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New York International Chapter News

A publication of the International Section
of the New York State Bar Association

Message from the Chair

Andre R. Jaglom

As I write this message on my plane back to New York from our remarkable Panama Seasonal Meeting, I am struck by what an extraordinary group our Section has become over the last twenty-plus years. The quality and breadth of our programs and activities, which we sometimes take for granted, are brought home when viewed through the eyes of newcomers to our work, like many of the attendees at the Panama meeting, who repeatedly told me it was the best legal conference that they had ever attended.

The success of the meeting can be attributed in large part to the contributions of our Program Co-Chairs, Alvaro Aguilar and Juan Francisco Pardini in Panama and Alyssa Grikscheit in New York. Their efforts in recruiting speakers and sponsors, identifying venues and assisting in meeting logistics were critical. Alvaro also provided an intern to coordinate with Linda Castilla and help with translation and venue communications. Perhaps most important, Alvaro's service as Program Co-Chair also resulted in his wife, Pamela Oakes, serving as a "minster without portfolio." Pam was virtually another Program Co-Chair, helping with protocol issues, serving as official photographer (photos can be viewed at http://www.facebook.com/media/albums/?id=142136312535240), and acting as emergency interpreter, chauffeur and gener-

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ally taking care of whatever came up. Many thanks to them all, and also to all of the members of our Steering Committee, whose sound advice, strong efforts to garner publicity for the meeting, and assistance in identifying speakers from their countries resulted in the breadth of participation from across Latin America, both for speakers and attendees.

Great thanks also go to our meeting sponsors, without whom the meeting would not have been possible:

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Special thanks to Michael Galligan, who stepped in as a late Meeting Sponsor to cover some unanticipated expenses.

Nearly 200 lawyers from 29 countries—14 from Latin America, 10 U.S. States and Washington, D.C., and another 14 countries from Europe, Asia and Australia—attended the meeting in Panama. First, however, a group of a dozen or so New Yorkers went to Costa Rica on Monday, September 19 for a terrific program there hosted by Hernán Pacheco, our Costa Rican Chapter Chair, his firm Pacheco Coto, and the Costa Rican Bar Association.

We began with lunch at the Costa Rican Bar Association's facility, which inspired quite a bit of envy in the visiting New Yorkers, with its soccer field, basketball/volleyball court, tennis courts, two auditoria, library, cafeteria and hearing room. Albany has some catching up to do! I had the pleasure of sitting at lunch with Erika Hernandez Sandoval and Eduardo Calderón, the President and Treasurer of the Colegio de Abogados y Abogadas de Costa Rica (the Costa Rican Bar Association), respectively. They expressed a strong desire to enter into a Memorandum of Understanding with us—as we have done with the Law Council of Australia and the Sao Paulo Bar Association, and were about to do with the Panama Bar Association—to facilitate future exchanges, participation in joint programming, and attendance by members at each other's events. We have already begun working on such an MOU.

That evening, we attended an informative CLE presentation by NYSBA Immediate Past President Stephen P. Younger and former International Section Chair Michael Galligan on the use of New York law and forum in international agreements. The program was attended by over 40 of the leading international lawyers from major Costa Rican firms, many of whom indicated their plans to join NYSBA and the International Section. It was followed by an equally well-attended cocktail reception that allowed the New York and Costa Rican lawyers to meet informally. Kudos to Hernán for putting together a great event that may inspire similar "pre-meetings" in nearby nations before our future Seasonal Meetings.

We then decamped to Panama on Tuesday, where we began with a dinner attended by members of our Section Executive Committee and some twenty leading Panamanian lawyers, including Cesar A. Ruiloba, President of the Colegio Nacional de Abogados de Panamá (the Panama Bar Association), and former Chief Justice of the Panama Supreme Court, Graciela J. Dixon. Wednesday was devoted to productive meetings of our Chapter Chairs and Executive Committee, followed by a boat cruise cocktail reception on the Pacific (where despite the rainy season, the weather held up for us) and an excellent dinner at the Union Club, where we were entertained by traditional Panamanian dancers, who finished their performance by having many of our attendees join them to show off moves we didn't know they had.

The business sessions began in earnest on Thursday morning, and Thursday and Friday were both filled with a wide variety of plenary sessions and panels that were of uniformly high quality, and showed the quality and broad scope of our membership. I received many comments from both first-time and regular attendees about the excellence of the presentations. Remarkably—and uniquely in my experience with these meetings—virtually all of the plenary and panel sessions were completed on time. Kudos to the panel chairs and speakers for managing the difficult task of maintaining the high quality of the programs while remaining on schedule!

Thursday at lunch, NYSBA President Vincent E. Doyle and I had the honor of signing, with Panama Bar Association President Cesar Ruiloba, the Memorandum of Understanding between our two Associations to foster cooperation and exchanges of information on a variety of matters, including legal ethics and professional training. Mr. Ruiloba expressed particular interest in having New York lawyers assist Panama in transitioning to the new accusatory system of criminal justice that Panama

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A Word from the Editor

Dunniela Kaufman

I am pleased to bring you this edition of the *Chapter News* as the publication, like our section, continues to grow, mature and expand its coverage. This edition is unique in that it, for the first time, really captures what the *Chapter News* should be—a means to communicate amongst ourselves. In that regard, in addition to the always informative personal "Message from the Chair," we have had many individual members contribute on a personal, rather than substantive, level. To begin with, the founding father of our Section, Lauren Rachlin, has aptly provided a heartfelt thank you on behalf of the Section to our retiring NYSBA liaison, Linda Castilla. On the other end of the spectrum, Andrew Nelson, a second year law student and newly active member of our Section (who nobly assisted me in editing the submissions found in this edition), has provided us with his personal thoughts on his first experience at a seasonal meeting. In addition, a new member of our Section from Sydney, Australia, Diane Chapman, who attended UNCITRAL's 44th session, has provided us with her thoughts on the conference. Diane's submission is found at the conclusion of our spotlight this month; a compilation of members' contributions, which chronicle the Section's participation at the recent UNCITRAL meeting. I encourage you to read this spotlight as our participation at this meeting is something that we should all be proud of. While I think we all learn more about our Section through these personal contributions, the international and country-specific substantive contributions are the glue that binds this publication, and the Section, together. Exposure to one another's legal regimes helps each of us to be better lawyers, and enables us to provide our clients with legal advice in a global context.

I hope that you enjoy reading this edition and, as always, I welcome your feedback and, of course, your contributions!

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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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Contributions should be submitted in electronic document format (pdfs are NOT acceptable).

www.nysba.org/IntlChapterNews

A Tribute to Linda Castilla

What do Toronto, Mexico City, Berlin, Buenos Aires, Vancouver, Monaco, Hong Kong, Coral Gables, Budapest, Madrid, Rio de Janeiro, Rome, Amsterdam, Santiago, London, Shanghai, Lima and Cusco, Stockholm, Singapore, Sydney and Panama City have in common?—Linda Castilla, of course. Over the past 20 years that Linda has been the Staff Liaison to our Section, and some would say she is our Section, she has been responsible for putting together, in each of these cities, some of the most successful NYSBA meetings ever held. There is clear evidence of this in the fact that so many Presidents of the NYSBA, after attending these meetings during their tenure in office, have elected to join the Section and attend many more. Jack Zulack, a past Section Chair, likened it to putting on three weddings.

If this were all Linda had done for the International Law Section, it would be significant enough. However, it is but a fraction of what she does for us each year, and on a daily basis, that makes her truly outstanding (a word I do not use lightly). It is fitting that I should be writing this tribute for I have worked with Linda during every one of those 20 years and I surely must know best her value, importance and outstanding contributions to our Section.

We share so many memories. In its entire history the Section has had but two Staff Liaisons. When the first one retired only four years after helping us get the Section started, I was very concerned. We were still a very fledgling Section seeking to find our way, not only within the well-trod paths of the NYSBA but in the global legal community where the NYSBA had not previously ventured.

My first meetings with Linda quickly allayed my concerns and by the end of the Toronto seasonal meeting, all doubts had vanished, replaced by a total confidence in this remarkable woman. Over the years she has demonstrated equal facility in creative attention to detail, imaginative planning, crisis (yes there were some) management, and an ability to make problems disappear all with a charm and grace uniquely her own. She quickly proved herself to be indispensable. This could not have been more clearly demonstrated than it was at our last seasonal meeting in Panama City where for over an hour, person after person rose to pay her tribute. The highlight, of course, was Andrew Otis falling to his knees and begging her to reconsider her decision to retire—or at the very least stay on during *his* tenure as Chair.

To Linda I can say you are a beautiful person—both inside and out. There is no way that our Section could have become the international force in the world which it has become without you being at our side. Almost every country in Latin America was represented at our Panama meeting. What will grow from that and from our International Chapter structure, which is unique in the world, will be a lasting testimonial to you and what you have helped us to become. This is a reality far beyond our wildest conceptions when we started down this road together.

I know you are looking forward to your retirement and time with your grandchildren (a fact I have trouble comprehending—you are so young and full of vitality). We wish you the very best as you proceed to the next phase of your life.

We will miss you but you will always be one of us.

On behalf of the entire Section,

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NYSBA International's First UNCITRAL Experience (June-July, 2011)

For the first time, NYSBA sent delegates to the United Nations Commission on International Trade Law (UNCITRAL) during its 44th Session, which took place in Vienna for two weeks from June 22 to July 8, 2011. NYSBA was recognized as an UNCITRAL non-governmental organization (NGO) Observer earlier in 2011. This status allows us to send delegates to various UNCITRAL sessions and directly participate in the development of international law. This event marks a historical milestone for NYSBA.

Concurrently, NYSBA International Section (NYSBA International) developed a relationship with the UNCITRAL Secretariat. As a result, we received UNCITRAL's nonfinancial sponsorship for our Seasonal Meeting in Panama in September 2011 and invited an UNCITRAL official to participate in our dialogue at that occasion.

NYSBA International set a goal to actively monitor the development of international law through the United Nations (U.N.) and other international bodies (see Third Mission of NYSBA International). The following articles feature the activities of members of the International Section to acquire NGO Observer status, our delegates' activities and experience during the 44th Session and selected agenda items discussed at UNCITRAL that may be of interest to NYSBA International practitioners.

1. Background—The Road to Vienna

UNCITRAL was created by the United Nations (U.N.) General Assembly under a 1966 U.N. General Assembly Resolution to set up an organ to promote the harmonization of commercial law across the world. UNCITRAL's role includes both the development of international legal norms and standards ("legislation" of UNCITRAL texts) as well as the active promotion of UNCITRAL texts to facilitate cross-boarder economic activity through technical assistance to nations and other means. UNCITRAL texts include various international conventions (treaties), model laws, legislative guidance, and UNCITRAL Arbitration Rules. The U.N. Convention on Contracts for the International Sale of Goods (CISG) (1980) stands as the most successful achievement of UNCITRAL. Promotion of the 1958 U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which precedes UNCITRAL, is also an integral part of UNCITRAL's Portfolio. The UNCITRAL Secretariat, which is located in Vienna, plays an important supporting role for UNCITRAL.

UNCITRAL consists of 60 member nations of the U.N. that are elected for a term of six years. The "Commission" of UNCITRAL makes the final decision regarding the adoption of UNCITRAL texts ("legislative" function) and other important organizational decisions. The United States is currently a member of UNCITRAL, and has never failed to be elected as a member since the inception of UNCITRAL over four decades ago. Most of the recent UNCITRAL texts fairly reflect the U.S. negotiating position, and we may describe UNCITRAL as one of the most U.S.-friendly and pro-business U.N. organs.

UNCITRAL develops the drafts of UNCITRAL texts through several Working Groups, each of which is made up of the delegates of the same 60 member nations, prior to the Commission adopting such texts. However, UNCITRAL allows non-member observer states and other approved observer organizations to participate in the discussions of both the Commission and Working Group sessions. Due to the technical nature of the subject matters that UNCITRAL handles, it has historically allowed various bar associations and international business associations to participate in the discussions as NGO Observers. By tradition, UNCITRAL makes a decision based on consensus, the existence of which is determined by the Chairman's judgment. This tradition allows those delegates that possess a high level of technical knowledge and diplomatic skills to play an important role in helping to coalesce a consensus and compromise through informal discussions between the formal sessions (consultative breaks) and throughout the UNCITRAL process.

NYSBA International's conscious effort to have NYSBA recognized as an NGO Observer before the U.N. and other international bodies started a long time ago, but it gained momentum when the NYSBA International Executive Committee adopted the Three Long-term Missions in September 2009. The Third Mission calls for monitoring of development of international law through the U.N. system. The same resolution also created a new Committee on International Contract and Commercial Law, which was expected to play a significant role in promoting these long-term missions.

Throughout 2010, within NYSBA International the Austria Chapter and the Committee on International Contract and Commercial Law, in coordination with the Executive Committee, studied the workings of UNCITRAL, built a relationship with the UNCITRAL Secretariat, and developed a strategy to obtain UNCITRAL NGO Observer status. Early in 2011, based on NYSBA International's and NYSBA's Executive Committee resolutions, the NYSBA President sent a letter to UNCITRAL.

In April 2011, NYSBA received a letter from UNCITRAL confirming that NYSBA would be invited to future Commission and Working Group sessions as an NGO Ob-

server. Based on this news, NYSBA International started preparations for the upcoming 44th UNCITRAL Session, which was handled by a number of volunteers that became an UNCITRAL Team, under close coordination with the Executive Committee. Early in June, based on the International Section's recommendation, the NYSBA Executive Director sent a letter to UNCITRAL to nominate the five delegates (maximum numbers permitted) to UNCITRAL 44th Session. NYSBA delegates included a former Secretary of UNCITRAL, a retired professor, and chairs and members of the Austria, Czech and Poland Chapters of NYSBA International.

Shortly thereafter, NYSBA International Executive Committee made a formal decision to oppose a proposal that was to be considered at the upcoming 44th UNCITRAL Session to discontinue future UNCITRAL Commission and Working Group sessions in New York City (the UNCITRAL meeting location proposal). For the whole month starting from early June to early July, our UNCITRAL team in New York and Vienna worked closely to handle all the issues that our organization had never before addressed, and hundreds of e-mails flew across the Atlantic every week to coordinate all details, both big and small. As discussed in greater detail below, based on these efforts, we launched and participated in a successful campaign to block the proposal. Our outreach effort during the four-week campaign to block the proposal targeted numerous stakeholders and decision-makers ranging from New York's elected public officials, the City of New York legal department, the U.S. State Department, a major global newspaper, and various UNCITRAL member states' delegates on the floor. The historical and institutional knowledge of UNCITRAL that was possessed by one of our delegates, a former UNCITRAL Secretary, provided tremendous benefits when navigating in this uncharted world.

Our NYSBA delegates also played a role in promoting NYSBA among other UNCITRAL participants during the two-week session, including dissemination of information about our Panama Seasonal Meeting for which we had secured UNCITRAL's endorsement. One of the other NGO delegates (from Moot Alumni Association (MAA)) eventually joined NYSBA and herein has kindly shared her first UNCITRAL experience (see her article below). Our five delegates left us precious reports, which will assist us in planning ahead for the future development of UNCITRAL's agenda in the years to come. The following articles include a summary of daily reports from our delegates, which serve to illustrate how UNCITRAL develops its texts and agenda.

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2. Relevance of the UNCITRAL Agenda to NYSBA Practitioners

UNCITRAL's 44th Session lasted only two weeks rather than three as in the previous year. This was because there was only one major "legislative" action this year (2011)—the adoption of a Model Law on Public Procurement. This agenda had been developed over many years under Working Group I, and the first week of the 44th Session was almost exclusively spent on the adoption of this model law. The second week (July 4 through 8) dealt with miscellaneous issues, including a decision on UNCITRAL's future meeting locations and agenda, as well as progress reports of the projects of various Working Groups and other routine matters such as promotion of UNCITRAL texts and rule of law.

Following is a highlight of the substantive issues that were discussed at the 44th Session that will affect NYSBA practitioners in the future. This summary is organized by reference to Working Groups [WG].

WG I: A consequence of the adoption of the new Model Law on Public Procurement at the 44th Session will be an improvement of the foreign trade environment across the board. This environment will benefit various U.S. businesses, not just the simple sellers of goods but also the sellers of services such as civil engineering who build infrastructure in developing countries. The U.S. State Department (Office for Private International Law) held a public meeting in 2010 to hear stakeholders' views in preparation for the WG session. The texts ultimately adopted generally follow the U.S. interest.

WG II: The current topic is investment-treaty / state-arbitration-related issues, specifically transparency. This outcome will impact those who work in investment in third-world countries that have bilateral investment treaties with the U.S. and other developed countries, as this may potentially limit the confidentiality of information in the arbitral process in favor of the public interest. WG II completed a major task in 2010 (43rd Session) by adopting revised UNCITRAL Arbitration Rules, and the current agenda can be characterized as a relatively minor issue in between two major projects. It was explained that WG II is likely to go back to its core issue, which is to further improve the efficiency of enforcement of foreign arbitral awards under the New York Convention. Practitioners should continue to pay attention to case law and domestic legislation of the U.S. and other countries affecting the efficacy of the New York Convention along with UNCITRAL's effort to improve the system.

WG IV: At the 44th Session, UNCITRAL decided to reactivate this working group on electronic commerce, and asked it to handle the electronic transferable record issue. The Commission chose this subject over other potential topics that were on the table (as discussed at the

43rd Session and the colloquium in February 2011). This topic is related to UNCITRAL's past work such as the Rotterdam Rule, and will affect practitioners who work in the international trade area (distributions and shipment) and as well as cross-border financial issues.

WG VI: This working group has historically handled security interest issues. Currently, it is dealing with the relatively light topic of a security interest registration system after the adoption of major texts in the past several years, UNCITRAL Legislative Guide on Secured Transactions including the Intellectual Property Supplement (2007 and 2010). The long-term focus of WG VI is to improve the cross-border legal environment for secured lending and finance and with that the legal and business environment for international sales of goods, which should affect many practitioners who work in international trade. See the article below for more detail.

Albert Bloomsbury

3. Working Group VI and Related Issues—the U.N. Receivables Convention and Coordination of the EU and UNCITRAL Approaches

Working Group VI of UNCITRAL handles issues related to security interests. Its aim is to remove legal obstacles to secured credit and improve the availability and cost of credit. In this perspective, it is addressing issues such as the security rights in receivables, negotiable instruments, default and enforcement.

Lately, it began its work on the preparation of a text on the registration of notices with respect to security rights in movable assets, pursuant to a decision taken at its forty-third session, in 2010. The decision was based on its understanding that such a text would be a useful supplement to UNCITRAL's work on secured transactions (including assignments of receivables). UNCITRAL also agreed that such a text would draw on the UNCITRAL Legislative Guide on Secured Transactions ("the Guide") issued in 2007, recognizing that secured transactions law reform could not be effectively implemented without the establishment of an efficient publicly accessible security rights registry. Working Group VI is, as of now, expected to submit the corresponding text for final approval and adoption in 2012 (*see* A /CN.9/WG.VI/WP.47). These latest developments on the agenda of Working Group VI should lead us to examine the steps undertaken regarding the regulation of assignments of receivables as of this day and especially the coordination between UNCITRAL and the European Union in this respect.

a. Current global framework for the assignments of receivables

With a view to promoting the movement of goods and services across national borders by facilitating increased access to lower-cost credit, the United Nations General Assembly adopted the United Nations Convention on the Assignment of Receivables in International Trade on December, 12, 2001 (the "Convention"). As of today, it has not yet entered into force but has been signed by Luxemburg, Madagascar and the United States and it has been acceded to by Liberia.

This article will merely address one specific issue, i.e., the conflicts rule relating to the possibility of pleading an assignment of a claim against a third party, by which is meant persons other than the assignor, the assignee and the debtor.

Article 22 of the Convention provides, as the relevant conflicts rule, that "the law of the State in which the assignor is located, governs the priority of the right of an assignee in the assigned receivable over the right of a competing claimant."

The legal framework in the European Union was meant to be the Rome Convention on the law applicable to contractual obligations of June 19, 1980, later amended by Regulation (EC) No. 593/2008 of 17 June 2008. However, after lengthy debates, the regulation did not address the issue of the law applicable to the third-party effects of assignments of receivables. The European Commission launched a consultation on this specific topic in 2010.

b. Practical stakes

The importance of receivables as a potential source of capital and liquidity in the economy of a country (especially for small and middle-sized-enterprises) has received widespread recognition. With respect to their assignment, a trend is developing whereby the assignment is subjected to the same provisions whether it involves an outright transfer, an outright transfer for security purposes or a security transfer.

The economic advantages of a system favorable to the assignment of receivables are known given that it:

(i) enables the transfer of debts from the initial creditor into the hands of experts (such as factors) knowing either how to find a buyer willing to purchase them on good conditions or how to recover the debts, which is essential to bringing value to depreciated assets;

(ii) is an interesting way to find funding and restore virtuous economic circulation during a crisis where lines of credit are scarce;

(iii) is an important instrument for the financing of export transactions.

Finally, although recent economic turmoil may have affected securitisation, the widespread presence of this mechanism, which is fundamentally a transfer of receivables, cannot be denied.

c. The case for complete coordination between the UNCITRAL rule and the EU's rule

The initial position retained by the EU was to match its conflicts rule with the one resulting from the Convention: hence, the law of the assignor's habitual location should govern. But later on, the draft wording changed into the "assignor's habitual residence," and ultimately the issue was not addressed in the final text of the 2008 Regulation.

However, the case for matching rules is that it would enable a homogeneous interpretation by the different courts and provide certainty for cases involving bulk assignments and assignments of future receivables (the same law would govern).

Furthermore, other creditors of the assignor would likely orientate themselves to this rule, in particular, where it subjects assignments to registration requirements.

In conclusion, at this stage, the European Commission has not issued its final position. The UNCITRAL Secretariat is continuing its dialogue with the European Commission with a view to avoiding conflicts between the Convention and any future instrument on the matter (*see* A / CN.9 / 707).

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4. Blocking a Proposal to Discontinue New York UNCITRAL Meetings

UNCITRAL 44th Session Agenda Item 21 included a proposal to change the patterns of future meeting locations of the UNCITRAL Commission and Working Group sessions. Historically those UNCITRAL sessions have been held alternately between New York and Vienna. This historical precedent was based on an international consensus and was included in the original U.N. General Assembly Resolution. To change this practice, and abolish meetings in New York, formal approval of both the U.N. General Assembly and UNCITRAL (the Commission) is required. However, in order to deal with the U.N. budgetary constraints and reduce the U.N. Secretariat's overall costs, the U.N. Secretariat decided to cut the travel costs for the UNCITRAL Secretariat to send its personnel to support the UNCITRAL meetings in New York (a small amount of approximately $140,000 a year within the multibillion annual U.N. budget) without first asking UNCITRAL to agree to change the historical alternate-city meeting arrangement. The proposal to change the meeting locations that suddenly appeared in the 44th Session Agenda surprised many.

NYSBA International decided to take a formal position and object to this proposal, not only because it negatively affects NYSBA's ability to actively participate in the UNCITRAL process, but also because we concluded that this would negatively affect the efficacy of, and influence of, UNCITRAL in the future development of global commercial law. There are two major reasons for this objection: (i) eliminating meetings in New York would significantly reduce the exposure of the stakeholders in the UNCITRAL process to the real-life business and legal concerns that a global commercial center like New York typically handles, and therefore weaken the connection between UNCITRAL and the real world; and (ii) this will hurt small countries which can only participate in New York sessions because they typically maintain a dedicated U.N. mission only in New York. In addition, the balance between Common Law and Civil Law was also cited as an additional reason to maintain the status quo (Vienna is a historical center of the Civil Law tradition, while New York is a major global hub of the Common Law tradition). If UNCITRAL only meets in Vienna, the future UNCITRAL law would lean toward the Civil Law tradition and that would alienate the U.S. and other Common Law countries.

To counter this proposal, NYSBA International worked closely with NYSBA Albany public relations representatives to engage in an active campaign to move both public officials and the media. We drafted two different versions of arguments to object to this proposal: one for New York elected public officials and one for the global audience ("op-ed article"). We used all available channels, and tried to take advantage of opportunities to have face-to-face informal discussions with UNCITRAL member state delegates on the floor, including the U.S. delegate, during the "consultative breaks" starting from Day 1 of the 44th Session until the last possible moment (the discussion of this agenda was on Day 8). During this time, we continuously gathered information as to which countries were likely to support our view and updated our strategy on a daily basis.

Based on the report from our NYSBA delegates in Vienna, in the middle of the first week, many member state delegates, especially those from Europe, were indifferent to this proposal. We got a suggestion from one of them that NYSBA should speak its own views proactively on the floor. After an internal debate, we decided to deliver a speech on the floor on Wednesday, July 6 (Day 8) when the agenda item was set to be discussed.

At the end of the first week, we saw some light: we found out that the countries from Latin America were leaning against the proposal to discontinue New York

meetings. Encouraged, our delegates developed a dialogue with representatives of the Latin American countries to exchange views and strategies. However, the overall picture was not rosy and there were many suspensions. Many countries indicated to us that they were not interested in this topic and some Europeans didn't hide their preference to fix the meetings permanently in Vienna. The biggest question was whether or not the U.S. State Department would affirmatively oppose the proposal. We never received any indication from New York-based elected officials that they would support our campaign, and the newspaper never published our "op-ed" article; thus, we had to fight our campaign without significant outside help.

We tried to gather intelligence about the view of the Chairman of UNCITRAL because of the Chairman's significant role in the UNCITRAL process to forge a consensus among various opinions, and we even planned a global public diplomatic campaign through our own International Chapters within the UNCITRAL member nations. Those, however, never materialized for a number of reasons, especially the lack of time and experience launching such an international campaign.

As a member of the UNCITRAL Team (approximately 10 people), I was constantly monitoring our delegates' reports from Vienna and handled the situation throughout the session from Day 1 (June 27) until all was settled, in the whirlpool of communications in a war-room like atmosphere. It was absolutely necessary for us to constantly monitor the ever-changing situation, update the strategy accordingly and coordinate among various players in this global campaign in both Vienna and New York.

In the end, the matter was settled in our favor without our delegate ever opening his mouth on the floor. On July 6, 2011, the UNCITRAL Chairman exercised a skilled stewardship to forge a consensus to reject the proposal to change the historical meeting locations. Based on what was discussed on the floor, it appeared that our campaign in Vienna and New York actually paid off despite the fact that our prepared speech was never formally delivered. The specific reasons for objections that we summarized in our "op-ed" article appeared to reinforce the views of many passive opponents of the proposal. They also seemed to influence the undecided delegates and probably silenced the Europeans' preference for the Vienna-only solution. This subtle change in the atmosphere might have helped the Chairman find a consensus to maintain the status quo. At the end of July 6, we received a letter from the City of New York, thanking us for informing them of the proposal and its potential to harm the future of New York's prestige. In this letter we learned that the City had been acting behind the scenes to let its objection be known to the U.S. State Department while we were engaging in our campaign in Vienna.

Despite our initial success at the UNCITRAL Session in Vienna, the battle was not over. The New York meetings remain unfunded even though UNCITRAL rejected the proposal to discontinue New York meetings. It may not be easy to change this situation under the Byzantine U.N. budgetary rule. Under the U.N. organizational structure, legal matters, including UNCITRAL's work, are under the jurisdiction of the Sixth Committee of the General Assembly, but the budgetary matters of the U.N. Secretariat are under the Fifth Committee. The next battle is (at the time this article is being written) at the U.N. General Assembly and its two Committees in the fall of 2011. We have learned that a 16-member independent U.N. Advisory Committee on Administrative and Budgetary Question (ACABQ) will play an important role in this determination and we are now considering how to influence the discussion at ACABQ to achieve our goal.

Albert Bloomsbury

5. Disposition of Microfinance Agenda—Further Preliminary Study to Narrow the Scope of Future Work

At UNCITRAL's 44th Session, the Commission included on its agenda a discussion exploring whether it should support the microfinance industry.

The UNCITRAL microfinance tale began in earnest less than three years ago. In December 2008, the U.N. General Assembly outlined and endorsed the role of microfinance in the eradication of poverty, recognized its challenges, and noted means to address them. The Assembly committed to devote a plenary meeting to the topic and requested its Secretary-General report as to how the Assembly could help the industry meet its challenges. Partly as a response to the Assembly's challenge, UNCITRAL also recognized its possible place in future work on microfinance.

Mindful of its charge to promote the progressive harmonization and unification of international trade law, as well as its role in advancing the United Nations Millennium Development Goals, UNCITRAL commissioned a particularized evaluation of microfinance legal and regulatory issues. The Commission recognized that such an assessment could help law and policy makers establish a legal framework for microfinance to prosper.

