NYSBA SPRING 2006 | VOL. 11 | NO. 1

# New York International Chapter News

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

## A Word From Our Immediate Past Chair

What a year! Looking back, it is difficult to know where to begin to describe our Section's activities. What is not difficult is to thank the members of our Section, our Executive Committee, Vice-Chairs, Committee Chairs and Chapter Chairs, our Officers, and especially Linda Castilla, our NYSBA Liaison in Albany, for their hard work and dedication that made 2005 a successful year by any measure.

Our Committees continued to hold meetings and run impressive programs. The Committees on United Nations & Other International Organizations, International Privacy Law and the Women's Interest Networking Group held truly informative programs, with noted

(Continued on page 2)

## A Word From Our New Chair

At the Annual Meeting of the Section in January of each year, the same question reoccurs: "How can the New Chair match the high standards achieved for the Section under the leadership of the Immediate Past Chair?" The question expresses both a premise and a challenge. The premise is that the International Law and Practice Section ("ILPS") has grown stronger for many consecutive years. The challenge is to make the Section incrementally stronger in the upcoming year than it was in the past year.

Robert J. Leo understood the premise and met the challenge. He, like Paul M. Frank, James P. Duffy, III, Kenneth A. Schultz and Isabel C. Franco before him, to

(Continued on page 4)

## Inside

## A Word from Our Immediate Past Chair

*(Continued from page 1)*

speakers and expert practitioners. Other committees such as International Banking, Securities & Financial Transactions, Immigration and Nationality Law, International Litigation, and the U.S.-Cuba Affairs Subcommittee of the Inter-American Law Committee also deserve special mention for their continued work and programs.

Our Section's Chapters around the world, now numbering close to 40, are becoming more organized and active, and continue to bring new members into the Section. Speaking of new members, our Section made a concerted effort to reach out to younger lawyers in our Section and in the NYSBA overall. We recently held a well attended networking reception with the Young Lawyers Section and offered scholarships and "Young Lawyers discounts" to our Seasonal Meeting in London this past October.

As for London, there are not enough superlatives to describe our meeting there. Spearheaded by Michael Galligan and Jerry Ferguson, combined with the hard work and invaluable input of our London Chapter Chairs, Anne Moore-Williams, Randal Barker and Jonathan Armstrong, the attendees agreed that the meeting set a new standard for substantive programs and networking, highlighted by a full-wigged moot court held at the Old Hall of Lincoln's Inn. We were pleased to have as our guests NYSBA President Vince Buzard, NYSBA President-Elect Mark Alcott, and the Presidents of the Law Society of England and Wales and the Bar Council of England and Wales.

The London program would not have been possible without the generosity and cooperation of all our sponsors, the Bar Council and especially our host, the Law Society. We plan to continue our cooperation with these organizations on programs and issues through our London Chapter and a special subcommittee of the Section. If nothing else, I expect my English to improve dramatically, and I have already started using "u" in words like "honour."

We could have rested on our laurels after London. However, our NAFTA program at the NYSBA Annual Meeting was also top-notch, well attended and well received. The highlight of our luncheon was our presentation of our Award for Distinction in International Law to U.N. Legal Counsel Nicolas Michel for his commitment to the rule of law worldwide.

The NAFTA program continues our strong relationships with our legal brethren to the North, and in fact we are co-sponsoring programs in May with the Quebec Bar Association and the Hamilton Bar Association. In June in Toronto, we are one of the co-sponsors of the 72nd Biennial Conference of the International Law Association.

This October our Seasonal Program is in Shanghai to be held in cooperation with the Shanghai Bar Association. However, I think that our new Chair, Jack Zulack, is better able to describe what we have planned. Our Section is in great hands with Jack and we all are looking forward to another productive and successful year . . . no pressure there, Jack.

I could go on, however in the interest of your time, let me just state that I am "honoured" to have served as Chair of the best Section in NYSBA.

**Bob Leo, Immediate Past Chair**
**Meeks & Sheppard**
**New York, NY**



# Our Co-Editor

I am very pleased to bring you the first edition of the *New York International Chapter News* for 2006. As is evident by the nationalities of our members, and the articles found in this edition, this Section of the New York State Bar Association brings together lawyers from all over the world who share an interest in the global aspects of the practice of law. From informing ourselves about changes to domestic laws in our members' respective countries, to sharing international experiences and commentary on those matters that touch on the law that governs us all as members of the international community, this edition of the *Chapter News* epitomizes the broad interests of our membership, and their willingness to share those interests with one another.

This publication brings together legal counsel from around the globe in an effort to share information and benefit from our mutual interests and experiences. I want to thank those who contributed to this edition, and I hope that today's contributors inspire you to participate in our next edition. I look forward to hearing from you.

**Richard A. Scott, Co-Editor**
**Fraser Milner Casgrain, LLP**
**New York, NY**

## A Word from Our New Chair

*(Continued from page 1)*

mention only our extraordinary leaders in the 21st Century, strengthened the Section and broadened the scope of its activities during each administration. Bob Leo's leadership in 2005/2006 exemplified his admirable qualities as a lawyer and as a person. His intelligence, collaborative skills, vision, diligence, modesty and sense of humor were apparent throughout the year.

The challenge for the year ending January 2007 is not (and cannot be) to equal or surpass the leadership qualities of the prior Chair. The challenge is to strengthen and broaden the base that has grown since our Founding Chair, Lauren D. Rachlin, and others, almost 20 years ago, merged a committee of public international law and a committee of private international law into what is now our Section. The incremental success can continue in 2006/2007 only with the continued efforts of all members of the Section.

Please think how you can help the Section improve. For many of you, you need only to do what you have been doing so successfully for so many years. For example, Linda L. Castilla and Audrey J. Osterlitz should continue to do what they have done for the Section since they became Co-Staff Liaisons between the ILPS and the New York State Bar Association ("NYSBA") in 1992. Please let Ms. Castilla (lcastilla@nysba.org), Ms. Osterlitz (audrey@nysba.org) or me (jzulack@fzw.com) know how you can help make the Section become even larger, stronger and more effective.

### 1. Membership of the Section

The number of members of the Section exceeded 2,000 for the first time as of January 1, 2005. Our goal is to increase the membership to 2,200 by December 31, 2006. The challenge for each member of the Section is to recruit one new member to the Section. (The cost of membership of the Section is $35 per year.) Any member of the NYSBA can join the Section online at http://www.nysba.org/ilp.

### 2. Fall Meetings

Our 2006 Fall Meeting, *China: Engine of Growth for the 21st Century*, will be held in Shanghai at the J.W. Marriott at Tomorrow Square from October 17-21. Our three most recent meetings in London in 2005, in Santiago in 2004 and in Amsterdam in 2003 were outstanding events as were the numerous meetings before them. Our challenge in 2006 is for our Fall Meeting in Shanghai to set the standard for any future meeting of a foreign bar association in the People's Republic of China. Under the leadership of Program Chair, Lawrence A. Darby (ldarby@kayescholer.com) and Co-Program Chairs Joel B. Harris (jharris@tpwlaw.com) and Yingxi Fu-Tomlinson (yfu@kayescholer.com), we expect the Fall Meeting in Shanghai to excel in every category: MCLE programs; social and cultural events; networking opportunities; attendance; and overall satisfaction of those who participate in, sponsor and attend the program.

### 3. Presidents of the New York State Bar Association

Mark H. Alcott, President-Elect of the NYSBA, will open the substantive program of our Fall Meeting in Shanghai with his remarks on Thursday, October 19, 2006. President A. Vincent Buzard opened our 2005 Fall Meeting in London last October and Past President Kenneth D. Standard opened the Fall Meeting in Santiago, Chile in November 2004. The ILPS continues to be blessed with the support and participation of Presidents of the NYSBA during their terms of office and after their terms. Past Presidents, Kenneth D. Standard, A. Thomas Levin, Lorraine Power Tharp and Steven C. Krane, for example, have worked with the Section after their terms of office as President of the NYSBA ended. We hope that President A. Vincent Buzard will continue to be active in the Section after June 1st of this year. Mark Alcott, who becomes President on June 1, 2006, has been a member of our Executive Committee for many years. He is a strong supporter of the Section's activities. He is the first member of our Executive Committee to be elected President of the NYSBA. We congratulate Mark Alcott on his election and thank him for all of his contributions to the Section in the past.

### 4. Our Past Chairs

An additional strength of the ILPS is the continued participation of Past Chairs in the work of the Section. Our goal for 2006 is to have each of our living Past Chairs attend the Meeting in Shanghai: Lauren D. Rachlin; Arnold J. Schaab; Michael M. Maney; J. Truman Bidwell, Jr.; Leslie N. Reizes; Alfred E. Yudes, Jr.; Thomas O. Verhoeven; Joel B. Harris; Donald M. Mawhinney, Jr.; Thomas J. Bonner; Philip M. Berkowitz; Isabel C. Franco; Kenneth A. Schultz; James P. Duffy, III; Paul M. Frank; and Robert J. Leo. Like our Past Chairs, we know that our Immediate Past Chair, Robert J. Leo, will continue to be active in the Section and continue to provide assistance to the Chair and to others as he has done in the past.

### 5. House of Delegates

As a result of having reached the plateau of 2,000 members, ILPS has three Delegates to the House of Delegates of the NYSBA and one Alternate. This year we have decided that the Delegates will be our three most

recent Past Chairs, Jim Duffy (jpduffy@bergduffy.com), Paul Frank (pmfrank@hodgsonruss.com)and Bob Leo (robert.leo@mscustoms.com) and the Alternate Delegate will be Past Chair, Ken Schultz (kschultz@ssbb.com). We thank John Hanna, Jr. for serving as the Section's Alternate Delegate for many years. President-Elect Mark H. Alcott urged the Section at the Executive Committee dinner on January 24, 2006 to be even more active in making proposals to the NYSBA in the area of international practice. Members should communicate any ideas to the Section's Delegates or to the Chair.

## 6. Meetings

After the crown jewel of our Section, the Fall Meeting, the next most important activity is the Annual Meeting of the Section each January in connection with the Annual Meeting of the NYSBA. Calvin A. Hamilton (chamilton@mmmm.es) is the Program Chair for the 2007 Annual Meeting. Please forward ideas for the MCLE 2007 Annual Meeting Program to him. Executive Vice-Chair Marco Blanco was Program Chair for the Annual Meeting in January 2006 and organized an outstanding MCLE program on NAFTA. For the past two years, the ILPS has co-sponsored this MCLE program at the Annual Meeting with the Corporate Counsel Section. The Section wishes to continue to collaborate productively with other Sections and to continue to present the high-quality programs that lawyers from all Sections wish to attend.

Another important meeting is the Retreat of the Executive Committee, this year to be held in New York, New York during the weekend of May 19-20, 2006. The Retreat will start with a half-day MCLE program on Friday afternoon, followed by a cocktail party on Friday evening, and an Executive Committee Meeting on Saturday morning. The Executive Committee selected New York City as the venue for the 2006 Retreat for three reasons: first, to increase attendance at the Retreat; second, to encourage young lawyers to join the Section; and third, to provide MCLE programs on international law and practice that many can afford without incurring travel expenses to foreign countries. We will invite young lawyers and registrants for the CLE program to join other members of the Section at the cocktail party after the CLE program on Friday evening. Manuel Campos-Galvan, liaison with the Young Lawyers Section of the NYSBA, has agreed to be the Meeting Chair for the events on May 19th. Please direct any suggestions for the Program, attendance and any ideas for the cocktail party to Manuel Campos-Galvan (mcampos@lexcorp.com.mx).

