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A Word from Our Chair

I would like to graciously thank the Executive Committee members of our Section for electing me as your Chair. I am very moved with this election and most honored that you have the confidence to allow me to lead the way with our ongoing endeavor at establishing and maintaining ourselves as a foremost Section. I have already begun scheduling the necessary time I feel it will take to structure an agenda that should open new venues in achieving our goals.

I am proud of our Section. Our growth has been quite remarkable over the course of its beginnings. We have our past Chairpersons to especially thank for establishing, supporting and bringing our Section to where we are at presently. I would like to take this opportunity to express my personal gratitude and congratulations to each of you. Thank you.

International Law has sometimes in the past been secondary in the legal arena. However, with the dramatic change in business and technology, International Law has moved towards the legal forefront. Therefore, our Section not only has an important presence in New York State, one of the world's most international states, but throughout the world.

Inside

As a Section, we have many important tasks ahead of us. This year, the Committee Chairs are structuring several projects to stimulate the active participation of their members. Also, I am working with the Executive Committee on a project that would evoke the participation of our female members, which have been few and far between. In addition to that, we have decided to devote some attention to law students and young associates. We have already developed the *"Floating Internship"* project, which gives four law students the opportunity to work with our Section. During our Executive Retreat, one of the many items on our agenda is gearing a project towards young associates.

Also, we are currently restructuring our Web page, which will include vital information about our activities, committees, meetings and recent developments in the international legal arena. We ask that you visit our Web page, not only for the valuable information, but also to give us your suggestions and comments, as to how we could better serve our members. Our Section's Web site address is as follows: www.nysba.org/sections/ilp/ilpsdesc.htm.

Furthermore, I am proud to announce that our Fall Meeting will be held in *"meu Brasil, Brasileiro,"* my dear homeland, Brazil. Please participate with our Section even one step further by joining us on October 17–21, 2001, in Rio de Janeiro, Brazil, for the Fall Meeting. This meeting is titled *"Latin America in the New Millennium—Law and Business"* and will cover an array of topics that are not only important for Latin America but for those who conduct business in or with Latin American countries. The Co-Chairs, Joel Harris and Marcia Haddad, have done an outstanding job in structuring the Fall Meeting. It promises to be a great success! Also, visit our Web site for more information on this event: www.nysba.org/sections/ilp/brazil/1.html.

Finally to our new Editor, Oliver J. Armas, I would like to congratulate you on your first issue. Both you and your assistant, Thomas N. Pieper, have done a terrific job continuing this project. And, as always, I want to thank Soraya E. Bosi for her wonderful assistance not only to me, but also to the entire Section.

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http://www.nysba.org/sections/ilp

IL & P Country News

Argentina

New Law Increases Interest in Leasing in Argentina

By Hernán Slemenson, New York

Argentine law did not regulate leasing until law No. 24,441 (the "Trust Law") was enacted in 1995. This latter law included few provisions related to leasing, and many others dealing with different institutions including trusts and securitization. The Trust Law regulation of leasing was very narrow in scope and imposed many requisites on an entity before it could act as a lessor.

On June 8, 2000, Law No. 25,248 (the "Leasing Law") was passed. The Leasing Law constitutes a significant piece of legislation aimed at promoting leasing transactions in Argentina by removing restrictions previously imposed on the lessor, broadening the spectrum of assets that may be subject to leasing transactions and providing a more appropriate legal framework.

The Leasing Law characterizes leasing transactions as those under which the lessor agrees to transfer to the lessee the tenancy of certain property for the use and enjoyment of the same by the lessee, who, as consideration, pays a canon to the lessor and is granted an option to purchase at a future date the leased property for a price agreed in advance.

The advantages that leasing offers *vis-à-vis* regular purchase agreements are clear for both parties, since the lessor keeps title to the property until the purchase option is exercised, thus, increasing significantly its security, and the lessee may benefit from certain tax advantages and from the extended payment mechanism of leasing. It is also an interesting alternative to traditional rental agreements, because of the tax advantages it offers and the fact that the lessee may, in due course, acquire the asset.

A brief description of the most important aspects of the Leasing Law follows:

1. Parties to Leasing Transactions

While under the Trust Law, only financial institutions or special purpose companies were permitted to act as lessors in leasing transactions, the Leasing Law imposes no particular requirements on persons or entities to act as lessors or lessees in leasing transactions. Any entity duly authorized by law or its organizational documents and any individual may enter into leasing transactions either as a lessor or a lessee.

2. Property Subject to Leasing Agreements

The Leasing Law has widened the spectrum of assets that may be subject to leasing agreements. Most assets, whether movable or immovable, tangible or intangible may now be the subject of a leasing agreement. This means, for example, that trademarks, copyrights, software and industrial designs may now be possible subjects for a leasing agreement.

3. Flexibility as to Payments and Purchase Option. Waiver of Certain Obligations of the Lessor

Parties to a leasing transaction may agree on the amount and schedule of payments and also on the timing and the price of the purchase option. In addition, the parties may include within the amount of the payments to be made under the leasing agreement, any payment for services to be rendered by the lessor to the lessee pursuant to such agreement. Hence, the Leasing Law permits complete flexibility for the parties to adapt their leasing agreements to their respective cash flows and service needs.

Property subject to a leasing agreement may be either: (a) acquired by the lessor from a vendor specified by the lessee; (b) acquired by the lessor pursuant to specifications furnished by the lessee; (c) acquired by the lessor by means of the substitution of the lessee by the lessor as purchaser in a pre-existing purchase agreement for a determined asset; (d) previously owned by the lessor, (e) acquired by the lessor from the lessee (i.e., sale and lease back); and (f) held by the lessor, where the lessor, while not having full ownership, nevertheless has sufficient title to grant a leasing agreement over the property (for example as a trustee). The sale and lease back modality of leasing, indicated in (e) above, is an innovation, since it was not contemplated in the Trust Law.

In the event that the property subject to the leasing agreement is acquired by the lessor as described in (a), (b), (c) or (e) above, the lessee may contractually waive certain legal benefits to which it would normally be entitled pursuant to Argentine law. In such cases, the lessee may waive the delivery obligations of the lessor as well as guarantees that the lessor would normally be required to provide under Argentine law (perfect title and non-existence of hidden defects).

The waiver referred to above does not leave the lessee unprotected, since for the cases mentioned in (a), (b) or (c) above, the Leasing Law provides for the assumption by the lessee of the rights of the lessor in the corresponding purchase agreement without the need for any written agreement. Thus, the lessee is entitled to direct any claim relating to the delivery and guarantee obligations against the original seller.

4. Strict Liability

According to the Leasing Law, the lessor is released from the strict liability to third parties that arises as a result of ownership with respect to the assets subject to the leasing agreement and this liability is attributed to the lessee or the person in possession or the custodian of those assets.

5. Bankruptcy of the Lessee

Leasing agreements have to be registered with the appropriate registry in order to be enforceable against third parties. The registry in which a leasing transaction has to be registered is the one corresponding to the type of the property involved in the transaction. For example, in the case of real estate, the appropriate registry would be the real property registry.

In the event of bankruptcy of the lessor: (i) the leasing agreement shall continue to have full effect in accordance with its terms, and (ii) the lessee may exercise its purchase option as set forth in the agreement.

In the event of bankruptcy of the lessee, the appointed trustee or the person authorized by the bankruptcy judge may either (i) request the continuation of the leasing agreement or (ii) terminate the agreement, in which case, the lessor may request repossession of the corresponding assets.

Any amounts owed by the lessee arising under the leasing agreement, prior to repossession of the asset or the declaration of bankruptcy, will be treated in the same manner as other unsecured credits of the lessee.

6. Use of the Property Subject to the Agreement

The lessee is entitled to use and enjoy the property subject to the leasing agreement, but the lessee may not sell or encumber the property in any manner. Ordinary and extraordinary expenses relating to the leased property shall be borne by the lessee, unless otherwise agreed by the parties. The lessee may also rent out the leased property unless expressly prohibited in the leasing agreement.

7. Default by the Lessee

Pursuant to the Leasing Law, the lessor is entitled to request the eviction of the lessee from and repossession of the leased property in the event of non-payment of lease payments by the lessee. Proceedings aimed at such repossession vary depending on whether such property constitutes movable or immovable property, and in the case of the latter upon what proportion of the total amount payable under the lease has been paid by the lessee. The lessor is also entitled to claim any unpaid amount due under the lease agreement plus damages.

8. Securitization

The Leasing Law expressly provides for the possibility of securitization of the future receivables arising from leasing agreements. Such securitization transactions must be made in accordance to the provisions of the Trust Law. This innovation is expected to help to consolidate the use of leasing by broadening the range of financing alternatives available to lessors.

9. Tax Advantages of Leasing

Leasing has a number of advantages from the tax point of view.

Inasfar as VAT is concerned, the taxation implementing regulations of the Leasing Law which came into effect in November 2000 provide for a mechanism that allows the lessor to agree with the lessee (depending upon this latter's VAT position) to increase the amounts of VAT invoiced upon the first payments under the lease agreement. This mechanism allows the lessor to set off more rapidly the credit for the VAT paid by the lessor upon the acquisition of the leased asset. The lessor is thus able to reduce the impact of financing the VAT paid upon acquiring the asset to be leased.

Furthermore the Law also makes provision for any VAT applicable upon the importation of goods destined for leasing operations to be financed by banks and the cost of any interest thereon will, in principle, be borne by the Tax authorities. Details of exactly how this is to work have yet to be promulgated in enacting legislation.

The above fiscal advantages apply to all leasing agreements. If however the leasing agreement is considered to be what is known as a financial lease (i.e., the lessor is a financial entity), then further tax benefits may accrue which are as follows:

1. The limitations on allowable interest deductions for tax purposes established under the thin capitalization rules of the Income Tax Law for cases of thin capitalization and high rates of indebtedness are not applicable to debt funding raised by lessors (which are financial entities) to acquire assets for leasing.
2. The lessor is not subject to the tax on interest (now at the rate of 10%) which is payable in the case of certain loans obtained by Argentine companies.
3. Instead of amortizing the leased good during the term of its useful life (for example, the term of amortization for immovable property is 50 years and for automobiles is 5 years), the lessor is enti-

tled to amortize the leased good during the term the lease agreement, thus since financial leases are normally for shorter periods than those indicated above, there will be an accelerated amortization for tax deductibility purposes.

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Arbitral Jurisdiction: Restrictive Interpretation

By Guillermo Malm Green, Buenos Aires

In the case entitled *Alquigas S.A.* (hereinafter "Alquigas") *v. Servinorte S.A.* (hereinafter "Servinorte") Panel D of the Commercial Court of Appeals of the City of Buenos Aires has rendered an interesting judgment related to the interpretation of arbitration clauses whereby the parties agree to submit themselves to the jurisdiction of arbitration boards.

Alquigas and Servinorte had agreed in a contract that in the event of controversies or difficulties arising from the interpretation of the contract, the parties would first embark upon arbitration proceedings conducted by the chairman of the Business Chamber pertaining to the respective business sector, and in case of failure to reach an agreement, they would submit to the jurisdiction of the Ordinary Courts of the City of Buenos Aires.

In the case under analysis, Alquigas filed with the Courts a complaint against Servinorte in order to obtain an indemnification for damages sustained as a consequence of the termination of the agreement to which they were parties.

The Commercial Court of Appeals stressed that the arbitral jurisdiction is of a special nature and that contractual clauses that submit conflicts to private judges must be interpreted restrictively. Therefore, taking into consideration that the arbitration clause provided for arbitration only in the event of controversies or difficulties arising from the interpretation of the contract *but not* as regards to its enforcement or damages, the Court of Appeals resolved that, since the controversy arose from an event other than the mere interpretation of the contract, the ordinary courts, and not the arbitration board, should handle the case.

The judgment in question shows how important is to draft arbitration clauses properly in order to guarantee their effectiveness.

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Infrastructure Development— New Investment Opportunities

By Osvaldo J. Marzorati, Buenos Aires and Alejandra Novillo, New York

Argentina has created new opportunities for foreign investors by promoting the participation of the private sector in an Infrastructure Development Plan. It is a $4.3 billion plan that is intended to reduce unemployment through the participation of associated foreign companies.

Through Federal Decree 1299 on Infrastructure Development, the Argentine Government is seeking to reactivate the construction sector. The province of Buenos Aires is implementing a similar strategy with the enactment of provincial law 12.511.

Creation of a Fiduciary Fund

Decree 1299 creates a Fiduciary Fund to guarantee payments arising from projects approved under this regulation. All the projects will be financed by the private sector with public funds as collateral. The Fund's assets shall be placed in a Fiduciary Trust managed by Banco de la Nación Argentina.

Identification of Projects

Under the federal plan, 45% of the funds will be allocated to the construction of roads, 16% for fluvial works, 14% for potable water and sewage systems, 8% to improve railroads, and the remainder for other infrastructure projects.

A total of 2,800 projects will be carried out over a five-year period. National bid calls will be held for all public works under $45 million, and international tenders will be used for larger projects.

Role and Rights of Financing Companies

The role of financing companies will be to finance 100% of the project until provisional acceptance by the contracting government agency. If the project is finished, the Government guarantees full repayment to the investor. Financing companies may be assignees of the project and will have the right to appoint a new contractor in the event that the government agency terminates the contract of the awardee. Payments of the project will begin from the moment the project is provisionally accepted by the government agency.

Requirements for Foreign Companies

Foreign companies willing to participate in the tender as contractors or agents in charge of the projects will have to comply with certain requirements, such as:

- duly registering as a local company;

- verifying that they have already built projects whose value equaled or exceeded the value of the project under consideration; and
- demonstrating activity in the country for the last three years.

Participation of Local Companies

Non-resident companies shall participate in the call for bid with local companies. At the federal level, non-resident companies are allowed to have a participation of up to 51% and up to 49% at the provincial level.

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Brazil

New Aspects of the Brazilian Capital Market

By Renata Neeser and Isabel Franco, New York

Historically, the Brazilian capital market has never been a major source of financing for domestic companies. The companies used to basically raise capital through governmental incentives or through the government's active participation in those companies' capital. However, several privatizations have taken place in the last decade and many incentives have been restricted or completely abolished. Also, the Brazilian economy has been opened to the world, increasing the competition between domestic and foreign goods and creating a need for investing in technology, machinery and equipment to improve the quality of the domestic products and to develop new markets internally. The increasing globalization has also enticed the Brazilian companies to export their products and increase their participation in the foreign markets.

Currently, the largest publicly traded Brazilian companies have an eye in the New York Stock Exchange, which has a negotiation volume of approximately 160 times larger than its Brazilian counterpart in São Paulo ("BOVESPA") per day.[1] Many of such companies are already in the New York Stock Exchange raising capital, which is significantly less costly than in the Brazilian financial system with its soaring interest rates and currency devaluations.

As a consequence, the Brazilian stock market is still a secondary market, which negotiates shares of smaller companies. Also, due to the more attractive foreign markets, the multinational companies that acquire the control of public Brazilian companies tend to delist them and obtain funds outside Brazil, further reducing the domestic opportunities for investment.

In light of all that, there is movement in different fronts in Brazil to increment and develop the domestic capital market; on one hand, the legislative is debating a bill to amend the Brazilian Corporate Law[2] and to cause the Brazilian equivalent to the U.S. SEC,[3] to become stronger and more independent and, on the other hand, BOVESPA created the so called New Market.

On March 28, 2001, the Brazilian House of Representatives passed the bill that considerably alters the Brazilian Corporate Law and the attributions of the Brazilian SEC. However, even though several measures to guarantee transparency and better rights to the minority shareholders have been included, the bill has been attacked as either too shy in its measures, falling short of its intent, or too liberal in granting too many rights to the minority. Accordingly, the bill, after having been passed in the House with several amendments, has been dormant in the Senate, and the Senate will adjourn at the beginning of July without any immediate plans to vote the bill after the recess.[4]

The bill, without taking into consideration the two radical opposing sides, is after all an improvement to the corporate statute created in 1976. The capital markets in Brazil and abroad have considerably changed since then, and Brazil's only vehicle to adapt the current law to the new trends is going through this legislative process. Such process although difficult, and requiring a lot of compromising, is inevitable and the resulted statute seldom entirely satisfactory. In any case, whatever the outcome of such bill, what is important is that at least basic minority rights and basic assurance of transparency will be accomplished, following the established capital markets' trend around the world.

The New Market, on the other hand, may do the rest. The BOVESPA's New Market is a new listing segment launched in December 2000, whose main purpose is to develop the Brazilian capital market by introducing more stringent rules to the listed companies and rights to the minority shareholders, attracting, therefore, more investors to the Brazilian domestic market, which in turn would further attract new companies to the open market. In certain aspects, BOVESPA has been inspired to set up the New Market by the success of the German New Market ("*Neuer Markt*"), in which the German Stock Exchange lists only companies that have adhered to a unilateral private agreement, imposing rigorous rules of corporate governance.

The concept of the BOVESPA's New Market is "*that the valuation and liquidity of shares are directly related to the rights conceived to the shareholders, to the quality of the information provided, and to the efficiency in guaranteeing investor's rights.*"[5] BOVESPA has established two levels of commitment to the corporate governance practices and will certify the companies that voluntarily adopt such strict rules as level 1 or level 2, depending on their degree of commitment. The certified companies will benefit from the exposure of being part of such lists by attracting more investors that are interested in having more guarantees to their investments.

Many companies have previously adopted many of level 1's features of corporate governance practices as a way to improve their capability of attracting investments, and thus it was fairly simple for most of the newly listed companies to attain such level. However, level 2 requires that companies provide the minority shareholders with rights compatible with the controlling block's rights, to adopt the accounting principles of the U.S. GAAP or IAS GAAP, and to abide to the BOVESPA's arbitration panel, among others. In order to participate in the New Market the companies will have to attain level 2 and go even further as having to have only one class of voting shares.

On June 26, 2001, BOVESPA has implemented the first phase of the New Market by introducing the list of the newly certified level 1 companies, which consists of the most prominent publicly traded Brazilian companies.[6]

Some of these companies, however, are not considering changing their corporate governance practices in the near future just to attain level 2, but they do not discard this possibility. Nevertheless, BOVESPA expects to yet launch a list of level 2 companies before the end of 2001.

As with all major changes, the route is full of detours but, with the perseverance of some, we are, after all, seeing some light at the end of the tunnel.

Endnotes

1. www.nyse.com/marketinfo/marketinfo.html and www.bovespa.com.br for volume in U.S. dollars per day.
2. Law 6.404/76 revised by Law 9.457/97.
3. Comissão de Valores Mobiliários (CVM).
4. Bill number: PLC 23, 2001. The House approved bill is being reviewed by the Commission of Constitution, Justice and Citizenship and by the Commission of Economic Affairs of the Senate. A public hearing was scheduled for June 19, 2001, but the results of such hearing have not been published. www.senado.gov.br.
5. www.bovespa.com.br/dstqi_novomercado.htm.
6. The Companies certified as level 1 are: BRADESCO, ITAUBANCO, BRADESPAR, GERDAU, GLOBO CABO, ITAUSA, PERDIGÃO S/A, RANDON PART, SADIA S.A., UNIBANCO HLD, UNIBANCO, VARIG SERV, VARIG TRANSP, VARIG, WEG.

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The Brazilian Regulatory System and Conflicts of Jurisdiction between Regulatory Agencies

By Sérgio Guerra, Rio de Janeiro

The process of privatization in Brazil, which has been continuing since the beginning of the past decade, has caused profound transformations in the institutional organization of the Brazilian State. In this regard, it is worth recalling that the National Privatization Program—PND, which was instituted through Law No. 8031 of 1990, was conceived of as a means of reordering the State's role in the economy. This was to be achieved by transferring activities originally carried out by the public sector to private initiative. In this context, it can be stated that implementation of privatization was intended to allow public administration to concentrate its activities in areas where the State's presence is fundamental and indeed irreplaceable for attaining priority goals that are considered as being genuinely in the national public interest. The PND thus was aimed at the following objectives, among other measures: (i) reducing the Brazilian public debt and thus cleaning up public sector finances, (ii) instituting mechanisms for fostering new investments in companies and activities transferred to private initiative, (iii) modernizing the nation's industry, by expanding competition among private economic agents, (iv) reinforcing executive capacity in various sectors of the economy, (v) strengthening the capital markets by increasing the supply of securities and democratizing stock ownership in companies included in the privatization program. This led to the sale of shareholding control in various public utility companies to private Brazilian and international groups, with a resulting shift in the role of the State to that of regulating and inspecting private economic activities.