In April 2010, the UNCITRAL Secretariat released a thorough and thoughtful report establishing definitions for the microfinance discussion, describing trends, identifying legal and regulatory issues, and making recommendations regarding how UNCITRAL may contribute to the industry. The report noted that microfinance could be an important tool for alleviating poverty and achieving the Millennium Development Goals and that an appropriate regulatory environment would contribute to the development of the trade.

The Secretariat delivered the study findings at UNCITRAL's 43rd Session in the summer of 2010. UNCITRAL (Commission) responded by calling for a colloquium to explore the issues surrounding microfinance which fall within UNCITRAL's mandate. Held in January 2011, the colloquium was host to top experts in the field from around the world, including an outstanding presentation by U.S. State Department counsel Mike Dennis.

The resulting Secretariat Report described microfinance as a market-based approach to poverty "focused on developing entrepreneurship and expanding self-employment," characterized by close client relations, simplified procedures, and specialized credit methodology. It noted microfinance is entering a more dynamic and sophisticated stage and that legal, regulatory and market gaps prevent it from functioning at an optimum, calling for the establishment of shared industry practices and principles. The Report outlined the work of international and regional agencies in the field, addressed related legal and regulatory issues, and set forth fourteen areas for UNCITRAL consideration. The Secretariat noted that the issues of cross-border funding; secured transactions; use of e-money; and dispute resolution mechanisms particularly could lend themselves to legislative texts.

As the 44th Session approached, the next step for microfinance was unclear. The dominant view of member nations had been that the Commission should embrace the subject of microfinance. However, some participants consistently raised concerns regarding (i) whether microfinance is within the scope of UNCITRAL's mandate (including whether the topic is domestic rather than international in nature) and (ii) how UNCITRAL could participate without duplicating efforts of other agencies and organizations. As UNCITRAL operates on a consensus of the states rather than a pure voting system, these concerns would have to be vetted.

A typical straight path for approved UNCITRAL topics is assignment to a Working Group. Nevertheless, possible other outcomes included postponement of a topic, postponement of work, abandonment of a topic, or the calling for further reports or colloquia. There also remained the practical matter of what Working Group, if any, would be available to study microfinance. Most Groups had their plates full and chores yet to do.

Microfinance did have its discussion. As anticipated, controversy arose as to the propriety and breadth of UNCITRAL's involvement. While acknowledging it should not focus on the subject matter of other groups, such as matters of banking and public funding, UNCITRAL noted that it stood alone in its inter-agency work in improving the legal and regulatory aspects of microfinance. Thus, it determined to further study four particular topics within its purview:

1. over-collateralization and use of collateral with no economic value;
2. electronic money, including its status as savings; whether "issuers" of e-money are engaged in banking and hence what type of regulation governs them; and the coverage of such funds by deposit insurance schemes;
3. provision for fair, rapid, transparent, and inexpensive dispute resolution in regards to microfinance transactions; and
4. facilitating the use of, and ensuring transparency in, secured lending, in particular to micro- and small-medium enterprises.

As part of its effort, the Secretariat will be querying the States by questionnaire regarding their experiences, including obstacles, in establishing a microfinance legal and regulatory framework in their respective countries. The Commission also invited the attention of the Secretariat to its existing work on secured finance, dispute resolution, and electronic commerce as it may relate to microfinance. For now, UNCITRAL left to other organizations certain matters related to the microfinance regulatory environment, interest rates, over-indebtedness, credit bureaus, collection practices, foreign exchange risk, remittances, mobile device transactions, branchless banking, and financial literacy.

The Commission instructed its Secretariat to narrow the scope of work accordingly for future discussion.

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6. Activities of NYSBA Delegates in Vienna

Following is a summary of activities of our five NYSBA Delegates in Vienna based on their reports, which highlights what they did while attending at the 44th Session as well as how UNCITRAL makes a decision. We allocated the responsibility among the five so that we could cover as many days as possible.

Day 1 (Monday, June 27)

Our delegates arrived at the Vienna International Center U.N. Complex on time, cleared security and obtained the U.N. pass for the two-week period. Our delegates took designated seats in a new conference room, seated in the back row between the Moot Alumni Association (MAA) and Panama (an observer state). All the observers, both states and others, were arranged alphabetically at the end of the room behind the member nations. The session opened with the first agenda for the meeting time and the election of a Commission Vice-Chair to handle the procurement agenda.

The agenda for a substantial portion of the first week was the adoption of a Model Law on Public Procurement. At the beginning, the Commission appointed the Austrian delegate to head the drafting committee, which would take care of further amendments during the week to the texts of the drafted Model Law that had been prepared by Working Group I. Appointment of Austria to this position was due to its past active contribution to this project. One of the examples of this day's discussion was the usage of certain words, for instance the dispute over "equitable" vs. "equal," in the final text of the preamble. During the recess (consultative break), our delegates spoke to member state delegates on the future UNCITRAL meeting city issue, including the U.S. government delegate. Our delegates found that the interest among the other delegates in this issue was low, and we suspected that it might be because the delegates in the first and second weeks would be different individuals in most cases. However, we did learn that a delegate of an Asian country would support our view and that was partly because of his own New York connection, i.e., his American legal education and a New York law license. Our delegates had a chance to talk to the Panamanian delegate. As a result, we learned that our NYSBA International's annual meeting in Panama in September 2011 was not well publicized in Panama and this official was not aware of our meeting, so we gave out our materials for the Panama meeting.

Day 3 (Wednesday, June 29)

Our delegates reported that the discussions on the Procurement Model Law were progressing toward the successful conclusion of the project of the past seven years. Austria had led a thorough review of the changes proffered and made during the past two days. Member states discussed whether or not to define the subject matter of procurement, and the Secretariat was given the task of drafting some potential descriptions to help the member states to continue to discuss. The drafting committee was asked to clean up some confusing terminology and other clerical points in the text. During the recess, our delegate spoke with a number of people, including one from the UNCITRAL Secretariat, to gather intelligence, and covered a number of issues including the UNCITRAL meeting city issue, and the future of microfinance and e-commerce agenda.

Day 4 (Thursday, June 30)

Our delegates reported that the discussions continued on Procurement Model Law and an updated report of the drafting committee was presented by Austria. However, there was a setback as an old issue regarding the language to be used in procurement announcements was revived. The Commission also discussed the Model Law's Guide to Enactment as a possible next task of Working Group I after the adoption of the Model Law. A delegate from a country spoke about the importance of future discussions on procurement law from the developing country's perspective. The day closed with a recognition of the 51st anniversary of the independence of the Republic of Congo.

Day 5 (Friday, July 1)

At the beginning of the day, the Commission finally adopted the Procurement Model Law. The chairman of the first week sessions for the procurement agenda skillfully moved the discussions to a closure and declared that there was a consensus as he heard no objections (At the close of Day 4, our delegates wondered if a persistent resistance on a certain issue might derail the adoption of the text). The Commission then discussed how to prepare the Guide to Enactment that would provide guidance to nations on how to enact the Model Law into domestic legislation, and there was a dispute as to whether to convene a Working Group session before the end of 2011 or to follow a simplified process (through expert group conference) in view of the need for UNCITRAL to cut costs. Ultimately, it was determined that the Secretariat would prepare a draft text for a Working Group meeting in late fall or spring. Finally, there were some technical discussions regarding the text of the decision to formally adopt the text of the Model Law.

The Commission then elected a Mexican delegate as a Vice-Chair of UNCITRAL to take over the discussions on cross-border insolvency issues, the subject of Working Group V. The Commission adopted "The UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective," a text designed to provide information and guidance for judges on cross-border related insolvency issues. The next task for Working Group V was determined to be bankruptcy of physical persons.

Our delegate sent us a copy of the participant list, which provided us with a very useful strategic tool. We noticed that the other regular U.S.-based bar associations did not attend the 44th Session. That meant that NYSBA was the only U.S. based NGO that was seriously campaigning to challenge the proposal to eliminate New York meetings. Based on what happened on July 6, we are now able to tell other American NGOs that we singlehandedly fought in Vienna to save New York's prestige, but at the end of Day 5, the prospect was not so rosy and we wished others had been present.

Day 6 (Monday, July 4)

The first topic was the progress report of Working Groups II (arbitration), III (online dispute resolutions) and VI (security interest). Then the Commission decided to reactivate Working Group IV (electronic commerce) and assigned to it the task of working on the electronic transferable record issue. Our delegates had informal discussions regarding the UNCITRAL meeting city issue, and we found a clear general trend that North and South American continents would support to maintain the status quo of having meetings both in New York and Vienna,

while Europeans would not. Our delegate had a talk with a Latin American country delegate who was going to have a regional-based informal talk to develop an idea to counter the budget-cut proposal intended to eliminate New York meetings.

Day 7 (Tuesday, July 5)

The day started with the discussion on microfinance (see a previous article). As discussed therein, this discussion was mainly about the provisional issue of the scope of the future UNCITRAL work on this subject, not the substance, and the available options were limited due to the resource limitation that prevented the formation of a new Working Group without sacrificing the existing one (it was understood that UNCITRAL cannot support more than six working groups under the current arrangement of each working group holding two one-week meetings per year). The consensus was that the agenda item required further study before forming a working group.

This was followed by the discussions related to promotion of UNCITRAL texts, including UNCITRAL's technical assistance to developing countries, establishment of regional centers (especially the proposal by South Korea), monitoring of implementation of the 1958 New York Convention, and the CLOUT system, the database that accumulates the case law of the world for the implementation of UNCITRAL texts (CISG and others). Our delegate approached the UNCITRAL Chairman to discuss CLOUT. Also, during the recess, the U.S. government delegate approached our delegate on the UNCITRAL meeting city issue and thanked us for our effort.

Day 8 (Wednesday, July 6)

It was the day of judgment: the day when the Commission discussed the future UNCITRAL meeting city issue. Our delegate reported that it started with the Secretariat's presentation going over the pros and cons of the alternatives and the historical background of the current two-city arrangement (the two-city arrangement was itself an international compromise because initially a proposal was to have meetings in each of the five continents). Then the Chair stated his view that there is a benefit for UNCITRAL to maintain its visibility in two different cities, New York and Vienna, and asked if any country had objections. No country raised an objection. Instead, a delegate from a Latin American country raised a hand to state his view to support the status quo, noting that smaller states would be marginalized if no meeting was held in New York. After that, the Chair declared that consensus was found and the status quo should be maintained. As a result, the discussion later on in the day on this issue was limited to alternative means to save costs.

Our delegate sent us the first report of this exciting development midday Vienna time (morning in New York), without waiting for the end of the day's session in Vienna, telling us that he didn't even have to deliver a prepared speech to get this result. We, however, remained cautiously optimistic and continued to monitor the budgetary discussions because the lack of budget could still force UNCITRAL to abandon New York meetings.

Aftermath

The UNCITRAL Commission did not have a formal meeting on July 7, and July 8 was reserved for the formality to adopt resolutions. So, our delegates' mission was complete at the end of Day 8 (July 6).

Despite our anxiety only a few days earlier, the end result was that our view was shared and supported by all the countries of the North and South Americas and some Asian countries with common law traditions. We don't claim the entire credit for this victory or success, but we can fairly state that NYSBA played an active and important role in this multinational campaign. It is probable that our opinion actually helped so many different countries of broad geographic span to come together to defeat the proposal from the U.N. Secretariat.

After the completion of the 44th Session, one of our delegates spoke with the UNCITRAL Secretariat to confirm that the real battle would continue in the upcoming fall at the ACABQ and U.N. General Assembly Fifth Committee levels. We wrote a thank you letter to the City of New York, which worked hard to move the U.S. State Department behind the scenes, and in this letter we proposed to work together in the upcoming season. At the Executive Committee on July 18, the Section Chair reported NYSBA's successful UNCITRAL participation and the hard work of the UNCITRAL Team that made it possible.

At the beginning of August, UNCITRAL's web site was posting a disclaimer for the uncertainty of the future meeting locations due to budgetary reasons. During the quiet summer holiday season when the U.N. campuses in New York and Vienna are presumably very quiet, we are studying the U.N. budgetary process and public diplomacy to prepare for the next round.

Albert Bloomsbury
Julee Milham

7. Personal Observations of a Young Delegate at the UNCITRAL 44th Session

(Editorial note: The following is a report of a NYSBA student member from Sydney, Australia who attended the 44th UNCITRAL Session as a representative of Moot Alumni Association (MAA) and who offers a young professional's unique perspectives.)

It is pretty special to be able to walk into the United Nations offices in Vienna and to see all of the flags of the nations of the world fluttering around the waterfall which

is representative and reflective of the earth in which we live. The summer weather was also stunning in Vienna and the bustle of students, academics and government officials can make a first encounter quite daunting.

Sixty UNCITRAL member countries and additional observer states in different stages of development and economic cycles were represented at the 44th Session of UNCITRAL; some had recently or were still involved in conflict and some were looking to enhance trade and commerce within their region and improve international relationships.

I applied and was subsequently invited to be an observer at the UNCITRAL 44th session by the Moot Alumni Association (MAA). This is a voluntary coalition of law students who have shared the experience of the Vienna or Hong Kong Vis Moot, an international arbitration competition supported annually by a growing league of law students from all over the world who are often migrating to their first taste of international advocacy.

Having only been in the 18th annual Vis Moot earlier this year (2011) in April, I joined the Moot Alumni Association unaware that it was going to open a door to another wonderful and memorable experience in this 44th UNCITRAL session.

On Friday, July 1, 2011, I had the opportunity to observe the final deliberations and adoption of the revised Model Law on Public Procurement which concluded a seven-year mandate of the working group which had been working on the text.

When you hear the countries on the floor raise their drafting and substantive issues for the texts, you realise how universal and important the rule of law is and how sometimes it is difficult to get everyone to agree. This may be because words can be expressed differently in different languages or because there are sometimes cultural borders that cannot be crossed or maybe just because they can't decide on the principle or the content of the matter. Certain words in different languages can sometimes have a completely different meaning and there were a number of delegates who worked exceptionally hard to draw to an adoptable standard the texts that were finalized at this session.

Another new text, "The UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective," was also adopted in the same session and was lauded as being a great academic material already finding strong support throughout the international legal community.

UNCITRAL has so many great causes it is working on at the moment. I was able to observe and understand how important time and resource constraints are and how difficult it can be to prioritize their existing and future mandates.

The issue of microfinance was addressed at this session with UNCITRAL, noting its primary concerns as being the promotion of financial literacy, protection from unscrupulous financial transactions and the facilitation, use and support of secured lending. Many countries corroborated future work for UNCITRAL on microfinance, particularly for a legal framework to regulate this area. One country submitted that microfinance institutions play a very important role in their country's development and account for 35% of their non-formal banking. The Commission approved a work plan to be completed by UNCITRAL member states and analysed prior to the 45th sitting. This will assess the scope and support for a new mandate in this area.

A further session dealt with treaty-based investor-State arbitration and the working group's dealings with transparency between investors and states, elaborating on the rules of notification, how information is brought to the general public and how third-party interests should be dealt with in proceedings.

It was also tabled that the Guide to Enactment on the New York Convention should be updated with an expected finalization date of 2013/14 after the mandate for this was given at the 2008 session.

One representative asked if UNCITRAL would consider adopting other methods of alternative dispute resolution for foreign disputes such as mediation and conciliation. This was supported in principle by the floor, though due to budgetary concerns this was held to be better addressed at a later date. One country stressed the importance of ADR and advised that mediation is an initial mandatory stage to their financial courts. The delegate noted that ADR often saved relationships without litigation and provided for remedies that could be agreed to between the parties and implemented immediately with no issue of enforcement.

Another area of development was the work on Online Dispute Resolution, which had a mixed response from the floor. This was because of the current exponential growth in the area and the recognised need for a uniform resolution on whether the new law should be dealing with B2B, B2C and C2C transactions. It was identified that B2C disputes were the least straightforward area to streamline and regulate and these are currently the main focus of the working group. Though UNCITRAL would like to include C2C transactions in the task of the current working group, pragmatically at this time there were no further resources to be extending the mandate to that area.

It was also advised that the first draft of the text on the registration of security rights in movable assets had been completed by the UNCITRAL Working Group VI, taking the form of a guide called "The Security Rights Registry Guide." The focus of this guide is on Model Regulations and Regulatory Regulations and is expected

to be completed in 2013. UNCITRAL and the EU Commission are seeking a more harmonious co-operation in this area of law once the first draft of the UNCITRAL law is produced.

The International Chamber of Commerce (ICC) presented updated rules on The Uniform Rules of the International Chamber of Commerce regarding Demand Guarantees. These are rules used internationally by banks and industry sectors and they codify the international practice on payment and presentation of international guarantees. UNCITRAL adopted the new text with the approval of the floor.

The Secretariat also advised that a colloquium was held in February this year (2011) to identify areas of future work in electronic commerce. It was agreed that the revived Working Group IV would deal with the electronic transferable records issue in October 2011.

Other areas suggested included identity management, use of mobile phones in electronic commerce, letters of credit and electronic payments. The Secretariat advised that they had also been working with the World Customs Organisation on electronic transactions. The floor was very receptive to electronic commerce. One country was concerned that the proposal was very far ranging and ancillary to the work of UNCITRAL.

The Secretariat also proposed the adoption of regional hubs for UNCITRAL with interest having been expressed from Asia, Latin America and also Kenya on behalf of Africa. These hubs are to assist in the promotion of UNCITRAL's work and its texts in regional centres of the world. The Republic of Korea is to be the first regional centre and they were warmly acknowledged at the sitting.

There was also a panel discussion about the rule of law and how UNCITRAL is seen as a very reliable and dependable partner in countries experiencing or coming out of conflict. UNCITRAL promotes good governance and the rule of law at an international level and adherence to international trade instruments. It also seeks to strengthen arbitration and conciliation at an international level and promote the laws and practices of UNCITRAL texts with member states. The rule of law in international relations is integral to the work of the United Nations in facilitating enhanced trade and commerce, contract negotiation, arbitration and procurement.

The Moot competitions were raised with complete support and favour across the floor and from all countries. A new Insolvency Law moot was proposed by the University of Texas which met with approval and also a moot through the University of Versailles which would be held in the Spanish language. The 18th annual Vis Moot was held to be a great success and very highly supported and regarded by the United Nations.

The location of future UNCITRAL meetings was also discussed with strong support tabled from the floor to keep the meetings alternating annually between Vienna and New York. Hopefully I will get the opportunity to be selected for the New York session to again write and take notes for the MAA as an observer, advocate and supporter to this important international work.

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Of International Interest

Introduction: Panel Discussions at the 2011 Annual Meeting

At the 2011 Annual Meeting of the New York State Bar Association, our Section put forward a presentation entitled "You Have a Problem Where?—Selecting and Managing International Counsel." The program, co-chaired by Timo Karttunen and Gerald Ferguson, both of Baker & Hostetler's New York City Office, provided members with insight into some of the basic questions that practitioners face when selecting and managing counsel in foreign jurisdictions. It did so by engaging panels from various regions around the Globe and asking them very pertinent questions. The program was very interesting, engaging, and useful. Timo Karttunen has kindly collected some follow-up material from four of the panelists in order to provide you with a sampling of what was covered in the program. Below please find some pertinent information regarding legal practice in Sweden, Spain, the Czech Republic and Argentina. Please note that the first three articles are consistent as they were part of the same panel (the Europe Panel) whereas there is some discrepancy with the Argentinean article as this was part of the Americas Panel.

* * *

Europe Panel—Spain

1. What are attorneys' licensing requirements in your country?

Are there specific requirements for becoming a member of the Bar?

Can a foreign legal counsel provide legal services in your jurisdiction?

Spanish law graduates have access to the profession of *abogado* upon obtaining their university degree without need, to date at least (Spain being the only core EU country with this practice), for a bar exam or practical experience of any sort. Similarly, historically there has been no requirement for practical training or "articles" of any sort before being licensed to practice. However, this anomalous regime is set to change as this article goes to press: on November 1, 2011, a regulation implementing a law passed five years ago will enter into force. The effect being that—after a transition period—future law graduates will need a one-year post-graduate degree, practical training and a bar exam before becoming licensed to practice. EU nationals who are admitted in other EU jurisdictions have essentially full practice rights under EU freedom of services rules; they have easy access to Spanish bar admission as well. Strictly speaking, non-EU lawyers have no clear practice rights; there is no "foreign legal counsel" or similar regime in place. However (perhaps because of the very limited number of non-EU / non-*abogados* in the country), these formal limitations do not seem to have a significant practical effect on the professional activities of non-EU lawyers.

2. Are there different branches of legal profession (solicitors, barristers, if any)?

What is the role of a notary public?

Are areas of specialization recognized?

Spain has a single-tier legal system: the profession of *abogado* has no separate branches. As with other Latin legal systems, the Spanish legal system reserves a very significant role to public or quasi-public officials such as notaries and registrars. In fact, the Spanish system probably takes this role to its highest level in Europe. While a full discussion of the meaning of "public faith" and the role of the Spanish notary and registrar in providing it is impossible to present in a single paragraph, a useful shorthand is to say that they filter documents and transactions to ensure their efficacy; once such documents and transactions have successfully passed their filter, they are entitled to greater or lesser degrees of presumed and occasionally unimpeachable validity, on which third parties in good faith can rely and which can have certain important effects in all matters of legal and commercial intercourse, including, in particular, in judicial proceedings. At present, the Spanish legal profession does not regulate or recognize specializations nor does it have CLE or similar requirements.

3. How many law firms do you have and how big are they?

Is there a distinction between a general firm and a business firm?

All kinds of law firm structure, size and vision are present in Spain, from the traditional small / family firm (years ago ethical rules prohibited firms from having more than 20 partners and an informal "gentlemen's agreement" prohibited the larger firms from "poaching" partners from other similar firms) to full-service boutique / mid-sized / giant firms (the Garrigues firm, with more than 2,000 lawyers, is the largest in Europe) to local offices of international firms. Spain is a relatively heavily lawyered country, perhaps due to the easy admission requirements noted above. On the other hand, it is relatively under-represented by foreign and international firms, at least when compared to other European countries such as France or Italy.

4. Are there any resources that can be used when selecting a counsel (websites, ratings)?

What would you recommend as an alternative?

Remarkably little information about Spanish lawyers is generally available for users to consult other than the usual international sources (Martindale-Hubbell, Chambers and the like). Some online sites and a magazine called *Iberian Lawyer* do provide useful information, but the most common and most reliable source of useful information tends to be the recommendation of a colleague or friend with first-hand experience; i.e., word-of-mouth.

5. Are there significant differences in the rules of professional conduct, in your jurisdiction and those in New York? E.g. privilege, confidentiality and ethics?

Spanish lawyers are subject to ethical rules which will be generally familiar to a common law lawyer. Conflicts of interest tend to be less rigorously policed, perhaps as a result of concentrated legal and business communities where situations of conflicts are frequent. In a recent high-visibility takeover battle, it turned out that one of the participants had taken advice from virtually all of Madrid's top firms…precisely to "conflict" them from being involved on the other side of the takeover battle. Pure contingency fees are banned, although sizable "upsides" as a function of results are permitted.

6. Hypothetical 1: Rochester, Inc. Wants to Set Up a Manufacturing Site in Europe

Where should it go? What are the most important considerations?

In all likelihood, commercial—rather than legal—considerations should be determinative of this question. Statistics will show that Spain is generally considered a good choice for the setting-up of activities, with relatively low costs, large market, good transportation and skilled workers offsetting some of the costs and complications caused by rigid labor laws and a heavy bureaucracy.

7. What is the preferred legal form for Rochester, Inc. in your country?

Corporate law considerations?

Tax considerations?

Typically, a "sociedad limitada" (a kind of closed company) is the appropriate choice. The "sociedad anónima," a more traditional corporate entity, comparable to the English Public Limited Liability Company or the American Corporation, is more cumbersome, e.g., having substantially higher minimum capital requirements and less flexible management options.

8. Are there any specific employment law issues that you would like to point out?

Spanish labor law and practice will be unrecognizable to a common law lawyer, where labor relations are relatively unregulated. In Spain, in what may be considered, at least to some extent, a legacy of the Franco regime, labor relations are extremely regulated, resulting (in the view of many, including the OECD and the EU) in a rigid, inflexible system where excessive worker protection (including high indemnity payments in cases of firing and a special system of labor courts generally favorable to workers' claims) results in high employment and a two-tier system: those with "indefinite" (long-term) contracts and substantial protection, and those with "temporary" contracts, with little or no protection.

9. Hypothetical 2: Rochester, Inc., Paris Corp., and Berlin Ltd. Are Negotiating a Joint Venture Agreement for the Cross-Licensing, Manufacture, and Distribution of Widgets

How is a contract formed? Is there a requirement to always have "consideration"?

Are there formalities that must be observed?

The differences between common law "consideration" and civil law "cause" are not particularly relevant in the business or commercial context. Certain contracts require notarial intervention for their validity. However, as a general rule, the principle freedom of contract (autonomy of the parties) prevails.

10. What does it mean in practice to litigate in a court of your jurisdiction?

How long does a typical trial take?

How much does it cost?

Who pays attorney's fees?

Do you pay some court costs?

While the hoary distinction between the common law "adversarial" system and the civil law "inquisitorial" system may be oversimplified, it remains an essentially accurate depiction of the contrasting situations, and one which has many consequences. A frequently observed distinction gives rise to the familiar—although surely exaggerated and overly-stereotypical—characterization that, while the common law judge is blind and illiterate (preferring live, oral evidence), the Spanish or civil law judge is deaf and dumb (preferring written evidence and tending to discount oral testimony). "Trials" are not really known in Spain; court cases can take many years, with backed-up courts and many levels of appeal, including appeals of fact—essentially "second bites at the apple"—as well as at law. Modest court fees are payable, but are likely to be increased and extended precisely in order to discourage litigation. The plaintiff can be liable for the defendant's attorney's fees if it loses the case and can recover such fees from the defendant if it wins.

11. Do you have discovery?

U.S.-style discovery and deposition practice is entirely unknown in Spain. It is very hard for a Spanish lawyer to understand why damaging documents need to be preserved and ultimately disclosed to the other side in a litigation.

12. Do you recognize foreign judgments?

Spain is a party to a number of international conventions on the recognition and enforcement of foreign judgments, and is generally favorable to the enforcement of the same, so long as due process ("*orden público*") concerns are respected.

13. What alternatives do they have regarding the resolution of disputes and the choice of law?

Generally, there is considerable freedom of contract with respect to these matters.

14. Would it not be advisable to instead provide for international arbitration?

Generally, yes, since one or more parties may be uncomfortable with the national court system of the other party. In addition, arbitral awards are more readily enforced abroad (under the New York Convention) than court sentences. Arbitration is an increasingly selected option for the resolution of disputes, particularly in international contracts. Domestic arbitration remains somewhat stunted in practice although an increasingly receptive culture of arbitration is slowly modernizing practices and increasing the visibility and transparence of the institution. Mediation has yet to become a significant option, but this too should change over time, as frustration with both court and arbitration proceedings grows, and Spain implements the EU mediation directive.

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* * *

Europe Panel—Czech Republic

1. What are attorneys' licensing requirements in your country?

Are there specific requirements for becoming a member of the Bar?

Can a foreign legal counsel provide legal services in your jurisdiction?

In the Czech Republic, the provision of fully fledged legal services to third parties may only be conducted by an Attorney-at-law admitted to the Czech Bar Association or a European Attorney-at-law; a lawyer admitted to another bar in an EU Member State, but recognized and registered by the Czech Bar Association. It follows that a foreign lawyer, unless admitted to the bar in an EU Member State, cannot provide legal services in the Czech Republic. In order to be admitted to the Czech Bar Association, the Legal Profession Act (Act No. 85/1996 Coll.) prescribes that the applicant, inter alia, must (i) not be employed by any firm, unless it is a law firm; (ii) hold a university law degree in a Master's program obtained in the Czech Republic or its equivalent from a foreign university, (iii) have practiced as a legal trainee for a period of at least 3 years, (iv) have no record of criminal convictions, (v) pass a Bar exam and make an oath to the President of the Bar.

2. Are there different branches of legal profession (solicitors, barristers, if any)?

What is the role of a notary public?

Are areas of specialization recognized?

Czech law does not recognize different branches of the legal profession. However, apart from the attorneys-at-law as described above, legal services in the Czech Republic may be rendered, to a limited extent, by public notaries, licensed executors, patent attorneys or tax advisors. For example, public notaries may provide legal advice on certain real estate matters. As concerns the specializations, each attorney-at-law must in theory be able to cover any area of law. In practice, however, attorneys-at-law, usually those practicing in law firms, focus on certain areas and thus create specializations. Sole practitioners, however, try to keep their practice as wide as possible.

3. How many law firms do you have and how big are they?

Is there a distinction between a general firm and a business firm?

Currently, there are more than 12,420 attorneys registered in the Attorney Register maintained by the Czech

Bar Association. According to our information, there were more than seven law firms with more than 40 attorneys and 12 law firms with 20-40 attorneys in 2009; these figures will most likely apply in 2011 as well. An updated list of law firms is not publicly available. In general, law firms provide services in all areas of law; this is without prejudice that some law firms specialize in a particular area of law, including focusing themselves on business matters only. This is usually made sufficiently clear on each law firm's website, even though there is no statutory requirement to do so.