## 7. Committees

The work of the Committees is the lifeblood of the Section. Over the past years, some of our Committees have been vibrant and active. One of the challenges of the Section for 2006 is to continue to monitor the activities of the Committees and to make sure that Committees and the Co-Chairs of each Committee are contributing appropriately to the continued growth of the Section.

## 8. Chapters

The ILPS has nearly 40 Chapters in major cities in Asia, Africa, Europe, and in North, Central and South America. Past Chairs Isabel Franco, Ken Standard, Jim Duffy, Paul Frank and Bob Leo correctly broadened and deepened the role of Chapters in the life of our Section. For the past few years, a meeting of Chapter Chairs has been held in connection with the Fall Meeting. This tradition will continue in Shanghai with a meeting of Chapter Chairs on the morning of Wednesday, October 18, 2006.

## 9. Publications

The Section has three outstanding publications. David W. Detjen has served as the stellar editor-in-chief for the *International Law Practicum* for many years. Lester Nelson is the editor-in-chief of the *New York International Law Review* and Professor Charles Biblowit is the faculty adviser to the *New York International Law Review*. Together with students of St. John's Law School, they are responsible for this outstanding publication. *New York International Chapter News* is edited by Richard A. Scott and Oliver J. Armas, with the invaluable assistance of Dunniela Kaufman. The Section's three publications are available online on the Section's page at NYSBA (http://www.nysba.org/ilp). The Section's website contains an index for each publication together with complete copies of issues of the publications since 2000.

## 10. The Section's Expanding Horizons

### Canada and Mexico

The Section has always had strong ties with its North American neighbors. The Section held its Fall Meetings in Montreal in 1988, in Toronto in 1991 and in Vancouver in 1995. In the past two years the relationship between Canadian lawyers and our Section has intensified. The Section had an outstanding Retreat in Montreal during the weekend of June 4, 2004. In January 2005, panelists from four of the largest Canadian law firms presented an outstanding MCLE program at the Annual Meeting on the impact on international commerce under the Patriot Act, Sarbanes-Oxley and other recent U.S. laws. Representatives of the Section held fruitful discussions with the Law Society of Upper Canada on Cross-Border legal practice. On May 5, 2006, the Hamilton Law Association, in conjunction with the ILPS, will be presenting a full-day seminar on emerging issues in cross-border litigation in Ontario.

The Section also has strong ties with Mexico. The Section held its Fall Meeting in Mexico City in 1992 and had one of its most outstanding Retreats with our Meeting in Ixtapa from May 17 to 20, 2001, that was co-sponsored by the Bara Mexicana. At the Annual Meeting on January 26, 2006, the Section was honored to have as a speaker Carlos García Fernández, head of the Federal Bureau of Regulatory Improvement in Mexico, an agency that oversees the implementation of NAFTA in Mexico.

Our challenge in 2006 is to continue to strengthen our ties to our North American neighbors.

### Central and South America

Our strong ties with Central and South America grew even stronger as a result of the 2004 Annual Meeting in Santiago. We expect that the Section's relationship with counsel in Latin America will continue to grow in years to come. Our goal is to have a participation of lawyers from each country in Latin America at the Shanghai Meeting in October 2006. Then in 2007, the Section's Fall Meeting will be in Lima, Peru.

### Cuba

Under the leadership of the Past President of the NYSBA, A. Thomas Levin, the Section has sponsored a number of trips to Cuba for lawyers. Each person on the trip must become a member of our Section (and the NYSBA) to qualify for the trip. The professional and cultural exchanges between the Section and lawyers in Cuba will bear fruit when relations between the United States and Cuba improve.

### Europe

The Section has always had strong ties with lawyers from Europe. The 2005 Fall Meeting in London in cooperation with the Law Society of England and Wales was another example of the very strong ties that the Section has with European lawyers.

### Asia

The Section had its first meeting in Hong Kong in 1997. Over the past decade, trade between China and the rest of the world has exploded. Thanks to Jim Duffy's vision, the Section committed in 2003 to hold the 2006 Fall Meeting in Shanghai. We expect the meeting to be another step in building a strong bridge between the ILPS and the People's Republic of China and other countries in Asia.

## 11. The Albert S. Pergam Annual Writing Competition

Each year the Section gives an award to a student for the best paper on a selected topic of international law. The program is named after Section member Albert S. Pergam, an extraordinary person, who was Chair of the Section in 1993. After Mr. Pergam's death, his firm, Cleary Gottlieb Steen & Hamilton, established the Writing Award in Mr. Pergam's memory. This award furthered the Section's goal to increase students' interest in international law and scholarship in the area.

## 12. Awards

Each year the Section presents its Annual Reward for Distinction in International Law and Affairs at the Annual Meeting in January. The recipient at the January 25, 2006 Meeting was Nicolas Michel, the Under-Secretary General for Legal Affairs of the United Nations and U.N. Legal Counsel. Please contact the Co-Chairs of the ILPS Committee on Awards to propose a recipient for the 2007 Award who, like Mr. Michel and the recipients before him, have made major contributions to the development of international law. The Co-Chairs are Michael M. Maney (maneym@sullcrom.com), Lauren D. Rachlin (lrachlin@hodgsonruss.com) and Saul L. Sherman (saulsherman@optonline.com).

Nicolas Michel gave an inspiring speech in which he recounted that when he was a law student, he wanted to make a contribution to international law and justice. At first he thought that he was too young and without sufficient credentials to make any impact. He then realized that neither his age nor his status were excuses to procrastinate. He decided that he would give his best efforts every day towards his goal. The Section's mission has been to increase communication, education and sharing of knowledge and experience among lawyers engaged in the practice of international law. Through the efforts of dedicated members, officers and past chairs giving their best efforts every day, the Section has incrementally moved toward those objectives over the past two decades. Our challenge in 2006 is to continue on that path and through those efforts to encourage respect for the rule of law.

**John F. Zulack**
**Flemming Zulack Williamson Zauderer**
**New York, NY**

# Of International Interest

## A $4M Plane Ride: The United States' Victory in the Methanex Investor-State Arbitration

Last August, the United States scored another major victory in a NAFTA Chapter 11 investor-State arbitration, *Methanex v. The United States of America*.[1] This victory is significant in many respects. First, it preserves the undefeated U.S. record in Chapter 11 cases, and, for now, silences some critics of investor-State arbitration (Methanex was seeking $970 million dollars). A natural question follows—how long will this run last? Second, perhaps more than any of the other cases against the United States, *Methanex* fueled anti-NAFTA sentiment, and ultimately changed the landscape of investor-State provisions in U.S. treaties and agreements. Given the result, this leads to another natural question—were those changes necessary? Third, in dismissing all of Methanex's claims, the tribunal directed Methanex to reimburse the United States Government $4 million dollars in legal fees. One has to ask, what was Methanex thinking?

Let's start with the last question. Methanex is a Canadian manufacturer of methanol, an ingredient of MTBE, a gasoline additive. In 1999, California Governor Gray Davis, at the direction of the California legislature, banned the use of MTBE in gasoline due to its toxic effect on groundwater. Methanex's case, in essence, was that California's ban was the result of a conspiracy between Governor Davis, Archer Daniels Midland ("ADM") (the largest U.S. producer of gasoline additive ethanol) and the California legislature to drive Methanex out of the California methanol market and thereby benefit ADM. Unfortunately for Methanex, after more than 5 years of litigation the tribunal soundly rejected all of its facts and arguments. It's difficult to postulate what Methanex was thinking, but some of its arguments indicate clever legal thinking that in the end was not clever enough to support bad facts.

In addition to the perceived bold attack on U.S. environmental regulatory policy, Methanex also sought to blur the line between trade and investment principles. One of its key arguments in support of its claim of a violation of national treatment was its attempt to persuade the tribunal to import World Trade Organization ("WTO")/GATT standards of "like product" analysis to the determination of whether Methanex was "in like circumstances" with MTBE producers (the standard for determining whether there has been discrimination against a foreign investor in favor of a domestic producer under NAFTA Article 1102). Methanex made forceful arguments that since the trade analysis is of "like" not "identical" products, and since the investment chapter was part of a trade agreement, it would be acceptable for the tribunal to excuse the fact that Methanex was not in "identical" circumstances (it did not produce MTBE) with MTBE producers. The tribunal soundly rejected these arguments, and noted, that on the facts, these arguments were of no avail to Methanex—the ban applied to all producers—foreign and domestic. The tribunal also found that the NAFTA parties were clear in Chapter 11 that they were not importing trade standards for a discrimination analysis, but rather chose a different investment-based standard, which must be respected. This finding will have implications for other Chapter 11 cases currently in the pipeline where arguably the litigants are trying to recoup financial losses resulting from trade disputes through the Chapter 11 vehicle (i.e., cases associated with the ongoing U.S.-Canada lumber dispute and the BSE ban). Unlike Chapter 11 awards, trade decisions generally do not result in monetary damages.

In *Methanex*, the tribunal also addressed the issue of whether "interpretations" of the Chapter 11 text by the NAFTA parties were valid, especially as applied to Methanex, whose claim had already been filed when the interpretation was issued. On July 31, 2001, the NAFTA Free Trade Commission ("FTC") issued "Clarifications Related to NAFTA Chapter 11." In these clarifications, which are considered interpretations of the NAFTA text that are binding on tribunals, the FTC clarified that a finding of discrimination under a NAFTA provision (read Article 1102 (national treatment)) did not establish a violation of Article 1105 (the obligation to provide a minimum standard of treatment provision). This provision had become a "catch-all" argument for Chapter 11 litigants. Methanex, like other Chapter 11 litigants at the time, argued that the tribunal should ignore the interpretation because it was simply an amendment of the treaty specifically intended to suppress its claim. The tribunal rejected Methanex's arguments, finding first that the "plain and natural meaning" of the Article 1105 text did not address discrimination. Instead, it found that the interpretation "simply confirmed the text." The *Methanex* tribunal was not the first Chapter 11 tribunal to address the issue of the validity of the interpretations, but it was the first to squarely affirm the validity of the 2001 clarifications. The tribunal reaffirmed the right of treaty parties under international law to make changes to their agreement, no matter how unpopular with Chapter 11 beneficiaries.

It is no secret that the investment community was extremely unhappy with the interpretations, and with subsequent similar changes to U.S. investment provisions in recent free trade agreements and the revised model bilateral investment treaty. In light of the *Methanex* tribunal's findings, the question arises whether the clarifications are necessary. It's a rhetorical question and the answer of course depends on what your particular inter-

ests are. Clearly, investors are interested in broad text that can be interpreted in different ways depending on the facts. (In that regard, it is perhaps ironic that here again Methanex did not have the right facts—since its discrimination claim was so far-fetched, even under its own reading of Article 1105, it would not have a valid claim.) Unfortunately, there were perhaps too many investors taking liberties with the NAFTA Chapter 11 text, and that led to widespread fear-mongering that Chapter 11 would lead to the demise of environmental, public health, and other regulation. The governments were forced to respond to all of their constituencies—which led to even more changes. Today, under the new agreements' text, non-parties have the right to participate in investor-State arbitrations, arbitrators' interpretive discretion is arguably constrained, and yes, it is easier to dismiss "frivolous" investor claims.

So does this mean that no investor can win against the United States? Clearly not, in the pipeline of recent Chapter 11 cases there may be an Achilles heel, but investors should heed the lesson of *Methanex*—the facts and the law must be on your side.