I. Creation of Regulatory Agencies in Brazil

Within the scope presented herein, we should mention that in 1995 the Brazilian federal government enacted the Master Plan for Overhauling the State Apparatus ("Plan"). In this Plan, the government drew the main lines for administering the country, with a view, among other objectives, to establishing terms and conditions for the State to intervene in society and the market itself. The Plan called for creation of Autonomous Agencies, linked to the State's exclusive activities. With the evolution of what was contained in the cited Plan, there arose Brazilian Regulatory Agencies, based on adoption of the American model (U.S. regulatory agencies) and the French model (*Les autorités administratives indépendantes*). In this context, it should be pointed out that the legal nature of Brazilian Regulatory Agencies is special autarchy (quasi-autonomous agencies), part of the indirect administration of the political entity that has the authority to provide public utility services. In Brazilian positive law, the definition of autarchy was first established by Decree-Law No. 6016 of November 22, 1943, as being "decentralized state service with a public legal personality explicitly or implicitly recognized by law." In 1949, Article 139 of Law No. 830 of September 23, 1949, which reorganized the Government Audit Board (TCU), in regulating Article 97 of the 1946 Federal Constitution, defined autarchies as being:

> (i) decentralized state service with corporate personality (i.e. an artificial entity, whose costs are covered by its own budget, independent of the general budget); and (ii) such other corporate entities as have been specially instituted by law to engage in providing services of a public or social interest, the costs of which are covered by taxes of any kind or by other funds provided by the Treasury.

On the other hand, Decree-Law No. 200 of February 25, 1967, which provided for organization of Federal Administration and established directives for Administrative Reform, defined autarchy as: "Autonomous service created by law, with its own corporate personality, equity and funds, to engage in activities typical of public administration that require decentralized administrative and financial management for proper functioning." It should be mentioned at this point that according to the interpretation of authoritative Brazilian scholarship regarding autarchies, such entities are characterized, in brief, (i) by being instituted by legislative acts; (ii) by having a legal personality of internal public law; (iii) by specialization of their purposes or activities, and (iv) by their condition as an autonomous entity. Thus, in light of the above-cited intention to administratively reorganize the Brazilian State, certain federal agencies were created, such as the National Electric Power Agency—ANEEL (Law No. 9427/96), National Petroleum Agency—ANP (Law No. 9478 of August 6, 1997) and National Telecommunications Agency—ANATEL (Law No. 9472 of July 16, 1997). In turn, certain Brazilian states created their own State Regulatory Agencies, to regulate all utility services under state authority.

II. Authority of Brazilian Regulatory Agencies

It behooves us to point out, right from the beginning, that a great deal of controversy has arisen regarding the authority or jurisdiction of Brazil's Regulatory Agencies. In this sense, it should be mentioned that initially such jurisdiction "consists of the delimited sphere of power that is granted to a state agency or entity by means of specifying the matters over which governmental power is exercised."[1] The controversy that has arisen on this issue is partly due to the fact that the Brazilian Federal Constitution (of 1988) expressly mentions the creation of just two regulatory agencies, the first relating to the control and inspection of concessions or permits to engage in telecommunications services, and the second to the oil exploration activities.[2] It should be mentioned that interpretations on this issue are divided into two main schools of thought. The first of these schools sustains, in brief, that the jurisdiction of the Regulatory Agencies constituted in light of the constitutional text is limited to regulation of what is contained in the law, regulations, notice of privatization and concession agreements, with the "regulatory acts" being required to strictly adhere to the parameters and principles established by law. On the other hand, according to this same school of thought, as regards the Regulatory Agencies set up without express constitutional permission, their jurisdiction is limited to matters related to what is termed "administrative or organizational regulations," as they can only deal with relationships between private entities that have a special subject relationship with respect to the State. This indicates that from this point of view, any decisions made by the Regulatory Agencies that constitute regulations of laws as such would be contrary to the constitutional provision that assigns regulatory power over laws to the Head of the Executive Branch of Government. According to this line of thinking, any act issued by the Regulatory Agencies aimed at regulating a law violates the very Principle of Legality, prescribed in item II, Article 5, of the Federal Constitution, which establishes that no one can be obligated to do or not do something except by virtue of law. Continuing with this line of reasoning, the Federal Constitution does not assign any regulatory power at all to the Regulatory Agencies, but rather to the Chief Executive. It should be pointed out, nonetheless, that the second school of thinking takes a much less rigid approach to the issue. Indeed, the basic position of this second school of thought can be summarized in the sense that the jurisdiction of the Regulatory Agencies includes normative, executive and even para-judicial powers. Accordingly, administrative acts under-taken by Regulatory Agencies do not violate either the constitutional precepts that assign regulatory powers, through Decrees (executive fiat) to the Chief Executive or the principle of legality, inasmuch as Regulatory Agencies in the form of autarchies that a part of the indirect public administration have their function and jurisdiction defined by law, thus being able to issue regulatory acts of a secondary nature. We should mention, in this context, the position regarding this issue taken by the highest judicial authority in the land, the Federal Supreme Court (STF). It is known that this Court has already issued opinions on the jurisdiction or authority of the nation's Regulatory Agencies on at least two occasions. The first was a restraining order in a direct suit for declaration of unconstitutionality (ADIN) No. 1827-6, which considered Resolution No. 61/98, published by ANEEL, which authorized the granting and contracting of new concessions for 30-year terms, to provide public utility services (generation and distribution of electric power). On the occasion, the Supreme Court ruled that the ANEEL Resolution was an administrative act, individual and concrete in nature, without characteristics of a legal norm, that is it was not considered general, abstract and imperative. Based on this interpretation, the STF did not accept the ADIN. We should further point to another decision handed down by the STF in the preliminary injunction granted in the case of ADIN No. 1668, in which various political parties questioned provisions of Federal Law No. 9472/1997, which created ANATEL. Among the various legal provisions challenged by the said ADIN were items IV and X of Article 19 of the cited Law No. 9472/97. This law dealt with the jurisdiction of ANATEL to issue norms on granting, providing and performing telecommunications services on a public and private basis. Thus, in relation to this legal provision, part of the preliminary injunction petitioned for in the ADIN was granted, in the sense of their (the "norms") being given an interpretation in conformity with the Federal Constitution, for the purpose of imposing a requirement according to which ANATEL's authority to issue norms was subordinate to the legal and regulatory precepts that govern granting, providing and performing telecommunications services on a public and private basis. Accordingly, it is possible to extract from this Supreme Court decision the interpretation that special autarchies have the jurisdiction to regulate the public utility services granted to private initiative, provided that such regulation is within the limits of the "regulatory boundary mark," comprised of the law, regulations, notice of bid and concession agreement signed with the Public Authority. Therefore, and in spite of the authority established in the respective laws that created them, as a general rule Regulatory Agencies have the following powers and duties: sign and manage concession agreements; inspect and issue norms regarding the services provided; settle disputes arising between the Public Authorities, Concessionaire and Consumers; readjust and/or revise tariffs; apply disciplinary sanctions. It is appropriate to point out here that, contrary to French law, where administrative decisions have the nature of being decided matters, Brazilian law applies the so-called "principle of one jurisdiction," prescribed in the Federal Constitution, according to which no damage or threat of damage shall fail to be considered by the Judiciary.

III. Conflicts of Powers and Duties Between Regulatory Agencies

We cannot fail to recognize that in certain situations there may arise conflict of jurisdiction between Regulatory Agencies. Indeed, in certain cases, the matter being regulated, which normally touches on the jurisdictions of the agencies, may occasionally overlap, causing a conflict of authority. To illustrate, we can cite the potential conflict of jurisdiction in relation to gas, since the ANP is responsible for regulating the cycle that involves the production and transportation of gas, at the same time as the State Agencies are responsible for regulating activities relating to the local utility services of distribution of piped gas. Accordingly, it should be stated that, in the event of conflict between Federal Regulatory agencies, the conflict has to be submitted to the President's Office. The chief executive's aides will then consult the Attorney General, who is responsible for interpreting the administrative acts that are causing the conflict, as provided by Article 4, item X, of Complementary Law No. 73 of February 10, 1993. At this point it should be pointed out, in addition, that the Federal Regulatory Agencies that are responsible for inspecting the sectors of electric power (ANEEL), telecommunications (ANATEL) and oil and gas (ANP) recently instituted a "common regulation," approved by Joint Resolution No. 2/2001, aimed at mediating any conflicts, through a permanent commission made up of 2 representatives of each Regulatory Agency. It should finally be pointed out that if the conflict of powers and duties arises between federal and state agencies, the matter has to be taken to the STF, which has original jurisdiction to consider the matter, in the manner provided by Article 102, paragraph f, of the Federal Constitution.

Endnotes

1. *Cf.* José Afonso da Silva, in *Curso de Direito Constitucional Positivo [Course in Positive Constitutional Law].*
2. *Cf.* articles 21, XI and 177, III.

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Canada

Canadian Copyright Board Sets Private Copying Levies for 2001-2002

By Vicky Eatrides, Ottawa

The significance of round two of the private copying hearings would, at first glance, appear to be the substantial increase in the levy on recordable compact discs. A more subtle, yet equally significant, result is the Copyright Board's consideration of possible future levies on hardware and new audio recording media.

Legislative Framework

The copying of a sound recording for almost any purpose arguably infringed copyright prior to the 1998 amendments to the Copyright Act[1] (the "Act"). Enforcement was effectively impossible, however, and the making of unauthorized copies of sound recordings was widespread.[2] Canada's Parliament concluded that authors, performers and producers could not protect their rights or collect royalties for the use of their copyrighted works.

On March 19, 1998, however, Part VIII of the Act came into force and established the private copying regime in Canada.[3] The regime legalizes the copying of sound recordings by individuals for private use, but in return establishes a levy to compensate copyright holders. The private copying levy is applicable to blank audio recording media that are "ordinarily used by individual consumers" for reproducing sound recordings.[4] The levy is paid by manufacturers and importers of blank audio recording media sold or otherwise disposed of in Canada.[5] The proceeds from the levy are then to be distributed to eligible composers, lyricists, performers and producers of sound recordings through their professional associations or collectives.

Canada is not alone in implementing a private copying regime. Approximately 40 countries, including most G-7 and European Union members, have introduced comparable legislative measures to address the issue of private copying of sound recordings.[6]

Determination of the Levy

The Copyright Board (the "Board") determines the amount of the levy pursuant to section 83 of the Act.[7] The Board is a federal regulatory body that is empowered to establish, either mandatorily or at the request of an interested party, the royalties to be paid for the use of works protected by copyright, when the administration of these rights is entrusted to a collective society. Collective societies ("collectives") must file proposed tariffs for the benefit of their members or lose their right to remuneration. Upon receiving a proposed tariff, the Board publishes it in the *Canada Gazette* and gives notice that any person may file written objections to the tariff with the Board. After hearing from collectives and objectors, the Board's mandate is to set a "fair and equitable" levy. The Board has thus far held two private copying hearings, setting the tariffs for the years 1999-2000 and 2001-2002.

Private Copying Levy, 1999-2000

The first private copying proceedings were held over a period of seventeen hearing days in August and September 1999.[8] Numerous participants were involved, including the Canadian Private Copying Collective (CPCC), acting on behalf of all collectives that had filed proposed tariffs,[9] the Canadian Storage Media Alliance (CSMA), representing major manufacturers and importers of blank audio recording media, and several hundred private parties who objected to the tariff. The Board was called upon to, among other things, determine preliminary legal issues, engage in statutory interpretation, analyze economic evidence, set the amount of the levy and designate the collecting body.

Levies are imposed only on recording media that are ordinarily used to reproduce sound recordings. Thus, an important question for the Board's determination was the meaning of the term "ordinarily used." The Board, in its decision, considered case law and dictionary meanings and found that the ordinary character of an occurrence is not necessarily a function of quantity, but rather a matter of consistency. The Board held that ordinary use ought to be interpreted as including all "non-negligible" uses. Based on this principle, the Board concluded that all audio cassettes with a playing time of 40 minutes or more, CD-recordable (CD-R), CD-rewritable (CD-RW), MiniDisc, CD-R Audio and CD-RW Audio qualify.[10] The Board also left open the possibility of levying new blank audio recording media. "As markets evolve, new types may be identified if the Board is satisfied that consumers have found other ways to make private copies of their favourite music."[11]

In setting the levy, the Board relied on evidence regarding the average remuneration that typically flows to authors, performers and makers in the case of prerecorded CDs. This level of remuneration was then adjusted to take into account various factors, including the size of the eligible musical repertoire, the nature of the private copying market, market and usage characteristics for each audio recording medium, and the relative valuations of analog versus digital recordings.[12] Based on these considerations, the Board set the 1999-2000 levy substantially below the CPCC's proposed tariffs, at 23.30 on audio cassette tapes of 40 minutes or longer, 5.2¢ on CD-R and CD-RW and 60.8¢ on MiniDisc, CD-R Audio and CD-RW Audio.[13] The Board projected that these tariffs would raise approximately $9 million in the year 2000, to be distributed to the eligible authors, performers and makers of recorded musical works copied for personal use in Canada.[14]

Private Copying Levy, 2001-2002

The public review of the 1999-2000 private copying levies was held over a period of seven hearing days during October and November 2000. The CPCC filed evidence and proposed levies on behalf of eligible rights holders, while major manufacturers and importers of blank audio recording media were again represented by the CSMA. The evidence and testimony served as an update to the evidence from the previous year's hearings.

Expert witnesses offered testimony on a broad range of topics, including economic theory, market trends and the marketing of blank audio recording media and equipment in Canada. The role of technology in determining the levy was also a major focus of the 2001-2002 hearings. The CPCC presented evidence with respect to rapid technological developments[15] and the resulting ease of copying music,[16] while other witnesses testified as to the increasing popularity of MP3 players and similar devices,[17] recent Napster developments, such as its alliance with Bertelsmann AG,[18] and the increased availability of authorized downloads by artists and the major record labels over the Internet.[19]

The Copyright Board announced the levies for 2001-2002 on December 15, 2000 and released its reasons for judgment on January 22, 2001.[20] Effective January 1. 2001, private copying levies increased to 29¢ on audio cassette tapes of 40 minutes or longer, 21¢ on CD-Rs and CD-RWs and 77¢ on CD-R Audio, CD-RW Audio and MiniDiscs. The most notable and significant change is the 300 per cent increase in the CD-R levy, from 5.2¢ to 21¢, over a period of one year. According to Claude Majeau, Secretary General to the Board, "The increases in the levies reflect, among other things, the significant changes in private copying behaviour since last year, especially the increased usage of digital media, such as CD-Rs, for copying pre-recorded music."[21]

In its decision, the Board considers the significant growth in sales of CD burners and digital media. The Board predicts that sales of CD-Rs and CD-RWs in Canada will increase from 49 million units in 1999 to 78.5 million in 2000, 113 million in 2001 and 138 million in 2002.[22] In addition, the Board estimates that approximately 25 percent of CD-Rs are used for private copying, a substantial increase from the 8 percent figure that was used by the Board in last year's decision.[23]

Based on evidence presented at the hearings, the Board predicts that the levies will raise approximately $27 million in 2001 and $32 million in 2002, a significant increase from the projected $9 million in 2000.

Exemptions and the Zero-Rating Scheme

The Act exempts the payment of the levy when recording media are sold to a society, an association or a corporation that represents persons with perceptual disabilities.[24] No other exceptions are provided for in the Act. In order to help mitigate the effect of the levy on certain groups, however, the CPCC has implemented a voluntary "zero-rating scheme" which permits manufacturers and importers to sell blank audio recording media to certain categories of users without having to pay the levy. These include religious organizations, broadcasters, law enforcement agencies, courts, tribunals, court reporters, provincial ministers of education, members of the Association of Universities and Colleges of Canada and music and advertising agencies. The exemption applies to all blank audio recording media except CD-R and CD-RW.[25]

The Future

Rapidly evolving technology will no doubt affect future tariffs to be collected on the sale of blank audio recording media. Following the 2001-2002 hearings, the Board left open the possibility of imposing a levy on new blank audio recording media:

> Some media, such as MP3 player memory cards, are not subject to the levy because the Canadian Private Collective Society (CPCC) did not ask for one. As markets evolve, new types of blank audio recording media used for private copying may be identified and be made subject to a levy.[26]

In fact, during the most recent private copying hearings, one member of the Board queried whether tariffs should be imposed on computer hard drives, considering their significant role in the reproduction of music.[27]

Considerations such as these, as well as rapidly evolving technologies and the uncertain fate of Napster and illegal Internet downloads underlie the difficulty in predicting not only the tariffs that will be set on blank audio recording media during the next private copying hearings in 2002, but also which media will be subject to a levy in years to come.

Endnotes

1. R.S.C. 1985, c. C-42.
2. Canadian Heritage, News Release, "Cultural Community to Benefit as Copyright Bill Receives Royal Assent" (25 April 1997).
3. Bill C-32, *An Act to Amend the Copyright Act*, S.C. 1997, ch. 24, ss. 50, 53).

4. Copyright Act, s. 79 ("audio recording medium").
5. Blank media that are exported from Canada are not subject to the levy.
6. Canadian Heritage, Information, "Information on the Private Copying Provisions of the Copyright Act" (updated May 1999) <www.pch.gc.ca>.
7. The Board is established by § 66 of the Act.
8. Private Copying 1999-2000 (1999), 4 C.P.R. (4th) 15.
9. The member collectives of the CPCC include the: Canadian Mechanical Reproduction Rights Agency (CMRRA), Neighbouring Rights Collective of Canada (NRCC), *Societé de gestion des droits des artistes-musiciens* (SOGEDAM), Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) and Society of Composers, Authors and Music Publishers of Canada (SOCAN).
10. CD-R can be written onto only once, whereas CD-RW can be written onto several times. The audio line of products was created at least in part to comply with U.S. legal requirements. They are encoded so as to be recognized as audio products when played on digital audio recording equipment and may not be readable by all CD-ROM drives, but are otherwise technologically identical to their non-audio counterparts.
11 Private Copying 1999-2000 at 32.
12. Copyright Board, Fact Sheet, "Copyright Board's Decision—Private Copying 1999-2000" (17 December 1999).
13. The CPCC proposed levies of $1.50 for each cassette 90 minutes in length and $2.50 for each 75-minute CD-R, CD-RW, CD-R Audio, CD-RW Audio and MiniDisc.
14. Copyright Board, News Release, "Copyright Board Sets Private Copying Levies" (17 December 1999).
15. Transcript of the examination of Mr. David Basskin, Vol. 1 (24 October 2000) at 28, 42-44 and 46-48.
16. *Id.* at 36.
17. *Id.* at 84 and Transcript of the examination of Mr. Jeff Hemmings, Vol. 5 (7 November 2000) at 1170.
18. Transcript of the examination of Mr. Jeff Hemmings, Vol. 5 (7 November 2000) at 1177.
19. Transcript of the examination of Mr. David Basskin, Vol. 1 (24 October 2000) at 129.
20. The Copyright Board's *Private Copying 2001-2002* decision is available at the Board's Web site <www.cbcda.gc.ca>.
21. Copyright Board, News Release, "Copyright Board Sets Private Copying Levies for 2001-2002" (15 December 2000).
22. *Private Copying 2001-2002* at 5.
23. *Id.* at 21.
24. Copyright Act, s. 86.
25. More information about the zero-rating scheme is available at the CPCC's Web site <www.cpcc.ca>.
26. Copyright Board, Backgrounder, "Copyright Board's Decision—Private Copying 2001-2002" (15 December 2000).
27. Member Callary, Transcript of the examination of Mr. David Basskin, Vol. 1 (24 October 2000) at 59.