4. Are there any resources that can be used when selecting a counsel (websites, ratings)?

What would you recommend as an alternative?

The Attorney Register maintained by the Czech Bar Association and publicly accessible at: www.cak.cz serves as a basic source of information, providing information on all attorneys practicing in the Czech Republic. This includes a lawyer's specialization, language skills and areas of practice. Also, many sole practitioners and almost all law firms maintain their own websites. In addition, professional publications and rankings, both national and international (including Chambers Europe or Who's Who), can assist in selecting a counsel.

5. Are there significant differences in the rules of professional conduct, in your jurisdiction and those in New York? E.g., privilege, confidentiality and ethics?

In general there are no significant differences. Each attorney in the Czech Republic is obliged to follow the client's instruction provided that such institution is not in conflict with the law or professional regulations, to reject the provision of legal services where there is a conflict of interest or in case of an attorney's lack of experience, knowledge or work overload, etc. Each attorney (as well as its employee or other persons cooperating with the attorney) in the Czech Republic is subject to the duty of confidentiality.

6. Hypothetical 1: Rochester, Inc. Wants to Set Up a Manufacturing Site in Europe

Where should it go? What are the most important considerations?

The Czech Republic is still a favourite destination for foreign investors due to its highly qualified work force. Foreign investors setting up manufacturing sites may rely on a modern legal system which, to a large extent, reflects the needs of entrepreneurs. Apart from areas where EU law is applied directly or implemented via national legislation, there are other modern pieces of legislation that support the development of business activities and protect investments, such as the Mergers Act and the Insolvency Act. The Czech Republic provides an advanced system of investment and tax incentive schemes. Moreover, the Czech Republic and the United States are parties to a large number of bilateral and multilateral international treaties (e.g. on prevention of double assessment, protection of investments etc.) whereby the interests of U.S. investors are sufficiently protected or their investments in the Czech Republic are promoted.

What is the preferred legal form for Rochester, Inc. in your country?

Corporate law considerations?

The most commonly known and used types of companies are the limited liability company ("LLC"; in Czech: společnost s ručením omezeným) and the joint stock company ("JSC"; in Czech: akciová společnost). In principle, joint stock companies are used for relatively high turnover activities and high costs relating thereto. The joint stock company is also advisable in case of holding companies. This type of company offers the opportunity to raise capital through a public offering. On the other hand, its management is more complicated than the LLC. The LLC offers the advantage of lower registered capital requirements and more flexible management.

Tax considerations?

The corporate income tax base is derived from the accounting result reported in the financial statements according to Czech accounting standards and adjusted for certain tax-deductible and non-deductible items as well as non-taxable revenues. The corporate income tax rate applicable for 2011 is 19%. The Czech Republic has concluded almost eighty Income Tax and Capital Tax Conventions. As a member of the EU, the Czech Republic adopted the EU common system of the value added tax (VAT). The Czech Republic applies two VAT rates on goods and services. The basic tax rate is 20% and the reduced VAT rate is 10%.

Are there any specific employment law issues that you would like to point out?

The current Czech employment law is a relatively new regulation that brings a higher degree of liberalization to employment relationships. However, there remains a large number of mandatory rules, which the parties to a labour contract cannot deviate from. The employment is in principle established by a labour contract that must be executed in writing and must include the type of work, place of work and date of work commencement. The work week is limited to 40 hours; however, an employer can demand overtime (to a restricted extent) for serious operational reasons in exceptional circumstances. The employer may also introduce a flexible working time concept. There is a standard minimum wage adjusted by the Government on an annual basis.

7. Hypothetical 2: Rochester, Inc., Paris Corp., and Berlin Ltd. Are Negotiating a Joint Venture Agreement for the Cross-Licensing, Manufacture, and Distribution of Widgets

How is a contract formed?

Is there a requirement to always have "consideration"?

Are there formalities that must be observed?

The concept of contract formation in Czech law is based on assent between two or more contracting parties which is reached through an offer of a contract made by one contracting party and its acceptance by another contracting party. Czech law is part of the continental legal system which takes the approach that an exchange of agreeing wills (i.e. promises) between contracting parties rather than the exchange in valuable rights sets the basis of a contract (i.e. agreement upon certain consideration provided by both contracting parties does not create a condition for the contract's validity or its enforceability). In general there are no formalities laid down in Czech law. However formalities may apply to certain types of contracts, such as the requirement that it be executed in writing or be registered. The latter requirements are more or less limited to real estate related contracts.

8. What does it mean in practice to litigate in a court of your jurisdiction?

How long does a typical trial take?

There are no statutory deadlines for courts to issue their decisions except for certain preliminary injunctions. In general, the first instance litigation usually takes two years and appellate litigation ranges between 12 to 18 months. Complex cases may take much longer.

How much does it cost?

The costs for the proceedings include a court fee (a percentage of the amount in lawsuits involving cash amounts), legal fees and cash expenses incurred by parties to the proceedings and their legal counsels. However, the legal fees each party may incur in court proceedings are regulated and predetermined. Therefore, the winning party may only recover the predetermined and fixed amount and not the actually incurred legal fees.

Who pays attorney's fees?

Czech law imposes a fundamental cost-allocation rule that the losing party shall bear the costs for the proceedings (i.e. also the attorney's fees). If a party wins only a part of a lawsuit, the court shall split the costs on a pro rata basis, but exemptions to this rule may exist. However, as outlined above, the attorney's fees to be recovered from the losing party are regulated or, speaking more precisely, capped.

Do you pay some court costs?

Yes, the losing party is usually ordered to pay the court fees that the applicant had to pay in order to make its application / action. The court costs may include costs for experts providing testimony during the hearing.

9. Do you have discovery?

No, the plaintiff cannot enjoy the advantages of discovery in the Czech Republic.

10. Do you recognize foreign judgments?

In general, the recognition of foreign judgments depends on whether it is a judgment of a court from an EU member state or not. The judgments of courts from non-EU member states are recognized on the basis of bilateral interstate agreements (there is no such agreement between the United States and the Czech Republic). Judgments of courts from an EU member state are recognized in the Czech Republic on the basis of Council Regulation (EC) No. 44 / 2001.

11. What alternatives do they have as regards the resolution of disputes and the choice of law?

There are not many alternatives to litigation in Czech law. The most common alternative to litigation is arbitration. The parties to the dispute may choose a permanent arbitration court (as well as an international arbitration court) or an ad hoc arbitrator. Due to recent Czech case law the parties may choose a Czech arbitration court only if it is established on the basis of an Act.

Another alternative to litigation is mediation. The advantage of mediation is that it provides the parties with full control over the course of the dispute settlement. A draft act on mediation is currently in the legislative process and should become effective in 2012.

12. Would it not be advisable to instead provide for international arbitration?

Yes, international arbitration is a suitable alternative for dispute resolution. Czech entities may choose any arbitral tribunal or arbitrators. In practice, however, arbitration is recommended only for large contracts since it is still rather expensive. Also many parties are reluctant to accept arbitration clauses due to the fact that there is no remedy available against the arbitral rulings. The United States as well as the Czech Republic are parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards dated 1958 (also known as the New York Convention).

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Europe Panel—Sweden

Basics of Legal Profession

1. What are attorneys' licensing requirements in your country?

Sweden is possibly unique in the sense that there are no restrictions as such on the practise of law—the giving of legal advice or even representing legal third party in court—there is not even a requirement to pass a legal exam to advise on legal matters or represent someone in a court of law. However, the title "Advokat" is only available for members of the Swedish Bar Association and is in fact the only title which is legally protected.

Are there specific requirements for becoming a member of the Bar?

The member of the Swedish Bar has first passed a legal exam at university—normally 4–5 years of studies. After that it is quite common to work as a clerk and judge in a court for approximately two years. The recently modified rules of the Bar Association provide that a lawyer will need to pass a bar exam and "work as a lawyer in a law firm" for three years.

Can a foreign legal counsel provide legal services in your jurisdiction?

As indicated above anyone can work as a lawyer in Sweden; however, this is not too common today. Accordingly, there is nothing blocking non-Swedish lawyers from practising law in Sweden with the sole restriction that they cannot be partners of a Swedish law firm where one or more partners are also members of the Swedish Bar Association. In terms of members of a Bar Association from another EU country, they can relatively easily "convert" their membership to membership in the Swedish Bar Association.

2. Are there different branches of the legal profession (solicitors, barristers, if any)?

There are no differences—other than the (formal) distinction between members of the Bar Association and non-members.

What is the role of a notary public?

The role of a notary public is to verify the correctness of certain types of documents—but only in relation to other jurisdictions. Consequently, there is no need for a notary public as related to Swedish Authorities.

Are areas of specialization recognized?

Not as such—however, it is possible for a member of the Swedish Bar to identify areas of specialization.

3. How many law firms do you have and how big are they?

Sweden has some 5,000 members of the Bar, and there is an unidentified number of legally educated and trained people and people "posing" as lawyers.

In terms of law firms—a guesstimate is 1,000-plus. The largest firm is approximately 350 lawyers. The ten largest firms are likely to have approximately 2,000 lawyers cumulatively. The largest group of law firms consists of solo practitioners, sometimes in groups of two-three but still "solo" as firms.

In addition there are a number of "legal firms" where the lawyers are not members of the Bar.

Is there a distinction between a general firm and a business firm?

No, there is no formal distinction but in practice there is increasingly a difference between corporate commercial firms and those that represent private individuals.

4. Are there any resources that can be used when selecting counsel (websites, ratings)?

There are a multitude of resources available—from the Bar Association's general list of lawyers where it is permitted to provide information on specialization via the web sites as well as different types of listings and ratings (Chambers, Legal 500 etc.) including domestic listings like "law firm of the year" etc. Additionally, there are some 150 legal networks, most of which have a website that can provide some guidance.

What would you recommend as an alternative?

As always, the best is the personal reference; however, sadly the official rankings and listings are becoming increasingly important.

5. Are there significant differences in the rules of professional conduct, in your jurisdiction and those in New York? E.g., privilege, confidentiality and ethics?

There is not a major difference—as a matter of principle the Swedish Bar Association is very focused on "independence" in relation to the individual members; nothing is accepted where there is a risk to affect this negatively.

In some regard, confidentiality can be weaker as compared to the U.S., in particular when it relates to money laundering issues and tax issues. A member of the Swedish Bar must act ethically and may not "further injustice"—a simple example is the lawyer who knows

that his client has committed the crime he is charged for. The lawyer cannot lie and say that he has not committed the crime; instead he will have to use phrases like "my client says…" etc.

Legal privilege is an important aspect and all information between the lawyer and the client is privileged. However, as indicated, legal privilege is weaker in certain areas such as in money laundering and in tax matters.

6. Hypothetical 1: Rochester, Inc. Wants to Set Up a Manufacturing Site in Europe

Where should it go? What are the most important considerations?

In the European Union there are a number of good alternatives for setting up a business depending on circumstances and specific requirements.

Key considerations are:

Tax law

Labor law

Corporate law

Financing

Legal form is difficult—presence or no presence leads to permanent establishment issues, as well as branch or subsidiary. Another key question is a resident or nonresident company or a holding company structure. A European company is normally of no interest other than for show. Usually it boils down to a corporation; however, currently there is a trend to set up branches to keep the number of legal entities down!

Once there is a company there are a bunch of different options—sometimes it is preferred to arrange a holding company (HoCo) structure and there are a number of options there; many jurisdictions within the EU today provide special rules for holding companies. A Swedish HoCo is usually an attractive structure—in a nutshell: it is a normal corporation which can carry out ordinary business as well as HoCo functions. Capital gains and dividend income are normally exempt from taxation, good double tax treaty-network (80+ countries) so it's possible to avoid withholding tax both in and out. In addition full deductibility on most interest payments, no thin cap rules and with some planning no withholding tax on dividends and on interest paid.

What is the preferred legal form for Rochester, Inc. in your country?

Based on experience it usually will end up as a corporate entity as such an entity is known, simple to set up and relatively simple to wind up.

Corporate law considerations?

Setting up a Swedish company is easy and very quick, basically an overnight thing to put in place. Restrictions on operations are the same as any other form. There are some financial restrictions like a minimum share capital (SEK 50,000–2011) and certain equity requirements to monitor to avoid responsibility of the board.

Tax considerations?

There are many! Sweden is well known as a high tax society, which is correct in terms of individuals but Sweden is close to a tax haven when it comes to corporate entities. The formal rate is 26.3% (2011) with an effective rate of approximately 20%. However, as indicated most dividends and capital gains are exempt from taxation.

Are there any specific employment law issues that you would like to point out?

Like most countries within the EU, employees are well protected and in Sweden the *Security of Employment Act* has a strong status protecting employees and providing certain basic rights to them—termination for cause (difficult) or redundancy (last in—first out). However, termination of employees in case of redundancy is possible at a relatively low cost.

In addition the *Co-Determination Act* provides the right for the employees (or rather the unions) to "influence" the decision making; this is a formal type of legislation which needs to be taken into account prior to critical business decisions being taken by management.

7. Hypothetical 2: Rochester, Inc., Paris Corp., and Berlin Ltd. are Negotiating a Joint Venture Agreement for the Cross-Licensing, Manufacture, and Distribution of Widgets

How is a contract formed? Is there a requirement to always have "consideration"? Are there formalities that must be observed?

Under Swedish law there are no specific rules on how to form the contract, no requirement for "consideration" and no formalities with the sole exception for real estate transactions and wills—in these two cases there must be a written document signed by the parties. In case of the will, the document must be witnessed by "nonrelated" parties.

What does it mean in practice to litigate in a court of your jurisdiction?

The matter is initiated at a Swedish court by filing the summons with the court; a nominal fee also must be paid. The court will deal with all communication in the matter, will arrange for a date for the preliminary hearing before the judge etc. The court's decision can in most cases (currently) be appealed to the Court of Appeals, and then—in case of a precedence—to the Supreme Court.

8. How long does a typical trial take?

It is difficult to say how long a typical trial will take. A commercial dispute can go on forever, in particular if one of the parties is good at delaying the procedure. Statistics would probably indicate that a commercial dispute will, on average, take two to three years in the court of first instance. If appealed, the time can be another two to three years. In this context, it is important to keep in mind that Sweden does not have a system of interrogatories and depositions like in the U.S., which normally means that the "planning phase" is shorter than in the U.S.

How much does it cost?

The fees due to the court are virtually nothing; simply some minor fees when initiating the procedure. The main cost is the lawyers and expert witnesses.

Who pays attorney's fees?

Each party will pay his own costs during the litigation. The ruling by the court will also determine whether / how much the losing party shall pay of the winning party's legal fees. The basic rule is that the losing party shall compensate the winning party for his legal expenses.

Do you pay some court costs?

As indicated above—the party initiating the dispute at the court will pay some nominal fees but these may be compensated as part of the ruling.

9. Do you have discovery?

As indicated above, Sweden does not have the U.S. type of discovery. However, the proceeding at the court always starts with a "planning" or preparation meeting where the judge will do his best to figure out the position of the parties, the issue and what is necessary to produce in documentation etc. for a meaningful trial. In addition, at this stage, the judge will consider whether it is possible to settle the matter.

10. Do you recognize foreign judgments?

Foreign judgements are generally recognized if there is a convention in place. Consequently, U.S. rulings are not automatically recognized.

11. What alternatives do they have as regards the resolution of disputes and the choice of law?

There are many alternatives—theoretically the parties can agree on any law; however, a Swedish court can find that the clause on applicable law is meaningless / senseless and therefore conclude that they will apply Swedish law. If there is one non-Swedish party, this is unlikely to happen.

12. Would it not be advisable to instead provide for international arbitration?

Arbitration is, from a Swedish point of view, a very common form of settling conflicts. Consequently, it is very common that commercial agreements include a clause that disputes shall be settled by arbitration—often in Sweden.

Stockholm is a well recognized place for arbitrations and there has been a focus of the Stockholm Arbitration Institute, as well as the Stockholm CC, to promote Stockholm as a venue for arbitrations—with Swedish or other law.

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Questions for the Americas Panel—Argentina

Basics of Legal Profession

1. What are the attorney licensing requirements in your country?

A law degree and bar admission are required. It is not required to pass an exam in order to be admitted to bar.

2. Are there different types of lawyers?

Are there solicitors and barristers?

What is the role of a notary public?

There is only one type of lawyer in Argentina.

A notary public is the person authorized by a province to perform certain official acts (e.g., certification of documents or attestation of signatures). Since Argentina has a civil code system, many acts (e.g., mortgages, wills) require the participation of the notary to be considered valid.

3. Are there situations when a client should consult a specialist as opposed to a generalist?

Criminal matters?

Employment matters?

Do you have patent lawyers and agents?

In some cases, it is suggested that a client should consult a specialist, mostly in criminal, employment, tax or environmental matters.

Do you have trademark lawyers and agents?

Yes.

4. In your jurisdiction, what is the size range of law firms?

Are there local, national, regional or international law firms?

As a general rule, lawyers are sole practitioners. Nevertheless, there are many medium and large law firms in Argentina. A large law firm is considered as such when it has more than 50 lawyers.

5. Are there resources that you would recommend people to use when selecting a counsel in your jurisdiction?

Are there websites or ratings?

There are no local resources to be used in order to select a counsel in our country. I would recommend word of mouth and personal recommendations.

6. How is an attorney-client relationship formed in your country?

What are the conflict of interest rules?

How does the local bar police these rules?

What is the scope of the attorney-client privilege?

Law No. 23.187 regulates legal practice in the City of Buenos Aires and establishes the Bar Association for the City of Buenos Aires. In turn, the Bar has enacted its own "Code of Ethics." Lawyers must behave according to that Law and Code. In order to enforce those rules, there is a tribunal that supervises the conduct of lawyers.

Regarding conflicts of interest, under the abovementioned Law, a lawyer cannot represent, neither concurrently nor consecutively, in the same case, adverse interests and neither shall a lawyer represent anyone in connection with a matter in which the lawyer participated as a judge.

As regards to the attorney-client privilege, the abovementioned Law sets forth the rights and duties of lawyers. Among other duties, lawyers must keep professional secrets, unless disclosure is expressly authorized by the interested party.

Additionally, lawyers are entitled to keep professional secrets, freely discuss with their clients their legal interests (when such clients are committed to prison) and maintain the sanctity of their office (to safeguard the right to defense at trial established in the Argentine Constitution).

Lastly, the Federal Code of Civil Procedure establishes that a witness is entitled to refuse to testify in order to protect professional secret.

Subject Matter Questions

7. What are the formalities for a contract in your country?

Is there a requirement to always have "consideration"?

What is the level of freedom of the parties?

When should you use a notary public?

Is there a consular or similar process to authorize documents?

Are there local language requirements?

As a general rule, there are no formalities for a contract. However, some contracts have to be recorded in a notarized instrument (e.g. any real estate transactions, life annuity contracts, assignments or waivers of hereditary rights, powers of attorney for litigation matters and for the administration of property, etc.). Moreover, in some cases, contracts have to be written (as evidence of the agreement—"*forma ad probationem*," e.g. real estate leases).

There is no requirement for consideration.

The level of freedom of the parties is a key principle under the Argentine Civil Code. There are few exceptions to this principle (e.g. parties cannot legally agree on "immoral" or "unlawful" matters).

8. Does your jurisdiction recognize a trust as a legal instrument?

When is that used?

Trusts are governed by Federal Law No. 24,441. This Law establishes that a trust is created when a person (trustor) transfers the fiduciary ownership of certain property to another person (trustee) that undertakes to act for the benefit of the person named in the contract (the beneficiary) and to transfer same upon expiration of a term or upon fulfillment of a condition to the trustor, the beneficiary or the ultimate transferee of the trust property.

9. How is the court system organized in your jurisdiction?

Do you have discovery?

What alternatives do you have as regards the resolution of disputes and the choice of law?

Do you recognize foreign judgments?

There are both federal and provincial (state) courts. Moreover, there are first instance courts, courts of appeals, provincial supreme courts, and lastly, the Federal Supreme Court of Justice.

As a general rule, there is no discovery provided for in the Federal Code of Civil Procedure. However, as an exception, if a party has justified reasons to consider that the production of a piece of evidence would become impossible or burdensome, that party is entitled to request to have such piece of evidence produced pre-litigation.

Then, the judge decides whether that piece of evidence is admitted at that preliminary stage.

As a general rule, parties may agree upon the resolution of disputes (e.g. courts, arbitration, etc). Parties may freely agree upon the choice of law clause in a contract. Thus, foreign law may apply, except when it is opposed to "public law" or local "accepted moral standards."

In general, Argentina recognizes foreign judgments. In case there is no treaty that applies to the case, the Federal Code of Civil Procedure establishes the requirements that a foreign judgment must meet in order to be enforced in Argentina (e.g. it must comply with local "public policy" rules).

10. Does your jurisdiction have other specific characteristics that you would like to mention? [Each panelist will get couple minutes to mention some issues very briefly.]

E.g., employment law issues

E.g., corporate finance issues

Just to mention, the most usual common mistakes for foreign companies doing business in Argentina are related to Central Bank regulations (which may impact inflow and outflow of funds), labor claims (e.g., assuming that commercial representatives may not file labor claims in certain circumstances) and termination of dealers and distributors.

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Introductions to the CISG for the Practitioners

This paper formed the basis for remarks given by Albert Bloomsbury on Friday, September 23, 2011 at the Section's Seasonal Meeting in Panama

Introduction

The U.N. Convention on Contracts for the International Sale of Goods (the "CISG") is an important international treaty that governs contracts for the international sale of goods between businesses. The purpose of the CISG is to provide a modern, uniform and fair regime in this area. Thus, the CISG contributes significantly to introducing certainty in commercial exchanges and decreasing transaction costs. Over three decades it has gradually increased its influence. The United States is one of among 77 nations that have adopted the CISG.

The good news is that the practitioners have no reason to fear the CISG. The CISG is actually good for your practice and for your clients that trade internationally because it was created exactly for the benefit of the international sale of goods.

Although the CISG is now generally accepted, at the beginning, in the same way that people do not immediately accept a new technology, the business and legal communities were slow to embrace the new, more superior solution to cross-border sales. Twenty years ago, most of the practitioners in the U.S. and elsewhere in the world had reason to stay away from the new regime.

But now, times have changed and practitioners should embrace the CISG and use it to their advantage. During the last two decades, acceptance of the CISG has increased both in terms of the number of countries that have acceded to the Convention, and its real-life acceptance, exemplified by increased familiarity of the courts and arbitrators with the CISG as well as a corresponding increase in the volume of case law all over the world. These factors have changed the playing field in favor of the CISG. A critical mass has emerged.

A contract is an agreement of two or more parties, so the acceptance of a set of rules by more than a minimum percentage in the market dramatically changes the rules of the game. A small percentage of players in the market who insists on the use of the CISG can influence the silent majority, and that is especially the case because these determined minorities have the veto power against opting-out of the CISG (or no deal). We can draw similar examples in the acceptance of new technologies such as e-commerce and other telecommunication protocols. Those who refuse to follow the change of a tide will be left behind, in the similar way that those who refused to embrace e-mails and other information technologies lost their business. For attorneys, that means that ignoring the CISG factor in your client service would mean the risk of economic loss to your client. The CISG, and failure to advise regarding the same, has now become one of the serious risk areas for a disciplinary action against an attorney.

Basics

Under the U.S. legal system, the CISG is a self-executing treaty. It is the law of the land under the federal Constitution's Supremacy Clause. Therefore, the CISG supersedes state law to the extent of CISG's subject matters, for instance the formation and termination of a contract, performance and damages. In other words, under the Supremacy Clause of the U.S. Constitution, the CISG is a part of New York law as much as any other federal law is a part of the overall law enforced in New York's courts. It is therefore important for the practitioner first to understand the threshold issues—when the CISG applies and supersedes state contract law, and to what degree.

Threshold issues when negotiating and drafting a contract, including the importance of forum choice

The practitioner must ask the questions as to who the parties to the prospective contract are and where the locations of the parties' businesses are with respect to that sale, and what is the subject matter of the contract.

In general, the CISG applies when two businesses of different CISG member countries enter into a contract to sell goods. In addition, the CISG also applies when an international sales contract is governed by the law of a country that is a member nation of the CISG under the private international law rule (or conflict of laws rule) of the forum. The latter, however, has a notable exception as the member states may make an Article 95 declaration not to apply this provision, and the United States is one of a few countries that has made that declaration. If a U.K. corporation that is conducting a business in France through a branch sells wine to a business buyer located in the United States as a part of the branch's business activities, the CISG applies because the place of business of both the seller and buyer are located within different CISG member countries (i.e. France and the U.S.) even though the seller is a resident of a non-CISG country (i.e. the U.K.). Note that the CISG's scope of application is determined based on the parties' "places of business," not residency, so that a practitioner must dig into the facts carefully and may have to do some research of case law because your client's or the other party's continuous business activities through an agent or other arrangement in a country outside the headquarter location may create a

"place of business" in such a country for purposes of the CISG.

If the contract pertains to the sale of securities, such as a negotiable instrument, or that of a ship or aircraft, or if the buyer is a consumer, it is not subject to the CISG. When the contract is predominantly about the construction of a structure for the buyer, the CISG does not apply even if the service provider ships its own materials overseas to finish the work.

A practitioner also must consider relevant peripheral issues that affect the application of the CISG such as the forum and governing law of the contract, which still applies to the matters not covered by the CISG, such as the property rights and provision of services.

Forum choice can significantly affect the outcome. Practitioners should be aware that, depending on how the designated court or arbitrator applies the CISG when one of the parties is a business of a non-CISG country, the choice of forum can significantly affect the outcome, and plan accordingly. For example, assume that a contract includes a London arbitration clause for a sale between Brazilian and Indian businesses and New York law is the applicable law under the private international law rule. The London arbitrator is arguably not bound by the U.S.'s Article 95 declaration, which limits the application of the CISG, but a question arises at the enforcement of an arbitral awards under the New York Convention in the U.S. The answer depends on whether or not the enforcing forum, a U.S. court, can laterally invoke the United States' Article 95 declaration to deny the enforcement for manifest disregard of law under the U.S. domestic law, Federal Arbitration Act, despite the very limited basis of denial of enforcement under Article V of the New York Convention. This illustrates one of the most challenging issues that practitioners must think of. A more practical approach would be to choose the right forum and applicable law when an Article 95 declaration might cloud the picture.

There is an argument that parties may affirmatively choose the CISG as governing law, for instance by designating "New York law including the CISG" in their contract where at least one party's place of business is in a non-CISG country. However, there remains uncertainty whether or not a U.S. court would actually honor this type of affirmative opt-in. Although an Article 95 declaration merely states that the United States is "not bound by" the provision that requires the CISG to apply to an international sale where the private international law rules lead to the use of the law of a CISG member state, some courts appear to view this language in a more restrictive manner.

A practitioner should anticipate these issues in advance and plan ahead to maximize their client's objectives for clear, predictable results without incurring a risk of the mess of prolonged international litigation on the threshold issues. Similar issues must be dealt with when a practitioner handles the situation where one of the parties is from a CISG country that made an Article 96 declaration so that that country requires the written form in the formation of a contract while the other party's home country does not. This declaration also poses a practical issue in the age of e-commerce because the parties would be forced to take the traditional paper-and-ink method of formality to enter into a contract.

If the goods that are sold under a sales contract subject to the CISG are located in a third country, say for example in Kyrgyzstan as your U.S. client buys uranium ore sitting in Kyrgyzstan from a Russian business, the property right matter is arguably governed by the law of that third country and not by the CISG because the CISG does not cover such property rights.

If a sales contract under the CISG includes an after-care maintenance obligation of the seller, or the sale is subject to a security interest, those extra elements that are beyond the scope of the CISG will be governed by the applicable law of the contract. The practitioner must also become familiar with the U.S. federal case law on the U.S. Constitution's Supremacy Clause and federal pre-emption matters in general to understand which state law provisions are likely to survive when the CISG governs the sale.

Litigating the CISG cases

If you are a litigator, you must watch carefully whether the CISG actually applies where the contract is silent about the CISG. Following are the issues that a litigant should pay attention to if the case is in the United States (some of these issues are also valid when the case is handled elsewhere):

(i) If the contract assumes domestic law provisions but in fact the CISG applies, you must stitch together the rules of the CISG, the portion of the state law that survived the CISG's pre-emption and the contract provisions themselves to determine how the contract should be interpreted. Certain merger provisions may not be applicable because the CISG spares the form requirement and there is no parole evidence rule or statute of frauds, so you might want to secure eyewitnesses to corroborate your client's position.

(ii) If you are defending, you may want to remove the case to the federal court, which is usually more familiar with the CISG, because any contract that is subject to the CISG involves a federal question under the U.S. Constitution's Supremacy Clause and you may invoke the federal district court's jurisdiction.

