabel: Your unique combination of earnestness and charm, diligence and creativity will be missed tremendously at the Newsletter. However, the Section as a whole will benefit even more from those qualities when you move on to higher offices. Many thanks for the good work!

Hans-Michael Giesen
Bruckhaus Westrick Stegemann

Isabel: Although far away at this time, I couldn't resist the temptation to add my name to the numerous amount of people who in true appreciation wish to thank you for your devoted and committed work as Editor of the New York International Chapter News.

You are an inspiration and example, to us all, of scholarship, professionalism, talent, discipline, commitment, hard work and style. It is people like you who are able to remind us, by your daily actions, of the reason we choose to be lawyers. Your contributions to the New York State Bar Association International Law and Practice Section are evidence of the important role that foreign lawyers play in the New York Bar and the world communities at large and better prepare us for the challenges of this new century of globalization. Let the light of your accomplishments and example keep shining for years to come.

Eduardo Ramos Gomez
Ambassador of Mexico

No news can better be spread than through a newsletter. This highly demanding exercise though, is often criticized, poorly rewarding and usually of little interest. Why is it then that this has never been the case for the New York International Chapter News*? We all know the secret: it's the Editor's fault. Close or far from New York State, it kept us around and we all loved it.*

Such a commanding performance was made possible all together through that smiling pugnaciousness that dedicated creativity and that tremendous hard work of yours, Isabel.

Merci, l'amie!

Phillipe Xavier-Bender
Gide Loyrette Nouel

Isabel, as a foreign lawyer working in New York, I find that your work and dedication has made my work and acceptance much easier.

All foreign lawyers owe a great deal to you, for you are proof and evidence that foreign lawyers are just as professional, responsible and meticulous as local lawyers. For this and for your continued help, assistance and encouragement, we at Bryan Gonzalez Vargas & Gonzalez Baz, thank you very much . . .

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