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Canada's Supreme Court Says No Duty of Care Owed to the Opposite Party in Commercial Negotiations

By John B. Laskin, Toronto and Deborah L. Sharpiro, New York

The Supreme Court of Canada has refused to hold that a party to commercial negotiations owes a duty of care to the opposite party. In *Martel Building Ltd. v. Canada*,[1] the Supreme Court reversed a decision of the Federal Court of Appeal that held the federal government liable to a building owner for negligence in negotiating the renewal of a building lease. If the Supreme Court had upheld the decision, and subjected parties to negotiations to a duty of care, it would have added enormous uncertainty to the negotiation process. Parties disappointed with the results of negotiations would have been able to ask the courts to give them what they could not obtain through their own bargaining efforts. The courts in Canada would have taken on a new role in supervising commercial negotiations after the fact. The Canadian law would have diverged from the law in the United States, where there is, in general, no duty owed to the opposite party in commercial negotiations.

In *Martel*, the building owner had leased space to the government under a ten-year lease with a renewal option. The parties began negotiations for a renewal. At the same time, the government was considering putting its space requirements out to tender. The tender process started just as the negotiations failed. The building owner was not awarded the contract.

The building owner sued the government and succeeded at trial. One of its claims was for negligence in the negotiation process. This claim was upheld on appeal to the Federal Court of Appeal. The Court of Appeal held that the relationship between the government and the building owner was close enough that the law imposed a duty of care on the government in the conduct of the renewal negotiations. It relied for this conclusion on existence of a long-standing lessor/lessee relationship, and on the facts that the government was both the main tenant of the building and the "dominant player in the leasing of rental space in the area." It also held that the government's conduct breached its duty of care. This conduct included its failure to pursue the negotiations in a timely manner; to make the building owner aware of who had authority to commit the government and who did not; to make the government's negotiating position clear to the building owner; to set and communicate a realistic schedule; and to supply timely and pertinent information.

The Supreme Court of Canada agreed that the relationship between the government and the building owner was sufficiently close, or "proximate," to raise the presumption of a duty of care. But under Canadian law, proximity is not enough to establish a duty of care. It is also necessary to decide whether legal policy considerations should prevent a duty from arising or limit its scope. Here, the Supreme Court stated, there were "compelling policy reasons to conclude that one commercial party should not have to be mindful of another commercial party's legitimate interests in an arm's length negotiation."

Endnote

1. 2000 SCC 60 (November 30, 2000).

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Colombia

IP Developments in Colombia

By Maria Elvira Acosta De Valencia, Bogotá

I. Patent Cooperation Treaty (PCT) Becomes Enforceable in Colombia

The Patent Cooperation Treaty (PCT) elaborated in Washington on June 19, 1970, amended on September 28, 1979 and modified on February 3, 1984 and its rules were approved by the Colombian Congress by means of Law 463 of August 4, 1998. The Colombian Government deposited the instrument of ratification on November 29, 2000 and the PCT became enforceable for Colombia on February 28, 2001.

II. Domain Names in Colombia

a. Entity in Charge

In Colombia, the entity in charge of assigning domain names is the "University of Los Andes" through its Computer Center (Centro de Cómputo). In 1990, InterNIC delegated this function to the University, for the following reasons:

- It was the entity with the appropriate infrastructure at the time.
- It was the first entity to lead the connection between its general library and the largest library in Colombia, in order to provide access to the latter.
- It was the entity that actively participated in the meetings of the Internet Society (ISOC) back in 1992.
- It was the entity that assumed the leading role, with the support of other entities, of conducting the integration process of Colombia with the Internet.

It must be noted that the Colombian Administrator of Domain Names is working hard to adjust its policies and administration to the principles established by INTERNIC. However, many legal issues are pending for decision by this entity (i.e., the assignment of domain names).

b. Policies on Domain Names

To date no bill or legislation on domain names exists, but there are some policies established by the Colombian Domain Name Administrator that are compulsory for the registration of domain names. The policies for registering a domain name are:

1. Have an identification number registered with the correspondent authorities in Colombia, such as the identification number for individuals or the tax identification number for companies.
2. Submit all the information that the Colombian Domain Name Administrator might need to asses the application of the domain name, regarding: (i) the existence of a similar or identical domain names registration; (ii) the appropriate use of the domain name in accordance with the purpose of the company that is applying for the registration of the domain name; (iii) the existence of the contact persons, for payment, administrative and technical purposes; and (iv) the purposes of use of the domain name.
3. Not to violate any intellectual property rights.
4. The truthfulness of the information provided in the application.
5. The only valid characters for a DNS domain name are the English alphabetical letters ("a"–"z"; DNS does not make a distinction between capital and lower-case letters), digits ("0"–"9") and hyphen ("-").
6. The character "ñ" is not valid.
7. The first and/or last domain character cannot be a hyphen.
8. The minimum length admitted for a second-level domain under "co" is three characters.
9. The maximum length admitted for third-level domains under "co" is 63 characters (the maximum recommended, for practical reasons and configuration, is 24 characters).

10. Applicants are responsible for the use of domain names and sub-domains that, in turn, are delegated.

11. Domain names must have at least two independent servers to transfer the names to machine addresses and that shall be physically separated and if possible in different nets.

Finally, there is no policy on resolving disputes. Thus, if a claim arises from the use of a domain name that is registered as a trademark in Colombia, the owner of a trademark will not have an action or procedure established by NIC Colombia to resolve the dispute and it will thus be necessary to initiate a trademark infringement action before the courts.

c. Procedure for Registering a Domain Name

As stated above, there are no restrictions on who can apply for a domain name. However, a company or organization wishing to request a domain name shall submit the Tax Identification Number (NIT). This has been a problem for the foreign companies because a power of attorney should be granted in order to obtain a Tax Identification Number, causing a delay in the process of registering domain names. Thus, the Colombian Domain Name Administrator is allowing that authorized companies or individuals in Colombia register domain names on their behalf. For that purpose an authorization by the foreign company should be granted and sent by fax. It is not necessary that this authorization be authenticated or with any other formality. However, the letter should be written on the applicant's letterhead.

On the other hand, although there is no specific provision regarding certification on related IP rights, at present, the Domain Name Administrator is requiring a certification from the Trademark Office stating if the domain name exists as a trade name or trademark.

d. Conclusions

A more defined and clear policy must be established so that Internet users can assure their rights on the Internet. Many legal issues are still pending to be regulated, such as dispute resolution procedures as well as the assignment of domain names.

Likewise, the topic of registration of domain names raises many important issues, including whether international agreements alone can adequately preserve the Internet as a non-regulatory medium, or if a legal framework is necessary (legislation) that leads to an organized and predictable medium.

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European Union

The Takeover Directive: The Debate Rumbles On

By Andrew Pearson and Julie Stanbrook, London

Background

In June 2000, after more than ten years of wrangling, the Council of the European Commission finally agreed a common position on the text of the European Takeover Directive. However, just when it seemed that this saga had finally come to an end, it has been reopened by the European Parliament which, in December 2000, voted to amend various parts of the agreed text. The most controversial amendments are discussed below.

Defensive Action

The most controversial of the European Parliament's amendments would allow a target company to take defensive action against a hostile bid without obtaining shareholder approval provided that those measures are within guidelines set out by the national regulator from time to time. There would be no limitation, other than under national law, as to what those guidelines might be. The amendment, if implemented, would therefore have the potential of defeating the entire purpose of the Directive, namely "to create EU wide clarity and transparency in respect of legal issues to be settled in takeover bids and prevent distortion of EU corporate restructuring by arbitrary differences in governments and management cultures."

Target Employees

Various of the European Parliament's amendments envisage a far greater role in the takeover process for the employees of the target company. So, for example:

- the board of directors of the target company would be required to act in the interests of the company's "continuity, shareholders and staff and with a view to safeguarding jobs";
- the offer document would be required to include more information about the implications of the transaction for employees, in particular "the offeror's strategic planning for the offeree company, the effect of such plans on jobs and locations, their impact on labour law standards, social standards and collective undertakings and the consequences for bodies representing the interests of the workers";
- parties to a bid will be required to provide workers' representatives with any information concerning the bid which is necessary for them to discharge their functions; and

- any separate opinion of the workers' representative body must be enclosed with the circular containing the views of the target company directors.

While these provisions fall short of giving employees an absolute veto over a change of control, they would certainly give them a far more prominent role in the process than has typically been the case in the UK.

Comment

It seems unlikely that the European Parliament's amendments will survive in anything other than an extremely diluted form. They are however likely to result in further delay. For those opposed to the very idea of a European Takeover Directive, this may be no bad thing, but for others a further delay of at least several months in a process which has already taken more than ten years is frustrating to put it mildly.

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Hong Kong/PRC

Trademark Laws, Cybersquatting and Domain Name Protection in Hong Kong and the PRC

By George A. Ribeiro, Hong Kong

I. Relationship Between a Trademark and a Domain Name

The registration of a domain name does not mean that one necessarily has protected trademark rights; nor does the registration of a trademark mean that one has the right to use the trademark as a domain name.

In Hong Kong and the PRC, domain names serve an important purpose as a means of identification for businesses and companies. Many businesses therefore aim to register domain names that reflect or that are identical to their company name or a registered trademark in the hope of attracting potential customers to their Web sites and increasing their market visibility. Domain names are now routinely featured in advertising as a means of indicating the presence of an enterprise on the Internet.

With the popularity of and increasing ease of access to the Internet, domain names have increasingly come into conflict with established trademarks. While the functions and uses of both domain names and trademarks are similar, the methods for registration and legal protection offered by each are fundamentally different. Domain names have been registered in a system "outside the constraints" of intellectual property law and it is only recently that efforts have been made to address and regulate this problem.

In both Hong Kong and the PRC, trademarks are administered by the respective governments and confined to their respective territorial and jurisdictional limits. The registered trademarks therefore only give rise to rights that may be exercised subject to physical boundaries. In contrast, domain names have no jurisdictional limits, are usually administered by a non-governmental organization (i.e., HKNIC or CNNIC) and subject to relatively unregulated procedures for registration.

The "lacuna" in the laws governing domain names and trademarks has resulted in exploitation by "cybersquatters," who take advantage of the global, "first-come, first-serve" nature of the domain names registration and the established trademarks of an organization or business.

II. Trademarks in Hong Kong and PRC: A Comparison

Under the principle of "one country, two systems," Hong Kong and the PRC possess independent legal and administrative systems, and separate systems for the registration and protection of trademarks. In general, to be enforceable, a trademark must be validly registered in a country or jurisdiction of choice. Both Hong Kong and the PRC follow the International Classification of Goods and Services and a single class filing system.

Where a trademark is registered in the respective systems in Hong Kong and the PRC, for designated goods or services, the owner will have exclusive rights thereover in the relevant jurisdiction to use the same and prevent others from using the same without its authorization.

On the other hand, where a trademark is not registered or pending registration, the two territories provide for different yet similar protection.

In Hong Kong, an unregistered trademark may be protected by "passing-off." To succeed in passing off, the plaintiff must establish (1) there is sufficient goodwill/reputation in the unregistered mark, (2) that the defendant's action is a misrepresentation made in the course of trade to its customers/potential customers (3) so that confusion is caused to them, and (4) that the aforementioned acts has resulted in damage or likelihood of damage to the plaintiff's business goodwill. In the context of a domain name, for it to be considered as a trademark, the domain name "must function as a mark, i.e., it must serve as an indicator of the source and not merely as an informational part of an Internet Web address."[1]

In Hong Kong, a new Trademarks Ordinance is proposed and expected to be enacted by 2002. Among the relevant provisions are: (1) provisions for refusing marks that take unfair advantage of or are detrimental to the distinctive character or repute of earlier marks, whether or not for the same goods and services; and (2) protection for well-known marks whether or not registered or used in Hong Kong.

In China, unregistered marks may be protected under the Anti-Unfair Competition Law promulgated in December 1993. This law provides, inter alia, against unauthorized use or imitation of names, packaging and decoration peculiar to well-known goods so that the goods of such users are confused with the well-known goods of others, causing purchasers to mistake them for the well-known goods. In the context of domain names, this law has also been used to prevent unauthorized parties from registering domain names incorporating well-known trademarks (please see below).

III. Enforceability of a Trademark as a Domain Name

Domain names can be categorized by a generic top-level domain name (gTLD), e.g. .com, .net, .org, .edu, .mil or .int; or the two-letter country code top-level domain (ccTLD). The ccTLDs for Hong Kong and the PRC are ".hk" and ".cn" respectively.

A. Domain Name Protection and Cybersquatting in Hong Kong

Hong Kong domain names are those ending in ".com.hk."[2] At present, it is the Hong Kong Network Information Services (HKNIC) which principally handles registration of these domain names. HKNIC is a public service is administered by the Joint Universities Computer Centers (JUCC), a consortium of seven government-funded tertiary institutions. Registration is on a "first-come, first-serve" basis and normally done via an Internet Service Provider (ISP).

HKNIC has measures in place to minimize the possibility of cybersquatting. For example, private individuals are not permitted to hold .com.hk domain names, and only businesses registered at the Companies Registry or Business Registration Office of the Inland Revenue Department, or educational institutions registered with the Education Department are permitted to hold HKNIC domain names.

HKNIC's Domain Dispute Resolution Policy Statement

Recognizing the potential for conflict between a registered trademark and a domain name, HKNIC imposes further requirements in respect of the intended usage of the domain name. The HKNIC Domain Dispute Resolution Policy Statement (the "Policy") requires the applicant, upon requesting a domain name, to warrant, inter alia: (1) that use of the requested domain name will be bona fide; and (2) that the use and registration of the domain name "does not interfere with or infringe the right of any third party in any jurisdiction with respect to trademark, service mark, trade name, company name or any other intellectual property right."[3] The Policy specifies that upon any breach of applicant's obligations, HKNIC may "request that the Applicant relinquish the domain name in a written notice specifying the alleged breach."[4]

Furthermore, in the absence of a "good reason," only one domain name under ".com.hk" shall be given to each organization. Although this policy seems to be aimed at curbing the potential for cybersquatting, it is unclear what can be registered, i.e., the trademark or the company name. Furthermore, it is common for cybersquatters to register variations of well-known trademarks or company names.

In the event of a dispute over a domain name, HKNIC expressly excludes itself from any liability that may arise as a result of registration (i.e., not having screened out potential cybersquatters): "HKNIC has neither the resources nor the legal obligations to screen the requested domain name to determine if use of a domain name by an applicant would infringe upon the rights of a third party."[5] Furthermore, HKNIC expressly provides that will not act as "arbiter of disputes arising out of the registration and use of" domain names.[6]

The Policy seems to contemplate that any dispute will be taken to court and express provisions are devoted to the enforcement and effect of court orders. Where there is a dispute over a domain name that is also a trademark, HKNIC has the authority to request evidence of the ownership of the trademark, i.e., a certified copy of a trademark or service mark registration owned by the applicant that is in full force and effect and that is the same as the domain name registered by the applicant[7] and shall permit usage of the domain name "unless and until it receives a court order." However, where the applicant fails to provide such evidence within 14 days of such request, HKNIC will assist the applicant with selection of a new domain name and will permit both names to co-exist for an "orderly transition"[8] unless the applicant does not accept a new domain name, in which case, the domain name will be placed "on hold."

Cases Involving Hong Kong Entities

In Hong Kong, A.Testoni was successful in the Hong Kong courts in a claim for the transfer of the domain name, www.atestoni.com. Furthermore, the defendant, Conwise Engineering Limited, was ordered to pay damages.

In another dispute involving a Hong Kong company, a dispute arose over the domain name, www.hangsengcredit.com, between Hang Seng Bank Limited and Websen Inc., before the WIPO Arbitration and Mediation Center. The WIPO Panel ordered that the domain name be transferred to the complainant.

B. Domain Name Protection and Cybersquatting in the PRC

PRC administrative and judicial bodies have taken progressive steps to ensure that intellectual property rights are protected, while at the same time, allowing for relative freedom in the registration of domain names.

CNNIC imposes restrictions on registration of domain names that are similar to HKNIC, as only legally registered organizations may apply for ".com.cn" domain names.

CNNIC's Rules for the Resolution of Domain Name Disputes (the "Rules")

To address disputes between domain names registered under CNNIC and trademarks protected by Chinese law, the Rules were promulgated by CNNIC on 1 November 2000, to take effect within 30 days thereof. Decisions made under the Rules are limited to changes domain names only and are also "unconditionally subject to judgments by courts of competent authority or decisions by arbitration committees."

There are strict limits to when a disputes which may be contested under the Rules. They are confined to the following:

1. those managed and maintained by CNNIC (i.e., .cn ccTLDs);
2. those domain name disputes in which the trademark owner is the complainant (whether registered or not) and the domain name owner is the defendant; and
3. those domain names which have been registered for less than two years commencing before or after the effective date of the Rules, or which are "well-known trademarks" (i.e., accrued rights).

Furthermore, a complainant may *only* bring an action under the Rules if evidence of the following can be provided:

1. the complainant is legally entitled to ownership of the trademark under Chinese law (i.e., the complainant must have registered the trademark in China or its trademark has acquired well-known trademark status);
2. the domain name in dispute assumes the same title or has sufficient similarity that would lead to confusion;
3. the domain name holder does not own the trademark, or enjoy other legal rights or advantages;
4. the domain name holder has registered and holds the domain name in "bad faith";
5. the complainant's business has been or very likely will be disrupted by the registration and use of the domain name (this does not need to be established if it is a "well-known trademark").

The Rules set out criteria for determining "bad faith":

1. the domain name holder has offered to sell the domain name at an unreasonable price, i.e., above the costs of registration;
2. the registration of the domain name was not for exclusive use of the domain name holder, but to prevent the trademark owner from using its trademark (or its constituent parts) as part of that domain name; or
3. the domain name holder, motivated by profit, intentionally creates confusion between the registered domain name and the registered trademark, to lure and mislead Internet user to visit the domain name or other online sites.

However, the presumption of "bad faith" shall not be established (i.e., can be "rebutted") where the domain name holder can establish one of the following:

1. the domain name holder is a natural person and the registered domain is the personal name or other trademark or other marks owned by the owner himself or close relatives, or any part of these; *or* where the domain name holder is an entity, the registered domain name is the trade name, name of person, trademark or other legally protected marks of the owner, executives or affiliates thereof;
2. before receipt of any notice of dispute by the trademark holder, the domain name owner commenced a legitimate and fair use of the domain name; or
3. before receipt of any notice of dispute by the trademark holder, the domain name owner used any marks in similarity with such domain name, bona fide, in providing goods and services, and gained a reputation in doing so;
4. the complaint made by the owner of the trademark constitutes "reverse domain name hijacking."

The term "reverse domain name hijacking" addresses the dangers of over-protecting trademark owners, i.e., where the trademark holder takes advantage of the Rules to deprive the domain name holder of his domain name. It is defined in Article 10 of the Rules as including, inter alia:

1. the registration and use of the domain name is not in bad faith and has not imposed any negative effect upon the registered trademark and its owner, or where such effect belongs to the normal practice of business competition;
2. the complainant has registered completely different domain name(s) before registration of the contested domain name and fails to provide evidence to prove that his failure to register the contested domain name is fully justified;
3. when the contested domain name was registered, the trademark claiming for protection had not been registered in the PRC, nor recognized as a "well-known trademark" by competent agencies.

"Usage of a domain name" is strictly defined in Article 11 of the Rules, i.e., putting the registered domain name into operation as the external code of IP addresses which will, through decoding by an Internet system, guide Internet users to specific Web sites or Web pages.

Article 3 of the Rules provides for an expert panel consisting of non-governmental organizations that are approved and authorized by CNNIC to adjudicate actions (the "Panel"). The Panel may only (1) order that the domain name be canceled, or (2) order that the domain name be transferred to the complainant. The Panel has no power to make order for costs or award compensation.

The enforcement of decisions made by the Panel are subject to the overriding power of the parties to commence litigation or arbitration with respect to the *same* dispute, even after the Panel has reached its decision.[9]

Beijing Supreme Court Guide Opinions on the Trial of Civil Cases Related to Intellectual Property Rights Caused by the Registration and Use of Domain Names (the "Opinions")

The Rules are expressly subject to law and regulations promulgated by the relevant PRC administrative authorities and bodies, and the jurisdiction of the PRC courts. The PRC has taken a progressive stance in the regulation of disputes related to domain names and trademarks, and a number of rules, regulations and judicial opinions have recently been issued to clarify issues in relation to domain name registration and protection, and the problem of cybersquatting.