(iii) If you are dealing with an appellate case and if the lower court totally overlooked the CISG issues because neither party thought that the contract was subject to the CISG, you will have to do careful research on how to approach the issue under the particular jurisdiction's judicial administration rules. Technically, if a U.S. domestic court does not apply the CISG when it should, it's not only a violation of the Supremacy Clause of the Constitution but also of the U.S.' international obligation under public international law to faithfully observe the treaty provisions, and that problem vexed the U.S. Supreme Court in the *Medellin* case in 2008. So, in search of the ways to overcome the procedural challenges to help your client, the practitioner may want to think about every possible way to help the court to invoke an extraordinary measure and / or to take judicial notice to fix the serious breach of the United States' obligation under international law and constitutional violation.

(iv) Also, the practitioner must think carefully about whether a contract may have been accidentally formed under the CISG under a disputed fact pattern where only patchy written records exist. So, as a litigator, if you do not ask the right questions when your client comes to your office for the first time, your may make a huge mistake based on wrong assumptions. The four corners of the client's contract do not always reveal the whole picture, and your summary judgment motion for the plaintiff based on the paperwork may be denied with higher probability under the CISG. So you may have to budget for the discovery when you sign an engagement letter with your client.

Bottom line

The savvy practitioner should think about how to take advantage of the CISG because most of the provisions of the CISG are default rules that only apply where the parties do not address specific matters in the contract. Therefore to reach the desired result, he or she must understand the CISG's default rules and then decide how they can be modified under party autonomy and through contract negotiations.

It must be pointed out that opting-out of the CISG itself is an option under party autonomy, but that can be done only when both the parties agree, so the opt-out itself can become a part of contract negotiations if both parties do not agree on this point. Second, to opt-out, the parties must insert specific language that the CISG will not apply. For instance the contract should say that the parties agree not to be governed by the CISG and instead governed by the laws of, for instance, the State of New York, without regard to the CISG. Simply putting the applicable law as New York law does not achieve the opt-out because technically speaking, the CISG forms a part of New York Law.

Also, from a practical perspective, returning to the earlier Kyrgyzstan example, opting-out may not be a wise decision because it can significantly increase uncertainty of the outcome. That is because the forum may not necessarily honor the parties' choice of law in the contract when parties opt-out of the CISG, and the forum may end up pointing to the law of an unfamiliar country like Kyrgyzstan, the location of the goods. And then, the forum may decide to use the CISG as adopted by Kyrgyzstan, negating the opting-out, or the domestic law of Kyrgyzstan without regard to the CISG, and in either case the result may be a total surprise to your client.

As compared to the "exotic" or "ancient" law, the CISG reflects modern international commerce and gives more predictability and reasonable results in the context of international sales. It has become better known by all the serious international economic players, including reputable practitioners of international law. Rather than spending energy thinking about how to opt-out of the CIGS without a side effect, practitioners should be prepared to give a client advice as to which provisions of the CISG are likely to work for or against their objectives.

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Legal and Investment Updates

Corporate Governance in Ecuador

I. Introduction

In 2003 the Quito Stock Exchange decided to establish Corporate Governance Practices in Ecuador, and the Andean Development Corporation (ADC) also considered that it was necessary to contribute to Corporate Governance practices in the Andean region.[1]

The Andean region includes Bolivia, Colombia, Ecuador Peru and Venezuela.

The ADC together with a Spanish consulting firm and other organizations from Venezuela, Colombia, Bolivia, Peru and Ecuador developed a document called "Guidelines for an Andean Corporate Governance Code," which was welcomed by associations of the productive sector and Ecuadorian regulatory agencies as the Country Code to be applied in Ecuador in Corporate Governance matters.

The adoption of Corporate Governance practices by Ecuadorian companies was a timely action and a large number of them have already joined. Approximately 70 companies are officially part of the program and have included Corporate Governance in their charters of incorporation.

Ecuadorian companies are being forced to come to grips with globalization, a process that entails accounting transparency, the pursuit of efficiency and appropriate administrative management, and consequently, the adoption of Corporate Governance Practices (CGPs).

CGPs are an everyday action and a cultural process. We may say, as well, that CGPs are a series of formal, voluntary and self-regulating practices that govern relations between the company's administration and its constituencies, the latter being the competitors, suppliers, staff members, clients, creditors and society, which are influenced by a given productive activity. CGPs must generate trust among the players in order to reduce transaction costs, improve capital market access, and achieve more cooperation and efficiency within companies. CGPs also have self-regulation standards, and the trend of multilateral agencies is that these principles increasingly be included in the credit-risk assessments of clients.

Evidence shows that the companies which support CGPs have access to financing under more favorable conditions; thus loans become less costly because of the lower levels of risk and higher debtors' ratings, which in turn open the doors to the securities market. The current trend is that future securities buyers will require that CGPs be a part of an issuer's DNA. In fact, the Bank of the Ecuadorian Social Security Institute, a major investor in securities, requires issuers to provide a certificate of CGP's prior to purchasing any securities.

The full implementation of CGPs would, over time, enable stockholders to direct and control the policies of companies with transparency, objectivity, and fairness, in order to safeguard and successfully increase the value of their investments and to protect the resources of third parties or those of others.

Conversely, companies in turn believe that management has an increasingly executive role, that the role of the board of directors is becoming more strategic and stronger and that stockholders will be more uninvolved in the day-to-day operations, thus generating more efficient results.

II. Categories of Corporations for Purpose of Analysis and Applying the ACGC

Owing to the structure and characteristics of corporations in the Andean countries, the Andean Corporate Governance Code (ACGC) has divided corporations into four categories: Large Corporations, Listed Corporations, Unlisted Stock / Open Corporations, and Closed Corporations.[2]

1. Large corporations are those which regularly appeal to capital markets through fixed and / or variable income securities, whether or not these securities are listed on a Stock Exchange or are registered with the supervisory agencies.

2. Listed corporations are those which occasionally issue securities and whose registration with the securities market regulatory agencies is the result of the application of legal rules or regulations.

3. Unlisted stock and open corporations are those whose stock is not listed on a stock exchange or recorded in any registry of the regulatory agencies, and which do not issue fixed-income securities, have a large number of stockholders without any apparent ties of kinship and are not subject to any restrictions on the free transfer of the stock.

4. Closed corporations have stock which is not listed on a stock exchange, are not recorded in any registry of the regulatory agencies, do not issue fixed-income securities, have a limited number of stockholders in many cases with ties of kinship, have restrictions with respect to the free transfer of stock, and have stockholders who are usually directly in charge of the management and administration of the company.

The Andean Corporate Governance Code contains 51 measures that were developed based on OECD Corporate Governance principles. According to the type of company selected by the consultant as shown in the above categories, all or some of the 51 measures will be applied. The larger the company, the more rigorous the Code will be in the application of the measures.

III. Objectives of ACGC

The objectives to be achieved by Corporate Governance and by the application of the ACGC to:

- ensure the appropriate management and administration of companies;
- protect the rights of investors and other interest groups;
- foster confidence in financial and capital markets;
- promote entrepreneurial competitiveness;
- have efficient and transparent management;
- mitigate the country risk by generating the best possible environment for investors, stockholders, managers and employees.

IV. The Measures to Be Incorporated in Accordance with the ACGC:

1. The Rights and Fair Treatment of the Stockholders Principle

- The principle that each stock is entitled to one vote;
- Protection of the rights of stockholders; e.g. in the event of capital increases, mergers, split-offs, conversions (valuation of stock);
- Provision of current information to stockholders and investors, using transparent and confidential means and bringing up issues of corporate interest or that are related to their stockholdings;
- Establishment of special quorums; and
- Joint-sale (tag-along concept) of minority stockholders' stock.

2. Stockholders' Meeting

- The highest executive body;
- Internal rules and regulations for organization and operation;
- Right to call meetings and make their agenda known;
- Right to receive prior information;
- Establishment of the manner in which stockholders may participate in the meeting;
- Knowledge of how they can exercise their voting rights; and
- Manner in which they may vote by proxy.

3. Board of Directors

- Requirement that company have a Board of Directors;
- Internal rules and regulations for organization and operation;
- Clear and specific Board of Directors duties;
- Designation of directors according to the interests they represent, in symmetry with the capital;
- Need for independent directors;
- Procedure to elect and remove the directors from office;
- Need to keep directors apprised;
- Establishment of compensation paid to the members of the Board;
- Designation of the different committees and delivery of reports to the Board;
- Establishment of quorum and voting procedures of meetings; and
- Handling of conflict of interests and linked operations situations.

4. Disclosure of Financial and Non-Financial Information

- Format to present financial statements;
- Election of external auditor and reelection of auditors;
- Internal audits; and
- Presentation of environmental and social responsibility reports.

5. Resolution of Disputes

- Use of alternative dispute resolution, mediation and arbitration arrangements.

V. Assessment of Corporate Governance

In order to assess a company's corporate governance, consultants perform an assessment and implementation consultation for which they use the ADC software that allows the users to obtain: (i) summarized or detailed reports on the extent of compliance by any given company with respect to the Corporate Governance standards contained in the "Guidelines for an Andean Corporate Governance Code"; (ii) reports on critical and priority action areas; (iii) comparative graphs of compliance levels versus the highest possible scores; (iv) alarms; (v) report

on the measures that are absolutely essential for companies whose noncompliance significantly increases the level of internal risks.[3]

Once the assessment is completed and has been accepted by a company, the implementation stage begins. This stage usually includes changes in the corporate charter, the development of rules for general stockholders' meetings and for the organization and operation of the Board. The implementation stage may include the formulation of a code of ethics and an outline of a corporate governance report, which is to be delivered annually to the stockholders and other interest groups. The Assessment and Implementation process takes approximately six months (during 2009-2011 I have carried this out in 20 companies including four financial institutions).

VI. Common Practices That Companies Should Not Have

Through the experience that I have gained in the consultations that I have performed, I have been able to identfy the following:

- Stockholders lack knowledge regarding their rights and duties as stockholders. For example, stockholders may not know how many votes they have in terms of the company's capital; what voting quorums are required to hold general meetings of stockholders, as well as meetings requiring specific majorities; or what a stockholder who does not receive sufficient information regarding the items on the meeting agenda should do;
- There is a total lack of knowledge on the part of stockholders regarding the procedures to select the managers and even the members of the board. Stockholders need to know what they can do in order to exercise the right to vote their members of the board out of office; how they can remove the managers from office; and how they can institute an action for damages against the managers;
- In most companies, particularly family-owned companies, there is no board of directors; thus the stockholders' meeting is confused with the board meeting because of the composition of the board members;
- For the majority of companies which tend to be family owned, the Board is not professionally qualified, and the directors are appointed from among family members and friends, thus showing that commitment and experience are lacking; the age of the directors is also a sensitive issue, and
- No arbitration clause in case of conflicts exists.

VII. The Practices That Companies Should Have for the Greatest Impact

- Undertake corporate charter reform, incorporating rules on the duties and rights of stockholders into the charter itself;
- Transparency in the management of information, both by the general stockholders' meeting and by the Board of Directors;
- Establishment of a Board of Directors, with clear rules for the structuring and running of meetings, setting up of committees, strengthening of internal audits, and improvement of strategic planning processes;
- Upgrading of internal risk and business management systems;
- Adoption of management control systems so that the delegation of tasks and empowerment of executives will be effective;
- Implementation of strategies to attract and develop talent at the level of directors and Boards of Directors;
- Approval of regulations for the functioning of the Board of Directors; and
- Inclusion in the charter of incorporation of specific rules for the selection of an external auditor.[4]

VIII. Corporate Governance and Family Companies

In Ecuador, Corporate Governance issues are very important because 89% of Ecuadorian companies are family owned and 360 of the major companies in the country belong to families. "Notwithstanding their efficiency, family companies in Ecuador and in Latin America are facing problems which endanger and jeopardize their long-term survival; for example, informal accounting and staff recruitment practices, which result in sons and daughters working in the company, though they are not trained for the positions they hold and are not really interested in the business; and the lack of professional qualifications of the entrepreneurial family."[5]

IX. Corporate Governance In Financial Entities

The Banking and Insurance Superintendency of Ecuador has been working to strengthen all financial institutions under its control. Since April 2010, the superintendancy is required to evaluate financial entities according to the standards of the "Manual Único de Supervisión" (MUS) supervision manual, and to monitor compliance with the best practices of financial prudence and soundness according to a methodology and recording system which covers their performance in Corporate

Governance, Risk Management, Economic and Financial Evaluation and Regulatory Compliance (GREC).[6]

One of the main objectives of GREC is to assess the quality of corporate governance so that financial institutions may be managed in a sound and prudent manner and so that their stockholders and managers will not be a source of weakness for those institutions.

The programs supported by the International Development Bank (IDB), the Quito Stock Exchange and the Banking Superintendency have contributed to the adoption of sound corporate governance practices, which seek to attract capital, improve corporate management, protect the rights of stockholders and interest groups, foster confidence in financial markets and promote competitiveness.[7]

Insofar as corporate governance is concerned, GREC takes into account chapter IV of the "Improvement of Corporate Governance for Banking Organizations" issued by the Basel Committee for Banking Supervision Committee in February of 2006.[8]

X. Final Conclusions

It should be noted that Ecuador has initiated a process of change through local entrepreneurs by helping to make them aware that it is necessary for their companies to adopt corporate governance practices and that these practices do not have to follow a single pattern. According to our experience, the ways and means of implementing and achieving successful corporate governance are different in each company, and even in the same sector, but that positive results are attained in the long run.

It is also very important to note that regulators are also adopting corporate governance, just as the Banking Superintendency has done through its GREC-MUS regulation for financial institutions. The Superintendency of Companies, which is the regulatory agency for companies in Ecuador, has not yet formally established a requirement that companies adopt corporate governance.

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Endnotes

1. Memorias del Programa de Buen Gobierno Corporativo, Junio 2011.
2. ADC assessment software.
3. ADC software.
4. "Memorias del Programa de Buen Gobierno Corporativo," June 2011; presentations by Evelyn López de Sánchez and Walter Gavilanes.
5. María Teresa Escobar, interview with Alfredo Irbaguen. "Memorias del Programa de Gobierno Corporativo," June 2011.
6. News Web Page of the Banking Superintendency, June 30, 2011.
7. www.gobiernocorporativo.com.ec, "Memorias del Gobierno Corporativo, June 2011.
8. Study by Monica Villagómez: "Las Instituciones Financieras y el Buen Gobierno Corporativo, un Análisis Comparativo: Memorias de Gobierno Corporativo," June 2011.

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Issues That U.S. Corporate Counsel Should Consider When Doing Business in Guatemala[1]

As reported in *The New York Times*, "Central America's 45 million consumers buy more U.S. products than the 1.5 billion people in India, Indonesia, and Russia combined."[2] With Guatemala itself accounting for about one-third of the total population in the region, it is not surprising that U.S. companies have an interest in this consumer and labor market just a short 2½ hour flight from Miami. In fact, there is a rich tradition of U.S. business interests in Guatemala.

After spending many years working together with foreign counsel on how to protect their clients´ legal interests in Guatemala and having lived and studied in the U.S., I can say that the following are some of the most important issues that corporate counsel should take into consideration when doing business in Guatemala.

I. Guatemalan Business Culture

Most lawyers doing deals in the country will find that Guatemalans are hard-working and business savvy. Although some meetings can be relaxed, usually business meetings are serious affairs. Formal business attire and punctuality is expected. In contrast, social events tend to be more relaxed and punctuality is not the norm. In business, it is normal to address people by their professional titles (i.e. *Licenciado/a* is used to address Attorneys). As in many other Latin American countries, complete names are frequently comprised of a first and middle name and two family names, usually the paternal family name followed by the maternal family name (i.e. Juan Carlos López Valenzuela). To address someone formally typically one uses their title and only the first of their last names (i.e. *Licenciado* López). Married women will use a first name and the prefix "*de*" followed by their husband's family name (i.e. Monica de López). This is generally the norm but as always there are exceptions. Addressing somebody by his or her title and his or her first family name is expected for business correspondence. However, legal documents should include all names.

Once you have met someone, in many cases, you may refer to them by their first name. Relationships are very important in Guatemalan business culture, therefore social conversation usually takes place before or after serious business. Particularly within long-term business relationships it is common to get invited to social events and to meet or inquire about each other's family.

In the context of large deals with foreigners, English is usually the language of negotiation; it is also the language in which the final documents are drafted. Only once did I encounter a local bank that was reluctant to draft a major deal in English. Local courts will enforce a contract drafted in any language if a certified Spanish translation is provided. However, some particular documents need to be drafted originally in Spanish, especially ones that require registration before the local authorities (like real estate transfers and local articles of incorporation). In communicating with others outside of the meeting room, you may get along in English in hotels in the capital and in the main tourist sites (Antigua, Atitlan, Tikal, etc.), but apart from these areas you will most probably need to speak in Spanish.

The local currency is the quetzal but dollars are very often accepted.[3] Deals can be conducted or indexed to any foreign currency without restriction. Generally, even purely local agreements dealing with large assets, such as real estate or rental agreements, are fixed in or indexed to the dollar. Local bank accounts can be set up in local currency, dollars and in some cases, Euros. There are no restrictions on conducting business in dollars, nor are there limits on currency exchange or repatriation. However, there are newly implemented limits on handling cash deposits and withdrawals at banks, though note that these are mainly directed at preventing money laundering.[4]

Newcomers often find it surprising that Guatemala City has a modern and business-friendly atmosphere. Most business deals take place in the capital. The infrastructure, hotels, telecommunications and banking industry generally are sufficiently sophisticated for the purposes of cross-border business. Crime rates are high so you should always take precautions.[5]

II. Dealing with the Government

Whether it's a trademark registration, the recording of a power of attorney, or securing a mortgage over land, many business activities require dealing with the government. It is particularly on these aspects that you will need local counsel. Government offices and registries are centralized in the capital. Some documents, and in particular those that will be recorded, such as land transfers and articles of incorporation, are drafted in Spanish on special paper (*escritura pública*) available only to notaries.[6] In these notarial documents, the original is kept by the notary who may issue certified copies. If confidentiality is an issue, keep in mind that notaries are legally required to send a copy of these documents to a registry where they are available to the public.

Some documents and in particular those that will need to be recorded, including foreign powers of attorney, are only valid in Guatemala once they have passed through a lengthy consular legalization process. It is important to note that Guatemala is not a party to the Hague Apostille Convention.[7] This means that unlike other jurisdictions the legalization process will take some time. A few years ago, a foreign in-house counsel for a financial institution called me in order to consult on whether a shareholders´ meeting could be scheduled to take place later that week. I explained that in this case the proxies had to be notarized in the country of execution, legalized at the Guatemalan consulate, sent to my office, legalized at the Foreign Relations Ministry and recorded at the General Notarial Registry and at the Commerce Registry. Needless to say, the shareholders´ meeting had to be postponed.

Once a request has been submitted at a government office or court on any matter it is indispensable to have an experienced professional ensure that the process runs its due course. On one occasion I found out that a client's request for a permit at the Finance Ministry had been delayed because the clerk had left for vacation and the documents were locked in her desk. Although some institutions have undergone substantial modernization and can provide timely results, you should always be prepared for substantial delays, holidays or requests for new documents. Even the most specialized and experienced practitioners can't ensure that a process will be complete by a set date, so always consider leaving some time available for unforeseen delays.

III. Limitations for Foreigners

In addition to domestic regulations, U.S. companies are granted the protections afforded by the U.S.-Dominican Republic-Central America Free Trade Agreement (DR-CAFTA), in effect for Guatemala since July of 2006.[8] The agreement contains the usual protections regarding national treatment, compensation for expropriation, most favored nation, minimum international standards and others.[9] So far only one case has been filed against Guatemala by a U.S. investor.[10] The arbitral award has not yet been issued.

In general terms, foreigners have the same rights as nationals when it comes to business.[11] It is only if you are involved in certain specific activities that you might find that a distinction is relevant. Foreign investment requires no registration and there are no limitations for repatriation of earnings. Most limitations for foreigners involve the prohibition on owning certain lands, including some government lands;[12] land located in the national borders, and in the shores of navigable rivers and lakes.[13] Activities in the forestry industry and other regulated sectors like banking and insurance might also present some

restrictions.[14] In addition, foreign institutions are barred from receiving inheritances.[15] Other relevant limitations include the protection of Guatemalan workers: therefore, if you are setting up shop in the territory consider that 90% of all employees must be nationals and the sum of their salaries should account for at least 85% of the total payroll.[16]

It is important to consider that some limitations might be the result of practice rather than law. For example, in one case the delivery of a money judgment to a foreign client was delayed for a few days because the Tribunal had to file for a temporary tax number on behalf of the company. In many cases, limitations on foreigners´ activities become irrelevant where a local company is incorporated.

IV. Incorporating into a Local Company

There are no limitations on foreign ownership or control of local corporate entities. A locally incorporated company requires a minimum capital balance of Q.5,000.00 (U.S. $627.00)[17] and following a procedure at the Commerce Registry that can take about a month to complete. Some fees and taxes will also be applicable. After this, a separate registration process before the Tax Authority will be necessary. However, companies can begin to operate temporarily before the process is complete. In general terms, there are no readily available off-the-shelf companies. If you happen to find one, always be wary of the liabilities it may have acquired in the past.

The most common corporate entity is the *sociedad anónima*. It allows for limited liability and unlimited duration. Note that some features of the *sociedad anónima* will change in the following two years due to legislative amendments.[18] Once a company has been established corporate formalities or fees are minimal, but there are some periodic tax documents that should be filed regularly.

Many business activities carried out by foreign companies do not require specific registration as a foreign company nor to be incorporated as a local company; these activities include acquiring title over land, registering trademarks, and taking part in litigation or lending money.[19] In my experience the registration of a foreign company is quite uncommon and generally related to foreign companies involved in government procurement. In cases where registration as a foreign company is required, the process can take about a month and requires the subscription of a U.S. $50,000 bond.[20]

V. Intellectual Property

Guatemala has relatively modern IP legislation and is party to several international agreements, including the Patent Cooperation Treaty,[21] the Rome Convention,[22] the Paris Convention for the Protection of Industrial Property,[23] and TRIPS.[24] Additional protection for U.S. companies is afforded by DR-CAFTA: the IP provisions of this treaty have been described by the U.S. Advisory Committee for Trade Policy and Negotiations as "the best that have been negotiated in any U.S. trade agreement."[25]

All IP matters are handled by the Intellectual Property Registry. The Registry received about 7,400 trademark applications during 2009, more than two-thirds of which were owned by foreign companies.[26] The trademark registration process typically takes between 10 to 12 months and grants protection for 10 years, at which time the protection is renewable.[27] Protection dates back to the filing date. Registration, defense or opposition can be handled by an attorney by means of a proxy in Guatemala. A patent for an invention is protected for 20 years and takes about 2.5 to 3 years to obtain.[28]

VI. Labor

Labor issues are regulated by a specific set of rules outside of the scope of general contract law. There is no at-will employment and individual labor disputes cannot be submitted to general arbitration. Guatemala recognizes the creation of labor unions and provides protection for the negotiation of collective bargaining agreements. However, it is unusual for small and medium sized companies to have a union.

Minimum wage is fixed by the government on a yearly basis. For 2011 it has been set to Q.63.70 (U.S. $8.01) a day for all sectors, except for the export and confection industry which has a lower salary of Q.59.43 (U.S. $7.47) a day.[29] The usual work week consists of 5 or 6 working days, 8 hours a day, and no more than 44 hours a week.[30] Overtime is paid at a 50% increase over the normal hourly rate.[31] Fifteen days vacation leave is mandated.[32] In addition, the Guatemalan calendar year has about 12 holidays.[33] Most recently Congress approved a law stating that if certain official holidays land on a Tuesday they will be moved to the previous Monday. If the holidays land on a Wednesday or Thursday, they will be relocated to the following Friday in order to enjoy a three-day weekend.[34]

Employees are entitled to 14 monthly wage payments a year, corresponding to 12 monthly salary payments plus a Christmas[35] and mid-year bonus.[36] Employees are also entitled to a minimum performance bonus[37] and social security, among other benefits.[38] In case an employee is fired without cause, he or she is entitled to receive severance pay equal to one monthly salary for every year of employment, plus 30% as economic benefit.[39] An employee can be fired without severance pay only if it is with cause or during the first two months of the employment.

In general, it is very important to maintain well prepared written agreements with all employees; otherwise the courts will apply a presumption in favor of what is stated by the employee.[40] Counsel for a U.S. company should also be aware that even if the company has an agreement with a local independent contractor or distributor stating that it is not a labor agreement, if it meets

the general conditions of a labor agreement, a local labor court might consider it an effort to conceal an underlying employment relationship and enforce it as such.

VII. Taxes

Taxes are a complex and industry-specific matter. Guatemala does not have any double taxation agreements with the U.S. The fiscal year begins on January 1 and ends on December 31. Income tax is charged on earnings from national sources only. When registering before the National Tax Authority companies can choose as to whether they pay 5% of gross income or 31% of taxable income.[41] Personal income tax for individuals depends on a bracket that goes from 15% to 31% of taxable income. Professionals may, however, elect to pay 5% of gross income as an alternative.[42] Capital gains are also taxed.

Some foreign industries like transportation, film production companies, insurance and news agencies have specific taxation brackets.[43] There are also many industry-specific taxes, for example, on the distribution of cement, petroleum and alcoholic beverages.[44] A "solidarity" tax may also be applicable on commercial activities that generate profits over 4% of gross income. This tax is about 0.25% of the larger between assets or income, but can in some cases be deducted from income tax contributions.[45] A value added tax (VAT) is applicable on most sales, including land transfers and is equivalent to 12% of the sale price.[46] There is an annual tax for the circulation of vehicles which is 1% to 0.1% of the value of the vehicle, depending on the year model.[47] Annual property taxes are about 0.9% of the registered value, but most properties have a commercial value that far exceeds their registered value.[48]

Central American regional agreements will also offer advantages for products made in Guatemala. Additionally, there are several operating Free Trade Zones (FTZ) in which companies are exempted from paying import duties.[49] Many apparel shops have taken advantage of this scheme in order to import raw materials and export manufactured goods into the U.S. FTZs can also be advantageous for other activities, like call centers and factories. A few years ago I even advised a foreign client on how to set up a refrigerated fruit export business in an FTZ.

VIII. Dispute Resolution

As a general rule I advise my clients to avoid litigation in Guatemala. A judicial procedure can often be a lengthy and costly affair. A regular contract dispute takes between 4 and 6 years in order to reach a final judgment, sometimes even more, and this does not include the enforcement process that follows. Bankruptcy procedures can take decades. If you do have to file a suit, the courts in the city are more accustomed and equipped to deal with complex matters than those in the provinces. If you need to serve process outside of the country, it will entail a prolonged letter rogatory procedure.

In general terms, Guatemalan law allows for the parties to establish the courts of another country or arbitration as the forum for dispute resolution. In many cases, the laws of another jurisdiction can also be set as the law of the contract. Contracts dealing with large sums will often include an arbitration clause. Our arbitration law is based on the UNCITRAL model law.[50] For international deals it is common to select Miami or New York as the seat of arbitration. The American Arbitration Association (AAA) or the International Chamber of Commerce (ICC) rules are common for these types of deals. There are a few national arbitration centers as well, but they handle only a few cases a year and are subject to the delays that might arise from legal action filed before the national courts.

It is important to remember that even if the forum for dispute resolution is set outside of Guatemala, the final judgment might eventually have to be enforced by local courts. Even though Guatemala has been a party to the New York Convention since 1984, it has been my experience that the enforcement of foreign awards can sometimes be a substantially lengthy ordeal.[51] Although some awards can be enforced within one or two years and orders for attachments obtained over assets, I know of at least one case where enforcement of an arbitral award rendered in the U.S. has taken over nine years.[52] Therefore, when the deal is made you should take care to ensure contractual provisions give you an advantage and help you reach a negotiated settlement if a future dispute should arise.

IX. Local Counsel

One of the most important decisions you will make is selecting local counsel. Always have a written agreement and be clear about your expectations from the beginning. It is essential to clearly define the services that are covered, otherwise you might be liable for additional fees that are contained in a statute.[53] Be wary that some practitioners have very relaxed standards regarding conflicts of interest. National ethics regulations are not nearly as detailed or strict as the ABA Model Rules on Professional Conduct and ethics boards are not as effective.

Most lawyers will work with either hourly fees or fixed rates, and in dollars. It is always advisable to obtain an estimate of total billable hours in advance. You will find that most law firms are located in Guatemala City. It will be harder to find qualified English speaking counsel in the provinces.