**Mélida Hodgson**
**Miller & Chevalier**
**Washington, D.C.**

## Endnote

1. August 10, 2005 Final Award and other documents available at www.state.gov/s/l/c5818.htm.

**Ms. Hodgson is counsel at Miller & Chevalier, Chartered in Washington, D.C. Until July 2005 she was associate general counsel at the Office of the United States Trade Representative, where she had responsibility for investment negotiations and arbitrations.**

* * *

## The International Court of Justice (World Court): A 60th Birthday

On April 18, 2006 the International Court of Justice, also known as the World Court, celebrated its 60th year of operation.[1] On the same day of its establishment, April 18, 1946, the League of Nations voted itself and the Permanent Court of International Justice, the predecessor to the World Court, out of existence.[2] The Court is physically situated at the Hague, The Netherlands, in a building aptly entitled The Peace Palace.[3]

Professor and diplomat Shabtai Rosenne is the acknowledged foremost scholar of the World Court. Much of the material for this article is taken from the latest edition of his work, revised and updated by Professor Terry D. Gill, known as *Rosenne's The World Court: What It Is and How It Works*.[4]

The World Court is the principal judicial organ of the United Nations and all members of that body are ipso facto parties to it which totals 191 nations, but non-member nations may also bring cases to the Court.[5] Jurisdiction may be conferred on the Court by specific agreement of two or more States, by unilateral declaration of a State when it becomes a member of the United Nations (called "compulsory jurisdiction" but really based on voluntary acceptance) and a treaty provision requiring referrals to the World Court.[6] A State may refuse to take part in World Court proceedings (called "non-appearance") or can withdraw from a case before the final decision has been given (as the United States did in the hereafter discussed Nicaragua case).

There is no mechanism to force a State to acknowledge the competence of the Court, although under the United Nations Charter a State has an obligation to comply with World Court decisions.[7] The only real sanction is the diplomatic pressure of non-binding resolutions of either the United Nations Security Council (assuming no veto) and the General Assembly.[8] As seen in the Nicaragua case non-appearance or withdrawal of a State is not necessarily a bar to continuation of the proceedings before the World Court. There is no judgment by default however, and the Court must satisfy itself that it has jurisdiction and that the claim is "well founded in fact and law."[9] Moreover in nearly all cases of non-appearance the unwilling State finds a way to make its views known to the Court in an attempt to avoid an unfavorable decision.[10]

On October 7, 1985, the United States withdrew its 1946 acceptance of the compulsory jurisdiction of the World Court because of the Nicaragua case.[11] Interestingly this hasn't stopped the appointment of a United States representative to the fifteen-member court since its withdrawal from the Court, and this country's judge served as President of the Court from 1997-2000.[12] A significant portion of *Rosenne's*[13] is devoted to this case which the author expressly finds was a miscarriage of justice with respect to the United States and an unfortunate trigger causing this country to opt out of the court's jurisdiction.[14]

### Nicaragua Case

This case was before the Court from 1984 until 1991 and *Rosenne* uses it as a test case because "it raised nearly every problem encountered in international litigation" and is thus "one of the most significant cases" to come before the Court.[15] It dealt with prohibitions on the use of force (as found in the United Nations Charter and international law in general); the role of law in instances where force is used; the relationship between the Court and the Security Council; as well as the issue of compulsory jurisdiction and its validity in a politically charged case.[16]

Although, as noted, the United States withdrew from the case and the jurisdiction of the Court in 1985, and has not accepted the compulsory jurisdiction of the Court to this date, this did not affect the jurisdiction of the Court which proceeds to hear the case.[17] It is significant that *Rosenne's* contends that revelations discovered after the case was discontinued in 1991 "indicate that Nicaragua was misleading in its presentation of evidence and sworn statements relating to certain key factual aspects of the case."[18] The United States' "position on the facts regarding Nicaraguan involvement in El Salvador has since been vindicated," so that even the Contras apologized to the Secretary-General.[19]

By way of brief background, Nicaragua's application to the World Court, which instituted the proceedings, claimed that the United States was using military force against and intervening in Nicaragua's internal affairs "in violation of Nicaragua's sovereignty, territorial integrity and political independence and of the most fundamental and universally accepted principles of international law."[20] The Sandinista National Liberation Front, a revolutionary government, came to power in 1979 with the backing of the United States which had long exercised influence in the area. When there appeared to be undemocratic policies internally and Sandinista support for insurgent movements in neighboring Central American States, especially in El Salvador, the United States in 1981 cancelled its aid to Nicaragua and began covertly supporting Nicaraguan opponents of the Sandinistas, called Contras (for counter-revolutionary).[21] The purpose at first was to stop the flow of material from Nicaragua to the insurgents in El Salvador and to get the Sandinistas to change their domestic and foreign policies, but it eventually turned into an attempt to overthrow the Sandinistas. By filing in the World Court, Nicaragua was seeking a cease and desist order against the United States to stop aid to the Contras as well as alleged military and paramilitary activity by the CIA against Nicaragua.[22]

Beginning in 1982, Congress enacted a number of statutory restraints on the Reagan administration's assistance to the Contras.[23] In 1984 Congress, realizing its other measures had proven insufficient, adopted strict language in the Boland Amendment prohibiting all executive assistance of any kind to support the Contras.[24] Unfortunately officials in the Reagan administration continued to solicit funds from private citizens and foreign countries, such as Saudi Arabia, to carry on its activities.[25] This flouting of the Boland Amendment led to the Iran-Contra Affair (also known as Irangate, as well as the arms-for-hostages deal) and to the indictments and trials of a number of Reagan administration officials.

On June 27, 1986 the World Court ruled in favor of Nicaragua and ordered payment of restitution to be assessed in the future because of the United States' involvement in Nicaraguan affairs.[26] Nicaragua subsequently requested the staggering sum of $11,216,000,000, the largest amount ever sought in a single international claim.[27] The United States refused to pay any restitution and claimed the Court was not competent to try the case, *inter alia*, because of the Schultz letter of April 6, 1984 which purported to modify the 1946 United States' acceptance of World Court jurisdiction by excluding "disputes with any Central American State or arising out of or related to events in Central America."[28]

Subsequently the United States vetoed a United Nations Security Council Resolution calling on all states to obey international law.[29] The United Nations General Assembly also passed a resolution to pressure the United States to obey the judgment of the World Court and any fine to be assessed.[30] Eventually the Sandinistas lost power in February 1990 and the World Court case terminated after seven years before the Court.[31] The compensation phase of the Nicaragua case never led to a decision.[32]

## World Court Potpourri

### Judges

As noted, fifteen judges from various countries try each case.[33] The President of the Court may not be a national of any party but other judges can be.[34] Various phases of one case (such as the issues of jurisdiction, admissibility of evidence, merits and sanctions phases) may be tried by a different fifteen-member panel because of the length of time required by most cases concerning international disputes.[35]

### Language

The official languages of the Court are English and French, although languages other than those may be authorized as long as interpreters of one of the official languages are provided.[36]

### Costs

The rule concerning costs of the proceedings is each party bears its own, which is normal in international litigation.[37]

### The Agent

The person entrusted with the formal representation of a party is called the Agent, who is assisted by counsel and advocates and other experts as needed.[38] The Agent binds his country throughout the proceedings before the Court.[39] The Agent is usually a country's ambassador to the Hague or other high-ranking member of the diplomatic service, although it may also be an attorney or a professor.[40] If an Agent is not appointed by a government, it is a signal that country does not intend to take part in the proceedings.[41] As noted, other than resolutions passed by the United Nations, as in the case of the Nicaragua case, which were unsuccessful in forcing the

United States to obey the Court's judgment, there is no sanction available to force member States to join a case before the World Court or to enforce the Court's decisions.[42]

### Advisory Opinions

In addition to decisions in international law cases, the World Court issues advisory opinions on all sorts of international legal issues but only at the request of a qualified international intergovernmental organ and not for an individual State or groups of States.[43] The United Nations charter specifically gives the Security Council, the General Assembly, and any organs or Specialized Agencies of the same, the right to seek advisory opinions.[44] Thus advisory opinions can be sought by these bodies even if the request is made over strong opposition so that requests can be made for advisory opinions concerning controversial and sensitive issues.[45] The purpose of an advisory opinion, which is non-binding, is to enlighten the requesting body as to some issue of international law.[46]

### Appellate Jurisdiction

Interestingly the World Court has an appellate jurisdiction (called a "reference" rather than an "appeal") where it acts on the basis of references from other international judicial or quasi-judicial bodies (such as the result of a decision rendered by a body under a treaty).[47] This is not a *de novo* matter, as the Court is called upon to determine whether the award complies with the rules of international law governing such awards.[48]

### Law Applied

As stated in *Rosenne's*, the international law applied by the Court consists of "(a) international conventions, whether general or particular, expressly recognized by the contesting States; (b) international custom, as evidence of a general practice recognized as law; (c) the general principles of law recognized by civilized nations; and (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of the rules of law."[49] For an international law tidbit, the technical name of (c) above is *non liquet* (literally "it is not clear" a Roman Law term) and permits the Court "to deal with entirely unprecedented situations and through its pronouncements to keep the law abreast of the constantly changing developments."[50]

### Precedents not Binding

Interestingly for those of us versed in Anglo-American law, which entails the binding force of judicial precedents, a World Court decision has no binding effect except between the parties and only with respect to that particular case.[51]

### Equity

Equitable principles may also be applied but only "when these are inherent in the rule of law itself."[52]

### Intervention

Third-party intervention is allowed in contentious (as distinct from advisory) proceedings. A State whose interests may be affected by a decision in a case may request permission to intervene similar to the process we have in civil cases in most states.[53] The decision is up to the Court. In certain limited instances there is intervention of right, with the Court examining whether it is properly brought or not. If intervention is granted the judgment is officially binding on the intervening State or States.[54]

### Judicial Review

There is no duty on any organ of the United Nations or any State or any person to seek the opinion of the World Court, even with reference to interpreting the United Nations Charter or Rules of Procedure.[55] It has no general power of judicial review to determine the propriety of actions of any organ of the United Nations.[56] It can only act in response to a contenious or advisory case duly brought before it, although in the course of its decision on a case it may and does give interpretations of the Charter and of the compatibility of the actions of States with their obligations under the Charter.[57]

### Criminal Cases

It is not a court which exercises jurisdiction in criminal cases, although cases do often involve allegations of wrongful behavior which will be judged by the Court under international laws governing the behavior of States.[58]

### World Court Wannabes

Finally, you may ask how one becomes a counsel or advocate at the World Court. There are no formal qualifications for these positions. Usually experienced members of the international bar appear "drawn mainly from the legal professions of Belgium, France, Italy, Switzerland, the United Kingdom and the United States who have specialized in practice in the International Court."[59]

## Significance and Relevance

There are approximately 250 substantive decisions, whether contentious cases or advisory opinions, over a period of 80 years given by the prior Permanent Court and the present World Court.[60] The World Court has been presented with 126 of these.[61] The usual annual filing of cases has numbered 1 to 4 cases on the average but in 1999, 17 cases were filed and in 2002, 40 cases were commenced, showing the increased workload of the Court.[62] The increased filings have caused the Court to streamline and expedite the Court's procedures.[63]

The cases brought before the Court range from routine disputes between States, such as the interpretation or application of central legal issues to major international disputes which at the time constituted threats to international peace such as the right of parties to fisheries, the law of the sea, territorial (called delimitation) cases, and disputes concerning continuing armed conflict as the dispute between Yugoslavia and the member states of the NATO alliance in relation to the Kosovo conflict.[64] *Rosenne's* devotes 114 pages of the 241-page text to a discussion of the World Court's cases from 1946 on.[65] A listing of some of the disputes include: armed conflict in the Congo;[66] whether a foreign minister was immune from an international arrest warrant;[67] border incidents between Pakistan and India;[68] French nuclear tests in the South Pacific;[69] fishing rights between Canada and Spain to an area 200 nautical miles from Canadian shores;[70] advisory opinions concerning the legality of the threat or use of nuclear weapons;[71] the conflict in Bosnia-Herzegovina;[72] the crash of the American civil airliner over the Scottish village of Lockerbie;[73] the East Timor case;[74] incidents in the Arabian/ Persian Gulf during the Iran/Iraq war of 1980-1988;[75] the legality of the Act of Congress of December 22, 1987 requiring the closing of all offices of the PLO in the United States;[76] diplomatic hostages in Tehran;[77] peace-keeping operations of the United Nations;[78] and cases of military and civilian aircraft invading the airspace of sovereign nations including the shooting down of such aircraft.[79] In some of these cases the Court proceeded to judgment, in others it determined there was no jurisdiction to proceed, and others were settled or dropped without a decision.