The Beijing Supreme Court recently issued Guide Opinions on the Trial of Civil Cases Related to Intellectual Property Rights Caused by the Registration and Use of Domain Names (the "Opinions") to resolve disputes between domain names and trademarks. It is expected that Beijing courts will follow the Opinions. The Opinions set out a definition of "cybersquatting" as the act of registering and using other's well-known trademarks as domain names, and identifies two broad categories as indicative of cybersquatting, i.e., where a domain name is identical or confusing similar to a trademark, the domain name holder cannot prove he has a prior right to the trademark, and (1) such acts was done with "bad faith" or (2) such acts constitute unfair competition. "Unfair competition" is as set out in Civil Law and Anti-Unfair Competition Law.

Given the importance of the domain holder's intention in determining whether the domain name holder is a "cybersquatter," the Opinions set out a definition of what the courts in the PRC may consider to be "bad faith." The elements closely mirror the definition set out by the WIPO and CNNIC, namely where the domain name holder:

1. Offers to sell, lease or transfer the domain name to the trademark owner for valuable consideration; or
2. Attracts Internet users to his Web site or other online services by intentionally confounding the disputed domain name with the trademark or corporate name for financial gain; or
3. Intentionally prohibits others from registering a trademark or corporate name as the disputed domain name; or
4. Intentionally registers the domain name to harm other people's commercial reputation.

Where a domain name holder is held to be a domain name holder in "bad faith" or where such registration is held to constitute "unfair competition," the Opinions give the court broad powers to remedy the situation as it sees fit. This shall include an order to (1) stop using the domain name, (2) apply to cancel or change the domain name. The powers of the court extend to ordering monetary compensation, in the form of damages, be paid to the trademark owner.

Although the Opinions have not been applied in any cases yet, the courts have already taken an assertive stance against domain users by applying a combination of PRC laws and by applying internationally recognized standards such as WIPO. The trend is clear.

Endnotes

1. Differences Between Trademarks and Domain Names, INTA.
2. SARnic (presumably, an anagram of "Special Administrative Region") offers ".hk.com" (not ".com.hk") domain names to companies *and* individuals. However, the domain names that can be registered at SARnic are only "sub-domains," i.e., the ultimate ownership of the domain name remains with the domain name registration company.
3. Article 1 of the HKNIC Domain Dispute Resolution Policy Statement.
4. Article 6 of the HKNIC Domain Dispute Resolution Policy Statement.
5. Article 1 of the HKNIC Domain Dispute Resolution Policy Statement.
6. Article 6(b) of the HKNIC Domain Dispute Resolution Policy Statement.
7. Article 6(c)(1) of the HKNIC Domain Dispute Resolution Policy Statement.
8. Article 6(c)(3) and Article 6(c)(4) of the HKNIC Domain Dispute Resolution Policy Statement.
9. Article 17 of the Rules.

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Italy

Deregulation of Italian Corporate Law Matters

By Tomaso Cenci, New York

Law no. 340 of November 24, 2000 (hereinafter, "Law 340/2000") introduced major deregulation of certain administrative procedures in Italy. In particular, Law 340/2000 has an extremely relevant impact on Italian corporate law, since it significantly simplifies the administrative and bureaucratic procedures to be complied with by the companies, both in the incorporation process and when implementing major corporate actions in the course of their business (such as merger, de-merger, increase and decrease of the corporate capital and amendments to the by-laws in general).

1. Incorporation of a New Company

a) By repealing paragraphs 3 and 4 of Article 2330 of the Italian Civil Code (hereinafter, the "Code"), Article 32 paragraph 2 of Law 340/2000 modified the regime concerning the incorporation of a capital company (hereinafter, "Company").[1]

The repealed version of paragraphs 3 and 4 of Article 2330 of the Code imposed as a condition precedent to the registration of the new Company in the Companies' Register the verification (the so-called "*omologazione*") by the competent Court (i.e., the Court where the registered office of the Company under incorporation was located) of the compliance of the incorporation process with the applicable laws. The "*omologazione*" step took from three to six weeks, depending on the load of work of the Court concerned.

Pursuant to Article 32 paragraph 2 of Law 340/2000, the "*omologazione*" step is no longer required to incorporate a Company. It is now sufficient that the Public Notary, before whom the Deed of Incorporation is executed, file the same Deed of Incorporation with the competent Companies' Register (i.e., the Companies' Register where the registered office of the Company under incorporation is located); then, the clerk of the Companies' Register, having verified the formal regularity of the documentation submitted by the Public Notary, registers the Company with the Companies' Register. Once registered, the Company validly exists.

The most immediate practical effect of the above is that incorporation of a Company presently takes from five to ten days, while before this new regime the incorporation process took from four to seven weeks.

b) Article 32 paragraph 2 of Law 340/2000 awards a fundamental role to the Public Notaries in the incorporation process of a Company: the Public Notaries (and no longer the Courts) are now granted with the powers and duties to verify preliminarily whether the Deed of Incorporation and the by-laws of a Company are in compliance with the applicable laws.

The above described increased powers and duties of Public Notaries led the legislature to provide for adequate liability in situations in which the Public Notary violates the law. In fact, Article 32 paragraph 5 of Law 340/2000, by adding a new Article to the law governing the profession of the Public Notaries, provides that a Public Notary who files a Deed of Incorporation of a Company with a Companies' Register when the conditions required by law are manifestly non-existent shall be subject to the payment of an administrative fine ranging from Lit. 1,000,000 (approximately $450) to Lit. 30,000,000 (approximately $14,000).

2. Amendment to the Company's By-Laws

a) Italian corporate law provides that to amend the by-laws of a Company (e.g., increase or decrease the corporate capital, change the corporate name, change the registered office or change the rules governing the shareholders' meetings or the board of directors' meetings), a resolution of the extraordinary shareholders' meeting of the Company is required.

Before the enactment of Law 340/2000, pursuant to Article 2411 of the Code, all resolutions of the extraordinary shareholders' meeting of a Company were subject to the "*omologazione*" of the competent Court, which had to verify the compliance of such resolutions with applicable laws. Similarly to the incorporation process (see point 1 above), the "*omologazione*" step necessary to amend the by-laws took from three to six weeks, depending on the work load of the Court concerned.

Due to the amendment of Article 2411 paragraph 1 of the Code, Article 32 paragraph 4 of Law 340/2000 introduced the following new regime for resolutions of extraordinary shareholders' meetings held to amend the by-laws of a Company:

(i) if the Public Notary before whom the extraordinary shareholders' meeting was held deems the resolution amending the by-laws to be in compliance with the applicable laws, then he or she shall file such resolution with the Companies' Register within 30 days of the meeting. Then, the clerk of the Companies' Register, having verified the formal regularity of the documentation submitted by the Public Notary, registers the resolution amending the by-laws with the Companies' Register;

(ii) on the other hand, if the Public Notary before whom the extraordinary shareholders' meeting was held deems that the resolution amending the by-laws is not in compliance with the applicable laws, then he or she shall immediately communicate his or her decision to the directors of the Company. The directors, within 30 days from the receipt of such communication (and, in case of default of the directors, any shareholder of the Company at the Company's expense), may request the Court to verify the compliance of the resolution with the applicable laws. Then, should the Court accept the request made by the directors or by one or more shareholders, such Court shall order the clerk of the Companies' Register to register the resolution amending the by-laws with the Companies' Register.

Similarly to the incorporation process (see point 1 above), *the most immediate practical effect of the above is that amending the by-laws of Company can presently take from 3 to 7 days (in case the Public Notary deems the resolution amending the by-laws to be in compliance with the applicable laws), while before this new regime amending the by-laws of a Company took in any case from 4 to 7 weeks.*

b) Article 32 paragraph 5 of Law 340/2000, by adding a new Article to the law governing the profession of the Public Notaries, provides that the Public Notary who files with the Companies' Register a resolution amending the by-laws of a Company when the conditions required by law are manifestly non-existent, shall be subject to suspension from practice for a period ranging from 6 to 12 months and to the payment of an administrative fine ranging from Lit. 1,000,000 (approximately $450) to Lit. 30,000,000 (approximately $14,000).

3. Mergers and De-mergers

a) Law 340/2000 significantly simplifies the various steps of a merger or de-merger process. In fact, Article 30 of Law 340/2000 repealed all those provisions of the Code that required the publication in the *Official Gazette of the Italian Republic* (hereinafter, the "Gazette") of certain documents/deeds necessary to implement the merger or the de-merger (i.e., the merger or de-merger plan, the extraordinary shareholders' meeting resolution approving the merger or de-merger and the deed of merger or de-merger). It is noteworthy that such simplification is aimed not only at accelerating the finalization of a merger or de-merger process, but also at reducing the costs which the Companies implementing the merger or de-merger must bear.

The consequences of the enactment of Article 30 of Law 340/2000 can be summarized as follows:

(i) *Merger plan or de-merger plan (hereinafter, the "Plan").* Before the enactment of Law 340/2000, the Companies involved in a merger or a de-merger were under the obligation to publish an abstract of the Plan proposed by the board of directors in the Gazette, at least one month prior to the extraordinary shareholders' meeting resolution approving the relevant merger or de-merger. It should be noted that the usual time required by the Gazette to publish any document varies from 18 to 25 days. Such period of time had the effect of increasing the above mentioned one-month period provided by law.

Article 30 of Law 340/2000 repealed the provisions of the Code which required the publication of the Plan proposed by the board of directors in the Gazette.

(ii) *Extraordinary shareholders' meeting resolution approving the Plan. Deed of merger or de-merger.* Before the enactment of Law 340/2000, the Companies involved in a merger or a de-merger were under the obligation to publish an abstract of the extraordinary shareholders' meeting approving the Plan proposed by the board of directors in the Gazette, as well as an abstract of the final deed of merger or de-merger.

Article 30 of Law 340/2000 repealed the provisions of the Code that required the publication in the Gazette of an abstract of the extraordinary shareholders' meeting approving the Plan and of an abstract of the final deed of merger or de-merger.

Incidentally, it should be noted that, should the merger or de-merger resolution of the extraordinary shareholders' meeting imply an amendment to the Company's by-laws, such amendment may no longer be subject to the "*omologazione*" step previously provided for by the law (see point 2 above), and this may further shorten the timing of finalization of the merger or de-merger process.

b) *The most immediate practical effect of eliminating the requirement to publish in the Gazette is that finalization of a merger or a de-merger presently takes from 3 to 5* *months, while before this new regime finalization of a merger or a de-merger took from 4 to 6 months.* Also, as already mentioned, the provisions of Article 30 of Law 340/2000 reduced the costs which the Companies implementing the merger or de-merger must bear.

4. Further Simplifications in Corporate Law Matters

a) Article 31 paragraph 2 of Law 340/2000 provides that after one year from the date of the enactment of Law 340/2000 (i.e., starting from November 9, 2001), *all Companies' communications to, or filings with, the Companies' Register shall be made electronically or through a software support.*

b) Article 33 paragraph 1 of Law 340/2000 *repealed all provisions of the Code that required that the signature of newly appointed legal representatives of a Company be previously certified by a public notary before being filed with the Companies' Register.*

Such simplification is particularly important in case of legal representatives of a Company who are not resident in Italy; in fact, it is now no longer required for such individuals to have their signature certified by a non-Italian Public Notary, whose signature in turn must be legalized by the competent authority by means of the so-called "Apostille," in order to be effective in Italy.

Endnote

1. The following are capital companies, i.e., companies where shareholders are in general not personally liable for the obligations of the company: *societá per azioni* (i.e., joint stock company), *societá a responsabilitá limitata* (i.e., limited liability company) and *societá in accomandita per azioni* (i.e., partnership limited by shares).

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Italian Supreme Court on Crimes Committed Via the Internet

By Raimondo Premonte, New York

On December 27, 2000, the Italian Supreme Court (hereinafter, the "Supreme Court") rendered an important decision concerning *the authority of an Italian criminal lower court to adjudicate defamation crimes performed in Italy through Web sites whose server is based abroad.*

As a result of this decision, *an Italian criminal lower court has jurisdiction to hear a defamation case performed through a foreign Web site which is accessible from a computer located into the Italian territory*. Moreover, the same court has the powers to order a preliminary injunction, enjoining the relevant Web sites from continuing to operate, and has also the authority to seize the contracts entered into with the relevant Internet provider.

The underlying facts regard the story of an Israeli individual (hereinafter, "Mr. D.") resident in Genoa, Italy, to whom the Israeli courts had granted the custody of his two daughters, whose mother had remarried and resided in Israel.

Mr. D. was seeking protection from a defamatory language published on certain Web sites whose server was located in Israel; in particular, such Web sites alleged that he had illegitimately and unjustly "kidnapped" his daughters. Mr. D. formally asked the office of the competent Genoa criminal prosecutor to petition the competent authority for both the issuance of a preliminary injunction enjoining the Web sites from continuing to operate, and for the seizure of the contracts entered into with the relevant Internet provider.

The petitioned lower criminal court of Genoa declined its jurisdiction to hear the case; such decision of the lower criminal court of Genoa was based on consideration of the fact that the criminal conduct was performed in a foreign state, and thus the court would lack the power to adjudicate the case and to enforce Italian criminal laws.

The decision of the lower criminal court of Genoa was appealed before the criminal court of appeal of Genoa, and then before the Supreme Court.

In its judgment no. 4741 of December 27, 2000, the Supreme Court overruled the interpretation of the criminal statute offered by the lower criminal court of Genoa, and declared the existence of the Italian jurisdiction.

In reaching said conclusion, the Supreme Court triggered the application of Article 6 of the Italian Criminal Code which encompasses in its drafting the so-called "theory of ubiquity." Pursuant to such theory, Italian courts may claim their jurisdiction over those criminal conducts which, even though originated within the territory of a foreign state, display their effects in the Italian territory.

According to the Supreme Court, the crime of defamation is committed upon the occurring of a specific event (i.e., acknowledgment of the defamatory language, concerning the victim, by a third person) which is the proximate cause of the conduct performed by the defendant (i.e., publication of the defamatory language). In other words, *the crime of defamation is not committed at the time of publication of the defamatory language, but upon the acknowledgment and the understanding of the message by a third person.*

In the case at bar, the crime of defamation is then committed any time a person visits the relevant foreign Web sites, even though the visiting person has access to the Web sites from a computer located in Italy. Accordingly, if the crime is committed in Italy, Italian courts may retain jurisdiction and apply Italian criminal laws.

The Supreme Court remitted the case to the competent court of Genoa, which shall then retain jurisdiction and render the final decision on the merits.

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Mexico

Mexico: Legal Reforms For E-Commerce

By Alejandra Cuestas Jaimes and José Alejandro González Garza, Mexico City

I. Introduction

Scientific and technological advances have reorganized commerce in a way that has made production, trade, supply and consumption chains more efficient through the use of information technology. Nowadays, companies of various sizes perform their commercial transactions by electronic means, thus reducing their operational expenses and, at the same time, increasing their efficiency and productivity. In response to the use of electronic transactions to carry out business, legislation has been amended in order to regulate electronic commerce. The United Nations Commission on International Trade Law (UNCITRAL), drafted an "Electronic Commerce Model Law" in June 1996. Its objective was to establish rules that could be used as a guide by countries in developing legislation that would enable them to regulate the use of electronic means in commercial transactions. UNCITRAL asked member nations to review their legislation in order to facilitate the execution of commercial transactions based on electronic means. Following this proposal and in recognition of the business world's needs regarding the use of electronic commerce to carry out business, Mexican legislation was amended.

A brief description of the legal framework that regulates electronic commerce in Mexico follows.

II. Background

On May 29, 2000, a Decree was issued that adds to and amends several articles of the Civil Code for the Federal District in Local Matters and for the entire Republic in Federal Matters, the Federal Civil Procedure Code, the Commerce Code and the Federal Consumer Protection Law (the "Decree"). Prior to the Decree, the existing regulation in Mexico regarding electronic transactions was limited to certain provisions in financial legislation[1] and others issued by or applicable to different entities of the federal government that established the validity of electronic signatures.[2]

Before these amendments were introduced, it was difficult for contracts executed by distant parties to be legally valid by means other than correspondence letters under Mexican law. In those cases, except when contracting by telephone,[3] the parties had to enter into a negotiating guidelines contract before the actual agreement. A negotiating guidelines contract is a kind of contract that regulates the way that transactions can take place among the parties. The above was the result of the interpretation by analogy of Article 1811 of the Civil Code for the Federal District in Local Matters and for the entire Republic in Federal Matters before it was amended by the Decree. These requirements were introduced to limit the possibility of mistakes or fraud in the formation of contracts.

Since the issuance of the Decree, a legal framework exits that establishes rules for electronic commerce. Such rules tend, in general, to permit the execution of agreements among distant parties through the use of technology without following the formalities that were once necessary and are mentioned above.

III. Analysis

Articles 1°[4], 1803, 1805 and 1811 of the Federal Civil Code[5] were amended and Article 1834 bis was added. These amendments modified the rules of consent in the formation of contracts as follows:

Article 1803, as amended, states: "Consent may be express or tacit, therefore: I. It will be express when one's will is stated verbally, in writing, by electronic means, optic means, or any other technology, or by unequivocal signs, and . . . "

The purpose of this amendment was to emphasize that express consent may be stated through electronic means or by any other technology.

Article 1805, as amended, states:

> When the offer is made to a present person, without a fixed time period to accept it, the offeror is not obligated by its offer if it is not accepted immediately. The same rule will apply to any offer made by telephone *or by any other optic or electronic means, or by any other technology that allows the offer and acceptance to be made instantaneously*.

Originally, Mexican law considered only parties within talking distance of each other to be present parties. Later, parties agreeing by telephone regardless of the distance between them, were also considered present parties. All other cases were considered to be distant parties. The importance of this issue lies in the duration of an offer: (i) among present parties the law assigns the offer an ephemeral duration: if the offeree does not immediately accept the offer, it expires; (ii) among distant parties, the offer is valid for three days plus the time it takes for regular postal mail to arrive to and return from a given destination.

At this time, an offer made by electronic means is considered to be an offer made among present parties to the extent that it is possible for consent to be given immediately after the offer is made. The duration of offers is now determined by the immediacy of communications rather than by physical proximity. However, questions still remain about which technology allows consent to be formed instantaneously.

Article 1811, as amended, states in its second paragraph that a negotiating guidelines contract between the contracting parties will not be required for an offer and an acceptance made by electronic means, optical or by any other technology to be deemed valid.[6]

As mentioned above, a negotiating guideline is an agreement between the parties which sets the rules for contracting among distant parties by means other than by the mail. Today, for example, to execute a purchase and sale agreement of goods on the Internet, the buyer and seller are no longer required to execute a contract prior to the sale that establishes how their transactions will be carried out on the Internet. Nowadays it is sufficient to conduct the sale by such electronic means.

The amendments aim to cover a wide spectrum of technological advances. Therefore, the new articles cover electronic means, optical technology and, lastly, any other technology that achieves the immediacy of communication. Furthermore, the value of the technology for providing evidence of the transaction and the possibility of tracking communications afterwards is an issue of great importance from the procedural side of the law.

In this respect, new Article 1834 bis states that a handwritten signature in a contract may now be substituted by a signature created by electronic or optic means, or by any other technology, as long as the information generated or transmitted in its entirety by such technological means may be ascribed[7] to the persons thereby assuming obligations and remains accessible for future reference. This article represents a major change in Mexican legislation since handwritten signatures until now have been widely considered the best source of proof of consent among contracting parties.

The Decree further introduced rules to evaluate the evidentiary value of information generated by electronic means or by any other technology. To this regard, Article 210-A, which was added to the Federal Civil Procedure Code, states that: "the reliability of the manner by which it [the information] has been generated, transmitted, received or stored will be given primary consideration, and if applicable, if it is possible to ascribe the content of the relative information to the persons thereby assuming the obligations…" In other words, whether the information can be easily falsified or tampered with, as well as the possibility of tracking such information to its originator will be the primary factors when evaluating evidence of this type.