The legal market is small and law firms range from sole practitioners to firms with 30 lawyers. There are no local branches of U.S. firms. Most attorneys handle a wide array of fields. There is no high degree of specialization, except in areas like Family or Criminal Law. Many practi-

tioners are also litigators. There are many qualified attorneys in Guatemala accustomed to protecting the interests of U.S. clients, although only a few with degrees from abroad and only a handful have been admitted to a U.S. State Bar. With this in mind and some diligent searching, you are sure to find a partner in Guatemala that will assist you with a high degree of efficiency and integrity.

By following these recommendations and taking some time to understand the unique characteristics of Guatemala's culture and regulation, you will be able to successfully represent your client's legal interests when doing business in the "land of eternal spring."

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Endnotes

1. *****An earlier version of this work was published in Vol. 29 No. 1 of Inside (Spring/Summer/2011), a publication of the Corporate Counsel Section of the New York State Bar Association.
2. Lionel Beehner, *Q&A: The CAFTA Debate*, N.Y. Times, July 8, 2005, http://www.nytimes.com/cfr/international/slot3_071805.html (last visited Sept. 29, 2011) (This data also included the Dominican Republic).
3. The currency exchange rate at this moment is about U.S. $1.00 = Q.7.85, but fluctuates constantly. *See* the Bank of Guatemala, http://www.banguat.gob.gt/cambio (last visited Sept. 29, 2011) (in Spanish).
4. Monetary Board Resolution, No. JM-108-2010 (2010), http://www.sib.gob.gt (last visited Sept. 29, 2011) (in Spanish) (Regulation applicable to cash transactions over U.S. $3,000).
5. *See, e.g.*, International Crisis Group, Latin America Report No. 33, *Guatemala: Squeezed between Crime and Impunity* (2010), available at http://www.crisisgroup.org (last visited Sept. 29, 2011).
6. All attorneys in Guatemala are also notaries.
7. Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents. Oct. 5, 1961.
8. The Dominican Republic–Central America–United States Free Trade Agreement (DR-CAFTA), July 1, 2006, http://www.ustr.gov (last visited Sept. 29, 2011).
9. *See id*. Section 10.
10. *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23 (2007-2008), http://icsid.worldbank.org (last visited Sept. 29, 2011) (The case has not yet reached a decision on the merits).
11. Foreign Investment Law, Decree No. 9-98, § 3 (1998).
12. Law for the Adjudication, Holding and Use of Land in Petén, Decree No. 118-96 (1996) and Supplementary Titles Law, Decree No. 49-79 (1979).
13. Const. §§ 122-123.
14. *See, e.g.*, Const. § 126 (forestry), Insurance Activities Law, Decree No. 25-2010 (2010) (insurance); Banking and Financial Groups Law, Decree No. 19-2002, § 6 (2002) (Banks).
15. Civil Code, Law-Decree No. 106, § 926 (5). (1973) A few years ago I petitioned the Constitutional Court to declare that this limitation was discriminatory; the Court however, held that it was a distinction within the powers of Congress. *See* Constitutional Court, General Unconstitutionality. *Najman Alexander Aizenstatd*, File No. 534-2007, Judgment of April 10, 2008.
16. Labor Code, Decree No. 1441, § 13 (1961).
17. This is equivalent to U.S. $636.94 as of 29 Sept. 2011. *See* the Bank of Guatemala, http://www.banguat.gob.gt/cambio (last visited Sept. 29, 2011) (in Spanish).
18. Extinction of Domain Law, Decree No. 55-2010, §§ 71-74 (2010).
19. Commerce Code, Decree No. 2-70, § 220 (1970).
20. *Id.* §§ 221–215(5).
21. Patent Cooperation Treaty, Oct. 14, 2006.
22. International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations, Jan. 14, 1977.
23. Paris Convention for the Protection of Industrial Property, Aug. 18, 1998.
24. The Agreement on Trade Related Aspects of Intellectual Property Rights administered by the World Trade Organization, 1994.
25. Advisory Committee for Trade Policy and Negotiations, Report to the President, the Congress, and the United States Trade Representative on the U.S. Central America Free Trade Agreement (2004), http://www.ustr.gov (last visited Sept. 29, 2011).
26. *See generally*, Intellectual Property Registry, http://www.rpi.gob.gt (last visited Sept. 29, 2011) (in Spanish).
27. Industrial Property Law, Decree No. 57-2000, § 31 (2000).
28. *Id.* § 126.
29. Presidential Accord No. 388-2010 (2010).
30. Const. § 102(g).
31. Labor Code, Decree No. 1441, § 121 (1961).
32. *Id.* § 130.
33. *Id.* § 127. (January 1 [New Year]; Holy Thursday, Friday and Saturday [Easter]; May 1 [Labor Day]; June 30 [Armed Forces Day]; September 15 [Independence Day]; October 20 [Remembrance of the Revolution]; November 1 [All Saints Day]; mid-day December 24 , 25 and 31; and the local patron's day in each province).
34. Promotion of Internal Tourism Law, Decree No. 42-2010, § 2 (2010). (Not applicable to all holidays).
35. Law that Regulates the Christmas Bonus, Decree No. 76-78 (1978).
36. Annual Bonus for Employees in the Public and Private Sector Law ("*Bono Catorce*"), Decree No, 42-92 (1992).
37. Performance Bonus Law, Decree No. 37-2001 (2001).
38. Organic Law of the Guatemalan Institute of Social Security, Decree No. 295 (1946).
39. Labor Code, Decree No. 1441, §§ 82, 90 (1961). (Economic benefits are understood as anything provided to the employee in addition to his or her salary, such as parking, meals, insurance and others. Unless it is otherwise agreed, benefits are fixed at 30% of salary).
40. *Id.* § 30.
41. Income Tax Law, Decree No. 26-92, §§ 44, 72 (1992).
42. *Id.* § 43.
43. *Id.* §§ 34-36.
44. *See, e.g.*, Specific Tax on the Distribution of Cement Law, Decree No. 79-2000 (2000); Tax on Distribution of Distilled Alcoholic Beverages and other Distilled Beverages Law, Decree No, 21-04 (2004); Specific Tax on Distribution of Isotonic Carbonated or Sports Beverages, Juices and Nectars, Yoghurts, and Concentrated or Powdered Preparations for the production of Beverages or Natural Bottled Water Law, Decree No. 09-2002 (2002); and Tax on Distribution of Law Petroleum and Fuels Derived from Petroleum Law, Decree No. 38-92 (2002).
45. Solidarity Tax Law, Decree No. 73-2008 (2008).

46. Income Tax Law, Decree No. 27-92, § 10 (1992).

47. Tax on Circulation of Terrestrial, Maritime or Aerial Vehicles Law, Decree No. 70-94, §§ 10-11 (1994).

48. Sole Tax on Immovable Assets Law, Decree No. 15-98, § 11 (1998).

49. Free Trade Zones Law, Decree No. 65-89 (1989).

50. Arbitration Law, Decree No. 67-95 (1995).

51. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 19, 1984.

52. *See North American Energy Services v. Generadora Eléctrica del Norte, Ltda.*, Constitutional Court, File No. 877-2003, Judgment of August 11, 2003, available at http://www.cc.gob.gt (search engine in Spanish (last visited Sept. 29, 2011).

53. Schedule of Fees for Attorneys, Arbitrators, Solicitors, Powers of Attorney, Experts, Administrators and Depositaries, Decree No. 111-96 (1996) and Notarial Code, Decree No. 314, Title XV (1946).

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Is This the Right Time to Sell? Legal Issues and Considerations Regarding the Upcoming Privatizations in Portugal

I. Introduction

In the context of the global economic crisis, and due to the accumulation of public debt by Portugal and the bailout negotiated with the IMF, the European Central Bank and the European Commission, Portugal is now required to adopt significant austerity measures in order to alleviate its public finance problems. Several drastic economic, tax, and policy measures are being implemented, one of them being the privatization of multiple State-Owned Companies (SOEs) by 2013.

The purpose of this article is to provide an analysis of the legal issues related to the privatizations to be undertaken in Portugal in the near future, as well as to explore other relevant considerations related to this hot topic. This article will cover: (i) the privatization plan for Portugal; (ii) the novelties of the newly amended Privatization Law; (iii) the legal issues related to the considered privatizations; and (iv) provide insight into the recent intention to suspend shareholder vote caps.

II. Portugal's Privatization plan

In order to stabilize European economies, the European Commission's Eurogroup and ECOFIN Ministers have declared that financial aid would be provided to Portugal, subject to a strict austerity plan, negotiated by the Portuguese authorities, the European Commission, the European Central Bank and the International Monetary Fund. The austerity measures to be adopted by Portugal as a condition for obtaining the financial aid are contained in the Troika Memorandum of Understanding[1] and its first update,[2] and cover the issue of privatizations. Indeed, the MoU describes two privatization waves, the first to be concluded before the end of 2011 and the second to take place during 2012-2013, resulting in the privatization of close to 20 companies, and estimated proceeds of about € 5 billion. The MoU provides that State participation in EDP—the Portuguese electricity company, REN—the Portuguese gas and electricity Network Company and GALP is to be divested in 2011. In addition, should market conditions permit, state participation in TAP—the Portuguese airline company—market is to be divested conditions permitting. The second wave will concern Águas de Portugal—the water management company, RTP—the media network company, ANA—the Portuguese company for the development and management of airports, the freight branch of CP—the railroad transportation company, Correios de Portugal—the public postal company, and Caixa Seguros—the insurance branch of CGD Bank, to mention some of the most significant.

III. Novelties of the Newly Amended Privatization Law

On September 13th, the Portuguese Parliament adopted Law 50/2011, an amendment to the Portuguese Privatization Law, in preparation for the numerous privatizations that will take place. Certain points are worth noting regarding the new wording of this law, as they touch on some fundamental elements of the privatization process in general.

The first element, reworded in the update of the law, is found in article 6. Public companies to be privatized, which are not already in the form of a Limited Company,[3] are to be transformed into such a type of company by way of Decree-Law. Such a corporate transformation is necessary to facilitate the sale of shares and for a public offering procedure.

Secondly, the amendment to the Law also modifies the wording pertaining to the method of privatization. Indeed, article 6 now states that the privatizations shall be carried out, as a rule and preferably, through a public tender or public offering process, in accordance with the Portuguese Securities Code. This does not exclude that the State can also opt for a trade sale or a limited public tender by pre-qualification if a national interest, a sector strategy, or the economic and financial state of the company should require it. Should the State opt for a public tender or a trade sale, it will be the competence of the Cabinet of Ministers to select the candidates, as well as to define the specific terms of the share acquisition. In both of the above cases, it is most probable that the Government of Portugal will consider each operation on a case-by-case basis. This flexibility will allow the Government to adapt the privatization procedure to the market

offer and the players at stake in the respective sectors of activity.

The final point amended by Law 50/2011 is the definition of the competence and function of the Privatization Commission. Indeed, the new wording of the law provides that such a commission will be created for the sole purpose of each privatization procedure, and would terminate upon the conclusion of the operation. The role of the Commission is to provide technical support to the process, and to ensure the full observance of the principles of transparency, rigor, impartiality and the defence of public interest. The commissions would, independently from the privatization mechanism selected for each operation, carry out the following:

a) Assess strict observance of the statutory rules and principles, as well as of the rigorous transparency in each process;

b) Draft legal opinions and reports that the Government deems necessary on matters related to the process;

c) Verify compliance with the restrictions and rules established in relation to voting rights and the acquisition of a limited percentage of participation;

d) Evaluate and submit to the competent entities or bodies any claims they are presented with; and

e) Draft a final report regarding its activity.

Each member of the Privatization Commission will be nominated by implementing order of the Prime-Minister, upon proposal by the Finance Minister, and a summary of their curriculum will be published in the Official Gazette. Moreover, they are held to the strictest duty of confidentiality, impartiality and will not be authorized to acquire any shares of the company their Privatization Commission is assigned to.

IV. Legal Issues Related to the Portuguese Privatizations

Several key issues must be identified when considering the privatizations. The first is predicting the Government of Portugal's decision concerning the sale mechanism of its participation in the State-Owned Companies. Here, the Government of Portugal will have to choose between a trade sale (through a public tender or a limited tender) or a flotation, as per the methods identified in the Privatization Law. Thus, other uncommon mechanisms such as auctions, voucher sales, or management buyouts seem legally excluded from consideration. Other issues could include how to carry out the pre-sale valuation, and finally, how the bid-criteria will be defined.

A. The Implications of Opting for a Trade Sale

The Government of Portugal may choose to sell its participation through the means of a trade sale, meaning that the buyers will be clearly identified and in direct negotiation with the Government in order to set the terms and conditions of the sale. Such a mechanism can be carried out in the form of a public tender, for which an invitation to tender is made public and any investor can present his or her bid, or through a limited public tender with pre-qualification, hence guaranteeing that potential bidders are selected individually by the Government of Portugal.

This mechanism can usually be completed more quickly than a public offering, and is particularly relevant if Portugal wishes to bring in a strategic investor, usually specialized in the sector of activity of the privatized company, to further a predefined or jointly defined future policy in that sector. For example, it would be plausible to imagine that an investor with significant experience in energy distribution and management be selected as an acquirer of a share in REN—the Portuguese gas and electricity Network Company—through a trade sale, under the negotiated conditions that certain specific investments be made for an innovative energy policy. An issue to point out in the case of a trade sale is the valuation of the shares, which will be discussed below.

B. The Implications of Opting for a Flotation

The Portuguese Government may also choose to carry out the sale of its participation in State-Owned Companies through a floatation, or public offering on the national or international stock markets. Such a sale mechanism is not new to Portugal, as EDP and REN, two of the major State-Owned energy Companies in Portugal, have already been the object of one or more public offerings after their nationalization in 1974. As a modern and well-established market economy, such a mechanism would definitely be a viable option for Portugal. Moreover, despite the fact that public offerings tend to be more costly, complicated, technical, and riskier than trade sales, the floatation on a stock market of the shares to be sold can sometimes provide greater returns, depending on the conditions of the stock market conditions.

As mentioned above, the sale of publicly held shares must comply with the Portuguese Securities Code, which leads to the issue of company structure and management prior to the offering. It will indeed be necessary, prior to the floatation date, to ensure that the corporate and management structure are not only aligned with this code but also with current European Regulations concerning securities trading.

The ultimate goal of the State of Portugal is to perceive as high a return as possible during these privatization operations, hence it is likely that Portugal will adopt a combination of the above described mechanisms in order to increase the price of the sale. One such strategy to adopt would be to have trade sales and public offerings simultaneously in order to create greater competition among the buyer groups, which may be individuals, insti-

tutions or national and foreign investors, thus increasing the odds of a higher share price. Also, the Portuguese Government may decide to carry out multiple waves of public offerings, divesting its ownership progressively while hoping that share price will increase with each wave.

No one can yet be certain what sale mechanisms and strategies the Government of Portugal will adopt. However, it would not be surprising for the privatizations to be carried out through the use of both mechanisms, thus permitting a concomitant control as to who some of the acquirers would be, how the risk associated with the sale would be controlled, and how the State could perceive the maximum possible return from the sale.

C. Pre-Sale Valuation

One of the other key issues of the privatizations in Portugal is the valuation of the shares to be sold before they are actually put up for sale. This valuation must be carried out by independent financial analysts to assess the market value of the shares so that the Portuguese Government can adequately evaluate any offers and bids it receives from interested buyers. Also, the valuation will be a key piece of information for it to set a floor price for the shares in the case of a public offering. As the companies to be privatized are likely to maintain their activity, the "ongoing concern" valuation method seems a probable method to be used, which is not uncommon for privatizations.

D. Defining the Bid Criteria

In the case of trade sales, through public tenders or limited public tenders by pre-qualification, the definition of the bid criteria will be a significant issue. As certain sectors of activity in which the companies that are to be privatized operate, there may well be a national strategic interest at stake, such as in the areas of transportation, energy or postal services for example. Therefore, the Government of Portugal and its financial advisors will have to define the bid criteria in such a way as to secure national interests without keeping a share participation in the company. This can be achieved mainly though engagements from the bidders regarding these interests in response to the criteria set by the State.

V. The End of Shareholder Vote Caps in Takeovers

Various companies in Portugal that are to be privatized, including EDP—the Portuguese electricity company—have rules which allow them to limit voting rights of shareholders regardless of how much capital they own. Indeed, some of these companies have ceilings set between 5 and 20 percent of voting rights for each shareholder, thus limiting their power within the company. With these existing limits and the risk that they fragment voting on acquisition bids at general meetings, the privatization process by way of public offering could be hindered. On August 17, 2011, the Portuguese Securities Authority (CMVM) announced its intention to suspend the shareholder vote cap in the context of acquisitions. The voting right cap would therefore be suspended during the acquisition process and thus boost the interest of foreign entities to invest in Portuguese listed companies.

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Endnotes

1. Memorandum of Understanding on Specific Economic Policy Conditionality of May 3rd 2011 entered into between the State of Portugal and Troika (European Commission, European Central Bank and International Monetary Fund).
2. Memorandum of Understanding on Specific Economic Policy Conditionality—First Update, of September 1st 2011 entered into between the State of Portugal and Troika (European Commission, European Central Bank and International Monetary Fund).
3. The corporate structure to be adopted by the public companies is that of a "Sociedade Anónima," a type of Limited Company.

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Private Limited Liability Company in Italy

I. Overview Regarding Companies with Limited Liability in Italy

The *Italian Civil Code* ("ICC") recognizes three types of limited liability companies:[1]

- *Società a responsabilità limitata*, also known as *S.r.l.* (a private limited company);
- *Società per Azioni*, also known as *S.p.a.* (a joint-stock company);
- *Società in Accomandita per Azioni*, also known as *S.a.p.a.* (a hybrid form, rarely used in practice, that involves two categories of shareholders, some with and some without limited liability).

The *S.r.l.* is the most commonly used corporate form in Italy, although the Spa is the corporate form used by major public corporations listed on the Italian stock exchange and preferred by large private enterprises. The *S.p.a.* is, obviously, the most regulated of the two major limited liability companies, requiring a full-blown board

of directors and board of auditors, as well as higher minimum capital requirements (€120,000.00).

The regulations set forth in the *Italian Civil Code* ("ICC") for the *S.p.a.* also apply to the *S.r.l.*, unless stated otherwise. The following are the main differences between the *S.p.a.* and the *S.r.l.*:[2]

- In the *S.p.a.* the capital is represented by shares which can be transferred by endorsement. All shares in Italy are nominal. In the *S.r.l.* the capital is represented by quotas, which are not represented by an endorsable instrument.
- The minimum capital of the *S.p.a.* is €120,000.00, as compared to €10,000.00 for the *S.r.l.*

II. Limited Liability Company (S.r.l.—Società a Responsabilità Limitata)

The *S.r.l.* is the most commonly used corporate form in Italy.[3] The Italian *Società a Responsabilità Limitata* is equivalent to the *Limited Liability Company* and the German *G.m.b.H.* (*Gesellschaft mit beschränkter Haftung*).[4]

The *S.r.l.* may be established by one (incorporation made by unilateral act)[5] or more founders (incorporation made by contract) who must be residents of EU-member states, or have residence permits. There are no requirements that directors be Italian citizens or residents, nor does the law require a company secretary.

For the incorporation of a *Società a Responsabilità Limitata* in Italy it is necessary to:

- enroll the company within 30 days at the competent Chamber of Commerce (*Camera di Commercio*), register with the Italian Registrar of Companies and publish in the Official Journal;
- enroll the company at the Tax office and VAT office for the release of a VAT code;
- enroll the director of the company or any employees at the Welfare Fund (*Istituto Nazionale Previdenza Sociale—INPS*) and with the *Istituto Nazionale Infortuni sul Lavoro—INAIL* for insurance of injuries of director or employees;
- get the release of the Smart Card for electronic signature of the director of the company;
- open a bank account (and therefore the titular may be required to travel to Italy once before setting up the account).

All shareholders (better qualified as "quotaholders") must sign all the company documents in front of an Italian Notary, or they can issue a Power of Attorney to enable a lawyer to sign and provide all the required documentation.

The Deed of Incorporation of an *S.r.l.* consists of a Certificate of Incorporation and by-laws. The following details must be provided therein:[6]

- Quotaholder's name and address;
- The name of the company , followed by the expression "*Società a Responsabilità Limitata*" or the abbreviation "*S.r.l.*" (Limited Liability Company) and the address of the legal office company;
- Company's address;
- A complete description of the purposes of the company;
- Amount of the share capital;
- Number and nominal value of the quotas held by any and all quotaholders;
- Quotaholders' contributions;
- Rules of administration and method of representation;
- Board of directors;
- Board of auditors; and
- The approximate costs borne by the company for the incorporation.

Registration with the Register of Companies is done by a Notary, who files the incorporation deed with the Register of Companies. Once the Company is duly registered pursuant to Article 2331 of the Italian Civil Code, it acquires its legal status.

It is important, at the time of incorporation, to consider the contents of the deed and the by-laws very carefully because, in addition to the information which must be set out, there are other provisions concerning the company, which should be included in order to avoid potential legal problems. Although the amendment of the above documents through a resolution of the quotaholders is always possible, this may not be easy when the foreign company does not have control of the Italian subsidiary.

1. Estimated Time of Formation

Excluding regulated industries such as banking, insurance, shipping, or aviation, which require government licensing and compliance with special laws, formation of an *S.r.l.* usually takes about two weeks.

2. Estimated Costs of Formation

For the incorporation of the Italian *S.r.l.* it is necessary, as stated above, to have the Certificate of Incorporation (*Atto Costitutivo*) and the Article of Association by-laws (*Statuto*) sworn in front of a notary. The medium cost of a notary for these documents, which includes registration tax, governmental tax and notary fee, is €2,000.00.

3. Tax treatment

An *S.r.l.* shall pay the company income tax ("*IRES*") and the regional tax on business activities ("*IRAP*"). *IRES* corresponds to 27.5% of a company's net income, whereas the tax rate of the *IRAP* is 3.9%, applied on the gross income plus certain items and minus the deduction of certain costs and depreciation.

As to the dividends paid by an Italian company to its foreign quotaholders, it should be observed that under most income tax treaties the withholding applied in Italy cannot exceed a certain percentage of the gross amount of the dividends.

4. Capital Structure

In the *S.r.l.* liability is limited by quotas instead of shares as in the *S.p.a.*[7] Thus an individual participant's capital contribution in an *S.r.l.* is termed a participant's "quota" and the participants are termed "quotaholders."

No certificate thereto is issued by the company and no public offering of financial instruments in connection therewith is allowed.[8]

The minimum authorized capital stock ("share capital") of an *S.r.l.* is, as stated above, fixed at €10,000.00, which may be contributed in cash or kind and, under the new Business Corporation Act, individuals may even contribute professional work or services.[9]

Specifically, the quotaholders' contributions of an *S.r.l.* must be in cash, unless the deed of incorporation provides otherwise; any type of asset which can be economically evaluated can be the object of a contribution. If a contribution is in kind, or consists of a credit, a report of an expert must be submitted. A contribution can also consist of an insurance policy or a bank guarantee.[10]

In order to set up an Italian *S.r.l.*, the company's capital has to be fully subscribed and, if the *S.r.l.* is established by more than one partner, at least 25% must be paid in.

In practice, prior to formation, quotaholders are required to deposit €2,500.00 in cash or bonds with a local Bank corresponding to 25% of the minimum authorized capital stock. If the *S.r.l.* is established by just one partner, the share capital to be deposited in the bank account has to be €10,000, in order to have and maintain the limitation of liability.

*S.r.l.*s may issue bonds (debentures).[11]

5. Relationship of Quotaholders, Directors and Officers, Limitation of Liability

Unless otherwise stated in the by-laws, the management of an *S.r.l.* is entrusted to the quotaholders.

The Company is governed by the quotaholders and (generally) by the board of directors.[12] However, there are no requirements for management by a board of directors.[13] In most cases, small *S.r.l.*s can do without a board of auditors but there must be at least one director (Sole Director).

Non-resident directors must elect a domicile in Italy and obtain a personal tax code (*Codice Fiscale*). If the director to be appointed is a non-E.U. resident, it is necessary to obtain a business visa permit from the Italian government. One or more managing directors can be appointed pursuant to the deed of incorporation or a resolution of the quotaholders' meeting.

Directors are generally entitled to take all decisions concerning the company's corporate object, with the exception of the restrictions contained in the deed of incorporation or in the by-laws. Restrictions are not valid in respect of third parties, unless it is proven that such parties have intentionally acted against the company.[14]

The memorandum of association may provide that the decisions of the board of directors can be taken by means of written consultation or consent, expressed in writing (both the subject matter and the consent must be indicated). In any event, the draft of a project of balance-sheet or of a merger project, as well as any decision to increase the stock capital in accordance with Article 2481 of the Civil Code, are within the exclusive competence of the board of directors.

Directors are jointly liable to the company for any damage due to breach of their duties.

The quotaholders' meeting is competent to:[15]

- approve the company's balance-sheet;
- appoint directors and auditors;
- fix their remuneration;
- decide any other question provided by the deed of incorporation or the by-laws including, the amendment of the deed of incorporation or the by-laws and the appointment of the liquidators, if the company is wound up.

The quotaholders' meeting can pass resolutions if at least half of the stock capital is represented and the resolution is approved by the absolute majority. Resolutions that concern the modification of the deed of incorporation or by-laws, or that imply a substantial modification of the corporate object, requires the approval of at least half of the stock capital.[16] A quotaholder can appoint a proxy to represent him at the meeting.

Like shareholders of an *S.p.a.*, quotaholders of an *S.r.l.* also enjoy limited liability up to the par value of their "quotas": the participants are not personally liable except where they have fraudulently used the company for their own purposes.[17]

As stated above, *S.r.l.*s may be formed by two or more quotaholders or unilaterally by a single (sole) quota-

holder. An individual or corporate entity may be the sole quotaholder of an *S.r.l.* without such person losing limited liability status, regardless of similar holdings by the same quotaholder in other limited liability companies. And, in the event of insolvency, the sole quotaholder will continue to have limited liability, provided all capital contributions have been fully paid-up or the *S.r.l.*'s sole quotaholder has been identified and the entity's sole quotaholder status has been publicized in the Registry of Companies.[18]

6. Transfer of quotas

Unlike other Italian corporations, the by-laws of an *S.r.l.* may contain a clause restricting the transfer of shares or subjecting transfers to the unanimous approval of the other quotaholders, making the *S.r.l.* the ideal form of "closed" corporation and well-suited for defending substantial private fortunes and holdings.[19]

7. The Board of Auditors and the Balance Sheet

A board of statutory auditors is mandatory for *S.r.l.*s under the following conditions:[20]

- It is required by the by-laws;
- The capital stock is not less than the minimum required for a joint stock company (*S.p.a.*), i.e. €120,000.00; and
- Two of the limits contained in Article 2435bis (concerning the simplified balance sheet) are reached during two subsequent fiscal years, or if their appointment is required by the deed of incorporation.

Auditors must control the company's management, by verifying that the law and the deed of incorporation are duly complied with and that the financial books and the balance sheet are properly kept and drafted. Under certain conditions, the auditors may be jointly liable with the directors for breach of the director's duties.[21]

Quotaholders can exercise control over the company's management by notifying either the auditors or the Court of any possible violation in the management of the company. This control is stricter if no board of auditors exists.

The balance sheet may be "simplified" if, during the first year, or during two subsequent years, two of the following conditions are met:

- the total value of the net assets did not exceed Euro 3,125.000;
- the total turnover from sales and services did not exceed Euro 6,250.000; and
- the average number of the employees occupied during the year was not more than 50.

It should be noted that Italian principles of accounting conform to internationally accepted principles of accounting.

8. Dissolution

The dissolution of a *S.r.l.* can occur in one of the following cases:

- At the end of the duration provided for in the deed of incorporation;
- If the corporate object has been achieved, or it is deemed impossible to achieve it;
- If the quotaholders' meeting cannot further carry out its duties;
- If the stock capital falls under the minimum legally required amount;
- Because of a resolution of the quotaholders' meeting;
- In any other case laid down by the deed of incorporation.

A company can also be wound up because of a judicial order or bankruptcy.

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Endnotes

1. G.F. Campobasso, Diritto commerciale 2. Diritto delle società, p. 43 ss. (6th ed. 2007).
2. G.F. Campobasso, Diritto commerciale 2. Diritto delle società, p. 552 ss. (6th ed. 2007).
3. Abriani-Stella Ritcher, Società a Responsabilità Limitata, in Il diritto, diretto da S. Patti, 2007, pp. 636.
4. Abriani-Stella Ritcher, Società a Responsabilità Limitata, in Il diritto, diretto da S. Patti, 2007, pp. 637.
5. G.F. Campobasso, Diritto commerciale 2. Diritto delle società, p. 554. (6th ed. 2007).
6. Article 2463, paragraph 2, Italian Civil Code.
7. Abriani–Stella Ritcher, *Società a Responsabilità Limitata,* in *Il diritto,* diretto da S. Patti, 2007, pp. 638.
8. Article 2468, paragraph 1, Italian Civil Code.
9. G.F. Campobasso, *Diritto commerciale 2. Diritto delle società,* p. 555 ss. (6th ed. 2007).
10. Abriani–Stella Ritcher, *Società a Responsabilità Limitata,* in *Il diritto,* diretto da S. Patti, 2007, pp. 639.
11. G.F. Campobasso, *Diritto commerciale 2. Diritto delle società,* p. 557 (6th ed. 2007).
12. Abriani–Stella Ritcher, *Società a Responsabilità Limitata,* in *Il diritto,* diretto da S. Patti, 2007, pp. 639 ss.
13. Abriani–Stella Ritcher, *Società a Responsabilità Limitata,* in *Il diritto,* diretto da S. Patti, 2007, pp. 641.
14. Abriani–Stella Ritcher, *Società a Responsabilità Limitata,* in *Il diritto,* diretto da S. Patti, 2007, pp. 642.