One of the most recent decisions of the World Court was issued on December 19, 2005 holding Uganda's interference in the Congo an unlawful military intervention and that it was responsible for the killing, torture and cruel treatment of civilians in the Congo in the late 1990s. The Court in its judgment, which is final, binding and without appeal, ordered that reparations were to be negotiated, failing which the Court would hold a further hearing.

According to *Rosenne's* in a majority of cases the work of the World Court had a beneficial diplomatic effect.[80] For those interested in any of the substantive decisions they are available on the Court's website http://www.icj-cij.org.

## Conclusion

*Rosenne's* discussion at the end of the book is an assessment of the World Court since 1946. [81] The Court, when States agree that it is time to settle a dispute, can assist them and any regional organizations.[82] On the other hand, even if there is no agreement, the Court's procedures can assist in channeling the tension and threats to peace created by a dispute into a peaceful and formal setting enabling diplomacy to do what it does best. From our short review on this 60th Anniversary of the Court can be seen the variety of its work and the novelty of the objects of its litigation often involving transcontinental disputes embracing much of the world, showing that the Court is truly deserving of its designation as the World Court.

**Robert L. Gottsfield**

## Endnotes

1. *Rosenne's The World Court: What It Is and How It Works*, revised by Terry D. Gill, M.Nijhoff Publishers, Leiden/Boston (Sixth Ed. 2003) at 18 (hereafter "*Rosenne's* at ___ "or" at ___"). See also on the Nicaragua case discussed in this article, Paul S. Reichler, *Holding America To Its Own Best Standards: Abe Chayes and Nicaragua In The World Court*, 42 Harv. Int'l. L.J. 15 (Winter, 2001). Abe Chayes was the lawyer for the Nicaraguan Sandinistas in the World Court and this tribute to him gives inside information and insight into the World Court proceedings and actual testimony and argument and a different take than *Rosenne's* on the activities of the United States.
2. *Rosenne's* at 18. The Permanent Court of International Justice, although formally not an organ of the League, was created by the League of Nations in 1922 and dissolved on April 18, 1946. *Rosenne's* at 10.
3. *Rosenne's* at 40. The World Court is not to be confused with the European Court of Human Rights (ECHR) formed by the European Convention on Human Rights. The Convention's enforcement bodies consisted of a Commission and a Court and these bodies were replaced by a single court, the ECHR, in 1998. The ECHR most recently upheld a Turkish Constitutional Court ruling approving a ban on head coverings and other forms of religious attire in Turkish universities. This decision has been denounced as a violation of an individual's right to free exercise of religion and expression. See Note, Benjamin D. Bleiberg, *Unveiling the Real Issue: Evaluating the European Court of Human Rights' Decision to Enforce the Turkish Headscarf Ban in Leyla Sahin v. Turkey*, 91 Cornell L. Rev. 129 (Nov. 2005).
4. *Supra* n.1.
5. *Rosenne's* at 15, 69. See the list of United Nations Member States at Appendix IV consisting of 191 member nations as of December 31, 2003. No members have been added since December 31, 2003, according to the United Nations' website. The last countries admitted were Kiribati and Nauru on September 14, 1999.
6. *Rosenne's* at 70.
7. *Id.* at 79.
8. *Id.* and also 118.
9. *Rosenne's* at 78.
10. *Id.* at 79.
11. *Id.* at 92, 96, 112. The official title of the case is *Military and Paramilitary Activities in and against Nicaragua*.
12. See Appendix III to *Rosenne's* for the members of the Court and where they are from during the period 1982–2003. The President of the Court from the United States during 1997–2000 is S.M. Schwebel who began on the Court in 1985 and left at the end of 2000. *See also Rosenne's* at 96-97. States have a right to appoint a judge ad hoc where the other party has a judge from its country on the panel which often results in 16 or more judges trying a case. *Id.* at 56-58. The present judge from the United States is Professor Thomas Buergenthal.

13. *Id.* at 92-125 (Chapter 5).
14. *Id.* at 92-93, 125.
15. *Id.* at 93.
16. *Id.*
17. *Id.* at 112.
18. *Id.* at 92. But see the different take on this conclusion in *Reichler*, *supra* n.1 at 38-43.
19. *Rosenne's* at 93 and 125. See especially postscript at 125 which details the finding of a weapons cache and documents in 1993 in Nicaragua conclusively showing Nicaragua's involvement in El Salvador in the 1980s. cf. n. 18.
20. *Rosenne's* at 95.
21. *Id.* at 93-94.
22. *Id.*
23. Louis Fisher, *Constitutional Conflicts Between Congress and the President*, University Press of Kansas (Fourth Ed. Rev. 1997) at 219-224.
24. *Id.* at 219.
25. *Id.* at 220.
26. *Rosenne's* at 116. The Court had previously ruled on November 26, 1984 that it had jurisdiction over the United States and the dispute. *Id.* at 111.
27. *Rosenne's* at 118.
28. *Id.* at 96.
29. *Id.* at 118-119.
30. *Id.* And see http://www.un.org/documents/ga/res/41/a41r031.htm.
31. *Rosenne's* at 118-119.
32. *Id.* at 123.
33. *Supra* n. 12.
34. *Rosenne's* at 97.
35. *Id.*
36. *Id.*
37. *Id.* at 123-124.
38. *Id.* at 98.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Supra* notes 7 and 8.
43. *Rosenne's* at 86, 136.
44. *Id.* at 87.
45. *Id.* at 88.
46. *Id.* at 136.
47. *Id.* at 85-86.
48. *Id.*
49. *Id.* at 120.
50. *Id.*
51. *Id.* at 121-122.
52. *Id.* at 122.
53. *Id.* at 104.
54. *Id.* at 105.
55. *Id.* at 28.
56. *Id.* at 29.
57. *Id.*
58. *Id.* at 30.
59. *Id.* at 59.
60. *Id.* at 235, 238. This is as of 12/31/03.
61. *Id.*
62. *Id.* at 241. See also *Rosenne's* Appendix V, Judicial Statistics.
63. *Id.* at 241.
64. *Id.* at 206.
65. Through 12/31/03.
66. *Id.* at 227, 233.
67. *Id.* at 230.
68. *Id.* at 229.
69. *Id.* at 169, 217.
70. *Id.* at 214.
71. *Id.* at 208.
72. *Id.* at 203.
73. *Id.* at 199.
74. *Id.* at 192.
75. *Id.* at 188.
76. *Id.* at 186.
77. *Id.* at 174.
78. *Id.* at 163.
79. *Id.* at 150, 156
80. See the Assessment portion of *Rosenne's* at 235-241.
81. *Id.*
82. *Rosenne's* at 236.

**Robert L. Gottsfield, Superior Court, Maricopa County (Phoenix), Arizona and member of the New York State Bar Association since 1960.**

* * *

## Some Thoughts About Costs in International Arbitration

### I. Introduction

This is, primarily, a report from the trenches on some cost considerations for litigants in international arbitration.

The management of the costs of prosecuting or defending an international arbitration is an important shared burden of counsel in such proceedings and their clients. Whereas in conventional litigation cost management mainly involves the efficient delivery of legal services to the client, in international arbitration three major further considerations come into play: (i) the parties' obligations to fund the costs to be incurred by the Arbitral Tribunal, any Tribunal-appointed experts, and the sponsoring arbitral institution, (ii) the powers of the Arbitral Tribunal to require security for costs, and (iii) the powers of the Arbitral Tribunal to allocate costs in favor of the prevailing party in the final Award.

Below, I first review some of the basic rules governing advances on costs, security for costs, and final allocation of costs. More experienced practitioners and arbitrators will find this to be familiar terrain. I then offer some thoughts on how those rules should apply to some recurring and difficult situations.

## II. Essential Rules and Legal Standards

### A. Advances on Costs

International arbitration rules uniformly provide for payment by the parties of an advance deposit, in an amount set by the sponsoring institution based upon the size or perceived complexity of the case and the projected fees and expenses of the arbitrators and the institution itself. Where the parties are in a financial position to pay their shares, and are willing to do so, payment of the advance on costs is a routine and non-controversial first step in the case. But if there are payment difficulties on either side, issues arise that must be solved or else the arbitration will fail at its inception. It is the prospect of such difficulties that makes the advance on costs a worthwhile subject for discussion.

In ICC arbitration, published sliding scales of administrative and arbitrator fees, tied to the amounts in dispute, are found in Appendix III to the ICC Rules. Article 30(2) of the Rules states that the Court "shall fix the advance on costs in an amount likely to cover the fees and expenses of the arbitrators and the ICC administrative costs for the claims and counterclaims which have been referred to it by the parties."[1] Appendix III, Art. 1(4) defines with precision the costs covered by the advance on costs: "the fees of the arbitrator . . . any arbitration-related expenses of the arbitrator and the administrative expenses." Other institutional rules are similar in concept, with some variation in detail and mechanics.[2]

Very significant, from the standpoint of strategic planning for (and during) an international arbitration, is the way the rules handle a situation in which one party fails to pay its share of the advance on costs. Arbitration rules typically state that if one party does not pay, the parties (i.e. the other party) shall be informed of this fact so that the non-defaulting party "may" pay the defaulting party's share. Thus, for example, Rule 30(3) of the ICC Rules provides in pertinent part that "any party shall be free to pay the whole of the advance on costs in respect of the principal claim or the counterclaim should the other party fail to pay its share," and Rule 30(4) provides in pertinent part:

> When a request for an advance on costs has not been complied with, and after consultation with the Arbitral Tribunal, the Secretary General may direct the Arbitral Tribunal to suspend its work and set a time limit, which must be not less than 15 days, on the expiry of which the relevant claims, or counterclaims shall be considered as withdrawn. Should the party in question wish to object to this measure it must make a request within the aforementioned period for the matter to be decided by the Court.[3]

Such rules have impact only with respect to payment defaults by Respondents, including Claimants who are counterclaim respondents. Where the Claimant (or respondent asserting counterclaims) defaults in payment of an advance, the solution is that the claim will be deemed withdrawn; the defending party need not finance prosecution of a claim against itself.