The Commerce Code was also amended to include a special chapter on electronic commerce.[8] As a result of these amendments, the Commerce Code now defines the term "data message," establishing that for purposes of the Code, information generated, sent, received, stored or transmitted by electronic or optical means, or by any other technology, will be deemed a "data message." It also states that such technological means may be employed when conducting commercial transactions.[9]

The Commerce Code defines an information system as "any technological means used to operate data messages."

Article 80 of the Commerce Code, in suit with the amended articles of the Civil Code, states that contracts executed through electronic means will be valid once the acceptance of the offer is received by the offeror.

Article 90 of the Commerce Code establishes the rules by which a data message will be presumed to come from the issuer in question.

Article 92 of the Commerce Code establishes that "when dealing with communications of data messages that require an acknowledgment of receipt so as to have legal effects . . . the data message will be deemed to have been sent, when an acknowledgment has been received." At the same time, it states that unless there is evidence to the contrary, the data message will be presumed to have been received when the issuer receives an acknowledgment of receipt.[10]

In line with provisions of the Federal Civil Code, Article 93 of the Commerce Code establishes that when the law requires contracts to be in writing, and requires the handwritten signature of such documents, these requirements will be considered met in the case of data messages provided that the data message can be ascribed or attributed to the persons thereby assuming obligations and accessible for future reference.[11] It is worth mentioning that just like the Federal Civil Code, the Commerce Code does not define the term "attributable," so this definition should be agreed upon by the contracting parties to avoid possible controversies.

Finally, in Article 1298-A the Commerce Code recognizes data messages as evidence. To evaluate the evidentiary value of such messages, the reliability of the manner in which such proof has been generated will be the primary consideration. This provision reflects the same contents set forth in the Federal Civil Code and the Federal Civil Procedure Code establishing that in case of controversy the evidentiary value of the act will depend on the reliability of the electronic means that were utilized.

In addition, the Federal Consumer Protection Law was also amended to protect consumers that engage in commercial transactions by electronic means. Article 1 of this law establishes that one of its main purposes is to effectively protect consumers in transactions carried out by electronic or optical means, or of any other technology, including the proper use of information furnished by the consumer.[12]

In this respect, Article 76 bis of this law states that in transactions using electronic means, the supplier or merchant: (i) will treat the information provided by the consumer with confidentiality; (ii) will use means available to safeguard and maintain the confidentiality of information provided by the consumer; (iii) must give the consumer its address and telephone numbers for complaints and clarifications before carrying out any transaction; (iv) will avoid misleading commercial practices with respect to the products' features and (v) will respect the consumer's decision regarding the quantity and quality of the products he or she wishes to receive.

To accomplish the foregoing, the Federal Consumer Protection Law establishes a fine of up to 2,500 times the general minimum wage in force and effect in Mexico City in case of infringement of said provisions.[13]

The Decree entered into effect nine days after its appearance in the Federal Registry, where all federal laws must be published before entering into effect.

IV. Conclusion

The main premises of the new legal framework that regulates electronic commerce in Mexico, are: (i) the manifestation of consent granted through electronic means is considered express consent; (ii) entering into a previous negotiating guidelines contract to regulate electronic commerce transactions is not required by law; (iii) an offer made by electronic means that allow immediacy in communications is considered an act among present parties, and (iv) the evidentiary value of the transaction will depend on the reliability of the electronic method selected to carry out the transaction.

The new legislation regarding electronic commerce, in commercial and federal civil areas, as well as the administrative area, reflects the Mexican government's desire to promote the use of new technologies that allow individuals to transact their business in a more efficient manner.

Endnotes

1. I.e., Articles 52 and 68 of the Credit Institutions Law (*Ley de Instituciones de Crédito)* and Article 91, sections II and V of the Stock Market Law (*Ley del Mercado de Valores)*.
2. I.e., Articles 26, 27, 31, sections XVIII and 56 of the new Public Sector Law of Acquisitions, Leasings and Services (*Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público*) published in the Federal Register (*Diario Oficial de la Federación)* on January 4, 2000; as well as Articles 27, 28, 33, sections XXII and 74 of the new Public Works and Related Services Law (*Ley de Obras Públicas y Servicios Relacionados*) published on the same date.
3. Mexican law considered, and still does, that agreements made by telephone are executed by present parties, not distant parties.
4. This article establishes that the Federal Civil Code will govern in the entire Republic in federal matters, such as acts of commerce.
5. Article 1 of the Decree changed the title of the Civil Code for the Federal District in Local Matters and for the entire Republic in Federal Matters to the Federal Civil Code.
6. The first paragraph of article 1811 remained the same: "The proposal and acceptance made by telegraph produce effects if the contracting parties previously had stipulated in writing this way of contracting, and if the originals of the respective telegrams have the signatures of the contracting parties and the conventional signs established between them."
7. The Federal Civil Code does not define the term "ascribed" (attributable), so this definition should be defined by the contracting parties, if applicable.
8. Articles 18 to 32 of such Code were also amended. These articles establish the obligation for the Public Registry of Commerce to use a software program that will store the databases of such registry, and the obligation to use electronic folios and, in general, that all procedures carried out in such registry be automated with maximum response time limits.
9. *See* Article 89 of the Commerce Code.
10. It is worth mentioning that neither the Federal Civil Code, nor the Commerce Code establish what "acknowledgment of receipt" means, so this is an issue that should be solved by the contracting parties.
11. Just like the Federal Civil Code, the Commerce Code states that in cases in which the law establishes a requirement that a legal act be executed before a public authority such as a notary public, such authority and the parties intervening may express, through a data message, the exact terms by which the parties have decided to obligate themselves, in which case such public authority must state in such instrument, the elements by which such messages are attributable to the parties and must retain for its records a complete version therefore for subsequent consultation.
12. This effectively creates a right to privacy for the consumer.
13. Article 128 of the Federal Consumer Protection Law.

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Monaco

The Status of Money Laundering Regulations in Monaco

By Julie Willemse and James P. Duffy, III, Monaco

Despite recent attacks from the French government, the Principality of Monaco has proven to be continuously committed to preventing money laundering in its jurisdiction. Among other things, as will be discussed below, Monaco has reinforced its collaboration with other countries. It has also sought to comply with the directives of the "Groupe d'Action Financiere Internationale" (International Financial Action Group), or GAFI.

As have most major countries, Monaco has passed a substantial series of laws and regulations against the "laundering" of funds arising from illegal transactions or frauds that might be deposited in or transit through local financial institutions.

Monaco's Law No. 1161 of July 7, 1993 establishes criminal penalties for any person who knowingly acquires funds of illegal origins, or who participates, or attempts to participate, in the laundering of these funds.

Monaco's Law No. 1162 of July 7, 1993, and its implementing Sovereign Order no. 11160 of January 24, 1994, impose strict requirements on financial establishments to know their customers and the source of their funds and provides severe sanctions for non-compliance.

Monaco has also created the "Service d'Information de Contrôle des Circuits Financiers" or Department of Information and Control of Financial Circuits (SICCFIN), which controls the transfers of suspicious funds. Financial institutions must declare suspicious transactions to the SICCFIN. The primary purpose of the SICCFIN is to guarantee both the transparency and the regularity of financial transactions that originate in or transit through Monaco.

Because of this, Monaco felt the recent criticism from the French government was unjustified and unwarranted. Monaco has taken strong exception to a June 2000 French Legislative Committee report criticizing Monaco's allegedly deficient money laundering policy, its alleged lack of cooperation with other countries' law enforcement and justice officials, and its alleged lack of suitable controls. Happily for Monaco, it was able to show that the French had totally ignored Monaco's recent efforts against money laundering, including those discussed above.

Indeed, Monaco was also able to establish that the French Legislative report was based on highly subjective information, including, anonymous testimony and incomplete information. Furthermore, the report totally ignored GIPA's June 2000 upgrading of Monaco from a black to a gray listing therefore eliminating GIPA sanctions.

In addition, during the June 27, 2000 meeting of Monaco's National Council in response to the negative French report, Monaco challenged the report's allegations by, among other things, showing the extent of Monaco's participation and cooperation with French criminal investigations. For example Monaco executed and responded to Rogatory Commissions at the rate of 93.75% in 1998, 96.63% in 1999, and the trend continues to strengthen.

Monaco concluded bilateral cooperation agreements with Belgium and Spain late last year. This March, Monaco signed a similar bilateral agreement with Portugal. This April, Monaco signed yet another similar agreement with Luxembourg. Counting its agreement with France, this agreement is the fifth agreement of this type signed by Monaco. Thus, Monaco has shown a strong and continuous resolve to combat money laundering, not only in the enactment of strong legislative measures against money laundering but also in its record of cooperation with other governments, including bilateral agreements.

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Spain

The New Spanish Civil Procedure Act: A Domestic and International Perspective

By Jorge Angell, Madrid

After a long and healthy life, our old Civil Procedure Act, enacted back in 1881, finally gave way to the new Civil Procedure Act 1/2000 dated January 7, 2001 (hereinafter the "CPA"), which took effect on January 8, 2001. The purpose of this short commentary is twofold: to provide an overview of the CPA highlighting the main changes introduced and to focus on the international dimension of the new law.

As stated in the Preamble of the CPA, the Spanish procedural system is still more adversarial than inquisitive. Consequently the courts do not take an active role in developing the case, relying in general on the motion of the parties for this purpose. Nevertheless, the new rules strengthen the role of the courts in the declaratory procedures, namely by giving them more power to enforce their rulings and punish undesirable behaviors, introducing a preliminary hearing where important legal issues will be decided, and guiding and helping the parties in an effort to settle the controversy at an early stage, without prejudice to the powers conferred by the former law to impel the proceedings, e.g., rejecting evidence which is deemed irrelevant or impertinent, ordering new evidence, etc.

The CPA has reduced the declaratory procedures from four to two: the oral procedure for amounts not exceeding 500,000 pesetas (US$2,700), and the ordinary procedure for claims over the said amount. Moreover, the CPA has introduced a fast-track procedure called "*Monitorio*" to recover amounts under 5,000,000 pesetas, (US$27,000) by means of an application form facilitated by the Court and without the involvement of an attorney-at-law being mandatory. In addition, there are certain special procedures.

With regard to the ordinary declaratory procedure, once the statement of claim and the defense, along with the counter-claim in the event, have been filed, the parties are summoned to a preliminary hearing, the main purpose of which is to attempt reaching a settlement. Otherwise the parties will submit the evidence they would intend to use. If the court deemed that the controversy solely relates to points of law, the lawsuit could be called to an end and judgment passed on the issue. If not, the court will fix a date for the hearing where all evidence submitted and admitted is to be taken (e.g., testimonies, depositions, etc.) and then the parties' attorneys will orally summarize their conclusions.

Another significant modification relates to the provisional enforcement of judgments. Formerly it was necessary for the party seeking provisional enforcement to post a bond in an amount decided by the court. Under the CPA, the bond is no longer necessary.

Jurisdiction of the Spanish Courts

The international jurisdiction of Spanish courts is asserted on the basis, in the first place, of the international conventions signed by Spain, by far the more important being the Brussels Convention of 1968 and the Lugano Convention of 1988. In the second place, jurisdiction is asserted on the basis of domestic legislation, inspired by two key principles: firstly, the international jurisdiction of Spanish courts is limited to certain cases out of which they may not get to know the case in question and, secondly, the courts may only hear a controversy if the law explicitly so provides. Under Article 22 of the Judiciary Power Organic Act of 1985, Spanish courts have international jurisdiction where some of these criteria are met: (i) fora envisaged for matters in relation to which Spanish courts have exclusive jurisdiction; (ii) explicit or implied submission of the parties; (iii) where the defendant has his domicile in Spain; and (iv) special fora by reason of the specific matter concerned. Having regard to the above, Spanish courts will be competent to hear all the controversies arisen in the Spanish territory between Spanish nationals, Spanish nationals and foreigners and between foreigners, specifically excluding claims referred to individuals or assets that enjoy the benefits of immunity of jurisdiction or enforcement according to the public international principles.

Motion to Dismiss the Jurisdiction of the Spanish Courts

Apart from those situations involving international conventions, such as the Brussels Convention which has its own rules, the CPA has provided specific rules in order to challenge the international jurisdiction of Spanish courts. Under Article 63 of the CPA, the defendant and third parties that could be called to the lawsuit may challenge the jurisdiction of the Spanish courts if the matter should be heard by a foreign court or referred to Arbitration.

Foreign Public Documents

For evidence purposes foreign documents will be deemed to be public (as "public" is understood under the Civil and the CPA) to the extent international treaties or conventions or special laws would confer them the evidentiary effects envisaged in Article 319 of the CPA. Public documents fully prove the fact, act or status which are their subject matter, the date thereof and the identity of the parties involved (Article 323, CPA). In absence of an international treaty or convention, for a foreign document to be deemed public as indicated above, the following requirements would have to be met: (i) those of the country in which the document was executed for it to produce full evidentiary effects; and (ii) the document shall be duly legalized under The Hague Convention of 1961 (the Apostille system).

Should the foreign document contain personal statements, these shall be deemed proved, but their efficacy shall be that determined by the applicable Spanish or foreign laws with regard to the capacity, object and formalities of contracts.

Enforcement of Foreign Judgments and Other Titles

Foreign judgments and certain other titles may be enforced in Spain in accordance with the International Treaties entered into by Spain and the rules on international judicial cooperation (Article 523, CPA). The Final Provision number 20 of the CPA requires the Government to send within six months from January 8, 2001 a bill on International Legal Cooperation on Civil Matters to the Parliament. Until such time, the enforcement of foreign judgments shall be subject to the former Civil Procedure Act, Articles 951 through 958. Very briefly, foreign judgments will be enforced pursuant to the provisions of the applicable treaties or conventions, if any. Otherwise, enforcement will be based on the principle of reciprocity, either positive or negative. If reciprocity cannot be proved, which some times is not easy to do, the plaintiff may always have recourse to the general or supplementary system. Judgments coming from countries in which Spanish judgments are not recognized and enforced will be refused recognition and enforcement in Spain (negative reciprocity).

As Spain and the United States have not entered into any convention on recognition and enforcement of judgments, judgments originated in the United States could be enforceable on the basis of reciprocity (since generally Spanish judgments are enforceable in the United States) or by application of the general system. In practice and due to the difficulties inherent in the proof of reciprocity, a party wishing to enforce a U.S. judgment in Spain would go direct to the general system. The conditions to be met by the plaintiff are listed basically in Article 954 of the Civil Procedure Act as construed and re-defined by case law, as follows:

- The judgment must be final and binding (as final and binding is defined at the foreign court);
- The judgment must have been rendered in the context of a personal action (i.e., actions in rem and mixed actions are excluded). This means that judgments related with matters on which Spanish courts have exclusive jurisdiction cannot be recognized and enforced;
- The judgment should not be obtained in default, i.e., infringing upon the right of the defendant to a due process in law;
- The obligation concerned must be lawful in Spain. This means that recognition and enforcement will be refused if the foreign judgment affects the Spanish public policy (with qualifications);
- The foreign judgment must be authentic; and
- The foreign judgment should not be irreconcilable with an earlier judgment rendered or recognized in Spain, and that there are not proceedings in course in Spain in which an irreconcilable judgment with the foreign judgment could be rendered.

Interim Measures in Arbitral Procedures and in International Litigation

Provided the Spanish courts do not have exclusive jurisdiction, a party to a lawsuit or arbitration proceedings pending outside Spain can apply to the Spanish courts for such interim or provisional measures as may be available under Spanish law. This is a significant innovation in line with Article 24 of the Brussels Convention.

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United States

International Bankruptcy Law: Territoriality vs. Universality

Rights of Secured Creditor Protected Under § 304(c)(4) of the Bankruptcy Code (*In re Treco)*

By Robert W. Dremluk, New York

Introduction

A significant decision affecting the rights of secured creditors under section 304 of the Bankruptcy Code was recently issued by the Second Circuit Court of Appeals.[1] The Circuit Court held that a creditor holding a valid secured claim against funds in a domestic bank account of a foreign debtor cannot be directed to turn over such funds in a Bahamian bankruptcy proceeding. The Court's holding was based primarily upon 11 U.S.C. § 304(c)(4) which requires that a court consider whether a distribution of proceeds of a debtor's estate is substantially in accordance with the order of priority prescribed under the United States Bankruptcy Code. The Court concluded that the priority distribution scheme under Bahamian law which gave priority to costs of administration over the interests of secured creditors was not "substantially in accordance with the order [of priority] prescribed by" the United States Bankruptcy Code.

Procedural Background

In April 1995, the Supreme Court of the Bahamas placed Meriden International Bank Limited, ("Meriden") into involuntary liquidation and appointed two partners of KPMG Peat Marwick, (Alison J. Treco and David Patrick Hamilton) as liquidators. In September 1995, the liquidators filed a petition in a United States bankruptcy court under § 304(a) of Title 11 U.S.C. Code (the "Bankruptcy Code") for an injunction and for a turnover of property.[2] The liquidators specifically requested that all actions against Meriden be enjoined and that all persons in possession or control of Meriden's assets or the proceeds thereof be directed to turn over those assets to the liquidators. One of the named parties was the Bank of New York ("BNY"). At the time the liquidators filed the petition, approximately $600,000 remained in Meriden's accounts with BNY.

BNY opposed turnover of the funds in the Meriden account. BNY relied, *inter alia*, upon § 304(c) of the Bankruptcy Code which provides:

> In determining whether to grant relief under subsection (b) of this section [which includes turnover], the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with:
>
> 1. just treatment of all holders of claims against or interests in such estate;
> 2. protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
> 3. prevention of preferential or fraudulent dispositions of property of such estate;
> 4. distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;
> 5. comity; and
> 6. if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.[3]

On appeal to the Second Circuit, BNY asserted, *inter alia*, that its secured claim will be subordinated under Bahamian law to, among other things, the administrative expenses of liquidation. Under United States law, by contrast, "a secured creditor's interest is generally not subject to diminution based on administrative expenses."[4] BNY further argued that in light of the extent to which the "distribution of proceeds of [Meriden's] estate" in the Bahamian proceedings would depart from "the order prescribed by" the United States Bankruptcy Code, § 304(c)(4) bars turnover. Additionally, BNY argued that the district court erred in treating the principle of comity set forth in § 304(c)(5) as the conclusive factor outweighing any discrepancy between United States and Bahamian law regarding the priority of claims for administrative expenses and secured claims.[5]

In response, the liquidators did not dispute that secured claims are subordinated to administrative expenses under Bahamian law. The liquidators argued, however, that comity is the most important factor under 11 U.S.C. § 304(c) and that comity therefore trumps BNY's claim that it will be materially disadvantaged by the relative priority of its secured claim under Bahamian law.[6]

Treco Court Denies Turnover

The Second Circuit vacated the district court's judgment and remanded for a determination of whether or not BNY's claim is secured. The Second Circuit concluded that if BNY's claim is secured, then turnover of the funds in the Bahamian bankruptcy proceeding would not be "substantially in accordance with the order prescribed by" the United States Bankruptcy Code.[7]

Analysis

There are a number of points to be taken from this decision. First, the Second Circuit unequivocally concluded that cases filed under 11 U.S.C. § 304 will necessarily be reviewed on an *ad hoc* basis within the proper statutory framework. Second, the Second Circuit deliberately avoided any bright line test is to determine the rights of secured creditors to assets of foreign debtors located in the United States. Third, Second Circuit did, however, provide guidance upon which to make these cases easier to evaluate in the future.