15. Article 2479, Italian Civil Code.

16. G.F. Campobasso, Diritto commerciale 2. Diritto delle società, p. 567 (6th ed. 2007).

17. Abriani–Stella Ritcher, *Società a Responsabilità Limitata,* in *Il diritto,* diretto da S. Patti, 2007, pp. 637.

18. G.F. Campobasso, *Diritto commerciale 2. Diritto delle società,* p. 554 (6th ed. 2007).

19. Abriani–Stella Ritcher, *Società a Responsabilità Limitata,* in *Il diritto,* diretto da S. Patti, 2007, pp. 639.

20. G.F. Campobasso, *Diritto commerciale 2. Diritto delle società,* p. 574 (6th ed. 2007).

21. Abriani–Stella Ritcher, *Società a Responsabilità Limitata,* in *Il diritto,* diretto da S. Patti, 2007, pp. 645.

* * *

Insurance Arbitration in France and Belgium: Bitter Rivals or Simple Differences?

If the resolution of reinsurance disputes by arbitration is widely accepted and practised, the resolution of insurance disputes by the same method has been depicted as more delicate to carry-out.[1] The protection of the policyholder, the question of every party accepting the arbitration agreement, or even the implementation of multi-party arbitration proceedings are among some of the reasons for such resistance. That said, it appears that the settlement of insurance disputes by arbitration results notably from the choice by lawmakers to either enhance or reduce recourse to such a method of settlement.

This raises the question of the validity of insurance arbitration and of the arbitrability of insurance disputes. The arbitrability involves the determination of which types of dispute can be resolved by arbitration and which do not belong exclusively to the domain of the courts. This demarcation line is usually drawn by the lawmakers by reference to the doctrines of objective arbitrability or non-arbitrability.[2] The question is important as arbitration is first and foremost a private proceeding that can have public consequences.[3] Due to this peculiarity, lawmakers may reserve some disputes for national courts. However, arbitrating insurance disputes seems to raise a deeper problematic question regarding the validity of such proceeding rather than on its arbitrability.

The question of the validity of arbitration for insurance disputes is more vexing than commercial arbitration because those mainly concerned, the policyholders, wear two hats: the first is that they are party to an arbitration that they are bound to have accepted and the second is that they are mostly consumers (hence subjected to protective laws). Wearing both hats may lead to contradictory solutions and it may explain why the resolution of insurance disputes involving consumers has not elicited a universal answer.

On this particular point, the arbitration laws of France[4] and Belgium have strong resemblances since both legal systems emanate from the same source, namely, the Napoleonic Code of 1805. Interestingly, the independent evolution of their respective arbitration laws has led to contrary solutions that have important consequences today, notably in the field of insurance arbitration.

Belgium: A Regime Inclined to Insurance Arbitration?

In Belgium, the idea of the resolution of insurance disputes by arbitration is accepted and is not considered to be abusive. Historically, the laws of Belgium did not oppose the arbitration of insurance disputes by the parties when they wished to do so and did not contain any provisions forbidding the use of this alternative way of dispute resolution.

It wasn't until 1931 that Belgium lawmakers introduced a law regulating recourse to arbitration in the field of life insurance. Consequently for non life insurance disputes, arbitration was a valid option and as a result Belgium developed a "pro-insurance" arbitration stance.[5] For instance, arbitration clauses in multi-risk policies were not an uncommon feature.[6]

This situation changed radically when the law on non-maritime insurance contracts issued on 25 June 1992 included in its article 36 a provision that stated, "*any clause by which parties agree to submit any future disputes to arbitration is said to be unwritten.*"[7] Basically, such an evolution was based on the protection of the insurer's rights to be well-informed and to be able to launch the procedure best considered to be the most protective of his rights.

But article 36 only limited recourse to arbitration clauses in insurance policies. Conversely, when a dispute arose, the parties were free to decide whether to resolve their dispute by arbitration. Consequently, the law of 25 June 1992 revitalized the distinction between arbitration clauses (as an agreement to submit future disputes to arbitration) and submission agreements (as an agreement to submit existing disputes to arbitration).

Furthermore, this law stated that some categories of insurance disputes could always be settled by arbitration including mass risks, insurances subscribed by undertakings, credit insurance or insurance related to transportation.

France: A Regime Reluctant to Insurance Arbitration?

Insurance arbitration in France did not call for such a claim. Although, at this time, France generally accepted

arbitration clauses in the case of commercial disputes, the initial stance in France held by the Prunier case of 10 July 1843 was that arbitration clauses in insurance policies were deemed to be invalid.

Recently, however, the new article 2061 of the French Civil Code, introduced by the law dated 15 May 2001, provided that unless specifically stated by the law, arbitration clauses are valid when inserted into contracts concluded for professional purposes. As a result, this article requires determination regarding the status of the signatory prior to determining the validity of the arbitration. Are they acting as a consumer or for professional activities.

This provision has to be analyzed in conjunction with article L. 132-1 of the French Commercial Code, which defines which clauses are considered to be abusive per se when concluded with consumers. Article L. 132-1 of the French Commercial Code was later completed by the law dated 28 January 2005, which states that clauses imposing the resolution of disputes by alternative means are abusive. These provisions have been described as unnecessary and technically difficult to implement.[8]

However, it remains that the French lawmaker pays heed to the fact that the protection of consumers should prevent the parties from using alternative dispute resolution mechanisms, including the recourse to arbitration. This is probably based on two reasons. First, insurance law is highly protective of policyholders and the French lawmaker's intention was to prevent any situation where insurers may profit from arbitration to the detriment of the insured.[9] Second, the participation of insurers to arbitration proceedings has been seen as a potential hindrance to a smooth implementation.[10]

France: At the Dawn of an Evolution

Consequently, all these provisions designed for consumer protection have had a negative influence on insurance arbitration because, in most cases, policyholders belong to the category of consumers. This is why, in France, insurance arbitration hasn't developed as significantly as it has in Belgium. It should be noted that on 25 February, 2010, the French Supreme Court rendered the Guichard decision, which has the potential to alter the status quo.[11] In this decision, the French Supreme Court held that *"submission agreements to arbitration, with the exception of arbitration clauses inserted in insurance policies, between the insurer and the insured, after a dispute has arisen, are not constitutive of a clause of a contract concluded by a professional and a consumer and hence cannot be held as abusive."*

With of this decision, the French Supreme Court, known for its pro-arbitration policy, cleverly by-passed article L. 132-1 of the French Supreme Court, which could be an impediment to the acceptance of arbitration in the field of insurance, by giving a restrictive interpretation to article L. 132-1 by limiting its applicability to clauses, not agreements.

When an insured takes out an insurance policy, the question of the resolution of disputes is not, at that very moment, the principal concern of said insured. The protection of his rights is a legitimate goal to be secured by the lawmaker. However, once a dispute arises, the insured is more aware of the situation, as well as the possibility to settle it. It is therefore possible for the insured to enter into a submission agreement with the insurer.[12]

The French Supreme Court rekindles the distinction between submission agreements and arbitration clauses in the field of insurance arbitration in order to allow this type of dispute settlement, just as the Belgian lawmaker did. Both systems of law tend to consider that the protection of the consumer's rights is a legitimate goal and that arbitration clauses should be invalidated because of the poor information that the policyholder possesses when entering into the contract. However, once a dispute has arisen between the parties and when an insured decides to settle its dispute by arbitration, he should be free to do so.

Conclusion

The only temperance that could be held for the enthusiasm caused by the Guichard case is that the facts of the case concern a medical arbitration. Such an arbitration is a common feature in French insurance law and resorts to an expertise in order to determine the causes and details of the damage. Although the facts could be limiting, common legal opinion tends to accept that the rationale of the French Supreme Court is written in such a way that it exceeds the scope of medical arbitration to delineate the notion and regime of submission agreements for the settlement of insurance disputes between insurer and policyholder.

The resolution of insurance disputes by arbitration could lead to various advantages for both parties including confidentiality for insurers and provide insurance law with resources other than classic court litigation. That said, the carrying-out of insurance arbitration may also trigger legal and technical questions and hence be an opportunity for counsel, arbitrators, insurers and policyholders to further explore this type of settlement of disputes.[13]

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Endnotes

1. Bernard Beignier, *Arbitrage et assurance: la place de l'assureur dans l'instance arbitrale [Arbitration and Insurance: the participation of the insurer in the arbitration proceeding]*, Rev. Arb. 227 (2008).
2. Gary Born, Intenational Commercial Arbitration 766 (Kluwer Ed., 2009).
3. Nigel Blackaby & Constantine Partasides, Redfern and Hunter on International Arbitration § 2.26 (5th Ed., 2009).
4. For a study of the new French arbitration law, *cf.* Luc Bigel, Julien Soupizet & Todd J. Fox, *The New Law of Arbitration in France*, Int'L L. Practicum (2011).
5. H. Classens, *Arbitrage en private verzekeringen: een algemene inleiding en stand van zaken* [*Arbitration and Private Insurance: A General Introduction and current state of events*], *in* Verzekeringen en geschillenbeslechting, 3, 3-20 [Insurance and Dispute Resolution] (Ed. 1994).
6. Marcel Fontaine, *Quelques aspects de l'arbitrage en droit des assurances et de la réasssurance*, *in* Liber Amicorum en l'honneur de Serge Lazareff 281 (Ed. Pedone, 2011).
7. Fontaine, *supra* note 6.
8. Sylvain Bollé, *Clauses abusives et modes alternatifs de règlement des litiges* [*Abusive provisions and alternative dispute resolution*], Rev. Arb. 225 (2005).
9. Franck Turgne, L'arbitrage en matière d'assurance et de réassurance [Insurance and Reinsurance Arbitration] 224 (Economica Ed. 2007).
10. *Supra* Beignier note 1.
11. Cass. 1e civ., Feb. 25, 2010, Docket No. 09-12.126.
12. Antoine Mazeaud & Loïs Raschel, *Contentieux des assurances* [*insurance litigation*], Procédures 19 (May 2011).
13. *See* Beignier, *supra* note 1.

* * *

Use "Adequate Protection," Avoid I(legally)T(ransmitting)D(ata)

This article first appeared in a slightly different form in the April 15, 2011 issue of EuroWatch, a Thomson Reuters publication. For more information, visit http://www.wtexec.com.euro.html.

> *"Without such a[n adequate protection] finding businesses must undertake more cumbersome and expensive processes under European law to legitimize such data transfers. A finding will be potentially advantageous to New Zealand from a trading perspective."*[1]

I(llegally) T(ransmitting) D(ata)

Every day, personal data are transferred across international borders in amounts impossible to quantify. Most companies in the EU/EEA,[2] as in any other region of the world, constantly need to send personal data outside that area for multiple business, administrative and compliance reasons in order to run their day-to-day operations and stay competitive in a market that is a little more global with every day that passes. An Austrian tourism agency that organizes trips to Brazil, for example, needs to send its customers' data to the Brazilian hotels; the Spanish subsidiary of a U.S. company may need to send personal data of its employees, suppliers or customers to the U.S. headquarters; a Japanese NGO trying to collect donations in Europe to help Japan with the terrible consequences of the recent earthquake may need to send donors' personal data outside of Europe, etc.

Despite the vital importance of cross-border data transfers, illegally transmitting data outside the EU/EEA is one of the most usual ways in which companies violate local laws implementing the so-called EU Data Protection Directive[3] and one more reason for corporate compliance officers to suffer yet another headache.

In fact, article 25.1 of the Directive establishes that data transfers to a third country[4] *"(…) may take place only if (…) the third country in question ensures an adequate level of protection."* A literal interpretation of this provision, and especially of the use of the word "only," would imply that either the third country is a "data-safe destination" under EU standards and data can be freely transmitted there or it is unsafe and no data at all can be transferred unless one of the exceptions included in article 26 apply. Of course, this would make it very complicated to do any business with those "unsafe" jurisdictions which, as we will see, are most of the countries in the world. As a result, the EU developed certain mechanisms that when properly implemented "sanitize" individual data transfers, as opposed to all collective transfers, to "unsafe" jurisdictions. These are chiefly: the U.S. Safe Harbor Certification, the Standard Contractual Clauses, and Binding Corporate Rules.

This article, however, does not focus on these individual mechanisms,[5] as its primary goal is to explore the history, evolution and future of the "adequate protection" standard that the EU developed as a starting point to identify certain jurisdictions as "data-safe destinations" to which data can be automatically sent from the EU.

The Process

Article 25.6 of the EU Data Protection Directive designates the EU Commission as the institution in charge of determining which countries ensure an adequate level of data protection "by reason of its domestic law or of the international commitments it has entered into." Once the Commission is satisfied about the protection offered by a jurisdiction, it makes its finding public by adopt-

ing a "Commission Decision." However, before reaching this final step, there is a whole previous process that includes:[6]

- An initial proposal from the Commission. Oftentimes, the country looking to obtain a positive finding, especially when it does not have a special political or administrative relationship with an EU Member State, will directly request the Commission to start the process through diplomatic channels.[7]
- A positive opinion from the Article 29 Working Party.[8] This is an essential step for any jurisdiction that aspires to obtain a positive finding.
- An opinion from the Article 31 Management Committee[9] delivered by a qualified majority of Member States.
- A 30-day right of scrutiny for the European Parliament (EP) to check if the Commission has used its executing powers correctly. The EP may, if it considers it appropriate, issue a recommendation.
- The adoption of the decision by the Commission.

But any avid reader, or country in search of a positive adequate protection finding, would not only want to know about the formal process, and would wonder what the Commission is really looking for in a country in order to make its determination. In its decisions to date, the Commission has offered some general guidance. The decisions usually refer to an analysis of the local data privacy / protection laws and implementing regulations that the country has enacted and the data privacy conventions, guidelines or other international instruments[10] the country has entered into to see whether these are *"largely based on the standards set out"* in the EU Data Protection Directive,[11] and *"cover all the basic principles necessary for an adequate level of protection for natural persons."*

This, of course, is very broad guidance. The Article 29 Working Party, whose previous opinion, as we have seen, plays a very important role in the process, has provided more specific guidelines. This group has made clear what it is looking for in a candidate:[12] the existence in its legal system of certain *"data protection 'content' principles and 'procedural/enforcement' requirements."*

- The Content Principles: The privacy laws or regulations of a country that may be considered to have adequate data protection need to include the following principles: the purpose of limitation principle; the data quality and proportionality principle; the transparency principle; the security principle; the rights of access, rectification and opposition; and restrictions on onwards transfers.
- The Procedural / Enforcement Mechanisms: The candidate's data protection procedural system must ensure the following objectives: to deliver a good level of compliance with the rules; to provide support and help to individual data subjects in the exercise of their rights; and to provide appropriate redress to the injured party where rules are not complied with. Complying with these objectives might be easier if there is a supervisory authority, a so-called data protection authority, in charge of enforcing the rights and obligations under the domestic privacy laws.

The Chosen 9

As of March 2011, only nine jurisdictions[13] have received an adequate data protection finding: Switzerland (Commission Decision of 7 / 26 / 2000), Canada (12 / 20 / 2001), Argentina (6 / 30 / 2003), Guernsey (11 / 21 / 2003), Isle of Man (4 / 28 / 2004), Jersey (5 / 8 / 2008), Faroe Islands (3 / 5 / 2010), Andorra (10 / 19 / 2010), and Israel (01 / 31 / 2011).[14]

Switzerland, a historic EU business partner completely surrounded by EU countries and that has a comprehensive data privacy law predating the EU Data Protection Directive by more than three years, was the perfect candidate to be the first country[15] recognized by the Commission as having adequate protection. This happened in July 2000.

At the end of 2001, Canada, another important EU business partner, was the second country to be issued an adequate protection finding just a little over a year after its federal data privacy law, PIPEDA, was enacted. The finding is limited to *"recipients subject to"* PIPEDA. Canada is, to date, the only North American country that forms part of this privileged club. Mexico, based on its enactment in 2010 of an omnibus data protection law, the Federal Law on Protection of Personal Data Held by Private Parties,[16] is the logical candidate to be the next country to enlarge North America's presence in this "data-safe destination" group.

We had to wait until mid 2003 for a South American country, Argentina, to secure a positive decision from the Commission. Argentina's recognition was primarily due to the similarities between its data privacy law and the Directive. Uruguay may probably soon join Argentina as the second South American country with a positive determination.

After these first three decisions validating the data protection standards of three trading partners of a considerable size, more than seven years had to pass until another economically and politically significant jurisdiction, Israel, obtained the Commission's approval at the beginning of 2011. During those seven years only five jurisdictions, all of a considerably smaller size than the first three in terms of population, extension and economic power, were anointed by the Commission as having ad-

equate protection: the three British Crown Dependencies (Guernsey in November 2003, Isle of Man in April 2004 and Jersey in May 2008), the Faroe Islands in March 2010 and Andorra in October 2010. All of these have in common being smaller jurisdictions located in the European continent and having very tight political, administrative and economic relationships with certain EU Members (U.K.; Denmark; and Spain and France, respectively).

As of September 2011, the Commission has not issued any adequate protection decisions in favor of countries from Africa or Oceania. The Article 29 Working Party, however, has issued opinions on the level of protection of personal data in New Zealand[17] and Australia.[18] As recently as April 4, 2011, the Article 29 Working Party, despite certain reservations with regard to the regulation of direct marketing and onward transfers, issued a positive opinion in favor of New Zealand. Australia was not as lucky when more than ten years before the same group of experts stated that Australia's regime could only be regarded as adequate *"if appropriate safeguards were introduced to meet"* the specific concerns expressed by the Working Party in the opinion. With this the Working Party was basically telling the Australian government that it needed to improve and strengthen its data privacy regime in order to obtain a positive finding from the Commission.

The Candidates

For an array of reasons, Uruguay is, without a doubt, the number one candidate to be the next jurisdiction to obtain an adequate protection finding. Uruguay's data protection law is very similar to Argentina's, a legal regime already approved by the Commission, and the Article 29 Working Party already issued its affirmative opinion in October 2010.[19] Therefore, everything indicates that the Commission decision in favor of Uruguay could be issued sometime during 2011. New Zealand is, due to the recent opinion from the Working Party, the second serious contestant with possibilities to be anointed by the Commission in the near future.

Other potential candidates include countries that have recently enacted or amended comprehensive data privacy laws such as Mexico, Morocco, Ukraine, Russia or Costa Rica.[20] However, as we will explain, it might take more time than usual for these countries to have a chance to obtain such recognition due to the privacy regime reform process that the EU is currently undertaking.

Why Does It Matter or Why Does It Not?

The words from New Zealand's Privacy Commissioner reproduced at the beginning of this article are the best answer to the first of these questions: *"Without such a[n adequate protection] finding businesses must undertake more cumbersome and expensive processes under European law to legitimize such data transfers. A finding will be potentially advantageous to New Zealand from a trading perspective."* That is to say, obtaining such recognition from the Commission should be, in principle, economically advantageous for a jurisdiction as, once anointed, companies based in the EU/EEA would be able to freely send personal data to such jurisdiction as if sent within the EU/EEA area (e.g., a transfer from Spain to Argentina is considered the same as a transfer from Spain to Denmark) without having to use model contractual clauses, binding corporate rules, etc. This, of course, simplifies the transfer, makes it cheaper and makes the jurisdiction a more appealing destination for EU/EEA-based businesses to grow there either directly by opening new subsidiaries or branches or indirectly through the outsourcing of part of their business.

This appears to be the rationale shared by the countries that decided to jump onto the EU comprehensive data protection regime wagon, as the information published by "Uruguay XXI," the Uruguayan Investment and Export Promotion Institute, evidences: *"The EU recognition will open the possibility for major European investments, in particular it will help Uruguay boost its outsourcing industry (call centers, data centers, technology parks) and attract more EU-based companies looking for providers of administrative, financial and other data processing services in Latin America."*[21]The idea is also supported by the preamble to the data privacy law currently being discussed in Colombia, and that is pending review by the Colombian Constitutional Court, which clearly states that one of the goals of this bill is for Colombia to be considered an "adequate protection" jurisdiction by the EU.

That being the case, why have only a very limited number of countries tried to obtain adequate protection recognition? As we have seen, only nine jurisdictions, five of which have a population of less than 100,000, out of the more of 190 countries in the world, have been anointed by the Commission, and only two more jurisdictions, Uruguay and New Zealand, are currently under serious consideration. We can all agree that this is not a significant turnover for the more than 15 years that the Directive has been in force.

The explanation to this might be twofold:

- Implementing an EU-style data protection regime is a lengthy, expensive, burdensome and potentially contested undertaking from the political, legislative, administrative and enforcement perspectives. Legislators from many jurisdictions may consider this task daunting and may be also unnecessary as individual data controllers have other mechanisms (e.g., U.S. Safe Harbor Certification, Standard Contractual Clauses, Binding Corporate Rules) they can effectively use to privately comply with the EU in-

ternational data transfer requirements without the specific data importing jurisdiction having to make the effort to adjust to the strict EU data protection parameters to obtain adequate data protection recognition.

- The implementation by a country of an omnibus data protection regime that may be deemed as offering adequate data protection by the European Commission may act as a deterrent for new businesses to start operations. It is arguably cheaper for companies to operate in a less-privacy-regulated environment where they do not have to allocate resources to, for example, notifying data subjects, differentiating the treatment of sensitive data from regular data, transferring data abroad, purging obsolete data, etc. That is to say, the same economic/trading analysis that may make a country consider it beneficial to implement a robust data privacy regime in order to be anointed by the Commission may be used to argue that less regulation makes more business sense.

Beyond the EU

The idea of a jurisdiction evaluating other jurisdictions and considering them as being safe enough to receive its personal data without having to adopt additional mechanisms is not unique to the EU in the data privacy world. Several other countries with comprehensive data protection laws such as Argentina, Hong Kong, Monaco, Switzerland or Uruguay share this concept. This is not surprising as many of these laws are greatly influenced by the EU Data Protection Directive and, consequently, deal similarly with the issues arising from international transfers of data. However, even though the concept may be set out in their laws, not all these countries have issued official declarations or lists, equivalent to the EU Commission adequate protection decisions, establishing the jurisdictions they consider as having "adequate protection."[22]

Looking Ahead

As is widely known, the Commission is currently embarked on a process to reform the EU data privacy legal framework. As part of this reform, the Commission[23] has already declared that it intends to *"improve, strengthen and streamline the current procedures for international data transfers, including the so-called 'adequacy procedure.'"*

The reform will apparently not only be limited to new requirements or limitations concerning international data transfers; it is conceived as a global reform of the EU privacy legal system. The Article 29 Working Party[24] and the Commission's positions appear to suggest the EU might be moving towards an even less business-friendly data privacy regime with the proposed inclusion of new individual rights for data subjects, such as the "right to be forgotten" or a data breach notice right.

Therefore, it is within the realm of possibilities that no new countries, with the possible exceptions of Uruguay and New Zealand as they have already been vetted by the Article 29 Working Party, will obtain an adequate data protection finding until the reform process is completed. It would not make much sense for the Commission to use the "adequate protection" process when it is currently under scrutiny and likely to be somewhat reformed to approve jurisdictions whose data protection level may be "adequate" under current EU standards, but deficient once the reform has been completed.

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Endnotes

1. For review and comments on drafts of this article, the author thanks Donald C. Dowling, Jr. (White & Case, NY). This article is current as of September 2011.

   Report by the [New Zealand's] Privacy Commissioner to the Minister of Justice on the Privacy (Cross-border Information) Amendment Bill at § 1.4., *available at* http://privacy.org.nz/report-by-the-privacy-commissioner-to-the-minister-of-justice-on-the-privacy-cross-border-information-amendment-bill/.

2. The European Economic Area (EEA) includes the 27 EU Member States, Iceland, Liechtenstein and Norway.

3. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML.

4. A "third country," for these purposes, is a country outside of the EEA.

5. For more information on these mechanisms *see* Donald C. Dowling, Jr. and Jeremy M. Mittman, *International Privacy Law*, in Proskauer on Privacy (Kristen J. Mathews, ed. 2010), at § 14:3.

6. *See* http://ec.europa.eu/justice/policies/privacy/thridcountries/index_en.htm.

7. For example, on October 20, 2008, the Mission of the Eastern Republic of Uruguay to the European Union sent a letter to the European Commission to officially request the Commission to initiate the procedure. *See* http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp177_en.pdf.

8. The Article 29 Working Party is an independent EU advisory body on data protection and privacy formed by the national data protection commissioners of the EU Member States, the European Data Protection Supervisor and a Commission representative. The Commission also provides the Working Party's secretariat.

9. The Article 31 Management Committee is a group formed by representatives of the Member States and chaired by a representative of the Commission.

10. Such as the Council of Europe Convention on the Protection of Individuals with Regard to Automatic Processing of Personal Data, or the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data.

11. It is logically easier to obtain a positive finding if the domestic laws are modeled after the EU Data Protection Directive. That was

the case in more than half of the positive determinations made so far by the Commission.

12. *See* Article 29 Working Party's *Working Document: Transfers of personal data to third countries: Applying Articles 25 and 26 of the EU data protection directive* adopted on 24 July 1998, *available at* http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/1998/wp12_en.pdf.
13. Hungary also received this finding on the same day as Switzerland, July 26, 2000. However, for obvious reasons the EU Commission Decision in favor of Hungary became irrelevant once Hungary joined the European Union in May 1, 2004.
14. All the decisions from the Commission are *available at* http://ec.europa.eu/justice/policies/privacy/thridcountries/index_en.htm.
15. Together with Hungary.
16. For more information on Mexico's recent data privacy law *see* Manuel Martinez-Herrera, *The 2010 Top 10 EU Data Privacy Changes*, EuroWatch, Vol. 23, No. 2 (2011) and Martinez-Herrera, *From Habeas Data Action to Omnibus Data Protection: The Latin American Privacy (R)Evolution*, Latin American Law & Business Report, Vol. 19, No. 9 (2011).
17. *See* http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2011/wp182_en.pdf.
18. *See* http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2001/wp40en.pdf.
19. *See* http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp177_en.pdf.
20. *See supra* note 16.
21. *See* http://www.uruguayxxi.gub.uy/innovaportal/v/1315/2/innova.front/uruguay_recognized_by_the_european_union_as_offering_an_adequate_level_of_data_protection.
22. *See* http://www.edoeb.admin.ch/themen/00794/00827/index.html?lang=en for the Swiss list which basically includes as adequate data protection jurisdictions all EEA countries, the Chosen 9 and Monaco (and Australia under certain conditions) and http://www.ccin.mc/ccin/contexte-international/transferts-de-donnees for the Monaco list which recognizes all countries that are parties to the Council of Europe Convention on the Protection of Individuals with Regard to Automatic Processing of Personal Data as having adequate protection (the list includes non-EEA / Chosen 9 countries such as Albania, Bosnia-Herzegovina, Croatia, Georgia, Macedonia, Moldavia, Montenegro and Serbia).
23. *See Data protection reform—frequently asked questions* press release dated November 4, 2010, *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/542.
24. *See* Article 29 Working Party's *The Future of Privacy: Joint contribution to the Consultation of the European Commission on the legal framework for the fundamental right to protection of personal data* adopted on December 1, 2009, *available at* http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2009/wp168_en.pdf.

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New European Union Directive Calls for Greater Transparency on the Internet

Technology lawyers in Europe have been gripped by "cookie fever" since May with the coming into force of a new European Union (EU) Directive which calls for greater transparency on the Internet. Each of the 27 EU member states should have introduced new laws following the Directive by the end of May. Implementation has been patchy but a new set of disclosures has shown that the regulators have every intention of enforcing the new laws.

As most internet users will be aware, cookies are small files sent by a website to the computer being used to visit a website. The EU's Article 29 Working Party confirmed in documents released in September that it was taking a "get-tough" attitude on cookies in anticipation of a scheduled meeting with the advertising industry to discuss the new laws. The Article 29 Working Party also confirmed that it was in discussions with the U.S. Federal Trade Commission to try to agree on a joint EU / U.S. approach to online behavioral advertising.

The Article 29 Working Party was set up as an independent European advisory body on data protection and privacy. It is run from Brussels, but the Working Party has representation from each of the 27 EU member states.