The ICC Rules do not make it inevitable that a Claimant must pay the Respondent's share of the advance in order for the case to proceed. However, they do not in terms suggest any alternatives, and it is clear that the ICC Court has the power to determine that the Claimant's claims shall be deemed withdrawn if the Claimant fails to pay the Respondent's share of the advance on costs in relation to Claimant's claims. Article 70 of the WIPO Rules is even more explicit, making the withdrawal of the Claimant's claims essentially self-executing if the Claimant, duly notified that Respondent has failed to pay its share, thereafter fails to pay the Respondent's share. Article 33(3) of the AAA International Rules vests discretion in the tribunal to decide whether to terminate or suspend proceedings. LCIA Article 24.3 states that the LCIA Court "may direct the other party . . . to effect a substitute payment to *allow the arbitration to proceed*" (emphasis supplied), the implication being that otherwise the arbitration will not proceed. The practical application of such rules, where one party refuses to pay or cannot pay its share, is examined in Part III below.

### B. Security for Costs

The power of arbitral tribunals to grant orders for security for costs is sometimes provided expressly in arbitration rules, sometimes in national arbitral procedural law or law on civil procedure generally.[4] Security for costs is a provisional measure—in the words of one commentator, "one of the most neglected and misunderstood forms of interim relief"[5]—which, if granted and obtained, provides a party that expects to be the prevailing party with assurance that, if it is awarded its costs, at least that portion of the award will be collectible. As such, this device is primarily, but not exclusively, attractive to Respondents who consider that they are burdened with the expense of defending against meritless claims. It may also be useful as a device to coerce a recalcitrant party's compliance with a direction to pay its share of the advance on costs, thereby possibly enabling the compliant party to avoid the difficult decision to either pay the entire amount of the advance, or suffer the suspension or withdrawal of its claims.

The ICC Rules contain no specific provision concerning security for costs, but certainly the power of an ICC Arbitral Tribunal to award security for costs is embraced within Rule 23(l)'s more general power to order interim and conservatory measures, subject to the provisions of the applicable arbitral procedural law in a given case. The same can be said of the AAA and UNCITRAL Rules. In contrast, the WIPO and LCIA Rules expressly identify security for costs as one of the interim measures that an arbitral tribunal may order.[6] Rule 31(1) of the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce provides that the Arbitral Tribunal may "order a specific performance by the opposing party for the purpose of securing the claim which is to be tried by the Arbitral Tribunal," a power which presumably embraces not only security for the claims but security for the costs.

National laws on international arbitration take varying approaches to the power of arbitrators to grant security for costs. Section 38 of the United Kingdom's 1996 Arbitration Act expressly empowers an arbitral tribunal to order security for costs, so long as the basis for the order is not residence outside the U.K. of the party required to provide security.[7] In the United States, the Federal Arbitration Act is silent concerning arbitral powers to grant any form of provisional relief, and there is relatively little case law because, in domestic arbitration as in U.S. litigation, the general rule (subject to some well known mainly statutory exceptions) is that each party bears its own costs. But U.S. courts have expressed willingness to treat arbitrators' interim orders granting security as awards capable of immediate enforcement under the New York Convention,[8] and U.S. law recognizes the powers of arbitrators to fashion relief between the parties except such relief as the parties by agreement have placed beyond the arbitrators' powers.[9] National laws that adopt or follow the pattern of the UNCITRAL Model Law on International Arbitration often provide that arbitrators may order any interim measure "in respect of the subject matter of the dispute,"[10] a power that should be broad enough to encompass security for costs absent an express exclusion of the specific power. But some countries or their subdivisions, which have taken the Model Law as a point of departure, provide express powers for arbitrators to grant security for costs.[11] In Switzerland, on the other hand, while the Private International Law Act provides broad authority for arbitrators to grant interim relief if chosen arbitration rules permit it and the parties have not agreed otherwise,[12] commentators indicate that the historical reluctance of Swiss arbitrators to exercise this power continues under the PILA regime.[13]

Thus, it may fairly be said that, in most major international arbitration venues, the powers of arbitrators to grant security for costs will exist, as an express or implied element of their powers conferred by the rules of arbitration or the applicable procedural law.

### C. Allocation of Costs in Final Award

The awarding of costs to the prevailing party is an important issue in most complex international arbitrations.[14] International arbitral practice generally follows the principle that, as a first approximation, costs should "follow the event," *i.e.*, that the loser should pay the forum costs and the legal costs of the winning side, subject to a more particular application in any given case for reasons relating, mainly, to the *extent* of the victor's success and the procedural comportment of the parties during the proceedings.[15] In some jurisdictions, this principle is reflected in national laws on international arbitration.[16] This may now be said (with some trepidation) to be a general principle of international law.[17] The principle is shaded, however, by an older view, which has not been entirely pushed to the perimeter of arbitral thinking on the subject, that forcing a losing party to bear the winner's costs may be unjust.[18] But it is the complexity of "picking the winner," and the application of considerations relating to the behavior of the parties, that makes cost allocation more art than science.

International arbitration rules tend to place the emphasis upon the discretion of the arbitrator rather than upon the guiding principle of "costs follow the event. "Only the LCIA Rule, Art. 28.4, appears to come close to a stated presumption in favor of the winner: *"Unless the parties otherwise agree in writing, the Arbitral Tribunal shall make its orders on both arbitration and legal costs on the general principle that costs should reflect the parties' relative success and failure in the award or arbitration, except where it appears to the Arbitral Tribunal that in the particular circumstances this general approach is inappropriate."*[19]

Published decisions of international arbitral tribunals concerning the allocation of costs, particularly the legal costs of a prevailing party, indicate that arbitral discretion is exercised very widely. Some stable predictive guidelines may now exist, and there is an overall sense that law and practice are moving in the direction of more generous awards of legal costs to deserving prevailing parties,[20] but the principles are not well codified nor are they stated systematically in published awards. A few illustrative cases are discussed here.

In the now-famous *Himpurna California Energy* arbitration (notorious in arbitration circles for the Indonesian respondent's effort to disrupt the arbitration by kidnapping its own arbitrator while he was en route to hearings), conducted under the UNCITRAL Arbitration Rules, the Tribunal contrasted Article 40(1), concerning allocation of costs for the arbitrators' fees, with Article 40(2) concerning allocation of the parties' own legal costs. As to the latter, the Tribunal noted, Article 40(2) expresses no presumption that the prevailing party should recover, but instead merely invites the arbitral tribunal to make an apportionment "if it determines that apportionment is

reasonable. "The *Himpurna* Tribunal, while apportioning arbitrators' fees fully against the losing Indonesian party, held that each party should bear its own legal costs."[21]

In one ICC award, where Claimant prevailed on the issues that were the "*main reason for the dispute between the parties*," but Claimant expended considerably more for legal fees than the Respondent, Respondent was ordered to pay 60% of Claimant's legal costs.[22] In another ICC case, Claimant recovered 100% of its legal fees where Claimant not only prevailed to the full extent of the amount claimed, but Respondent had been recalcitrant and dilatory in numerous important respects.[23] In a third ICC case, defendant, despite losing on the merits of Claimant's principal claim, argued that there should be no reapportionment of legal costs due to its success in obtaining dismissal of an extra-contractual claim of Claimant in an interim award and its making of a settlement offer just prior to the final hearing on the merits.[24] But the Tribunal rejected such arguments and awarded Claimant a substantial portion of its legal costs (precisely what portion is unclear from the published excerpt of the Award), noting that Claimant recovered more than the amount of the settlement offer and that the belated offer of settlement neither saved substantial costs nor took into account the heavy costs incurred by Claimant up to that point.[25]

## III. Practical Issues in Dealing With Costs in International Arbitration

### A. Refusal of Respondent to Pay Its Share of the Advance on Costs

One of the least enviable tasks for counsel to a deserving Claimant in international arbitration is to explain to the client that it may be required to bear not 50%, but 100%, of the advances on costs for the case, if the opposing party fails to pay its 50% share.[26] The problem of the recalcitrant Respondent who declines to its share of the advances is pervasive. The normal rule that Claimant "may" (or, as a practical matter, must) pay the Respondent's share (whether in cash, or as some rules and institutions allow, by bank guarantee) is oppressive for Claimants who are already made to bear enormous litigation costs to vindicate a wrong. The spectre of such recalcitrance hangs over many cases even if the Respondent initially pays its share, because a change of tactics as costs escalate might lead to refusal to tender a required supplemental deposit. The potential need for the Claimant to bear 100% of the costs is regarded to some degree as a necessary evil.[27] But this may be avoidable in many cases, where the arbitration rules or the applicable law expressly permit, or at least do not expressly prevent, the use by the arbitral tribunal of coercive measures against the Respondent to induce compliance with its payment obligations under the arbitration rules.

What should Claimant's counsel encourage arbitral tribunals to do when the Respondent fails to advance necessary funds when the case is already well advanced? The author faced this question in a case where the client, the Claimant, simply could not provide the Respondent's share in any form or amount, as Claimant's costs were borne by a third party which, by contract, was responsible only for Claimant's share of the costs.

At a minimum, application should be made to stay or dismiss without prejudice any counterclaims, and this is well recognized in rules and practice. But if Respondent is primarily defending against important monetary claims by the Claimant, dismissal of its economically less significant counterclaims is a remedy without sharp teeth. The Respondent may still defend on the merits against Claimant's claims. It is not a viable option to ask the tribunal to strike or limit the presentation of defenses on the merits, as this would implicate due process concerns and thus jeopardize the enforceability of the award. This sanction is unlikely to be granted even where arbitration rules or applicable law might arguably permit it.

What the Claimant needs in the circumstances is an immediately enforceable award against Respondent. One solution is that Claimant pays Respondent's share, asserts a breach of contract claim for the amount so paid, and obtains an award on that claim. A recent Swiss arbitration award under Swiss law treated the Respondent's non-payment as a breach of the arbitration agreement, and held that Claimant's payment of Respondent's share of the advance gave rise to an arbitrable claim for money damages in the amount so advanced, which could be the subject of a Partial Award in the arbitration.[28]

A better approach, because it does not require Claimant to advance funds, is for the Tribunal to enter an order (or partial award) directing Respondent to provide security for estimated total arbitration costs and legal costs allocable to Respondent in the final award, or indeed for the entire amount of the eventual potential award. Such an order can have substantial coercive effect: If the supplemental deposit required is, for example, $100,000, while the security ordered is in the millions, many Respondents can be expected to quickly cure their non-compliance by paying the lesser sum. (The author, as Claimant's counsel in arbitration against a recalcitrant State-affiliated Respondent, obtained such an order in these circumstances).[29] Recent case law in the United States treats interim orders for security as awards enforceable under the New York Convention, making this an attractive strategy if the Respondent is subject to jurisdiction in the U.S. and has U.S.-based assets.[30]

### B. Inability of Claimant to Pay Its Share of the Advance on Costs

Now we put the shoe on the other foot. How should the Tribunal respond when the Claimant, arguably a

Claimant with meritorious claims, runs out of money in the middle of the case and is unable to comply with a requirement to deposit additional funds for the costs of arbitration?