Two Possible Approaches—Territoriality or Universality

Section 304 of the Bankruptcy Code, enacted as part of the Bankruptcy Reform Act of 1978, was intended to deal with the complex and increasingly important problems involving the legal effect the United States courts will give to foreign bankruptcy proceedings citing *Cunard S.S. Co. v. Salen Reefer Servs.*[8] The *Treco* Court, however, recognized that courts and commentators have identified two general approaches to distributing assets in which a bankruptcy proceeding has been instituted in a foreign country and the debtor has assets in the United States. Under the "territoriality" approach, or the "Grab Rule," the court in each jurisdiction where the debtor has assets distributes the assets located in that jurisdiction pursuant to local rules. Under the "universality" approach, a primary insolvency proceeding is instituted in the debtor's domiciliary country, and ancillary courts in other jurisdictions—typically in jurisdictions where the debtor has assets—defer to the foreign proceeding and in effect collaborate to facilitate the centralized liquidation of the debtor's estate according to the rules of the debtor's home country.[9]

The *Treco* Court further acknowledged that the enactment of § 304 was a step toward the universality approach citing *In re Maxwell Communication Corp.*[10] (Section 304 embraces "a modified form of universalism accepting the central premise of universalism, that is, that assets should be collected and distributed on a worldwide basis, but reserving to local courts discretion to evaluate the fairness of home country procedures and to protect the interests of local creditors.").[11] On the other hand, there is a view shared by many courts, that comity is the ultimate consideration in determining whether to provide relief under § 304. The *Treco* Court dismissed this notion as incorrect; finding that comity does not automatically override the other specified factors in the statute. Depending upon the circumstances presented in any case, the *Treco* Court concluded that the other factors may form the basis for denying relief, and thus denying comity, in some cases.[12] According to the *Treco* Court, § 304(c)(4) represents a legislative choice to require courts to consider differences between American priority rules and those applicable to the foreign proceeding in determining whether affording comity will be repugnant to American public policies.[13]

Bahamian Law Not in Substantial Accordance with U.S. Laws

The *Treco* Court disagreed with the district court's position that the prioritization of administrative expenses over secured claims was not sufficient to render turnover inconsistent with § 304(c)(4). The *Treco* Court underscored that the difference in prioritization under U.S. and Bahamian law is particularly acute in this case because of the strong possibility that Meriden's estate will have little or no funds after payment of administrative expenses; stating: "the distribution of proceeds of Meriden's estate in the Bahamian proceedings would thus *not* be substantially in accordance with the order prescribed by United States law. 11 U.S.C. § 304(c)(4)."[14]

Substantial Difference in Treatment of Secured Claims Critical Factor

The key factor weighing against turnover in *Treco* was the special protected status that secured creditors enjoy under United States law. The Court found that the law treats those protections very seriously; a conclusion that, in turn, amplifies the significance of the difference in the way secured claims are treated under Bahamian law. Indeed, the *Treco* Court found this factor to be dispositive; concluding that: "The Bahamian rule that secured creditors do not have priority over administrative expenses threatens to destroy BNY's claim. We therefore conclude that the bankruptcy court abused its discretion by ordering turnover without first determining that in the discrete context of BNY's claim against Meriden's estate, the order of distribution under Bahamian law was "substantially in accordance with the order prescribed by" the United States Bankruptcy Code."[15]

Practical Considerations

Treco represents a significant development in international bankruptcy law affecting the administration of foreign bankruptcy proceedings. The decision is based upon the modified universalism approach contemplated by 11 U.S.C. 304(c)(4). This statute provides enormous flexibility for a court to evaluate each case on an *ad hoc* basis. Under the circumstances, the *Treco* Court was able to lean much more heavily toward a territoriality approach to protect American policies concerning the rights of secured creditors and to deny comity. Because of its unique facts the precedential value of this case may be limited. On the other hand, the Court's reasoning and statutory interpretation will be immensely helpful to analyze similar issues in future international bankruptcy cases.

Endnotes

1. *In re Treco*, 240 F.3d 148 (2nd Cir. 2001).
2. Section 304(a) of the Bankruptcy Code authorizes a foreign representative in a foreign bankruptcy proceeding to commence a case ancillary to that proceeding in a United States bankruptcy court to protect the administration of the foreign proceeding.
3. 11 U.S.C. § 304(c).
4. *In re Blackwood Assocs*., 153 F.3d at 68.
5. *Treco* at 155.
6. *Id.* at 156.
7. 11 U.S.C. § 304(c)(4).
8. *AB*, 773 F.2d 452, 454 (2d Cir. 1985).
9. *Id.* at 153.
10. 170 B.R. at 816.
11. *Id.* at 154.
12. *Id.* at 156-57.
13. *Id.* at 158.
14. *Id.* at 159.
15. *Id.* at 160.

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Commodity Futures Modernization Act

By Joyce M. Hansen and Eberhard H. Röhm, New York

President Clinton signed the much-anticipated Commodity Futures Modernization Act of 2000 (the "Act") on December 21, 2000.[1] The Act amends not only the Commodity Exchange Act, but also the various federal securities laws, the Gramm-Leach-Bliley Act, the Federal Deposit Insurance Corporation Act, the Bankruptcy Code and the Internal Revenue Code. Senator Phil Gramm, one of the principal proponents of the Act, described the Act as "bringing our financial regulation in line with the rapid pace of developments in the global marketplace."

Overall, the Act hopes to ensure that the United States can compete in the world derivatives marketplace. The Act provides U.S. futures exchanges and other trading facilities with considerable flexibility when trading derivatives. However, the complexity of the financial instruments and markets that the Act is designed to help are matched by the complexity of the Act itself. Accordingly, an unintended consequence of the Act may be increased litigation, regulatory involvement, or regulatory penalties for those market participants who do not fully understand the Act.

Endnote

1. The Act, formerly HR 5660, was passed as part of HR 4577, the Consolidated Appropriations Act of 2001. The Internal Revenue Code was amended through HR 5662.

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Collateralized Debt Obligations: A New Structure for Repackaging CMBS and Other Real Estate Assets

By Jeffrey Stern and Erik D. Klingenberg, New York

The commercial mortgage-backed securities (CMBS) industry has been reeling since the fall of 1998 when Criimi Mae, the industry's primary purchaser of the most subordinate tranches of CMBS ("B-pieces"), the riskiest class of CMBS securities, filed for bankruptcy protection: conduit originations are down over 50%, CMBS securitizations are down over 50%, numerous originators have closed or been acquired and spreads have widened considerably.[1] There are clearly numerous factors that have contributed to this turmoil, but undoubtedly one of the more significant of those factors lies in the fact that with Criimi Mae no longer providing an outlet for the sale of subordinate tranches of CMBS, and few investors stepping in to fill the void, issuers are finding it difficult to place their B-pieces at profitable spreads.[2] A partial solution may be available, however, through the same structural technology that has helped the junk bond market recover from the liquidity crisis following the fall of Drexel Burnham Lambert in the late 1980s and that has fueled the development and growth of a secondary market for emerging market debt over the last five years.

Since 1988, over $300 billion of corporate, emerging market and other high-yield debt has been securitized in the form of collateralized bond obligations (CBOs) and collateralized loan obligations ("CLOs," which together with CBOs are commonly referred to as "collateralized debt obligations" or "CDOs").[3] A CDO is a type of securitization consisting of a pool of bonds and/or loans that secure multiple classes or "tranches" of debt securities which are sold to the capital markets and, in particular, to institutional investors in the United States and Europe.[4] The pool of bonds and/or loans securing the CDO debt issuance is then, typically, actively traded by an expert collateral manager authorized to sell assets and buy replacement collateral on behalf of the holders of the offered securities.

Like most securitizations, CDOs allocate the risks associated with pools of low and/or unrated assets, such as high-yield corporate and emerging market debt, among tranches of investment grade and non-investment grade securities through traditional forms of credit enhancement, such as subordination and overcollateralization. As a consequence of this shifting of risk, the large majority of debt securities issued in most CDOs are rated "AAA" by the applicable rating agencies. By converting a pool of high-risk, illiquid assets into highly tradable, mostly "AAA"-rated securities, CDOs significantly expand the potential universe of investors in such assets.[5] For this reason, the use of CDO structures has fostered the development of a significant secondary market for high-yield corporate debt and emerging market debt and has, further, enabled banks, fund managers and other institutions to move assets off-balance sheet, free up risk-based capital, increase assets under management and exploit the arbitrage between the yield on such assets and the lower coupon paid on the investment grade securities issued by the CDO.[6]

In addition, as discussed in more detail below, CDOs generally provide greater flexibility for issuers and asset managers than other traditional securitization structures. This flexibility includes, in most cases, the ability to actively manage and trade the collateral underlying the CDO securities and to extend—sometimes until long after the transaction closes and funds—the period during which a portion of the initial collateral pool is selected and acquired.

The CDO structure has recently been used for the resecuritization of CMBS, residential mortgage-backed securities (MBS), real estate investment trust (REIT) unsecured debt and other real estate related debt obligations, and is available for the securitization of commercial and residential mortgage loans.[7] So applied, CDO technology affords a number of prospective benefits to the CMBS industry, most notably perhaps in the opening of new markets for CMBS B-pieces. By repackaging pools of subordinate CMBS and other investment or non-investment grade commercial real estate related collateral into a set of mostly highly rated debt instruments using the CDO structure, the CMBS industry has an opportunity to begin to establish a liquid secondary market for these otherwise illiquid assets.

Cash Flow vs. Market Value CDOs

There are two broad categories into which CDO structures are normally divided: "cash flow" CDOs and "market value" CDOs. As the names suggest, in a cash flow CDO, the ratings of the offered securities are based primarily on the portfolio's ability to generate sufficient cash flows to pay interest and principal on the CDO securities. For these transactions, the outstanding principal amount of the underlying collateral and the expected and actual principal and interest cash flows are key structural elements. On the other hand, in a market value CDO, the ratings of the offered securities are based on the market value of the underlying portfolio. For these market value transactions (which represent a small minority of the CDO market), the minimum overcollateralization ratio, calculated based upon the regular (and often daily) mark-to-market value of the portfolio to the CDO balance, must be sufficient to assure payment of interest and principal to the investors through the sale of the underlying collateral. Although residential mortgage-backed securities and certain other mortgage related securities have been resecuritized in both cash flow and market value CDOs, CDO technology has to date been used to resecuritize CMBS solely through the cash flow model.

Cash Flow CDOs—Basic Structure

The structure of cash flow CDOs is similar in many respects to the structure of a typical mortgage-backed transaction. The CDO issuer is a bankruptcy-remote special purpose entity that acquires the underlying collateral with the proceeds from the sale of the CDO securities to investors. As with many structured finance products, CDOs allocate principal and interest cash flows from the underlying collateral into several classes of offered securities.[8] In the CDO structure, such classes generally consist of one or more tranches of investment-grade debt and one or more tranches of non-investment-grade debt and/or equity.

The CDO issuer is generally structured as an off-shore, Cayman Islands entity in order to avoid entity-level taxation as a U.S. trade or business or, in the mortgage context, as a "taxable mortgage pool." In addition, as an off-shore entity, the CDO issuer can sell subordinate classes of securities for which a debt opinion cannot be obtained to foreign persons without creating a withholding tax requirement. Although, in some transactions in which such tax and withholding issues have not been present, CDOs have been issued by United States limited partnerships and limited liability companies. The CDO securities are typically issued pursuant to an indenture (or comparable instrument under English law) between the issuer and an indenture trustee. Related documentation includes a collateral management agreement, governing the management of the underlying collateral by the collateral manager, and a collateral administration agreement, requiring a calculation agent to monitor compliance with the various performance tests described below.[9]

The primary risk for a CDO financing lies in defaults on the underlying assets (as opposed to, for example, declines in the market value of those assets, which is the central concern for market value CDOs).The cash flow CDO structure manages this risk through several standard mechanisms:

First, the CDO utilizes subordination techniques common to securitization structures. Through subordination, a cash flow CDO credit enhances the cash flows available to pay each senior class of securities, using for such purpose some portion of the payments of principal and interest allocable to each more-junior class of securities.

Second, the CDO structure employs so-called "collateral quality tests" to manage the quality and composition of the collateral pool, in order to reduce the frequency and severity of defaults. The collateral quality tests require the CDO to maintain minimum levels of diversity, a minimum weighted average rating of the underlying assets and a minimum weighted average expected rate of recovery on the underlying assets. These minimum levels are typically tested (by the calculation agent appointed for the facility) upon each sale or purchase of an underlying asset.

Third, the CDO is subject to a set of "coverage tests" on the CDO's cash flows. One of these coverage tests—sometimes called the "par value coverage test"—monitors the principal or "par" amount of the collateral pool in order to guard against the loss of par value in the collateral pool (upon which principal repayment of the issued securities ultimately depends).To ensure compliance with this test, the calculation agent must confirm periodically that the par amount of the collateral pool exceeds the outstanding balance of the CDO securities by the required amount and/or percentage. In addition, the calculation agent must apply an "interest coverage test" which is designed to guard against shortfalls in collections of monthly interest from the underlying assets (upon which timely interest payments on the issued securities depends).For this test, the calculation agent periodically evaluates the level of interest coverage provided by the interest proceeds collected during the related collection period, comparing such collections to the scheduled interest payments on the offered securities. If the required levels of par value and interest coverage are not met, the trustee is generally required to cause the CDO to "de-lever," by applying interest proceeds and, if necessary, principal proceeds to the repayment of principal on the offered securities, until the par value and interest coverage levels are brought back into compliance with the CDO requirements.

If defaults on the underlying assets do occur, the collateral manager can exercise the remedies available to the CDO as the owner of such assets, including, for example, the rights of the "controlling class" of CMBS, or it can sell the defaulted assets in order to maximize the return on such assets to the CDO.

CDOs Compared to CMBS

The typical cash flow CDO transaction differs from the typical CMBS transaction in a number of respects. While CMBS are backed by fixed pools of commercial real estate mortgages, cash flow CDOs permit active trading of the underlying collateral within established parameters relating to the characteristics of that collateral. This ability to manage and trade actively the underlying collateral allows the collateral manager to take advantage of market opportunities arising after the closing and to address new developments—both good and bad—in the collateral pool. If, for example, an underlying asset appreciates in value, it can be sold and the proceeds can be invested in one or more new assets with a higher par value. If market conditions create buying opportunities for eligible assets, the collateral manager can take advantage of such opportunities by selling loss-production collateral and acquiring new assets at favorable prices on the CDO's behalf. In addition, if certain underlying assets are non-performing or under-performing or even show increased risk of delinquency and default, the collateral manager can generally affect the sale of such assets in a manner and with a timing that is calculated to maximize the return to the CDO. Unlike MBS securitizations, the CDO and its investors are not normally compelled simply to watch an asset decline in value and in expected returns, until only default remedies remain. The asset can be sold at an optimal point in time and its proceeds reinvested in new collateral.

Another key difference between traditional CMBS structures and CDO structures is that, in a CDO structure, the issuer is generally not required to own all of the underlying collateral at the closing. Instead, CDOs commonly utilize a "prefunding" mechanism whereby the CDO issuer purchases only a portion of the underlying collateral on or before the closing date and employs a "ramp-up period" (generally about three months but sometimes as long as one year or more) during which the remainder of the portfolio is acquired. As a result, the sponsor does not have to purchase and hold all of the assets on its own balance sheet prior to closing, and also has a longer "window" in which to identify well-priced assets, with more flexibility (if necessary) to wait for favorable market conditions for acquiring such assets. In addition, CDO structures also normally permit the reinvestment of principal distributions on the underlying collateral in new assets during a preset "reinvestment period," which may last several years. As with the trading of the CDO collateral by the collateral manager, as described above, any collateral acquired after the closing using principal collections must comply with the eligibility criteria established by the rating agencies for the CDO.

Unless the underlying collateral includes whole loans, a CDO does not require a servicer.[10] However, due to the need for active management of the underlying portfolio, virtually every CDO has a portfolio manager that is responsible for acquisition and disposition of the collateral and for ensuring continuing compliance with the eligibility criteria and collateral quality tests. The manager may be a third-party investment bank or fund manager hired by the sponsor of the CDO or it may be an affiliate of the sponsor with appropriate expertise in trading the applicable collateral. In either case, the experience and reputation of the manager will be an important consideration for investors in the CDO securities, as well as for the rating agencies in setting subordination or equity levels.

Special Considerations for CMBS CDOs

Although the basic CDO structure is not significantly altered for CMBS and related collateral, there are several considerations unique to real estate collateral that must be taken into account in such transactions. For example, the nature of the underlying assets raises issues relating to the treatment of taxable mortgage pools under U.S. tax law, which normally are not a concern with CDOs. As a result, any multi-class mortgage-related cash flow CDO structure may have to be modified in order to avoid entity level taxation, including, among other devices, by issuing the CDO securities through a REIT or qualified REIT subsidiary or by issuing the securities in a specially structured off-shore transaction.

In addition, because CMBS and other real estate-related assets (and, in fact, asset- and mortgage-backed securities generally) have different characteristics than corporate bonds and emerging market debt, the eligibility criteria that define the parameters for the type and mix of assets that may be acquired to secure the CDO securities may be significantly different in a CMBS CDO from those of a typical, non-mortgage CDO. The diversity criteria will include "baskets" that limit concentrations not only based on the location and "industry" of the issuer of the unsecured REIT debt and CMBS, but also based upon the real estate property type (i.e., retail, office, hotel, etc.) in which the related REIT is invested or which the related commercial mortgage loans encumber. Nonetheless, the rating agencies will tend to view the behavior of CMBS and other real estate related assets as more "correlated"—that is, as less diverse—than a typical high yield and emerging market CDO. For this reason, real estate CDOs will generally include more than one type of real estate related asset—the Fortress transaction held both subordinate CMBS and unsecured REIT debt—and will increasingly include asset-backed securities in the underlying collateral pool, as well, in order to increase the diversity of that pool and thereby obtain reduced enhancement levels from the rating agencies.

CDOs vs. Re-REMICs

Like CDOs, Re-REMICs convert a pool of lower rated securities into highly rated securities. Re-REMICs, however, consist of static pools of CMBS or MBS and are rated based on the specific securities included in the collateral pool rather than on the characteristics of eligible collateral. Similarly, the sales disclosure for a Re-REMIC is generally lengthy due to the inclusion of summaries of each underlying transaction and the performance history of the underlying securities, while the collateral disclosure for a CDO generally includes only a description of the applicable eligibility criteria, since the collateral pool for a CDO is often not fully assembled on the transaction closing date and since the make-up of the pool may change over time as a result of the collateral manager's management and trading of the collateral as well as the reinvestment of principal collections. In addition, unlike CDOs, Re-REMICs do not permit the purchase of additional "REMIC" collateral securities after closing, and such collateral cannot be traded to take advantage of market conditions or to address problems with defaulting or delinquent assets. Consequently, Re-REMICs do not provide the full range of benefits available through CDOs.

Conclusion

CDOs are highly flexible structures that can be used to securitize numerous asset types, including CMBS. CDOs permit the acquisition of a significant portion of the underlying collateral after the closing, thereby reducing the need for the sponsor to fund assets out of its own capital and permitting the collateral manager to take advantage of favorable market conditions arising after the closing. CDOs also allow the reinvestment of principal distributions in additional assets and the active trading of those assets, which permits the collateral manager to "lock in" gains by selling appreciated assets, seize buying opportunities by purchasing new assets, and manage the CDO's performance by replacing under-performing assets with performing assets. As a result, CDOs have become an extremely important structure for the securitization of high-yield bonds and other below investment grade assets. Now that the rating agencies have developed models to apply the CDO structure to CMBS, MBS and REIT debt, real estate related CDOs are expected to become the fastest growing category of CDOs in the near future. Given the CMBS industry's need to create a reliable marketplace for its lower rated securities, CDOs may well offer an important vehicle for the trading of these securities, and may help to establish and develop a secondary market for unsecured REIT debt and subordinate CMBS, as CDOs have done in the high-yield and emerging market debt arenas.