The debate on cookies has persisted for some time in Europe. The new laws affect all cookies on any website, although online advertising has been the focus of much of the activity thus far. The main issue with online advertising is the need to obtain consent before putting a cookie on a user's machine. Cookies power internet advertising and are used to make sure that the right advertisement is served to the right user, to ensure the effectiveness of advertising campaigns and to provide usage information to make sure those hosting the ads get paid. Under EU rules, consent has to be "freely given, specific and informed. It must also be an indication of the data subject's wishes." The Article 29 Working Party says, "In practice, in the context of online behavioral advertising, this means that to obtain consent, ad network providers must provide the necessary information before the cookie is sent and rely on users' actions (e.g., clicking a box stating I accept) to signify their agreement to receive the cookie and to be tracked for the purposes of serving behavioral ads."

In reality, this practise is likely to be unworkable for many in the world of the internet. This may especially be the case when the Article 29 Working Party appears to cast uncertainty on the use of browser settings to imply consent. The Article 29 Working Party says that users can-

not be said to have consented simply because they use an internet browser that by default allows cookies.

September's meeting was arranged with the industry for industry representatives to update the Article 29 Working Party on their proposals for an icon scheme to be used to imply consent. The idea is that an icon would appear next to an online ad in much the same way as a padlock was used in the early days of the internet to indicate a secure site. The user would be able to click on the icon to get more information on the ad, the data being collected and where it was going. The Article 29 Working Party has a number of issues with the industry's proposed scheme.

In the short term, the position remains rather uncertain. Enforcement of the cookie laws falls on the individual EU countries, not the Article 29 Working Party or the European Commission. As a result, enforcement is likely to vary across Europe. Businesses may want to consider acting promptly to ensure they know exactly the types of cookies their site is using. This would include auditing the practices of third parties who supply services to their website, such as order tracking; payment fulfillment; or investor-relations content. The U.K. data regulator, the ICO, has suggested a specimen cookie disclosure table, which businesses might want to consider in addition to full disclosure in their privacy policy. Even that might not be enough. Businesses should work on ways of informing visitors to their sites what is happening with their data. Given that the law is in a state of uncertainty, transparency should be the guiding principle of any business in its online activities.

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Public Company Takeovers in the U.K.— Recent Amendments to the Takeover Code

Seasoned practitioners will be aware of the significance of the U.K. Takeover Code (the "Code"), administered by the Panel on Takeovers and Mergers (the "Panel"), which plays a central role in regulating the conduct of public company takeovers in the U.K.

Important amendments have been made to the Code, which took effect on September 19, 2011 (the Implementation Date), based on concerns as to the way in which the Code had been operating. In particular, these amendments aim to address the adverse impact that a lengthy takeover battle may have on an offeree (target) Company's buisiness. Some transitional arrangements apply to bids that were already in course on the Implementation Date.

Concerns about the conduct of takeover bids in the U.K. were given public expression as a result of the manner in which several high profile bids (including Kraft's bid for Cadbury in 2009/10) had been conducted. The Kraft bid for Cadbury, which was ultimately successful, attracted particular attention, because the Cadbury board's defence to the bid rested on Kraft being an unwelcome overseas purchaser of British assets, which posed a significant threat to the jobs of those employed in Cadbury's U.K. operations. Given the number of British companies that have over time been purchased by non-British purchasers (and the fact that a substantial number of Cadbury shares were already owned by U.S. persons), the defence owed more to sentiment than reason, but Kraft's actions after the takeover gave substance to the arguments previously made as to its lack of concern for Cadbury's British workforce.

The amendments to the Code are in principle intended to:

- reduce the tactical advantages which some hostile (unrecommended) offerors may have had in the bid process over the offeree company and its shareholders, and
- improve the bid process, particularly by taking greater account of those other than offeree shareholders who may be affected.

In addition to the detailed changes to the Code rules giving effect to these intentions, the Introduction to the Code is being amended to emphasise that the Code is not concerned with facilitating or impeding takeovers.[1]

Identification of Offerors, and Changes to the "Put up or Shut up" Regime

The development of the "virtual bid" process, by which potential offerors have been able to stalk target companies for protracted periods without clarifying their ultimate intentions (often with material adverse effect on the business and morale of the target), has been regarded by many as unwelcome, and the changes in relation to this process are likely to be the most significant of the new amendments.

Briefly, the principal amendments to the Code are as follows:

- at the commencement of an "offer period" an offeree is now required to identify any potential offeror with which it is in talks or from which an approach has been received, and in subsequent announcements to identify any new potential offeror except where another offeror has already announced its "firm intention" to bid. Linked to this requirement is a new Code definition of "offer period," which is likely to make a possible takeover offer subject to formal regulation under the Code at an earlier stage in the process.

  Also linked is an amended provision making clear that a potential offeror should not attempt to prevent an offeree from announcing a possible offer or the identity of a potential offeror

- a potential offeror that has previously been identified is now required to announce either a (binding) "firm intention" to make an offer or its intention not to make an offer by 5 p.m. on the 28th day following the announcement of its identification.

  Where another offeror has already announced a firm intention to bid, a potential offeror will be subject to a different timetable, depending on the status of the other bid.

- The timetable for a potential offeror to "put up or shut up" may, at the request of the offeree, be extended by the Panel after taking all relevant factors into account.

  These new "put up or shut up" Rules will not normally apply where an offeree has invited bids for itself under a formal sale process, unless an offeror has already announced its firm intention to bid.

Prohibition on Break Fees and Other Offer-related Arrangements

The growth of break fee arrangements, by which an offeree may become bound to pay a specified sum of money to an offeror or potential offeror if a related takeover transaction does not proceed to a successful conclusion, has been generally felt to be an unwelcome fetter on the operation of the securities markets.

"Offer-related arrangements," a term which includes break fee and similar arrangements as well as many implementation agreements, are now generally prohibited during an offer period or when an offer is reasonably in contemplation. The new prohibition applies also to "whitewash" transactions under Rule 9 of the Code, in which offeree shareholders may in certain circumstances release an offeror from rules which require a mandatory bid to be made for a company.

The term "offer-related arrangement" is broadly defined for this purpose, but will exclude:

- confidentiality undertakings which do not include other provisions prohibited under the Code;
- commitments not to solicit employees, customers or suppliers;
- commitments to provide information to obtain regulatory consents or clearances;
- irrevocable undertakings or letters of intent;
- any commitment or arrangement which imposes obligations only on an offeror or any person acting in concert with it, except in the context of a reverse takeover (as newly defined);
- any agreement relating to any existing employee incentive arrangement.

Dispensations from the prohibition on offer-related arrangements will normally be available with Panel consent, where:

- there is a "white knight" situation where the offeree is subject to a bid which is not recommended and another offeror announces a firm intention to make a competing bid, when the offeree will normally be permitted to enter into a break fee agreement at the time the competing bid is announced, provided that (i) the break fee is limited to no more than 1% of the offeree's value (calculated by reference to the value of the competing bid) and (ii) is payable only if another offer becomes or is declared wholly unconditional, or
- a formal sale process has been initiated by an offeree, when an offeree will normally be permitted to enter into a break fee arrangement with one offeror who has participated in the process, subject to the same provisos as in the immediately preceding sub-paragraph.

Permitted offer-related arrangements must be fully described in offer documentation and be available for inspection (as described under "Documents on display" below).

The general prohibition on offer-related arrangements may have particular implications for offerors proceeding by way of a ***scheme of arrangement*** since the process for a scheme is under the control of the offeree. For the protection of offerors (and investors), in the case of a recommended bid which is being implemented by scheme of arrangement, the offeree is now required to:

- publish a detailed timetable of all the significant steps to be taken in the implementation of the scheme, and

- comply with the timetable in implementing the scheme, unless the offeree withdraws its recommendation.

In addition, the offeror and offeree may agree on long-stop dates for implementation of the scheme and (subject to some time limitations) the requisite shareholder meetings and court hearing. Fulfillment of the relevant steps by these dates may be stated as a condition to the scheme, and they must be given prominent reference in the offeror's "firm intention" announcement.

Offeree Board Views

A new Note is being added to the Code to make clear that the Code does not, and is not intended to, limit the factors which an offeree board may take into account in reaching a view on the merits of any bid, and that the board is not required to consider price as the determining factor (as it is frequently regarded). The overall duties of the directors in this regard are, of course, as in other contexts, a matter of both statute and common law.

Disclosure of Offer-related Fees

The extent of the fees payable in Prudential's abortive bid for AIA in early 2010 led to some public outcry, and the disclosure rules on offer-related fees and expenses are being extended in consequence.

An offer document will now be required to contain not just an estimate of the aggregate of the estimated bid-related fees and expenses payable on the transaction (as previously), but also a breakdown of the aggregate into various specified categories (e.g., financing costs, financial advice, legal, accounting, other professional etc.). Amounts in any category may be stated within a defined range. Where any initial estimate is exceeded by 10% or more, updates to the Panel will be required and may have to be publicly reported.

Offerees must make equivalent disclosures in the offeree board circular on the same basis, obviously not including financing costs.

Financial Disclosures

It has not previously been necessary for an offeror providing only cash consideration to make financial disclosure about itself to the extent required of other offerors (in offers involving a securities exchange).

This distinction is now being generally removed and the overall extent of financial disclosure in takeover documentation is being extended. However, the base period for historic disclosures is being limited in most cases to two rather than three years' audited accounts, and offerors in a securities exchange offer will be subject to more updating requirements than cash offerors. The offer document will be required to contain some of the same information about the offeree as the offeror, and an offeree will be required to provide updated information in the offeree circular.

For the first time, disclosure is being required in offer documents of detailed summary information published by rating agencies relating to both offerors and offerees.

In addition, offerors are now required to make full and detailed disclosure of their financing arrangements in relation to a bid, although detailed disclosure of equity financing structures in private equity offeror vehicles will not normally be required.

Documents Available for Inspection

Revisions are being made to the regime for offeror and offeree documents to be available for inspection during a takeover. (It has long been a Code requirement that certain key documents relating to a bid be made available for public inspection, subject to some exceptions.)

The documents now required to be made publicly available include all documents relating to the financing of an offer (in line with the new disclosure rules discussed above) and all offer-related documents, whether permitted under, or excluded from, the new rules discussed under "Prohibition on break fees and other offer-related arrangements" above. The Panel says that in particular cases it will be prepared to grant some dispensation from these requirements for financing documents indicating the amount of headroom an offeror has to increase its offer.

Disclosure of Offeror Intentions Regarding the Offeree's Business and Its Employees

Traditionally, a brief description in bid documentation of the offeror's intentions with regard to the offeree business and a brief and formulaic assurance that the offeror will respect the contractual entitlements of offeree employees have been regarded as fulfilling the offeror's disclosure obligations in these connections. The assurance regarding employees has frequently not been thought to inhibit subsequent redundancies being made in accordance with requisite legal procedures

This approach drew much criticism in the Kraft/Cadbury takeover (including criticism of Kraft's advisors) where, as noted above, there was particular concern about the future of Cadbury's U.K. operations following their takeover by a U.S. company.

In consequence, a much more stringent regime is now being imposed on offerors, requiring a significantly more detailed and more wide-ranging disclosure of the offeror's plans and intentions for the offeree's business, its workforce and related matters. Negative statements are now required if the offeror has no particular intentions in

any specific regard, and some disclosure is also required regarding the offeror's intentions for its own business.

In addition, offerors will be bound by their statements of intention for a period of 12 months from the end of the offer, unless there is a material change of circumstance. The Panel has said that it does not envisage problems of enforcement in this regard following a takeover, presumably because it envisages the possibility of enforcement action being taken through referral to other regulatory bodies; however, the effectiveness of such an approach remains open to some doubt.

Publication of Information to Employees, and of Their Views Concerning an Offer

Reinforcing the new disclosure regime for future business intentions and employee prospects, a number of amendments have been made to Code provisions regarding the publication of offer-related information to employees and/or their representatives and the ability of offeree employee representatives to deliver an opinion on the effects of an offer on employment.

The existing Code provisions on this are based on fulfilling the minimum requirements of the EU Takeover Directive; the new provisions extend beyond those requirements.

The new provisions cover the:

- manner in which offer documentation is to be made available to employees;
- definition of the term "employee representative";
- sharing of information with employees on a confidential basis;
- provision of the employee opinion on an offer;
- responsibility for the employee opinion (which will not be the offeree board's).

The employee opinion must now be:

- appended to the offeree circular if it is received in time, or
- published on a website (with an appropriate regulatory announcement of its publication) as soon as possible after its receipt, provided it is received no later than 14 days after the offer becomes or is declared unconditional.

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Endnote

1. Copies of the various statements and papers issued by the Panel during the consultation period leading up to the adoption of the Code amendments, and the new text of the Code, are available on the Panel's website, www.thetakeoverpanel.org.uk.

* * *

The Introduction of Punitive Damages in French Law: One Step Forward, Two Steps Back

"Nothing in excess"[1]

Introduction

Historically speaking, the institution of civil liability takes its roots in criminal liability; slowly but surely, it has freed itself from its past, thus becoming an independent and modern feature. Under French law, Articles 1382 and 1383 of the French Civil Code are the basis of the civil liability regime, which states in sum that when one person has caused a tort to another, the former has to indemnify the latter. Once the debt of liability has been fixed, the judge will then allocate a sum of money that under French law has to represent the exact same value of the suffered loss. French law has embraced the principle of compensation of assets that can be summarized as "*all the damage, but only the damage.*"[2]

There are exceptions to this principle. For instance, Article 1150 of the French Civil Code commands that when civil liability is triggered by the wrongful performance of an agreement, only predictable losses can be indemnified. In this particular case, a part of the suffered loss can still be borne by the injured party. This principle of compensation is also not applicable in criminal law. Here, the penalty mechanism is more peculiar due to the fact that criminal offences are seen first and foremost as an injury to society as a whole. The offender disturbs the organization and the rules on which a society is structured. As a result, the indemnification can be more important that the actual loss.

At the crossroads of civil and criminal liability, the features of punitive damages borrow from these two regimes. Punitive damages constitute an additional monetary penalty on top of the damages that a wrongdoer owes to an injured party. The gravity of the wrong, or the

profit that the wrongdoer may benefit by committing the injury, can be considered in the contemplation of imposing punitive damages.[3]

Position of French Law and Legal Authors with Respect to Punitive Damages

French law[4] is traditionally opposed to the doctrine of punitive damages. One of the reasons why French law has refused—so far—to introduce this institution into its legal system is because French law refuses the enrichment of the victim. Recent case law on the indemnification of losses due to asbestos is a perfect example of this position.[5]

Legal authors who oppose punitive damages contend that this mechanism integrates features emanating both from civil and criminal law. The act of condemning a person to such damages would be tantamount to a penalty, which only criminal judges are entitled to grant. This argument is no longer relevant due to penalties that administrative or civil judges may hold in counterfeiting, unfair trade practice or environmental impairment cases.[6]

Furthermore, there is resistance in France to what has been described as the "a*mericanization*" of its law, the main fear being the transposition of some "*infamous*" case law[7] whose features have been exaggerated to the point of being grotesque.

However, cautious readers of American law and jurisprudence should bear in mind that the allocation of punitive damages follows the rule according to which they shall not be excessive and that the judge acts as a guide and a regulator when estimating them.[8]

The rare case law that implies an excessive amount of punitive damages is in general caused by very specific facts and circumstances unique to the case.[9] Furthermore, the doctrine of punitive damages does not have full approval in the United States. Some voices criticize this institution stating that, "*we believe that the doctrine of punitive damages is unhealthy in its principle, unfair and dangerous in practice.*"[10]

Due to some external factors, including those pertaining to the development of international trade and the integration of legal orders within supranational organizations—for example, France within the European Union—as well as internal factors such as the influence of doctrine and comparative law, the question of France's openness to punitive damages has been progressively raised, causing a renewed debate by various categories of legal professionals (judges, lawyers and academics) who diverge on this particular issue.

Recently, academics and politicians have issued two reports—the Catala and Béteille reports[11]—that intend to delineate the introduction of punitive damages in French law. These reports have underscored punitive damages as an interesting feature. Among the arguments, this doctrine could complete French law when strict indemnification is not satisfactory. In particular, the Catala report suggests that "the author of an intentional wrong and notably of a lucrative fault could be condemned in addition to compensatory damages to punitive damages […]."

Other academics also tend to state that the introduction of this feature into the French juridical order could be particularly efficient in sanctioning a lucrative wrong[12] or an intentional gross negligence.[13] Therefore, the introduction of punitive damages (as non-compensatory damages) could be an adequate tool to complete and add precision to the sample group of existing penalties. In addition, the risk that exaggerated punitive damages could be granted will be avoided, since France—as other members of the European Union—is bound to the European Convention on Human Rights, which article 6 provides for the application of the principle of proportionality when judges pronounce a penalty.[14]

Given the controversy, it is always with great caution that the French Supreme Court tackles this issue. The recent Schlenzka case,[15] discussed below, is important in this respect and will influence the development of the possible introduction of punitive damages into French law.

However, when analyzing this decision, an important debate arises as to whether the French Supreme Court is reluctant to introduce this feature or whether it is trying to progressively change the views of the French legal world.

The Schlenzka Case: The Facts and the Ruling

The facts of the Schlenzka case are relatively simple. An American couple, the Schlenzkas, entered into an international sale of a catamaran with a French company located in La Rochelle. The order for this ship was made in July 1999. Later that same year, while the ship was in the waters of La Rochelle harbor, a terrible storm hit France. The damages suffered by the ship were repaired by the builder, who then finally delivered the catamaran to the Schlenzkas in February 2000 but omitted to mention the repairs done as a result of the storm.

After noticing the repairs, the Schlenzkas brought a lawsuit before an American state court for the inadequate performance of the sales contract. In 2003, the Superior Court of California condemned the French company to damages composed of (i) U.S. $1,391,650 for the ship repairs, (ii) U.S. $402,084.33 for lawyer's fees and (iii) U.S. $1,460,000 for punitive damages.

In October 2003, the Schlenzkas brought a new action before a French judge in order to obtain the recognition of this decision in France. According to French case law, when granting the *exequatur*[16] to a foreign judgment, the French must verify whether three conditions are met: the

proper jurisdiction of the foreign court, the absence of fraud and the respect of international public order. It is on this last point that the debate over punitive damages has crystallized in France. The Court of Appeal held that punitive damages were contrary to international public order. This ruling was then appealed on this particular point before the French Supreme Court ("*Cour de cassation*").

In its decision dated 1 December 2010, the French Supreme Court held that "if the principle of condemning someone to punitive damages is not, per se, contrary to public order, it is no longer the case when the amount allocated is disproportionate with consideration to the loss suffered and the debtor's breaches of the contract."[17] In the present case, the amount of punitive damages exceeded both the price of the catamaran and the repair works. The amount was considered to be disproportionate and hence the American judgment could not be recognized.

One Step Forward: the Opening of French Law to Punitive Damages

By holding that "*if the principle of condemning someone to punitive damages is not, per se, contrary to public order,*" the French Supreme Court made a significant step forward in the acceptance by French law and case law of this feature.

Indeed, the first consequence of the Schlenzka ruling is that, for the first time, in such an explicit manner, the French Supreme Court held that there is no general prohibition against the recognition of a foreign judgment ordering payment of punitive damages. This is an important aspect given that some of the legal world thought that the punitive damages mechanism was completely unfit for the continental system of French law.

The importance of this ruling is that it slightly opens the door towards not only recognition of foreign judgments holding punitive damages, but also towards a future admission of the introduction of punitive damages under French law.

However, the consequences and the enthusiasm shared by some parts of French legal opinion should not be excessive. The French Supreme Court only rendered a decision within the legal framework of the recognition of a foreign decision in France. Further, it limited the application of the recognition of punitive damages to a proportionality test, which may close the door it just opened.

Two Steps Back: The Introduction of the Proportionality Concept

The question brought before the French Supreme Court was to determine whether punitive damages were contrary to public order. The recognition of foreign judgments is subjected to international public order and not domestic public order, the former being less restrictive than the latter. More precisely, the French Supreme Court applies the theory of attenuated international public order. This theory is derived from the notion of international public order and is especially designed for the recognition of foreign judgments. In 1953, this theory was construed by the French Supreme Court which held in the La Rivière case that "*the reaction towards a provision contrary to public order is not the same depending on whether it impedes the acquisition of a right in France or whether it is about allowing the effects of a right acquired in a foreign country without any fraud to happen in France.*"[18] The Schlenzka case falls under the second hypothesis.

The principle of proportionality is used as a mechanism to prevent excessive consequences that might occur if the allocation of punitive damages was not limited. The use of this notion in this case makes sense as it precludes the ship's constructor from going bankrupt. The difficulty, however, results from the fact that the Schlenzka case remains ambiguous as it adds the concept of proportionality as a requirement, which aims to control the recognition of such a judgment.

This notion of proportionality is not, as such, a principle emanating from French law but seems rather to stem from European law. For instance, the Rome II Regulation on the rules of conflict of laws of non-contractual obligations states in its recital 32 that

> *considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seized, be regarded as being contrary to the public policy ("ordre public") of the forum.*[19]

The Rome II Regulation pays heed to mandatory laws and the principle of public order to which proportionality can be considered as an expression in order to respect the differences of the various Member States.

The Proportionality Test in the Schlenzka Case and the Future

In the Schlenzka case, the Cour de cassation held that "*the amount allocated is disproportionate with consideration to the loss suffered and the debtor's breaches of the contract*"

but, even with these elements, it appears to be difficult to properly assess this proportionality test.

First, the reference to the suffered loss is surprising because punitive damages are to be seen first and foremost as a penalty and in this respect should be linked to the gravity of the activities of the wrongdoer and not to the victim's damages. Second, the principle of proportionality is European. It should be applied by the French judge as the European judge applies it, which means taking into consideration the principle of necessity. This last arm of proportionality unfortunately seems to be missing from the motives adopted by the French Supreme Court Judges.[20]

Moreover, the ruling of the French Supreme Court also leaves one important question unanswered. According to French case law, the merits of a case should not be examined at the stage of exequatur.[21] This principle will surely be debated as performing the proportionality test according to the Schlenzka case could be viewed as an opportunity for courts to re-examine the merits of the case, which would be contrary to more than 50 years of consistent case law.

It remains to be seen what impact future decisions will have on this subject and particularly when courts will have the opportunity to interpret and apply the proportionality test when an exequatur will enforce a ruling ordering punitive damages.

Conclusion

The Schlenzka case is particular because the Cour de cassation discusses the question of punitive damages that was unthinkable not so long ago. In this case, even if the Supreme Court Judges ruled to refuse the recognition of a foreign judgement, their *obiter dictum* can be read as not opposing the introduction of this institution in France. This can be considered as a revolution.[22] Nonetheless, even if the motives behind the Schlenzka case are open to criticism, the trend towards the introduction of punitive damages in France is significant. This question is therefore subjected to cautious strategy that can be summarized as one step forward, two steps back.

The introduction of foreign features into another country's legal order is not a synonym for barbarity as long as the new feature is delineated in such a way that the forum's main legal conceptions are preserved.[23] To achieve this purpose, mechanisms of control may be implemented, notably with respect of the consequences of such an introduction.

Concerning punitive damages, the question of insurability must not be ignored. In the current state of French law, there are no special provisions for the coverage of punitive damages. However, a decision punishing a party to punitive damages could trigger particular insurance policies' clauses, such as those of directors' and officers' insurance.[24]

If French law were to introduce the institution of punitive damages, the legislator would have to recognize the comminatory effect of this institution and the insurability of punitive damages would be raised. Basically, punitive damages could not be covered by an insurer because the efficiency of such penalty would not be guaranteed and, furthermore, a hypothetical cover for punitive damages could in practice cause an inflationary spiral causing judges to increase the amount of these damages and in turn trigger actions first against the insurer and second (through legal recourses) against the insured.[25] This is probably the reason why article 1371 of the Catala report proposes that "*punitive damages cannot be insured*."

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Endnotes

1. «Μηδὲν ἄγαν,» Inscription on the temple of Apollo in Delphi, attributed to the ancient Greeks.
2. Patrice Jourdain, Les Principes de la Responsabilité Civile, Dalloz [Principles of the civil liability] 7 (7th ed. 2007).
3. André Tunc, *Responsabilité civile et dissuasion des comportements antisociaux* [*Civil Liability and Deterrence of Anti-social Behaviours*], *in* Recueil d'études en hommage à M. Ancel [Studies for M. Ancel] 407 (Pédone ed. 1975).
4. As well as other legal orders like Belgium, Germany and Italy.
5. Véronique Wester-Ouisse, *La Cour de cassation ouvre la porte aux dommages-intérêts punitifs*! [*The French Supreme Court is open to Punitive Damages!*], Responsabilité civile et assurances 7 [Civil Liability and Insurance Review] (2011); among others Cass. Civ. 2, Oct. 21, 2010, docket No. 09-67234, No. 09-67229, No. 09-67224, No. 09-67223, No. 09-67226, No. 09-67228; Cass. Civ. 2, Sept. 9, 2010, docket No.09-10013, No. 09-66008, Cass. Civ. 2, May 12, 2010, docket No. 09-66009.
6. See for instance the wreckage and oil spillage of the Erika ship. *Cf.* Laurent Neyret, *Naufrage de l'Erika: vers un droit commun de la réparation des atteintes à l'environnement* [*The Wreckage of the Erika: Towards the Indemnification of Environmental Damages*], Dalloz 2681 (2008).
7. Liebeck v. McDonald's Restaurants, New Mexico District Court Aug. 18, 1994.
8. *Cf.* Véronique Wester-Ouisse, *supra* note 5, at 8.
9. *Cf.* Geneviève Viney, *Quelques propositions de réforme du droit de la responsabilité civile* [*Some Propositions on the Reform of Liability Law*], Dalloz 2946 (2009).
10. "Spokane Truck" decision, Supreme Court of the State of Washington dated 1891, quoted *in* Jacques Bourthoumieux, *Dommages Punitifs* [*Punitive Damages*], RGDA 864 (1996).
11. Reform Bill on contract and liability law, dated Sept. 22, 2005, notably Art. 1371; Reform Bill No. 657 on Civil Liability Reform dated Jul. 9, 2010, Art. 1386-25.

12. *I.e.*, a wrong which profitable consequences for its author cannot be neutralized by the sole indemnification of the caused damages.
13. Geneviève Viney, *supra* note 9, at 2945; *Cf.* Muriel Fabre-Magnan, *Le dommage existentiel* [*Existantial Damage*], DALLOZ 2376 and following (2010).
14. Cf. Geneviève Viney, *supra* note 9, at 2945.
15. Cass. Civ. 1, Dec. 1, 2010, docket No. 09-13.303, DALLOZ 423 (2011), note from I. Gallmeister; Bertrand Fages, *Peines excessives* [*Excessive Penalties*], RTD CIV. [CIVIL L. REV.] 122 (2011).
16. *I.e.* the order allowing enforcement of a foreign judgement.
17. In French: "*Si le principe de condamnation à des dommages-intérêts punitifs, n'est pas, en soi, contraire à l'ordre public, il en est autrement lorsque le montant alloué est disproportionné au regard du préjudice subi et des manquements aux obligations contractuelles du débiteur.*"
18. Cass. Civ. 3, Apr. 17, 1953, REV. CRIT [F. INT'L L. REV] 412 (1953). This theory was used as a basis for the recognition in France of polygamous unions lawfully contracted (The Chemouny case, Cass. Civ. Jan. 28, 1958, REV. CRIT [F. INT'L L. REV] 110 (1958)) or the repudiation of a spouse pronounced abroad (Cass. Civ. 1, Nov. 3, 1983 docket No. 81-15.747), even if these two institutions are contrary to domestic public order.
19. Regulation (EC) No. 864/2007of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II").
20. François-Xavier Licari, *La Compatibilité de principe des punitive damages avec l'ordre public international: une décision en trompe-l'œil de la Cour de cassation?* [*The Compatibility Between Punitive Damages and International Public Order, a Smokescreen Decision From the French Supreme Court?*], DALLOZ 426 (2001).
21. Cass. Civ. 1, Jan. 7, 1964, REV. CRIT. [F. INT. L. REV.] 344 (1964).
22. *Cf.* Sébastien Tournaux, *L'Obiter Dictum de la Cour de cassation* [*French Supreme Court's Obiter Dictum*], RTD CIV 45 (2011).
23. Luc Bigel & Lars Markert, *Estoppel in France and Germany: The Introduction of Foreign Legal Features in Continental Laws of Arbitration*, 15 N. Y. INT'L CHAP. NEWS 25; *Cf. also* Luc Bigel, Julien Soupizet, Todd. J. Fox, *The Enactment of the New Law of Arbitration in France: New Features to Reaffirm Paris as a Venue for International Arbitration*, to be published at the INT'L L. PRACTICUM (2011).
24. Jérôme Kullmann, *Le périmètre de la garantie: les risques non couverts* [*The Scope of Coverage: Excluded Risks*], BULLETIN JOLY SOCIÉTÉS [JOLY COMP. BULL.] 783 (2010).
25. Jérôme Kullmann et al., LAMY ASSURANCE 2413 (2011).