The least acceptable response, if indeed the claims have merit, and particularly if the loss sustained at the hands of Respondent has materially contributed to Claimant's predicament, is to grant an order for security for costs against the Claimant. The order can have no coercive effect if Claimant is unable, rather than unwilling, to pay. And a Respondent who, *prima facie*, bears responsibility for Claimant's losses, deserves a tepid reception for the argument that it should be guaranteed the collectibility of an eventual final award of costs in its favor. The author as Claimant's counsel defeated a Respondent's motion for security for costs in these circumstances, and made these arguments explicitly, although the Tribunal did not disclose its reasons for denying the Respondent's security for costs motion. The principle that security for costs should be denied by arbitrators in these circumstances deserves, if it does not already have, the status of a general principle of international arbitration law.[31]

A better but still not entirely desirable solution is to stay proceedings until Claimant is able to raise the funds required to pay its share of the advance on costs. Delay tends to disfavor the party with the burden of proof. Delay also undermines the parties' objectives in agreeing to resolve disputes by arbitration, i.e., for speed and efficiency as well as a fair result. Further, as a practical matter, the arbitrators will turn their attention to other cases, their calendars will fill, and prior submissions and hearings will become hazy memories with the passage of time. All of these factors militate in favor of solutions that allow the case to progress without interruption.

The solution advocated here is for the arbitral tribunal to be creative and proactive. The Tribunal should determine what amounts Claimant expects to be able to pay toward the costs of the arbitration over a period of time, whether Claimant may be able to make payments in installments, or obtain financing, or furnish a bank guarantee. By making such inquiries, the Tribunal will at the very least position itself to better resolve any security for costs motion by the Respondent, based upon a close-up assessment of Claimant's *bona fides* in claiming financial distress.

Further, the Tribunal should assess carefully what procedures are required to complete the case in a way that protects the equality of the parties and their rights to be heard. It may be argued that a scaling-down of the procedure in response to Claimant's financial strain shows an arbitral bias toward the Claimant. But it may equally be said that adhering to procedures the Claimant cannot afford, and which may not be necessary to resolve the case fairly and equitably, indicates a greater bias toward the Respondent. As long as the altered procedure provides a fair hearing and treats both sides equally, neither side should have a basis to challenge the award. Absent such arbitral initiative, there might never be an award.

### C. Allocation of Legal Costs to the Prevailing Party in the Final Award

Finally, the parties complete their submissions and arguments, declare that they are satisfied with the procedure, and the Tribunal retires to write its award. Eventually, the Tribunal will need to resolve the parties' competing claims that the other side should reimburse their arbitration costs, most prominently costs for legal representation. The preferred norm today appears to be that at least a "clear winner" should recover all or nearly all of its legal costs, without showing in addition that there was some objectionable conduct by the losing side.[32] The question arises: How should the Tribunal decide this issue where there is no "clear winner. "Published awards and commentaries offer limited guidance, in part because fact patterns are so varied, in part because the elements of the record that influence a Tribunal's discretion may not be fully reflected in the published portions of awards.[33]

As a first principle, it is submitted that the Tribunal should look at the claims primarily as they were presented on the merits, and not primarily as they were initially pleaded or framed in the Terms of Reference. The Claimant deserves latitude to reformulate its claims to conform to the evidence, and often, particularly with respect to damages, the situation will be an evolving one in the marketplace as the case progresses. Further, it is the presentation of the case in memorials and hearings that consumes the time of the opposing party and the arbitral tribunal. If a Respondent in its Answer alleges seven counterclaims, asking $50 million in damages, but in its submissions on the merits Respondent seeks lesser relief—and declares that it is as a practical matter amending its request for relief—it is ludicrous to treat the Respondent as having "failed" to prove the claims as initially framed. (But of course the Claimant will ask the Tribunal to draw exactly this conclusion.) In fact, the Respondent has engaged in conduct that should be encouraged, modifying its position to save time and expense for the Tribunal and the parties at the merits stage and the award-writing stage. This should be encouraged by rewarding that conduct in the eventual allocation of arbitration costs. Conversely, of course, a rigid adherence to a position that neither the law nor the evidence will sustain—burdening the opposing party with the task of pointing out the deficiencies on multiple occasions, and the tribunal with the obligation to resolve the matter in a reasoned award—deserves to be punished.

Second, in most arbitrations there is a claim which stands apart and above the others as the "nub" of the

parties' dispute. The winner on this "main claim" likely deserves to recover a substantial part of its legal costs from the loser, with an important proviso: that the winner on the "main claim" did not overwhelm the other side and the tribunal with less meritorious claims, on which it did not prevail or which it eventually elected not to pursue, but which consumed disproportionate resources of the parties and the Tribunal during the course of the proceedings. Thus, it deserves to be recognized as a practical matter that an arbitration would have been entirely unnecessary if the losing party had complied with its obligations under the contract and applicable law rather than either commencing arbitration or forcing the opposing party to do so.

Third, the cost allocation that would result from "picking the winner" should be adjusted based upon a behavioral component, preferably after stating the allocation that would result without any behavior-related adjustment. The behavioral component consists of the responsibility of the party and its counsel for the efficient, or inefficient, consumption of resources. A non-exhaustive list of bad behaviors would include: lack of cooperation on scheduling; meritless challenges to arbitrator independence and arbitral jurisdiction; positions on the merits of claims and issues that either lacked any merit or reasonably should have been viewed by the party asserting them as highly unlikely to prevail; tactical and unsuccessful efforts to disqualify the opponents counsel (even though involving conduct in a proceeding other than the arbitration itself); non-compliance with respect to advances on costs; non-participation in formulating Terms of Reference; non-compliance with discovery orders; non-compliance in relation to the official language of the arbitration (e.g., failure to submit translations or reliable translations); mischaracterization of evidence; misrepresentation of applicable law; and intransigence in tribunal-mediated settlement discussions.

## IV. Conclusion

Of the many elements that distinguish international arbitration from litigation in national courts, the dynamics associated with arbitration costs are among the most significant. Parties and their counsel who take these elements into account in formulation of their initial arbitration strategy can hope to achieve more effective, and particularly cost-effective, participation in the arbitration process.

**Marc J. Goldstein**
**Hodgson Russ, LLP**

## Endnotes

1. The ICC Secretariat may, and routinely does, require the Claimant to pay a "provisional advance" on the costs of the arbitration, to ensure that funds will be available in the earliest stages of the case to compensate the arbitrators for their work up to and including the drafting of the Terms of Reference. See ICC Rule 30(1) and App. III Art. 1(2), and see discussion in Craig, Park & Paulsson, *International Chamber of Commerce Arbitration*, § 14.01 at pp. 253-256 (3d ed. 2000) (hereinafter cited as "CPP").
2. See Art. 33(1) and (2) of the AAA International Arbitration Rules, providing that the administrator may request an initial deposit from the Claimant, but leaving supplementary deposits to be requested by the tribunal. There is no fee sale for arbitrators, but instead under Art. 32 compensation is set by the administrator based upon the arbitrators' hourly rates, and the size and complexity of the case. Under World Intellectual Property Organization (WIPO) Arbitration Center Rules (Arts. 69, 70, 71), the Center sets the advance on costs with reference to its Schedule of Fees for arbitrators, but the Schedule provides only "indicative" hourly rates, with no component tied expressly to the sums in dispute.
3. See, e.g., Art. 33(1) of the AAA International Arbitration Rules; Art. 24.3 of the LCIA Rules; Art. 63 ( C ) of the WIPO Rules; Art. 41(4) of the UNCITRAL Rules.
4. Prior to the 1996 English Arbitration Act, the view of English law was that granting of security for costs in arbitration was the exclusive preserve of the courts, but this position was expressly reversed by the 1996 Act. This development is applauded in *Fouchard-Gaillard-Goldrnann on International Commercial Arbitration* (English ed. 1999) §1256 at p. 687 (hereinafter cited as "FGG"), where the authors note that "[t]he same position is implicitly accepted in most legal systems."
5. Noah Rubins, *In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration*, 11 Am. Rev. Int'l. Arb. 307, 310 (2000).
6. WIPO Rule 46(b), LCIA Rule 25.2.
7. Arbitration Act 1996, Section 38(3).
8. *See, e.g., Banco de Seguros del Estado v. Mutual Marine Offices, Inc.*, 230 F. Supp.2d 362, 368-71 (S.D.N.Y. 2002).
9. *See, e.g., Sperry Int'l Trade, Inc. v. Government of Israel*, 689 F.2d 301, 306 (2d Cir. 1982) ("arbitrators have power of fashion relief that a court might not properly grant").
10. UNCITRAL Model Law, Art. 17; German Arbitration Law, Section 1041 (1998); Law of the Russian Federation on International Commercial Arbitration, Art. 17 (1993).
11. See, e.g., Article 17(1) of the British Columbia International Commercial Arbitration Act. Singapore's International Commercial Arbitration Act, which embraces the UNICITRAL Model Law but grants arbitral tribunals certain further explicit powers, provides expressly in Article 12(1) that an arbitral tribunal "shall have powers to make orders and give directions to any party for . . . security for costs."

    > The Swedish Arbitration Act of 1999, in Section 38, empowers arbitrators to request security for their compensation, to require one party to furnish the entire security if the other party fails to provide its share, and to terminate the proceedings if the requested security is not provided.

12. *See* Private International Law Act (PILA), Art. 183(1).
13. *See* Rubins, *supra* note 5 at 334-35.
14. *See* Eric A. Schwartz, *The ICC Arbitral Process, Part IV: The Costs of ICC Arbitration*, 4 Bull. ICC Int'l Ct. Arb. 8, 23 (1993) ("When an international commercial dispute arises, the cost of resolving it may be as important to the parties as the merits of the claim themselves"); Francis Gurry, Fees & Costs, 6 World Arb. & Med. Rep. 227, 233 (1995) (stating that "the allocation of the costs of the arbitration and of the costs incurred by the parties in respect of the arbitration are very significant matters and important elements in evaluating the overall price of the arbitration process"); J.Y. Gotanda, *Awarding Costs and Attorneys' Fees in International Commercial Arbitration*, 21 Mich. J. Int'l L. 1, 2 (1999) (hereinafter "Gotanda") ("[P]arties now recognize that an important part of the case is allocating the costs of the proceeding itself and the costs incurred in presenting the case such as attorneys' fees").

15. John Beechey has observed that "it is nowadays by no means unusual for a successful party in an international arbitration to recover a far greater proportion of its costs of legal representation . . . than might hitherto have been the case." John Beechey, *International Arbitrations and the Award of Security for Costs in England*, 1994 ASA BULL. 179, 190.

16. Thus, for example, Section 42 of the Swedish Arbitration Act of 1999 provides that "[u]nless otherwise agreed by the parties, the arbitrators may, upon request by a party, order the opposing party to pay compensation for the party's costs . . ." Section 1057(l) of the New German Arbitration Law (in force from January 1, 1998) provides: "Unless the parties agree otherwise, the arbitral tribunal shall allocate, by means of an arbitral award, the costs of the arbitration as between the parties, including those incurred by the parties necessary for the proper pursuit of their claim or defence. *It shall do so at its discretion and take into consideration rise circumstances of the case, in particular the outcome of the proceedings.*" (emphasis supplied).

17. *See generally* Gotanda, *supra* note 14, at 34 (advocating a model in which the award of costs and fees to the prevailing party would be presumed, and stating that "[t]he principle that costs follow the event is almost universally recognized. Indeed, it is so well accepted that it may be viewed as a general principle of international law. Thus, the model's adoption of the costs follow the event principle in arbitration simply codifies the prevailing practice in the international arena.").

18. *See* Michael Buhler, Costs in ICC Arbitration: A Practitioner's View, 3 Am. Rev. Int'l Arb. 116, 143 (1992) (noting that arbitral reluctance to force the loser to pay the winner's legal fees was "not uncommon," and that "there is no universally recognized principle that the losing party has to bear the legal costs of its opponent."