Endnotes

1. *See CMBS Volumes Plunge in US, Seen Staying Low,* Commercial Mortgage Alert, April 10, 2000, at 1, 14 (first quarter 2000 U.S. CMBS issuance down 51% from first quarter 1999); *CMBS Backed by Recently Originated Loans* (chart), Commercial Mortgage Alert, April 17, 2000, at 12 (first quarter 2000 CMBS backed by traditional conduit loans down 50% from first quarter 1999); *Woes Force Issuers to Delay CMBS Deals*, Commercial Mortgage Alert, March 27, 2000, at 1, 8 (rising CMBS spreads, weak B-piece market and slow originations).
2. *See B-Piece Woes Scuttle Deutsche-DLJ Deal*, Commercial Mortgage Alert, March 13, 2000, at 1, 10; *Lack of B-Piece Buyers Casts Pall on Market*, Commercial Mortgage Alert, March 6, 2000, at 1, 8.
3. *See* Eileen Murphy, *Slow Start for CDOs, but a Substantial Pipeline*, Asset Sales Report, Vol. 14, No. 16, April 17, 2000, at 10.
4. CDO securities issuances are generally not registered public offerings under the Securities Act of 1933, as amended (the "Securities Act"), but instead are typically sold in reliance on the transactional exemptions from registration provided by Section 4(2), Rule 144A and/or Regulation S of the Securities Act.
5. This re-allocation of risk is similar to the Re-REMIC structure that has been used for several years to re-securitize CMBS and other mortgage-backed securities. The CDO structure, however, provides several benefits not available through Re-REMICs. *See CDOs v. Re-REMICs*, p. 9.
6. The sponsors of CDOs have generally been institutions seeking to securitize assets, such as loans or other debt instruments, that such institutions own and/or asset managers seeking an investment vehicle to hold assets being managed by such asset manager.
7. The first CDO to include both CMBS and unsecured REIT debt was closed in July 1999 by Fortress CBO Investments I, Limited, a Cayman Islands special purpose affiliate of Fortress Investment Corp. Thacher Proffitt & Wood was issuer's counsel and drafted the documentation for the Fortress transaction.
8. Since the debt instruments offered by cash flow CMBS CDOs are, as mentioned, generally divided into multiple classes and are also backed by commercial mortgage-backed securities that are themselves secured by real estate mortgages, such transactions must be structured in order to avoid being treated as "taxable mortgage pools" under the Internal Revenue Code. *See Special Considerations for CMBS CDOs*, p. 8.
9. The role of calculation agent is often played by the indenture trustee or one of its affiliates.
10. The authors are unaware of any CDOs issued to date that include whole loans as significant part of the underlying collateral. The rating agencies have indicated verbally that they are prepared, however, to model CDOs that include commercial and residential loans, as well as CMBS, MBS and REIT debt.

Jeffrey Stern is a partner and Erik D. Klingenberg is an associate in the New York City office of Thacher Proffitt & Wood.

Member News

Alston & Bird LLP and Walter, Conston, Alexander & Green, P.C.

Alston & Bird LLP and Walter, Conston, Alexander & Green, P.C., an international law firm headquartered in New York, have combined their practices. The combined Alston & Bird has over 550 lawyers with major offices in Atlanta, Charlotte, New York, the Research Triangle, Washington, DC and a liaison office in Munich. All partners of both firms are continuing as partners in the combined firm.

Demarest e Almeida

Scott Fenstermaker has become Of Counsel to Demarest e Almeida and will be working with its New York City office. Mr. Fenstermaker, 57, recently retired as Ford Motor Company's International Counsel. Mr. Fenstermaker received both his B.A. (economics), in 1965, and his J.D. (with distinction), in 1967, from Cornell University Law School, where he was an editor of the *Cornell Law Review* and was elected to the Order of the Coif legal honorary. Prior to joining Ford, he was a partner in the Syracuse, New York law firm of Hiscock & Barclay, after a four-year stint as an FBI Special Agent.

Demarest e Almeida—Advogados and Azevedo Sodré—Advogados announced the merger of their law firms. After a seven-month interaction, the merger of these two large offices sets up an organization with over 300 lawyers and 250 interns. Demarest e Almeida has offices in São Paulo, Rio de Janeiro, Brasília, Salvador, Maceió, Porto Alegre and New York. In the international area, in addition to the New York office, Demarest e Almeida is integrated with the largest Argentinean office, Buenos Aires' Marval, O'Farrell & Mairal. The firm also represents Brazil as a Lex Mundi member. Azevedo Sodré brings to Demarest e Almeida a team of 61 attorneys highly experienced in mergers and acquisitions. With its strong presence in the interior of the State of São Paulo, Azevedo Sodré brings to the merged firms its Campinas and Ribeirão Preto's offices.

Graham & James and Greenberg Traurig

The entire New York office of Graham & James merged into Greenberg Traurig. As a result of this merger, as well as the Camhy Karlinsky acquisition, Greenberg Traurig will now have some 740 attorneys in 17 offices domestically and approximately 240 attorneys in two locations in New York.

Greenberg Traurig now has an Intellectual Property Department of about 50 attorneys chaired by Albert Jacobs, Jr.

Kirkland & Ellis

As of January 1, 2001, Thomas O. Verhoeven has become a partner of the Kirkland & Ellis, working out of the firm's London office. Mr. Verhoeven is working intensively in the private equity area, in addition to expanding his general German law, M&A, corporate and litigation practice.

Monereo, Meyer & Marinel-Lo Abogados

MM&M is pleased to announce that Calvin A. Hamilton has joined the firm. Mr. Hamilton will continue to practice in the areas of international litigation, arbitration and transactions. He will be in charge of the firm's Arbitration Department and will be responsible for developing the firm's transactions practice with U.K., North and Latin America.

Thacher Proffitt & Wood

TPW is further expanding its global finance practice with the addition of Allen D. Moreland as a partner resident in its New York office. Mr. Moreland, 38, handles capital markets and bank financing transactions involving Latin American and European companies, issuances of debt securities in the Euro and global markets, ADR and GDR issuances and future flow securitizations. Mr. Moreland's experience includes three years as a practicing attorney in Brazil. He joins the firm from Mayer, Brown & Platt.

At the same time, TPW's affiliate firm in Mexico, Thacher Proffitt & Wood, S.C., announced that Miguel Angel Quintana has joined it as a partner. His practice includes corporate, energy and administrative law. Apart from counseling foreign clients and Mexican subsidiaries of foreign corporations doing business in Mexico, Mr. Quintana has also advised the Mexican Federal Government in privatizations and the drafting of power legislation. Recently, he acted as outside counsel to the energy transition team of President Vicente Fox. Mr. Miguel Angel comes to TPW from Noriega y Escobedo.

Torys

Torys announced the addition of two new partners and two new associates in the firm's New York office. Partners Bill Gray and Emanuel Grillo join existing partner Jerry Muntz in the firm's Bankruptcy and Restructuring Practice. Associates Alison Bauer and Darien Leung also join Torys in the Bankruptcy and Restructuring Practice. All four join Torys from Salans (formerly Christy & Viener).

Torys has elected Charles E. "Trip" Dorkey III as managing partner of its New York office. Mr. Dorkey, 51 is a senior litigation partner at Torys, head of the firm's New York litigation practice and a member of Torys' Executive Committee. The Honorable Jonathan Lippman appointed Mr. Dorkey to the Advisory Council for the Housing Part of the Civil Court of the City of New York. Also, he was recently appointed by President Bush to be a member of his Justice Transition Advisory Team.

Vivien Chan & Co.

The partners of Vivien Chan & Co are pleased to announce the firm has been awarded Second Place in the league table for the Best Patent Firm in Hong Kong for year 2000 in a survey conducted by Managing Intellectual Property.

Committee News

Immigration Committee News

By Jan H. Brown, New York

I. Legal Immigration and Family Equity Act

New York State Governor Pataki had requested that the Immigration Committee of the New York State Bar Association's International Law and Practice Section (NYSBA-ILPS) communicate to the public the terms of the LIFE Act (Legal Immigration and Family Equity Act) signed by President Clinton shortly before his departure from office. The LIFE Act gives certain benefits to persons unlawfully present in the United States, provided that an application or petition is filed for them on or before April 30, 2001. The main benefit to persons unlawfully present in the United States is the opportunity to apply for permanent residence in the United States without having to leave the country when the applicant is eligible to apply for permanent residence.

In response to the Governor's request, NYSBA-ILPS Immigration Committee members participated in a training session to instruct lawyers and law students who would advise aliens as to how they may file petitions which will qualify them under the provisions of the LIFE Act. The meeting was held at the City Bar Association of the City of New York, on April 4, 2001. Following the meeting, committee members Allen E. Kaye and Jan H. Brown lead an informational session for the general public.

II. ILPS/Brazilian Consulate Outreach Program

On March 19, 2001, committee members Jan H. Brown, Allen E. Kaye, and Kenneth Schultz, all with offices in New York City, appeared before an audience at the Brazilian Consulate in New York City to explain this new law to the assemblage and answer questions. This event was cosponsored by the NYSBA-ILPS and the Brazilian Consul, and was filmed for broadcast through the Brazilian media. NYSBA-ILPS Chair Isabel C. Franco was the moderator.

Jan H. Brown is a solo practitioner in New York City. Mr. Brown serves as Chair of the Immigration Committee of the International Law and Practice Section of the New York State Bar Association.

NYSBA**CLE** **Publications**

Federal Civil Practice

Editor-in-Chief

Georgene M. Vairo
Professor of Law and William M. Rains Fellow
Loyola Law School
Los Angeles, CA

When *Federal Civil Practice* was first released, its stated aim was to "make the vast and complex subject of federal practice comprehensible to every practicing attorney." That it is one of the most successful reference texts ever published by the New York State Bar Association is evidence that the goal of this book has been accomplished to a great degree.

Written by more than 30 of New York State's leading practitioners, judges and law professors, and designed as a text of first reference, *Federal Civil Practice* is an invaluable guide for new or inexperienced federal court practitioners, who may find the multi-volume treatises on this topic inaccessible as sources of information for quick reference. The more experienced practitioner will benefit from the practical advice and strategies discussed by some of the leading federal court practitioners in New York State.

Each chapter of *Federal Civil Practice* provides the reader with an overview of the topics presented, practical advice and a clear exposition of legal principles. "How to do it" checklists and sample forms are contained in many chapters. A thorough index and references to further legal authority greatly increase the utility of this book.

Each cumulative supplement to *Federal Civil Practice* provides practitioners with an analysis of the various statutory and rules changes, case citation updates and additional exhibits and forms.

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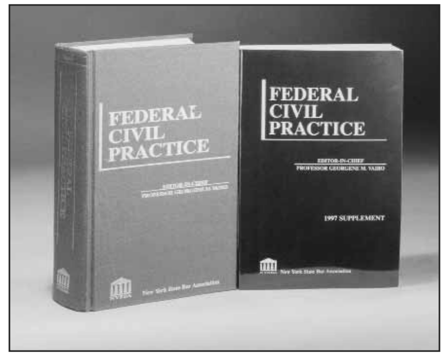

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New York State Bar Association

Awards

Alice Henkin Honored With International Award

By Barbara Peterson

The International Law and Practice Section presented its annual award for Distinction in International Law and Affairs to Alice H. Henkin of New York, Director of the Justice and Society Program at The Aspen Institute. The award was presented at a joint luncheon with the Corporate Counsel Section.

Henkin, a graduate of Bryn Mawr College and Yale Law School, is well-known for her unflinching commitment to the human rights cause, according to Isabel C. Franco of New York, Chair of the International Law and Practice Section. In her capacity as an attorney working on international human rights law, Henkin has written extensively on monitoring human rights, on transitional justice, and on human rights and multilateral peacekeeping. The Justice and Society Program she directs brings together leaders from government, the private sector and from international communities to examine how international law and human rights intersect. As such, it focuses on basic questions of justice in today's world. Henkin also serves as a Director of Human Rights Watch, where she is Vice-Chair of its Board Policy Committee and its Europe and Central Asia Division, as well as a member of its Advisory Committee, Africa Division. She was a public member of the U.S. Delegation to the Conference for Security and Cooperation in Europe during its Conference on the Human Dimension in Paris, in 1989, and has been a member of human rights observer delegations to Turkey, U.S.S.R., Cuba, and South Africa. Henkin has served as editor of such publications as "Honoring Human Rights: From Peace to Justice," and has co-written such works as "The Road to Madrid: Developing a Western Consensus on Human Rights."

At the Association of the Bar of the City of New York, Henkin has served on the Executive Committee, as a vice president, and chaired the Honors and International Human Rights committees. She is a member of its Council on International Affairs and served on the Nominating, International Law, Immigration and Nationality Law and Long Range Planning committees, and the Special Committee on the Bicentennial of the U.S. Constitution. Other affiliations include the Council on Foreign Relations and Nominating Committee of the American Society of International Law. She was a founding member and trustee of the

Photo by Fred Smith Associates

Alice Henkin, Director of the Aspen Institute, accepted the ILP Section award from Section Chair Isabel C. Franco of New York.

Refugee Policy Group and has been president and a trustee of the Court Appointed Special Advocates.

Root/Stimson Award

The Root/Stimson Award is named in honor of former NYSBA presidents Elihu Root and Henry L. Stimson, who selflessly gave much of their time and effort to community service activities. The award, created in 1974, is presented to a lawyer admitted to practice in New York state who is actively involved in volunteer community service work. Past recipients include Camille Siano Enders and Alderman Keith St. John, both of Albany; E.W. Dann Stevens and William R. Brennan (posthumous), both of Buffalo; Michael J. Siris, of Manhasset; and Judge Richard Lee Price, of the Bronx.

Archibald Murray Recipient of 2000 Root/Stimson Award

In recognition of his commitment to public service and improvement of the justice system, New York attorney Archibald R. Murray was honored with the 2000 Root/Stimson Award. The award was presented at the State Bar's House of Delegates meeting in Cooperstown. "For decades, Archibald Murray has demonstrated a deep commitment to public service and to providing access to legal representation for those who need it most. He has selflessly given his time, attention, and talents to the poor and indigent. The needs of this segment of our society are frequently overlooked. His integrity, compassion, and selflessness exemplify the high standards of the legal profession," said Philip Furgang of West Nyack, Chair of the NYSBA's Committee on Public Relations, which sponsors the award.

For nearly 20 years (1975-1994), Murray served as executive director and attorney-in-chief of The Legal Aid Society of New York City. From 1994 until his retirement in 1998, he served as chair of the Board of the Society, and continued to represent the Society in public outreach and fund raising endeavors. A native of Barbados, West Indies, Murray was the first Black-American to serve as president of the NYSBA (1993-1994). Murray has received doctor of laws degrees awarded by Fordham University (1982), New York Law School (1988), the College of New Rochelle (1983) and John Jay College (1990).

Nominations for the 2001 Root/Stimson Award Sought

The NYSBA is accepting nominations for the 2001 Root/Stimson Award. Administered by the NYSBA Committee on Public Relations, the award recognizes lawyers who have demonstrated outstanding commitment to community and volunteer service and to the improvement of the justice system. Lawyers who are admitted to practice in New York State and who are actively involved in volunteer public service work are eligible to be nominated for the award. Nominees need not be members of the NYSBA.

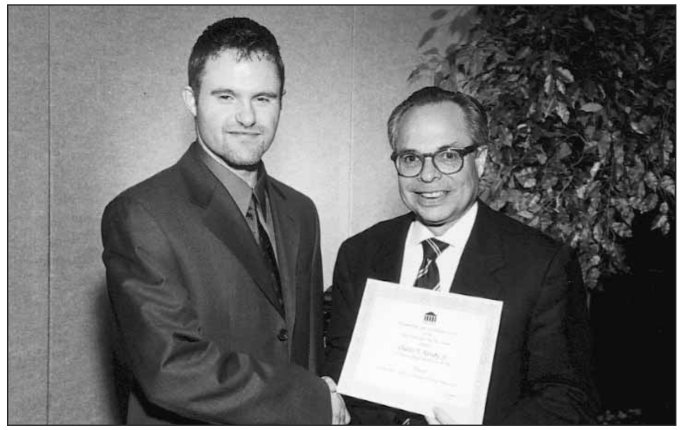
Nomination forms are available from Juli Robinson, Department of Media Services and Public Affairs, New York State Bar Association, One Elk Street, Albany, NY 12207.

Albert S. Pergam Award

This writing competition, which began in 1988 in memory of past Section Chair Albert S. Pergam, fosters legal scholarship among law students in the field of international law. The competition is intended to encourage students of law to write on areas of public or private international law. It is the International Law and Practice Section's belief that by providing a forum for students to disseminate their ideas and articles, the professional and academic communities are enriched. Furthermore, the competition presents an opportunity for students to submit law review quality articles to the Section for possible publication in one of its publications that include the *New York International Law Review* and the *International Law Practicum*.

Charles T. Kotuby Recipient of 2000 Albert S. Pergam Award

The International Law and Practice Section presented the 2000 Albert S. Pergam Award to Charles T. Kotuby. The award was presented at a joint luncheon with the Corporate Counsel Section, which the recipient attended with his fiancée.



Charles T. Kotuby (left) is presented the 2000 Albert S. Pergam Award.

Mr. Kotuby was honored for the LL.M. dissertation he presented at University of Durham Faculty of Law. In his 46-page paper entitled "External Competence of the European Community in the Hague Conference on Private International Law: Community Harmonization and Wordwide Unification," Mr. Kotuby displayed outstanding knowledge in a very complex topic and remarkable scholarship for a young lawyer. His conclusion is that in almost all cases where an envisaged international agreement falls under the new Community competence in private international law, at least where that competence has been exercised in the form of Community legislation, the Member States may participate in the agreement only if it deals with an aspect not covered at all by the Community measure.

Mr. Kotuby received a $2,000 check sponsored by Cleary, Gottlieb, Steen & Hamilton. His paper will be published in a NYSBA publication.

2001 Albert S. Pergam Award—Call for Papers

The International Law and Practice Section is pleased to announce the annual Albert S. Pergam International Law Writing Competition for 2001. The deadline for submission is December 1, 2001. Law students (including J.D., LL.M., Ph.D. and S.J.D. candidates) may submit an article concerning any area of public or private international law or practice. All submissions will be reviewed by a committee of attorneys practising international law, and a winner will be chosen based on a variety of factors, including, significance and timeliness of the subject matter, thoroughness of research and analysis, and clarity of writing style.

The winner will receive:

1. $2,000; and
2. Publication of the article (subject to editorial approval) in the New York State Bar Association *Journal*, the *New York International Law Review*, or the *International Law Practicum*.

One recipient is selected for the award at the discretion of the Committee. The Award will be presented at the luncheon of the January 2002 Annual Meeting. The rules follow below:

1. All articles are to be submitted (in English) in the following format:
   a. Typewritten;
   b. Double-spaced;
   c. On 8-1/2 inch by 11 inch paper, 1 inch margins;
   d. No longer than 25 pages in length (exclusive of endnotes);
   e. Citations are to conform to "A Uniform System of Citation" (The Bluebook).
2. All articles must be postmarked no later than December 1, 2001, to the address noted below. Articles received after that date will not be considered.

   Linda L. Castilla, Liaison
   International Law and Practice Section
   New York State Bar Association
   One Elk Street
   Albany, New York 12207

3. As indicated in the competition announcement, the scope of permissible topics for the articles is broad, i.e., any aspect of public or private international law and practice.
4. All articles submitted for the competition become the property of the International Law and Practice Section and the New York State Bar Association. No article so submitted may be published in any journal or periodical other than the New York State Bar Association *Journal*, the *New York International Law Review*, or the *International Law Practicum*, until after announcement of the winner of this competition in January 2001. After such announcement, any non-winning article submitted for consideration in this contest may be published in any other journal or periodical.

Attendees socializing

(l-r) Mr. and Mrs. Donald M. Mawhinney, Jr., Mrs. and Mr. Paul M. Frank

The Schultz family

Seasonal Section Meeting 2000 Madrid, October 25-29, 2000

The Palace Hotel in Madrid, Spain was the venue for the International Law and Practice Section's 2000 Seasonal Meeting. The event was an extraordinary success. Under the heading "Bridging the Atlantic: Impact of Recent Trade Agreements On International Practice," the meeting's showcase event focused on the legal implications of the signing of the EU-Mexico Free Trade Agreement. The Agreement will have a major impact on the practice of law in, and conducting business with, countries on both sides of the Atlantic. Speakers and panelists came from Europe, Mexico, and the Americas.