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Reduction of Corruption in the European Union: Czech Republic Perspective

While enforcement in the United States of the Foreign Corrupt Practices Act ("FCPA") is booming and British Authorities brought first charges under the U.K. Bribery Act 2010, the anticorruption legislation enforcement in Central and Eastern Europe still awaits such momentum.

The good news earlier this year for international anticorruption advocates was an invitation from the OECD to Russia to join the OECD's Working Group on Bribery and to accede to the OECD's Anti-Bribery Convention. Although there has been some positive momentum, corruption remains a serious problem within the European Union Member states themselves.[1] According to the European Commission "120 billion Euros per year, or one percent of the EU GDP3, is lost to corruption." The implementation of the anticorruption legal framework remains uneven within European Member States and is acknowledged by the European Commission—overall unsatisfactory.[2]

There is no mechanism in place to monitor and assess the effectiveness of anti-corruption policies in a "coherent-cross cutting manner."[3] Even enforcement under international instruments, such as the OECD's Anti-Bribery Convention, has been uneven within the EU Member States where "active enforcement occurred in only four EU Member States and little or no enforcement in 12 EU Member States."[4]

The country-specific reporting on anticorruption law enforcement is not easily obtainable; however, as the Czech Republic demonstrates, substantial progress has been made by some of the former Central and Eastern European countries that are now EU Member States on the legislative side to address corruption.

Based on the 2010 Transparency International Corruption Perceptions Index, which is an annual survey prepared by Transparency International, the Czech Republic is ranked 53rd as compared to Denmark, which is ranked in first place, and Somalia, which ranks 178th as the most corrupt place in the world.[5]

The Czech Anti-Bribery Laws

The Czech Republic Anti-Bribery Convention was ratified on 21 January 2000. The Convention entered into force internally on 21 March 2000 and was published by the Ministry of Foreign Affairs as No. 25/2000 of the Collection of International Treaties. The country has not to date ratified the United Nations Convention against Corruption which was signed on 22 April 2005 but is a signatory to a number of the European Criminal Law Conventions that address corruption.

The implementing legislation for the OECD Anti-Bribery Convention is Law No. 140/196 of the Czech Criminal Code. Though this legislation does not expressly mention the Anti-Bribery Convention, it extends its application by making reference to the international convention. As the criminal law remains the domestic law concern, Article 20a (1) of the Criminal Code speci-

fies that the [t]he punishability for an act shall also be considered under Czech law in cases stipulated in a promulgated international convention (agreement, treaty) which is binding on the Czech Republic. Further, based on Article 22 (2) sentence of a foreign criminal court may not be enforced on the territory of the Czech Republic or have other effects, unless it is stipulated in this Code or in a promulgated agreement (convention) which is binding on the Czech Republic.

Definition of Bribe

In the Czech Republic, a bribe is defined in relation to unjust enrichment. It means an "unwarranted advantage consisting in direct material enrichment or other advantage received or having to be received by the person bribed or with its consent to another person, and to which there is not entitlement."[6] The Criminal Code provides definition of a public official in Articles 89(9), which was extended in Article 162a. It does not only apply to people occupying public sector posts such as, for example, in the administration, international organizations or judiciary. It also captures corporate subjects and applies to any person "occupying a post in an enterprise, in which the Czech Republic or a foreign country has the decisive influence."[7]

Active and Passive Bribery

The EU Framework Decision on combating corruption in the private sector, which was adopted in 2003, aims to criminalize both active and passive bribery. The Czech Republic, along with 8 other Member States (i.e., Belgium, Bulgaria, France, Ireland, Cyprus, Portugal, Finland and U.K.) have correctly transposed all elements of the offence as laid down in Article 2 of the Framework Decision to their domestic law.[8]

As such, the Czech Criminal Code distinguishes between "passive bribery" and "active bribery."[9] The former refers to the situation where the bribery is accepted. It is subject to potential imprisonment for 6 months to 5 years or to prohibition of activity. In aggravated circumstances, which includes intent to procure benefit for oneself or another person or by committing an act of bribery as a public official, punishment can increase up to 2 to 8 years or monetary punishment.[10] The longest imprisonment, 5 to 12 years, is provided for in situations where there is intent to procure a major benefit for oneself, for another person, or if such an act is committed as a public official with the intent of procuring a substantial benefit for oneself or another person.[11]

Active bribery deals with offers or promises of a bribe. These have a lower threshold of penalties, with a maximum for aggravating circumstances of 5 years or monetary punishment. Even lower penalties (up to 3 years of imprisonment) are attached to "trading with influence" which refers to a situation when someone requests or accepts a bribe for exerting influence on the execution of the authority of a public official.

The Extraterritorial Application

The extra-territorial application of legislation stems from Article 17(2)(3) of the Czech Criminal Code, which specifies circumstances under which a criminal offense committed abroad shall be considered as having been committed on the territory of the Czech Republic.[12] This notion of extraterritoriality is reinforced by Article 18, which reiterates that "[t]he liability to punishment for an act committed abroad by a citizen of the Czech Republic or by a stateless person (a person having no citizenship) authorized to reside permanently in the Czech Republic shall also be considered under Czech law."

Correlation With Other Legislation

The legislators wanted to assure that developments on the anti-bribery side and the Criminal Code correspond with other legislation.

The Commercial Code,[13] when dealing with unfair competition, states in Article 44(2)(a) that one of the meanings of unfair competition is bribery. Article 44 of the Commercial Code also defines bribery as gaining an advantage by means of unfair conduct for or to the detriment of other competitors, or an illegal competitive advantage. The commentary to the Commercial Code explains that under section 49 the advantage may be material (e.g., money) or non-material (e.g., honorary membership). An amendment to the Income Tax Act, which states explicitly that bribes are not deductible expenses, entered into force on 1 January 2001. A new Act on Auditors entered into force on 14 April 2009. Accordingly, auditors have to notify immediately of any indication of possible acts of bribery to the statutory and supervisory bodies of the company. Parliament approved this amendment to the Accounting Act in September 2001. The Civil Code[14] provides the statute of limitation for bribery offenses that are committed pursuant to Article 162a par.1 of the Criminal Code.

Anti-Bribery Enforcement

The institutional base is set up for reporting bribery-related offenses. The law enforcement authorities, the Police of the Czech Republic and the Public Prosecutor's Office are considered primary contacts for reporting offenses; however, there are other sources such as email sites, some of which are dedicated to complaints against special groups, such as the police and the judiciary. The Anti-corruption Commission is established by the Ministry of the Interior and has a preventive mandate to detect corruption and monitor any signs of corruption, which may lead to preventive inspection actions. The Supreme Audit Office is a body that is independent from the legis-

lature, the judiciary, and the executive powers, and is in charge of auditing the management of state property.[15]

The legal system also promotes "whistleblowers" who were provided or promised a bribe but then turned to the authorities (the prosecutor or police) to self-report without delay. The anticorruption phone line also operates in English, which allows foreigners to notify the authorities of all forms of corruption.

Conclusion

Absent an effective monitoring system, the level and effectiveness of anticorruption enforcement in the Czech Republic and some EU member States remains somewhat vague, especially in Central and Eastern Europe where anti-corruption laws and their enforcement have not yet gained the same momentum as the FCPA with its escalating number of enforcement actions.[16]

The European Union recognizes the limitation of the international anticorruption framework, including its monitoring and evaluation mechanism. Proposals have been made to establish a specific EU monitoring and assessment mechanism in the EU Anti-Corruption Report.[17] Starting in 2013 this new mechanism—the EU Anticorruption Report—will be issued by the European Commission every two years and hopefully, as expected, will prompt a stronger political will within the Member States to focus their efforts to combat corruption. It will, however, take time for the EU and the Member States to get the same results as have been achieved by the FCPA. However, we need to also remember that the FCPA was enacted in 1977 and only recently became a meaningful enforcement tool.

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Endnotes

1. Communication from the Commission to the European Parliament, The Council and the European Economic Social Committee: Fighting Corruption in the EU, European Commission, Brussels, 6.6.2011COM(2011) 308 final, p.1 (online: http://ec.europa.eu/commission_2010-2014/malmstrom/archive/com308_corruption_en.pdf).
2. *Ibid.* at 4.
3. *Ibid.* at 5.
4. *Ibid.*
5. http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results See also some other useful references for bribery statistics- http://www.transparency.org/publications/publications/conventions/oecd_report_2011; https://secure.traceinternational.org/data/public/documents/GlobalEnforcementReport2011_000-64723-1.pdf.
6. Article 162 (a)(1) of the Criminal Code.
7. Article 160 a (2)(d).
8. Communication from the Commission to the European Parliament, The Council and the European Economic Social Committee: Fighting Corruption in the EU, European Commission, Brussels, 6.6.2011COM(2011) 308 final, ft.31 (online: http://ec.europa.eu/commission_2010-2014/malmstrom/archive/com308_corruption_en.pdf).
9. Article 160 and 161 of the Criminal Code.
10. Article 160 (3) of the Criminal Code.
11. Article 160 (4) of the Criminal Code.
12. A crime shall be considered as having been committed on the territory of the Czech Republic:

    (a) if an offender acted on its territory, even if the violation of, or threat to, an interest protected under this Code resulted, or was to result, completely or partly abroad, or

    (b) if an offender violated or threatened on its territory an interest protected under this Code, or if the consequence of such a crime was to have occurred on its territory at least partly, even though the crime was committed abroad.
13. Commercial Code, No. 513/1991 Coll.
14. Civil Code, No. 40/1964 Sb. Civil Code as amended.
15. Anti-Corruption in Eastern Europe and the CIS, http://europeandcis.undp.org/anticorruption/show/40AF3378-F203-1EE9-BC1B225EE997C12F.
16. "Currently the U.S. has more than 150 ongoing FCPA investigations and in 2009, it charged more than 40 individuals and numerous corporations with FCPA-related violations. In 2010 DOJ imposed the most criminal penalties in FCPA–related cases in any single 12-month period- well over $1 billion." Presentation "The U.S. Foreign Corrupt Practice Act and Related Anticorruption Issues," by Kathryn Nickerson, North Carolina Bar Center, June 9, 2011. For more OECD enforcement statistic see: http://www.oecd.org/document/3/0,3746,en_2649_37447_45452483_1_1_1_37447,00.html.

    For more statistics from DOJ see: http://www.justice.gov/criminal/fraud/fcpa/docs/response3-appx-b.pdf.
17. Supra note 5.

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Spotlight on Aruba's Thriving Aircraft Financing Industry

Introduction

This month marks the first anniversary of the entry into force in Aruba of the Cape Town Convention on International Interests in Mobile Equipment and the Protocol thereto on Matters specific to Aircraft Equipment (the "Cape Town Convention"). The Cape Town Convention covers various categories of mobile equipment, including (parts of) aircraft, space assets and railroad rolling stock, and has currently been ratified by 50 contracting states.[1] This legal update will address that part of the Cape Town Convention that applies to aircraft.

Aircraft Collateral May Be Unenforceable Without Treaty

In aviation finance, the primary collateral usually consists of security rights on the aircraft, which is constantly crossing borders. Without an applicable treaty, this collateral may be unenforceable, as different legal systems apply conflicting conflict of law rules. As a result, the courts where the aircraft is located when foreclosure is sought may not recognize the security interests created thereon. To illustrate, the English High Court of Justice recently held in *Blue Sky One Ltd. and Others v. Mahan Air and Another* that the law determining the validity of a mortgage on an aircraft is the law of the jurisdiction where the aircraft was located at the time the mortgage deed was executed (*lex rei situs*). As a result, the English law-governed mortgage was held to be invalid because at the time of execution of the mortgage deed the aircraft was located in the Netherlands and the mortgage was deemed to be of no effect under domestic Dutch law as it did not comply with certain formalities required thereunder. The English court disregarded the Dutch conflict rules, which would have pointed to English law as the law of the jurisdiction where the aircraft was registered on the relevant date (*lex registri*). Consequently, the mortgage was unenforceable and the mortgagee could not foreclose on the aircraft. The Cape Town Convention reduces this perplexing legal uncertainty by establishing a framework for recognizing and enforcing international interests on (parts of) aircraft in all contracting states.

Cape Town Convention

The Cape Town Convention applies if three requirements are met: (i) parties have entered into a security agreement, conditional sale agreement or lease agreement creating an international interest that satisfies the formalities prescribed in the Cape Town Convention (a "Security Agreement"), (ii) such agreement relates to (a) airframes (including parts and equipment installed or attached thereto); (b) aircraft engines; or (c) helicopters, that each must meet specific minimum size requirements (**aircraft objects**); and (iii) at the time of entering into such agreement, the debtor has its corporate seat or principal place of business in a contracting state or, alternatively, the airframe or helicopter is registered in the national register of a contracting state. The location of the aircraft, which determined the unfortunate outcome in the Blue Sky case, is therefore not relevant for applicability of the Cape Town Convention.

The Cape Town Convention creates rules for the recognition in all contracting states of international interests in aircraft that are created if the following formalities have been complied with: (a) the Security Agreement is in writing, (b) the debtor has the power to dispose of the aircraft object, (c) the aircraft object is specifically identified in the Security Agreement in conformity with the Aircraft Protocol, and (d) the secured obligations can be determined pursuant to the Security Agreement. International interests are constituted even if these formalities would not be sufficient to create interests under otherwise applicable national law. International interests extend to insurance proceeds and other loss-related proceeds of an aircraft object, but not to other proceeds, e.g., proceeds received from the sale of the object.

An International Registry has been established in Ireland for the registration of these international interests. To perfect the international interests, an electronic notice must be filed by the debtor or beneficiary with the International Registry. The other party must consent in writing to the filing. Interestingly, future interests can also be registered in the International Registry, and no additional registration is needed when a future interest becomes an existing interest. The security interest shall be treated as registered at the time of registration of the future interest. The priority rules are straightforward: the first to register its interest in the International Registry has priority, generally regardless of its actual knowledge of any prior unregistered interests or interests that are registered in national aircraft registers.

The default remedies under the Cape Town Convention are more flexible than under many national laws, and especially more flexible than in most civil law jurisdictions, including national Aruban law. In the case of default, the holder of an international interest may, to the extent the debtor has at any time so agreed, (i) take possession or control of an aircraft object; (ii) sell or grant a lease of such object; or (iii) collect or receive any income or profits arising from the management or use of such object. The creditor can also take ownership of the aircraft object in satisfaction of the debt, but only if, after the default occurs, the debtor consents thereto.

Why Register in Aruba?

Aruba is part of the Kingdom of the Netherlands and has a stable political and legal system, with the Dutch Supreme Court located in The Hague as the highest appeal court. Over the last decade, Aruba has become a premier jurisdiction for the registration of aircraft. For starters, the tax climate in Aruba is favorable for the registration of aircraft. Aruba has a special vehicle that can, inter alia, be used to own or lease aircraft. The Aruba Exempt Corporation (*Aruba vrijgestelde vennootschap*) can be subject to a minimal corporate income tax rate and, to a large extent, be exempt from most other taxes. Further, Aruban authorities are business friendly: if all paperwork is in order, aircraft can be registered in Aruba in as little as one week. Finally, Aruba applies high safety standards; it is rated a category 1 jurisdiction by the U.S. FAA.

At this time, 85 aircraft and helicopters are registered in Aruba. The recent entering into force of the Cape Town Convention can be expected to further enhance

Aruba's standing as a premier off-shore aircraft financing jurisdiction.

Conclusion

By registering an aircraft in Aruba, or by using an Aruban entity to own an aircraft, more certainty can be obtained with respect to the enforceability of security rights created on such aircraft. This certainly has been enhanced by the applicability of the Cape Town Convention, which will ensure that the security rights will be recognized and enforced in all contracting states. However, in order to ensure that the security rights will also be enforceable in jurisdictions that have not (yet) ratified the Cape Town Convention, it remains advisable, if possible and depending on where the aircraft is generally operated, to also make sure that the security rights are recognized under the law of the jurisdiction of registration of the aircraft and the law of the location of the aircraft at the time of execution of the security agreement.

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Endnote

1. Afghanistan, Albania, Angola, Aruba, Bangladesh, Belarus (as per October 1, 2011), Burundi (pending)*, Cameroon, Canada (pending), Cape Verde, Chile (pending), China, Colombia, Congo (pending), Costa Rica (as per December 1, 2011), Cuba, Curaçao, Ethiopia, Fiji, France (pending), Gabon, Germany (pending), Ghana (pending), India, Indonesia, Ireland, Italy (pending), Jamaica (pending), Jordan, Kazakhstan, Kenya, Latvia, Lesotho (pending), Luxembourg, Malaysia, Malta, Mexico, Mongolia, New Zealand, Nigeria, Norway, Oman, Pakistan, Panama, Russian Federation, Rwanda, Saudi Arabia, Senegal, Seychelles, Singapore, South Africa, Sudan (pending), South Sudan (pending), St. Maarten, Switzerland (pending), Syrian Arabic Republic, Tajikistan, Togo, Tonga (pending), Turkey (as per December 1, 2011), Ukraine (pending), United Arab Emirates, United Kingdom (pending), United Republic of Tanzania, United States of America, Zimbabwe.

   *pending means not yet ratified

Chapter News

Straddling the Gateway between South and Central America

Below is a personal recollection of a second-year law student on his experience at the Section's seasonal meeting in Panama. The enthusiasm of the student who wrote this, Andrew Nelson, can be seen throughout this edition of the Chapter News *as he so kindly assisted in the editing of many of the works found herein.*

When I landed at Tocumen International Airport twenty minutes outside of Panama City, I wasn't sure what to expect. True, as a law student I was eager to learn from and meet the members of the Section who have spent their lives practicing, traveling, and living with an international focus. What I was not prepared for was that as much as I would learn about ICSID, how the Special Rules of Civil Procedure can allow for pre-judgment attachment on vessels, and the difference in intestacy laws between Costa Rica, Brazil and New York, the experiences I would appreciate the most related to the time spent outside of the panel discussions.

From the midday lunch breaks and the boat tour of Monkey Island to the night out in Casco Viejo at the Canal Museum, I was able to see first-hand the congeniality of the Section members, transcendent of culture and nationality. To call it camaraderie would be a disservice. This point was only driven home by the Gala Dinner, which should have been renamed the Linda Castilla Retirement Party. Although I only knew Ms. Castilla as the woman who worked diligently to find a way to let me attend the meeting, the sheer number of love songs, tears, laughter, applause (and references to special moments in Peru) proved how much the members of the Section cared about Linda and each other.

When my fellow 2Ls ask how my trip to Panama was, I tell them I managed to have an authentic Panamanian breakfast at El Trapiche, enjoy a wild boat tour down the Panama Canal in the middle of a downpour, watch boats as big as Madison Square Park be lowered through the canal locks, and listen to notable speakers, dignitaries and professionals give their personal views on a part of the law I enjoy. Yet it was the members of the Section themselves which made the meeting memorable. I've had difficulty conveying to my classmates, friends and family why the people I met meant more to me than the possibly once-in-a-lifetime sights I saw. To that end the only thing I can say to them is that the meeting in Panama means that getting to Lisbon next fall will be a priority, and that while I'm not sure a meeting without Linda Castilla (yes, they have heard about Linda) will be as good as one with her, I will get another chance to further develop the relationships I started in between the panel discussions.

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Join Us for the European Regional Meeting in the Beautiful City of Prague

You are cordially invited to attend the 2012 European Regional Meeting of the NYSBA International Section in Czech Republic. The meeting will be held on March 8-9, 2012 in Prague, in conjunction with a meeting of the Executive Committee of the Section.

The substantive part of the European Regional Meeting will be devoted to the topic of the Foreign Corrupt Practices Act and the U.K. Bribery Act, as well as issues and considerations related to the U.N. Convention on Contracts for International Sales of Goods ("CISG"). For more information about the European Regional Meeting, please contact the Prague Chapter's Co-Chairs, Andrea Carska-Sheppard (andrea.carska@hblaw.eu) and Jiri Hornik (jhornik@ksb.cz).

Prague is Europe's top tourist destination. Much of this success can be attributed to its history, sheer beauty and heritage. Prague is also one of most exciting cities in Central Europe with wonderful architecture, sightseeing, opera, dance, film and theater, and excellent restaurants offering traditional Czech and international cuisine and enchanting pubs. Some of Prague's attractions include the **Old Town Square** where you can find the **Astronomical Clock**. The famous **Charles Bridge** provides a splendid view of the **Prague Castle.** You may find more information at the Prague Tourism website at http://www.prague-tourist-information.com/.

Mark your calendars for the NYSBA's European Regional Meeting in Prague in March 8-9, 2012. More information on the program and the tourist arrangements will follow.

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An Annual Update from the Brazil Chapter

The Brazil Chapter has been extremely active this year. We try to have Happy Hour meetings every month. Our gatherings are at a little place called Wall Street and it has a statue of a bull (just as the one in lower Manhattan).

Our core group also has frequent breakfast meetings, allowing us to organize our activities such as promoting the Panama Meeting within the Brazilian legal community. Due to our outreach within the Brazilian legal community, several Brazilian lawyers attended the Panama Meeting either as speakers or guests.

In addition, the Brazil Chapter hosted two major programs this year.

The first, a seminar entitled "International Arbitration in Brazil and in the U.S.," which was highlighted in the last edition of the *Chapter News*, was held on March 15th. The seminar was hosted by Mattos Filho, Veiga Filho, Marrey Jr. e Quiroga Advogados. The speakers were the then-president of the NYSBA, Stephen Younger, José Emilio Nunes Pinto, a highly renowned practitioner and arbitrator, and Eduardo Damião Gonçalves, an arbitration practitioner and partner of the hosting firm.

The second, more recent event, which was held in Sao Paulo on September 14, 2011, was a follow-up to last year's seminar entitled "Anti-Corruption Legislation" promoted by KLA Koury Lopes Advogados, Ernst Young & Terco with the support of the NYSBA. This seminar was about the FCPA and its impact on business in Brazil. For that seminar we had more than 150 attendees.

Lastly, the Brazil Chapter is supporting the special CISG Conference to be held in São Paulo on November 3-4. This very prestigious event will take place in Sao Paulo as a result of the efforts of the International Contract and Commercial Law Committee led by Albert Bloomsbury.

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Message from the Chair

(Continued from page 2)

adopted on September 2, and we intend to work to make that happen, involving the NYSBA Criminal Justice Section and attorneys who participate in the NYSBA trial advocacy programs. After the signing, Francisco J. Miguez P., Chief Financial Officer of the Panama Canal Authority, gave a fascinating presentation on the planned expansion of the Canal and its financing.

Thursday evening we enjoyed the hospitality of U.S. Ambassador to Panama, Phyllis M. Powers, for a reception at her beautiful Residence, followed by dinner on an extraordinary outdoor terrace overlooking the ocean at the Trump Hotel. Again Panama's rainy season withheld its downpours and we had a beautiful evening to enjoy the setting.

At lunch on Friday we were addressed by Ambassador Powers, who called upon us to support the Panamanian Bar in its criminal justice transition, and at dinner we were addressed by Jose Pacheco Tejeira, Panama's Deputy Minister of Foreign Trade in the Ministry of Commerce and Industry, who spoke of the many connections between Panama and the U.S., including his own. [*Postscript added on October 14*: Congress this week finally passed the U.S. Panama free trade agreement, expanding those connections between our two nations.]

On Saturday, we began at the beautiful Gamboa Rain Forest Resort, with an interesting and well-attended ethics plenary, then went outside to see a sloth and a large green iguana in trees near the building, and then went back inside for a buffet lunch. Unfortunately, the rain that had largely left us alone all week finally arrived, causing many of us to cancel the boat and walking tours we had planned, although a few intrepid souls persevered through the rain and enjoyed the natural beauty of Gamboa.

Finally, Saturday evening was the highlight of the meeting. We had dinner at the Miraflores Locks of the Panama Canal, where we were able to see several large ships move through the locks—a fascinating operation. We also had an excellent dinner, but the real high point was the tribute to Linda Castilla, which despite over a hundred of us being in on the plans, we were able to keep as a surprise to Linda.

Linda, who has been our Section's staff liaison since the Section was founded over two decades ago, is the heart and soul of the Section, and is, to our great dismay, retiring at year-end. Some twenty speakers (including two by email), including ten Section Chairs, recollected, with humor and emotion, Linda's contributions to the Section over the years. As one speaker put it, Linda has effectively been the Executive Director of the Section. While I always recognized Linda's extraordinary contributions to the Section, it was not until I became Section Chair that I fully appreciated the value of her wisdom, experience, dedication and judgment. Our gala speakers confirmed that, as well as recalling some of the extraordinary situations Linda helped us through, from persevering to persuade us to hold our 2001 Rio Seasonal Meeting after the events of 9-11, to continuing to worry about details of our Lima / Cuzco meeting while confined to a hyperbaric chamber while suffering from altitude sickness in 2007.

In appreciation of her contributions to the Section, we also announced several special gifts to Linda, in addition to the traditional Tiffany Apple. Linda, you are a truly unique individual, and your contributions to our Section will never be forgotten. Thanks for all that you have done, and our best wishes to you for a happy retirement.

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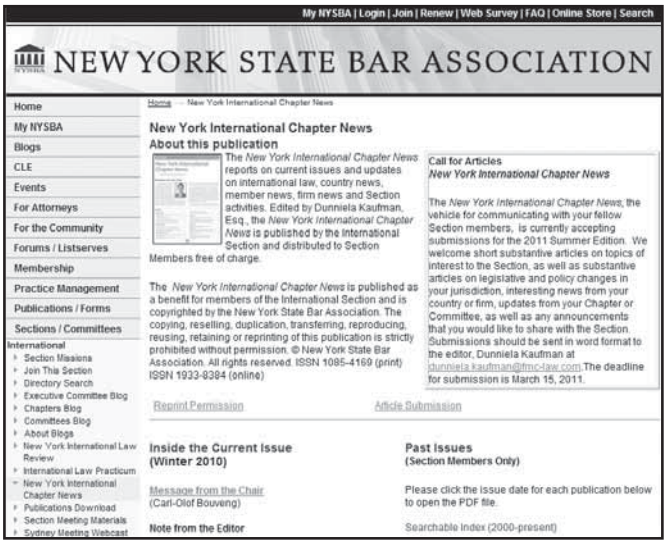

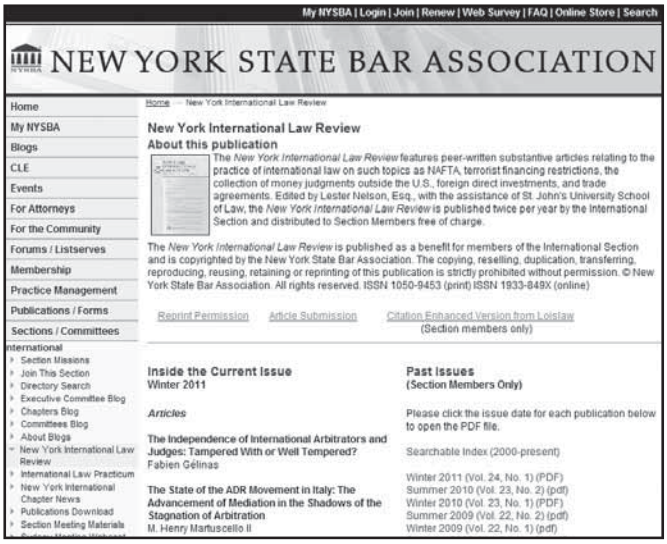

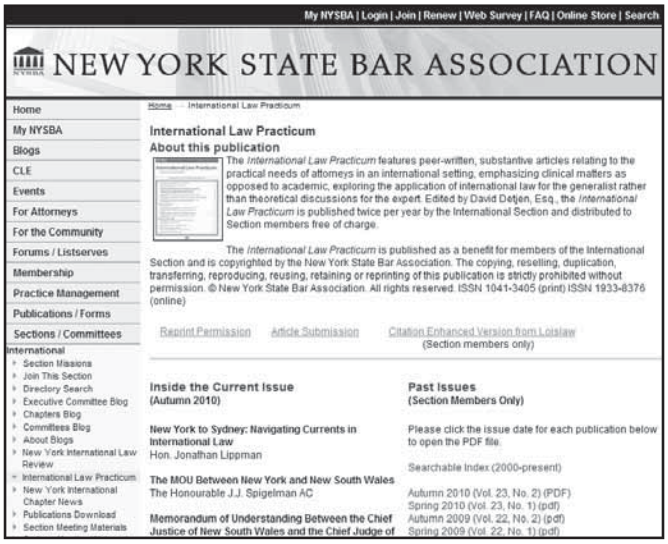

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