19. *Compare* ICC Art. 3 1(3) ("*[t]he final Award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties")*; WIPO Rule 72 (the Tribunal may "*in the light of all the circumstances and the outcome of the arbitration, order a party to pay the whole or part of reasonable expenses incurred by the other party in presenting its case, including those incurred for legal representatives and witnesses*"); AAA Art. 31 (Arbitral Tribunal may "*apportion such costs among the parties if it determines that such apportionment is reasonable, taking into account the circumstances of the case.*"). *See also* Art. 16.3 of the Center for Public Resources Institute for Dispute Resolution (CPR) Rules for Non-Administered Arbitration of International Disputes: "*Subject to any agreement between the parties to the contrary, the Tribunal may apportion the costs of arbitration between or among the parties in such manner as it deems reasonable, taking into account the circumstances of the case, the conduct of the parties during the proceeding, and the result of the arbitration*"; Article 59 of the Arbitration Rules of the China International Economic and Trade Arbitration Commission (CIETAC): "The arbitration tribunal has the power to decide in the arbitral award that the losing party shall pay the winning party as compensation a proportion of the expenses reasonably incurred by the winning party in dealing with the case. The amount of such compensation shall not in any case exceed 10% of the total amount awarded to the winning party."

20. *See* Murray L. Smith, "Costs in International Commercial Arbitration," *AAA Dispute Resolution Journal* (Feb-Apr. 2001) 30 ("An informal survey indicates that many North American arbitrators are overly influenced by litigation precedents and only award full legal fees and other party expenses on rare occasions. At the same time, there is anecdotal evidence that some of the most experienced international arbitrators from the United States commonly award legal fees and, indeed, believe that this represents a major reason to choose arbitration over litigation for the resolution of international commercial disputes.").

21. Among the factors considered by the Tribunal were that (i) recovery of significant legal costs was foreign to the legal system of Indonesia, where the parties chose to hold the arbitration, (ii) both parties came from countries where litigants broadly bear their own costs, (iii) the claimant was awarded only a fraction of its total monetary claim, and, (iv) Respondent's failure to fulfill its contractual obligations "was not the fruit of self-interested calculations, but of its powerlessness in the face of macroeconomic and political developments." *Himpurna California Energy Ltd (Bermuda) v. PT (Persero) Perusahaan Listruik Negara (Indonesia)*, Final Award of May 4, 1999, published in Yearbook Comm. Arb'n XXV (2000) at pp. 13 *et seq.*, quoted text at p. 106.

22. ICC Award No. 8528 of 1996, excerpts published in XXV Yearbook Comm. Arb'n (2000) at pp. 341 *et seq.*, decision as to costs at pp. 351-52.

23. ICC Award No. 8486 of 1996, excerpts published in XXIV Yearbook Comm. Arb'n (1999) at pp. 162 *et seq.*, decision as to costs at pp. 172-73.

24. ICC Award in Case No. 7063 of 1993, excerpts published in XXII Yearbook Comm. Arb'n (1997) at pp. 87 *et seq.*, decision as to costs at pp. 90-91.

25. For a succinct summary of the various alternative approaches to this issue, actual and conceptual, see ICCA Congress Series No. 5, "Preventing Delay and Disruption of Arbitration: Effective Proceedings in Construction Cases" (A.J. van den Berg, ed., 1991), at pp. 104-06 (comments of Prof. Gaillard). *See also* CPP § 14.02 at pp. 263-265.

26. While allocation of the advance on costs equally among Claimant(s) and Respondent(s) is the norm by rule or custom, there can be exceptions. LCIA Art. 24.1, for example, states that the LCIA Court may direct the parties to make payments toward the costs of arbitration "in such proportions as it thinks appropriate." Also, it is the custom of some arbitral institutions to fix a separate advance on costs for any tribunal-appointed experts, and in many European countries it is considered customary that if only one party is the proponent of such an appointment, that party shall bear the costs of the expertise subject to re-allocation in the final Award. (The author recently encountered this practice as counsel to a Claimant that was the proponent of such an appointment.)

27. The Secretariat of the ICC International Court of Arbitration, in a Note published in the ICC Bulletin in 1993, stated:

> [I]t is not an accepted practice in ICC arbitrations for a party to refuse to pay all or part of its share of the advance on costs and to leave it to the other party to pay for the defaulting party. While the ICC will permit a party to pay the balance of the advance on costs in lieu of a defaulting party in order to allow the arbitration to go forward, this should in no way be seen as an acceptance or endorsement by the ICC of the non-payment by a party of its share of the costs.

28. What was apparently the first published decision of an ICC Tribunal giving an award in favor of a Claimant for reimbursement of its payment of Respondent's share of the advance on costs was issued on March 27, 2001, when a partial award was rendered to this effect by a three-member arbitral tribunal, in a case involving a Panama company as Claimant and a Swiss company as Respondent. The decision is published at pp. 285-293 of the 2001 *Swiss Arbitration Association (ASA) Bulletin* (Volume 2). See also FGG § 1254 at p. 685, noting that French courts have intervened to order the defaulting party to pay its share of the arbitration costs; and CPP § 14.04 at p. 268, noting a "growing sentiment that . . . there should be a remedy, either in the hands of the arbitral tribunal or the courts," and referring to an interim award granting the claimant money damages in the amount of its payment of Respondent's share as "the most obvious option." Some rules expressly provide that a Claimant paying the share of the advance on costs of a recalcitrant Respondent "shall be entitled to recover that amount as a debt immediately due from the defaulting party." (LCIA Rule 24.3)

29. In that case, both the arbitration rules and the *lex arbitri* (respectively the Singapore Arbitration Centre Rules, Art. 27, and the Singapore International Arbitration Act) expressly gave the arbitral tribunal powers to order security for costs and security for the amount in dispute. Moreover, the rules provision conferring these powers, Art. 27(3), followed immediately the subsection concerning the powers of the Centre and the tribunal to require advances on costs, and the rules contained no provision for shifting to one party the other party's defaulted obligation for 50% of the advance. But the same solution should be possible under ICC, AAA, or other institutional rules which do not exclude the power to grant security for costs, provided there is no obstacle in the law of the place of arbitration.

30. *See* note 9, *supra*.

31. *See* Rubins, *supra* note 5 at 362 ("Arbitral 'hit and run' may be avoidable through security for costs, but forcing impecunious plaintiffs to 'put up or shut up' raises an equity concern no less serious: the risk that a large segment of the business world will be shut out of the dispute resolution system").

32. *See* Smith, *supra* note 20, at 34 ("The approach taken by some arbitrators where they award full indemnity costs only where there has been some form of misconduct is wrong in principle and may be seen as a misdirected adherence to principles that would apply in litigation but do not restrict an international arbitrator.").

33. The best and most succinct statement of a "test" for assessing legal costs that this author has found appears in H. Gillis Wetter and Charl Priem, *Cost and Their Allocation in International Commercial Arbitrations, 2 AM. REC. INT'L ARB. 249, 32__ (1992)*:

> In a costs follow the event regime, the factors which are likely to be taken into consideration in modifying the allocation of costs between the parties may be divided into two categories: the first includes inter alia (i) the outcome on each legal claim; (ii) the outcome on each disputed factual issue; (iii) failure by the successful party on an issue on which a large amount of time was spend and/or (iv) the relative prima facie strength of the parties' cases (regardless of outcome); the second includes inter alia (i) gross exaggeration of the claim, (ii) unsatisfactory conduct by a party in the arbitration, (iii) unreasonably or obstructive conduct which has protracted the proceedings and/or increased costs and/or (iv) extravagance in the conduct of the hearing.

*This paper was presented at the June 2005 annual conference of the Institute for Transnational Arbitration in Dallas, Texas, and is reprinted with permission from the* International Arbitration News.

* * *

## 156 Law Schools Participated in the 13th Annual Willem C. Vis International Commercial Arbitration Moot

On Friday evening, the seventh of April, 2006, in the historic Wiener Konzerthaus in central Vienna, Professor Eric E. Bergsten, 2003 recipient of the Section's Distinction in International Law and Affairs Award, welcomed more than 1,100 law students from 156 law schools based in 49 countries, their coaches and arbitrators from throughout the world to the Oral Rounds of the 13th Annual Willem C. Vis International Commercial Arbitration Moot.

The Moot was proposed by Michael L. Sher, a member of the Executive Committee, on Tuesday morning, the nineteenth of May, 1992, during a speech he delivered from the main podium of the General Assembly hall of the United Nations at United Nations headquarters in New York. He was speaking as a "Voice of International Practice" during the Silver Anniversary Congress of the United Nations Commission on International Trade Law (UNCITRAL) "Uniform Commercial Law in the 21st Century" as a means to promote knowledge of the work of UNCITRAL and, more specifically, in the United Nations Convention on Contracts for the International Sale of Goods (CISG). A valuable by-product was expected to be an increased awareness of international commercial arbitration.

Immediately after presenting his proposal, Mr. Sher embarked on the task of finding a "home" for the Moot.

Along the road to the launching of the Moot, there were key decisions and a few people who played pivotal roles in the success of the Moot, including the two wonderful Saints of Fate and Luck.

Immediately after being invited to speak, Mr. Sher called Professor Thomas M. Quinn, his law school sales law professor, to discuss what he might say. Professor Quinn invited his colleague, Professor Joseph C. Sweeney, to join the discussion. Professor Sweeney had been a member of the United States delegation to UNCITRAL. Professor Sweeney presented Mr. Sher with some materials on UNCITRAL, including the UNCITRAL pocket-size pamphlet on arbitration. The seed for an UNCITRAL-related arbitration Moot was firmly planted.

The succeeding autumn, Professor Bergsten and Willem Cornelis Vis, also a former Secretary of UNCITRAL (1975–1980), were teaching at Pace Law School. With the active encouragement of Mr. Sher, they took up the concept of the Moot. It was decided that the oral arguments would take place in Vienna, the situs of the UNCITRAL secretariat. Some months after the commencement of the inaugural Moot, Dr. Vis succumbed to brain cancer, and the Moot was named in his memory.

In 1993, Dr. Werner Meilis was the head of the International Arbitral Centre at the Wirtschaftskammer Österreich in Vienna. The Moot needed a venue. Professor Bergsten approached Dr. Mellis, and he agreed to arrange for the Wirtschaftskammer to provide the physical facilities in which to hold the inaugural Moot. It was a risk to contribute such significant resources to an untried concept. An absolutely authentic environment existed. The general oral rounds of the Moot were held in the very rooms in which commercial arbitrations were regularly held, and the participants (law students and arbitrators) were seated at the very tables utilized in commercial arbitrations. Lunch was in the cafeteria where advocates, clients, parties, experts, other witnesses, and the arbitra-

tors engaged in commercial arbitrations had lunch. The final oral argument was held in the grand auditorium of the Wirtschaftskammer Österreich.

To enhance the knowledge of, and enthusiasm for, the Moot on a global basis, Mr. Sher was invited by UNCITRAL to address the 1993 annual session of UNCITRAL convened in Vienna. In order to have the appropriate status to do so, Mr. Sher was designated a member of the United States delegation.

As the years passed, Professor Bergsten prudently and effectively grew the Moot from eleven law schools to 158 law schools based in fifty countries. (See graph below.)