Due to its central location across from the Prado and Thyssen Museums, the magnificent Palace Hotel

(l-r) Joel B. Harris, Marcia E. Haddad, Mr. and Mrs. Lawrence E. Schoenthal

The Frank family

James P. Duffy, III

(l-r) Michael M. Maney, Paul M. Frank, Joyce Hansen, Aureliano González Baz, Calvin Hamilton, Robert J. Leo

offered an ideal spot for the meeting. Attendees not only worked together in a variety of programs, but also found ample time to socialize with the local bar.

The Section Chair at the time was Philip M. Berkowitz, Salans Hertzfeld Heilbronn Christy & Viener, New York City. The Program Co-Chairs were Calvin A. Hamilton (at the time with B. Cremades y Asociados, and now with Monereo, Meyer & Marinel-Lo Abogados), Madrid, and Robert A. Leo of Meeks and Shepard. Special thanks go to Linda Castilla for her hard work.

The International Law and Practice Section welcomes you to join us for the 2001 Fall Meeting being held October 17-21 in Rio de Janeiro, Brazil, at the Copacabana Palace Hotel.

(l-r) Mr. and Mrs. Thomas Verhoeven, Leslie N. Reizes

Ingrid Sapona

Attendees socializing

Gerald J. Ferguson

Susan DeSanti

Susan Hankey

Michael M. Maney

Photo by Fred Smith Associates

David B. Perlman

NYSBA's 124th Annual Meeting Marriott Marquis, New York City, January 23–27, 2001

The International Law and Practice Section, together with the Corporate Counsel Section, held its Annual Meeting at the New York Marriott Marquis on January 24, 2001. The Program was entitled "A United States and International Perspective on Electronic Marketplaces." The *State Bar News* reports.

Unanswered Questions Abound in International E-Commerce

By Virginia Vitzthum

David B. Perlman of Lyndhurst, N.J., began the joint program of the International Law and Practice and Corporate Counsel sections on electronic marketplaces by calling for clear federal guidance on international electronic exchange, and noted wryly that "certain words mean something in Washington D.C. and something else everywhere else."

Gerald J. Ferguson of New York was the first of many speakers to quell the panic about the recent dot-com shakeout. "The Internet economy is dead. Long live the Internet economy," he said, adding that business conducted over the Internet is "humming along."

Antitrust Issues Dominate

Susan DeSanti, director of Policy Planning for the Federal Trade Commission, said antitrust issues dominated the FTC's concerns about B2B e-commerce. The agency held a workshop in June for more than 600 business people and antitrust experts to discuss the issues. Details about the meeting can be found at www.ftc.gov.

DeSanti echoed Ferguson's bullishness about Internet commerce. "Yes, there's some hype; yes there's some slowdown, but the efficiencies are so significant in their potential that they're not going anywhere." She quoted Section 4.2 of the Competitor Guidelines, which were released in 1996 but still govern B2Bs: FTC will not challenge a collaboration when the market shares of all participants "collectively account for more than 20 percent of each relevant market in which competition may be affected." In health care, that figure is 35 percent. DeSanti concluded by naming the four antitrust issues to watch: information exchange, joint purchasing, exclusion, and exclusivity.

European Perspective

Susan Hankey of London addressed the European Union's (EU) concerns about B2Bs, which are similar to the FTC's. "Information exchange worries the EU as does anything that suggests the word 'cartel,' " she explained. Article 81 of the new EC "Guidelines on Horizontal Cooperation" puts forth a guideline similar to the FTC's, but the market share requirement is 15 percent in contrast to the 20 percent needed for a U.S. collaboration. She also said the EC is less concerned with exclusivity than the U.S. "If someone doesn't follow objectively created rules for participation in a B2B," there's no prohibition against keeping them out," she said.

Contracts Online

Another panel discussion on forming contracts on the Internet dealt with thorny issues like electronic signatures, disclosure issues, and the difficulty of ascertaining what country's laws apply to cyber-transactions.


Manuel Campos-Galván


Reed Freeman, Jr.


Jaime Malet


André Betrand

Michael M. Maney of New York pointed out that New York law differs from U.S. law on electronic signatures and directed New Yorkers to www.irm.state.ny.us/esra.htm. He pointed out that virtually no jurisdiction allows "electronic living wills or testamentary wills or real estate sales" to be sealed with an electronic signature.


Ronald Lopez

E-commerce and Mexico

Manuel Campos-Galván of Mexico City summarized recent rules governing e-commerce in Mexico. "Neutrality of technology" is the standard, he said: "Data messages are equal to other types of documents . . . and admissible as evidence in court." He added that Mexico's consumer protection law doesn't allow spam or release of customer information.

Marketing and Advertising Online

Reed Freeman, Jr. of Washington D.C. and Jaime Malet of Barcelona constituted a panel on marketing and advertising on the Web. Freeman explained that since the FTC guidelines applied initially to paper, new interpretations are needed for directives like "disclaimers must be on the same page." Freeman asked, "What is a page? That's different on your laptop, your handheld PC, and your telephone." He said the FTC is "in a non-public investigation of small print." The FTC has issued some Web-specific guidelines, for example, disclaimers can't be hyperlinked and an advertiser must disclose if a banner ad hangs tracking "cookies" onto those who click on them.

Malet discussed the challenges of coordinating all the European countries' guidelines: Web advertising and marketing now must meet the home country's standards as well as the EU Competition Law. France often finds itself the odd country out, Malet said, and a Frenchman in the next panel echoed his assertion.

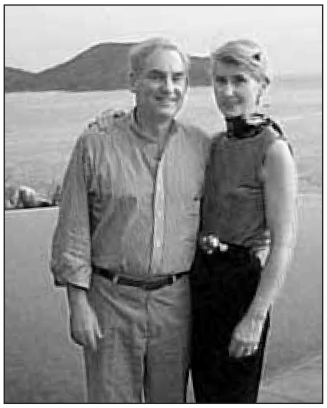
Libel, Obscenity, Defamation

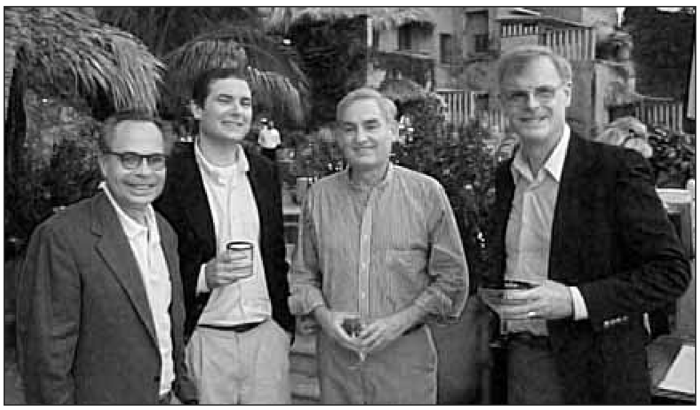
André Betrand of Paris and Ronald Lopez of San Francisco each offered fascinating examples of Internet cases testing various countries' laws on libel, obscenity, and defamation, among other issues. To much laughter, Betrand shrugged and said, "We don't have this freedom of speech thing in France. If you say something bad, you will get in trouble." France has gone after Web sites containing offensive material, such as Nazi propaganda, with more zeal than other EU countries. It doesn't matter if the poster or the ISP is in France or not. "If it appears on a screen in France, it comes under French jurisdiction," Betrand said. Betrand added that France has a strong tradition of privacy that predates the Internet; for example, all of Roger Vadim's ex-wives sued him over his kiss-and-tell autobiography. A precedent-setting Internet privacy case involved nude pictures of a famous French model, taken before she was 18 and posted on the Web. The courts are still sorting how responsible the ISP is for such postings; it has been established, however, that the ISP has to be warned before it can be sued.

Ronald Lopez took up the theme of content regulation and liability, outlining the three pre-Internet categories of "content providers." The phone company is generally not liable for what goes over the wires; a bookstore or newsstand isn't liable unless they have "notice of bad content" and do not act to stop selling it. The third category includes newspapers, publishers, and writers — the most liable of the three. Thus far, Lopez said, "Courts are inclined to treat the ISP as a bookseller/newsstand." His example was the 1995 suit the Scientologists brought unsuccessfully against the ISP when their secrets were published on the Internet. As in France, U.S.-based ISPs now have procedures for hearing complaints, then removing offending content.

Lopez also discussed about defamation suits, which have generally not prevailed when brought against ISPs. Among the Web sites allowed to keep publishing material that plaintiffs called "defamatory" were Walmartsucks.com, Bridgestone-Firestone.net, and Matt Drudge's drudgereport.com.

Executive Retreat—May 17-19, 2001—Las Brisas Hotel, Ixtapa, Mexico





New York State Bar Association International Law & Practice Section &
The Brazilian Bar Association (Ordem Dos Advogados Do Brasil)

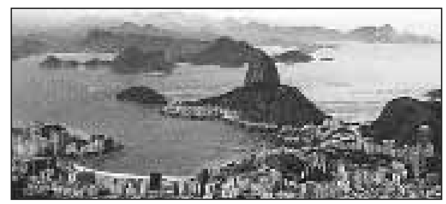
FALL MEETING

Rio de Janeiro, Brazil
October 17-21, 2001

"Latin America in the New Millennium—
Law and Business"

The NYSBA International Law & Practice Section is proud to announce that our friends at the Brazilian Bar Association have agreed to co-sponsor our Fall Meeting to be held in Rio de Janeiro, at the spectacular Copacabana Palace Hotel.

During last year's successful meeting in Madrid, Spain, we examined the various impacts of signing the Free Trade Agreement between the European Union and Mexico. We primarily focused on regional agreements, such as NAFTA and MERCOSUL. This year we would like to continue with a similar agenda and focus on the various strategies of establishing and conducting business with and in South America. Therefore, we have chosen the largest country in South America, Brazil, as the hosting country for the Fall Meeting. In a series of panels, we will examine various topics, including intellectual property, cross-border securities, e-commerce, international tax issues, antitrust, arbitration and litigation, and ethics in multi-juris law firms. We are delighted to have a truly international faculty of prestigious experts as our speakers and panelists.



The Program has been approved for up to 12 credit hours under New York State's MCLE rule, consisting of 10.5 credit hours in practice management and/or areas of professional practice and 1.5 hours in ethics, or 12 hours in practice management and/or areas of professional practice depending on the programs selected.

In addition to the substantive programs scheduled, we have organized various tours that explore the region's fascinating countryside. A tour of Rio de Janeiro, providing opportunities to visit such unique places as Ipanema, Leblon, the Tijuca Forest and Corcovado, goes without saying.

Come expand your international network, learn from leading experts and experienced practitioners about the newest legal developments in a variety of critical business topics, get CLE credits, enjoy the astonishing beauty of the Brazilian landscape—and, last but not least, have fun.

If you are interested in attending the Fall Meeting and would like more information, please contact:

Linda L. Castilla
New York State Bar Association
One Elk Street, Albany, NY 12207, USA
Phone: (518) 487-5562 • Fax: (518) 463-8527 • e-mail: lcastilla@nysba.org

Also, sponsorship opportunities for the meeting are available. To obtain further details, please contact Soraya E. Bosi (sbosi@demarest.com.br).

We are looking forward to seeing you in October!

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Thacher Proffitt & Wood, New York City
Program Co-Chair

Marcia Haddad, Esq.
New York City
Program Co-Chair

Isabel C. Franco, Esq.
Demarest e Almeida, New York City
Section Chair

Language Tips

By Gertrude Block

A subject that concerns many of the judges who send e-mails to be discussed in my language columns is the inability of lawyers to write clearly—or even grammatically. A Denver AP news item dated April 25, 1987 reported that U.S. District Court Judge Sherman G. Finesilver had denied the request of two lawyers (who shall remain unnamed) for a subpoena because they had misspelled it "subpeona" in their motion and supporting memorandum. Judge Finesilver noted, also, that the memorandum was "replete with grammatical and spelling errors, and with misuse of verbiage," so bad that some parts were "unintelligible." Judge Finesilver told the lawyers not to bother to file motions in his court unless they were in proper form.

More recently, Judge Mark Bernstein, of the Court of Common Pleas of Philadelphia County, wrote me that he was astonished at the inability of even experienced lawyers to ask questions! He said that instead of asking questions, lawyers make statements, often delivered with "an inflection at the end." The result, wrote Judge Bernstein, is that instead of responding, witnesses can "comment with whatever they feel like saying, and the interrogation "becomes mush . . . instead of a crisp examination."

The problem of lawyers' substandard writing, after they already graduated from high school, college, and law school seems almost impossible to solve. However, probably the problem is not really lawyers' inability to write satisfactorily, but the result of haste and lack of editing. If all judges reacted like Judge Finesilver, substandard writing would probably disappear.

The second problem, however, is resolvable. Judge Bernstein helpfully included, as illustration, the following three "non-questions" asked by lawyers in a recent medical malpractice case:

- And that was the day he was admitted (?)
- You were aware that it could be fatal (?)
- The patient was breathing when you examined him (?)

The core problem illustrated by these statement/questions is what constitutes a question. The standard characteristics of English questions are rising (upward) inflections at the end, along with an inverted verb phrase and, in writing, a question-mark ending. The sentences would then be re-written:

- And was that the day he was admitted?
- Were you aware that it could be fatal?
- Was the patient breathing when you examined him?

But what the lawyers are doing—and what understandably irritates judges—is delivering their questions as statements but with question-contour, ending them with a vocal upward inflection. That technique may be a subtle attempt to elicit an affirmative response, but slanting questions is, of course, illegal in direct examination. Judge Bernstein said that in cross-examination the problem is even worse, since good cross-examination technique involves control of the witness and "that is absolutely impossible without true questions."

The solution is fairly simple. Judges can require lawyers who question witnesses in their courts to formulate their question so as to include both the question-form (inverted verb-phrase) and the question-contour (final upward inflection) for all questions that require yes or no answers, the type of question most frequently posed by lawyers to witnesses in court.

It is interesting that in standard English all oral questions requiring answers other than yes or no contain the contour of standard declaratory sentences. That is, the voice drops at the end of the question just as it does at the end of a standard statement. To prove this for yourself just say, "John is going to the city tomorrow." Then ask the question, "Where is John going tomorrow?" Only the grammatical form of the sentence makes it differ from the question.

Judges have expressed other annoyances, for example, at lawyers who begin their comments with "I don't think." Those judges may recall the following dialogue from *Alice in Wonderland:*

> "Really, now you ask me," said Alice, very much confused,
>
> "I don't think"—
>
> "Then you shouldn't talk," said the Hatter.

One judge wrote that lawyers, who should be careful to say exactly what they mean, often are not. He cited, for example, the imprecise legal language designating an executor of an estate, who—he pointed out—is not the executor of an estate but the executor of the will of the decedent.

In short, judges decry all types of imprecise language. Perhaps, more than they realize, lawyers are judged, not only by what they say, but the way they say it.

Gertrude Block is a writing specialist emeritus and lecturer at Holland Law Center, University of Florida at Gainesville, and consultant on language matters. Mrs. Block is the author of "Effective Legal Writing" and co-author of "Judicial Opinion Writing Manual."

From the Mailbox

To Whom It May Concern,

As a current law student with a strong interest in international law, I would like to express my appreciation for the opportunities which the New York State Bar Association's International Law and Practice Section (NYSBA-ILPS) has given me to make a smooth transition into this field. I cannot strongly enough encourage other law students out there to come and get involved with the Section that interests them. Originally, I assumed that the New York State Bar Association was only for licensed attorneys, as many law students do, but the reality is that it's one of the very few places where highly successful practitioners meet students as well as each other to socialize and explore new legal frontiers, among other things. Recently, I attended the International and Cross-Border Internet Law Seminar, and the Immigration Outreach Program for the Brazilian Community. While I was very impressed with the quality of the speakers and their presentations, what really left an impression on me was the willingness of both the lawyer-members and the panelists to answer all of my questions about the field, and to give out their business cards so that we can speak in the future. In fact, I even got a few internship offers (which is a good thing since it's almost April already!) So if you are a law student who is looking to improve your knowledge and also meet great people, this is the place for you.

Sincerely,
Brad Bailyn
Brooklyn Law School
Class of 2003

This is a letter Isabel C. Franco and Soraya E. Bosi received in response of their "outreach program." They are working with the different law schools, trying to involve students with the Section's activities.

We strongly encourage our Section members to follow this example and engage in similar activities. Isabel and Soraya are happy to share their experiences with you and provide you with further information with regard to the good that such a program can do. You can reach them at (212) 371-9191.

Continuing Legal Education (CLE)

Q What are the CLE rules and requirements for attorneys admitted in New York, but who reside and practice elsewhere?

A If you live and practice in another jurisdiction, and are also admitted to practice in New York but do not practice here, then you must comply with any mandatory CLE requirement in the jurisdiction where you practice, and certify such compliance to the Office of Court Administration at the time of your biennial registration. If the jurisdiction in which you practice has no mandatory CLE requirement, then you must certify that fact to the Office of Court Administration at the time of your biennial registration.

The "Mandatory Continuing Legal Education Program for Attorneys in the State of New York" was adopted in the Joint Rules of the Appellate Divisions of the Supreme Court, and is found at 22 N.Y.C.R.R. part 1500. It can be accessed at http://www.courts.state.ny.us/1500.htm. For further questions about the mandatory CLE Rule, including those dealing with exemptions from the rule, or specifics about accreditation of programs, you should contact:

New York State Continuing Legal Education Board
25 Beaver Street, 8th Floor
New York, NY 10004
E-mail: CLE@courts.state.ny.us

If you have questions about the New York State Bar Association's CLE programs and CLE credits, please address those to:

Terry J. Brooks, Director of Continuing Legal Education
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International Law and Practice Section

Great Opportunities for Involvement!

The New York State Bar Association International Law and Practice Section Committees offer both the experienced and novice practitioners excellent ways to enhance their knowledge and expertise. Through Section activities members examine vital legal developments in international law. The Section sponsors continuing legal education programs and publishes the *International Law Practicum* and *New York International Law Review* to keep you informed on the latest updates in the area of international law.

International Law and Practice Section Committees are a valuable way for you to network with other attorneys from across the state and research issues and influence the laws that can affect your practice. Committees are also an outstanding way to achieve professional development and recognition. Your involvement is very much welcomed.

☐ Please consider me for appointment to the committees as indicated below.

☐ I wish to become a member of NYSBA's International Law and Practice Section. Please send me information.

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__ Corporate Counsel

__ Customs and International Trade

__ Immigration and Nationality

__ Inter-American Law/Free Trade in the Americas

__ International Banking, Securities & Financial Transactions

__ International Dispute Resolution

__ International Employment Law

__ International Environmental Law

__ International Estate and Trust Law

__ International Human Rights

__ International Intellectual Property Protection

__ International Investment

__ International Litigation

__ International Matrimonial Law

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__ Public International & Comparative Law / Arms Control & National Security

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The Last Page

Never forget your pledge to always follow the rule of law. Here are some really interesting laws to abide by, all from the State of New York*:

Albany: Against the law to play golf on the street.

Carmel: Men are not allowed to appear in public with pants and shirt that do not match.

Greene: Illegal to eat peanuts and walk backwards when a concert is on.

New York City: Women must not be on the street wearing "body-hugging clothing."

Illegal to display an unclothed mannequin in a store window.

Misdemeanor to arrest a dead man.

Against the law for a man to ogle a lady. Offenders are subject to a $25 fine and are forced to wear horse-blinders.

Disorderly conduct for a man to greet another man on the street by placing the end of his thumb against the tip of his nose, at the same time extending and wiggling the fingers of his hand.

Against the law to talk to a stranger on an elevator.

Staten Island: Illegal to water your lawn with a sprinkler.

A father must not call his son a "faggot" or "queer" in an effort to curb "girlie behavior."

So, you got the impression that everything is illegal in New York? Think again:

In New York City, it is technically legal for a woman to ride the subway topless since it is legal for a man to ride the subway topless. New York law states that if a man can be somewhere without a shirt, a woman gets the same right. (The decision came after arrests of women testing the ordinance on the subway.)

If you happen to know of or come across any amusing or interesting law in your jurisdiction, please let us know.

**Caveat: We do not guarantee that these laws are still (or ever were) in force. They might be though, so be advised accordingly.*

Request for Contributions

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

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