Specific recognition is due to the important role of the arbitration-world leading entities which have sponsored the Moot. From the outset, there were UNCITRAL and Pace University Law School's Institute of International Commercial Law, as well as the International Arbitral Centre at the Wirtschaftskammer Österreich in Vienna. The American Arbitration Association and the International Chamber of Commerce were initial sponsors. As the Moot evolved the list of sponsors grew to include the University of Vienna Faculty of Law, International Centre for Dispute Resolution of the American Arbitration Association, Chartered Institute of Arbitrators, Chicago International Dispute Resolution Association, Court of International Commercial Arbitration—Romania, German Institution of Arbitration (DIS), London Court of International Arbitration, Singapore International Arbitration Centre, Swiss Arbitration Association (ASA), Swiss Chambers' Arbitration, and the Moot Alumni Association. The Moot has also been the beneficiary of wonderful support by the City of Vienna, including that of its mayor, Dr. Michael Häupl, and the Vienna Convention Bureau.

From inception, the Moot was envisioned to be a multi-cultural, multi-faceted educational experience. There is a balance between teams representing universities based in civil law and common law jurisdictions. In the oral general rounds the pairings are structured to maximize mooting by teams of different legal systems. The standard of the work-product (written memorandum for claimant, written memorandum for respondent, and oral arguments) of the participating students continues to be extraordinarily high.

In the oral general round, each team moots twice as claimant and twice as respondent. The top thirty-two teams in the general round proceed to the single elimination round. Most of the moots in the general rounds and all but the finals in the single elimination round are held in the Law Faculty of the University of Vienna (Juridicum). The final round is held in the same venue as the Moot Awards Banquet which immediately follows the final round. Prizes are also awarded for best oralist in the general round and best written memorandum for each claimant and respondent.

Initial Rule Number 1 of the Moot has remained. "The Moot must be enjoyable for one and all." Pleasure can be and has been derived from the long hours of hard work in the research and drafting of written submissions and preparations for oral arguments. It is also derived in Vienna from the pride in performance and social activities.

Socializing has always been an important component of the entire Moot experience. On the evening preceding the official Moot Opening Ceremony, the Moot Alumni Association hosts a "Welcome!" reception for the students and makes arrangements with *Ma Pitom*, a Viennese bar located in the famous "Bermuda Triangle" section of Vienna, for it to be the socializing spot for the participating students. During the week of the Moot, many of the Vienna law offices host receptions for the persons who are serving as Moot arbitrators and others. The receptions have become so popular with both the law firms and their guests that law firms are now hosting luncheons so as to not become involved in the over-scheduling of the evenings. In addition, on the Sunday evening of the "Moot week," the Moot organizes a "Heurigen" wine-tavern buffet dinner in the colorful Vienna wine district of Neustift-am-Walde. The Moot concludes with the Moot Awards Banquet to which all of the students, coaches and arbitrators are invited, and during which the awards are announced and presented.


Each year the problem to be mooted is specially crafted by Professor Bergsten. One of the parties is based in the fictitious location of Port City, Equatoriana, and the other party is based in the fictitious location of Capitol City, Mediterraneo. The arbitration is held in the fictitious location of Vindobona, Danubia. Vindobona is the name of the ancient Roman city that is now Vienna.

The arbitration rules for the Moot change each year and are selected from those of the sponsors with a balance of those located in civil law and common law jurisdictions. The arbitration rules of the 2004–2005 Moot were the Swiss Rules of International Arbitration. The arbitration rules of the 2003–2004 Moot were those of the Singapore International Arbitration Centre. The 2005–2006 Moot utilized the arbitration rules of the Chicago International Dispute Resolution Association. It is anticipated that the 14th Annual Moot (2006–2007) will utilize the arbitration rules of the Court of International Commercial Arbitration—Romania.

The Moot has progeny: the Moot Alumni Association and Moot (East). This year, thirty-two law schools are participating. This is, perhaps, the highest form of flattery and indicia of the achievement of the fundamental *raison d'être* and concept, which was to promote the knowledge and use of the CISG and international commercial arbitration.

There are several thousand young lawyers who have participated in the Moot and commenced their professional career with a solid knowledge of, and deep appreciation for, the CISG, international commercial arbitration and UNCITRAL. Many of them are members of the Moot Alumni Association (<http://www.maa.net/>). The network of Moot participants, including many hundreds of arbitrators, lawyers, professors and other qualified persons who have served as members of the three-member Moot arbitration panels, continues to expand.

The MAA sponsors seminars throughout the year and publishes biannually the well-regarded *Vindobona Journal of International Commercial Law and Arbitration* <http://www.maa.net/vindobonajournal/default.htm>.

Participation in the Moot has become so respected in the international commercial arbitration community that lawyers and other professionals proudly note their participation in their *curriculum vitae*.

The dates of the oral rounds of the 13th Annual Moot were Friday, April 7, 2006—Thursday, April 13, 2006. The applicable arbitration rules were those of the Chicago International Dispute Resolution Association. As always, the physical venue was Vienna, Austria.

For additional information visit the Moot Web site (http://www.cisg.law.pace.edu/vis.html>).

**Michael L. Sher**

**Michael L. Sher is a member of the New York and District of Columbia bars, practices in Manhattan, and is founder of the Willem C. Vis International Commercial Arbitration Moot.**

* * *

## The Trials and Tribulations of Creating a Law Blog

My interest was captured the moment that Marie Newman, the Law Library Director, asked me if I would like to set up a law blog (or blawg) for three of Pace Law School's international law professors—Thomas McDonnell, Gayl Westerman, and Mark Shulman. My first question was: "What's a blog?" Needless to say, the learning curve was going to be steep. On the other hand, I have been interested in international law since attending a week-long workshop at Harvard Law School in 1995, and this would be a wonderful learning opportunity.

Our first organizational meeting was . . . well, "wide-ranging" would be an understatement. The blog was first conceived as a forum for commentary on the International Criminal Court and international criminal law, but it was clear that the professors' interests were going to take us farther afield. Darfur. Extradition. Saddam. Cluster bombs. Universal jurisdiction. The "war on terror." Genocide. Human rights.

And what should we call this blog? The International Criminal Court and International Criminal Law Blog? How dull. It was finally decided to give it the title: *Jus in Bello*. The focus would be on the laws and customs that govern the conduct of all belligerents—individual and state—during both formal and informal hostilities. Our welcome message refers to the 1997 article by Robert Kolb, now Professor of International Law at the Universities of Bern and Neuchâtel, that outlines the development of this concept. Our blog was beginning to take shape.

Because it was decided that the commentary offered would not merely be "off the cuff," we realized that the professors' pieces would take some time to write. An example is Professor McDonnell's thought-provoking piece on Assassination/Targeted Killing that was posted on the 1st of December. In the interim between scholarly postings, it would be my job to mine the news for current developments in international criminal law, to summarize those developments, and to post links to the sources. I have also compiled "A Pace Online Law Library" on the International Criminal Court and International Criminal Law to support legal research on the topic (http://library.law.pace.edu/icc/index.html).

I won't describe the agonies experienced by a not-at-all-techie librarian trying to design a blog using html tags and cascading style sheets. It wasn't pretty. However, we are very proud of the final product, and we believe it makes a substantial contribution to international criminal law scholarship. Check it out at <http://www.library.law.pace.edu/blogs/jib/>.

**Margaret Moreland**
**Lawyer/Librarian for Research Services**
**Pace Law School**

# IL&P Country News

## Argentina

### Cooperation Consortiums

Law 26,005 (published in the Official Bulletin on January 12, 2005) governs the organization of a new form of corporate association agreement called Cooperation Consortiums. In essence, Cooperation Consortiums are contracts whereby the parties agree to establish a common organization oriented to develop or increase operations related to their business activity.

Similarly as the so-called *Uniones Transitorias de Empresas* (UTE) governed by the Company Law, Cooperation Consortiums have a contractual nature. They are not considered legal entities or companies. On the contrary, unlike UTEs, the activities in which Cooperation Consortiums may engage must not necessarily be defined or identified at the time they are set.

The contract establishing Cooperation Consortiums must be registered with the Public Registry of Commerce. If such contract is not registered, the consortium shall be considered as a *de facto* company.

As concerns the liability of its members, the law establishes that, unless the contract fixes the proportion in which each member will be liable for the obligations assumed on behalf of the consortium, its members shall be regarded as jointly and severally liable.

For further information, please contact Guillermo Malm Green, telephone number (54-11) 4891-2717, e-mail: gmalmgreen@brons.com.ar

### News of the General Inspection of Corporations Regarding Foreign Companies

The General Inspection of Corporations has issued new resolutions concerning the requirements to be met by foreign companies doing business locally as branches or participating in local companies.

- **General Resolution 2/2005**

General Resolution 2/2005 of the General Inspection of Corporations (GR 2/05), published in the Official Bulletin on February 17, 2005, established that the Public Registry of Commerce shall not register offshore companies, whether to participate in local companies or to do business as branches. The above prohibition does not apply to companies requesting registration under the procedure established by General Resolution 22/2004 issued by the General Inspection of Corporations ("GR 22/04"), i.e., as "vehicles" of other companies that may provide evidence that their main business and major assets are located outside the Argentine Republic.

For the purposes of GR 2/2005, offshore companies are defined as companies organized abroad, which in accordance to the laws of their place of incorporation or organization, are restricted from engaging in all or their main activities in such place of incorporation or organization.

Furthermore, GR 2/05 imposed additional restrictions on companies organized in low- or no-tax jurisdictions or in territories regarded as "non-cooperative" to the prevention of money laundering and transnational crime. Although these companies are not restricted from registration, they are subject to more burdensome requirements than those applicable to other foreign companies.

General Resolution 5/05 ("GR 5/05"), published in the Official Bulletin on April 28, 2005, clarified and amended certain provisions of GR 2/05. GR 5/05 established that offshore companies previously registered with the General Inspection of Corporations which have met the requirements of General Resolution 7/03 (i.e., that have provided evidence that their main business and major assets are located outside the Argentine Republic) will continue to be in good standing.

- **General Resolution 3/2005**

General Resolution 3/2005 of the General Inspection of Corporations (GR 3/05), published in the Official Bulletin on March 10, 2005, provided that foreign companies applying for registration in Argentina to do business as branches or to participate in local companies must file documentation identifying their shareholders. Such documents must be dated not more than thirty days prior to date of filing the registration request.

If once the foreign company has been registered, a change in shareholder(s) occurs, the foreign company will be required to file documents evidencing such change at the time of complying with the annual filing required under General Resolution 7/03, or within 30 days following the occurrence of such change, if such change represents an alteration in the internal control of the company according to the majority requirements established by the legal provisions applicable thereto.

If the company has issued bearer shares, at the time of making the annual filing referred to above, it shall also submit certificates stating the names of the shareholders who have appointed agents or proxies and the names of the shareholders who attended shareholders' meetings during the next preceding year or otherwise a statement of the agents or proxies who have acted on their behalf stating the identity of the shareholders represented by them.

GR 3/2005 is not applicable to companies registered under the provisions of GR 22/04 ("vehicle" companies).

- **General Resolution 4/2005**

General Resolution 4/2005 of the General Inspection of Corporations (GR 4/05), published in the Official Bulletin on April 6, 2005, provides that (i) notices addressed by the General Inspection of Corporations to foreign companies at their legal domicile registered with the General Inspection of Corporations shall be binding; and (ii) that any subpoena to appear in court addressed to foreign companies in connection with any legal action brought by the General Inspection of Corporations may be validly served at such registered legal domicile.

Furthermore, GR 4/2005 included as a general provision a criterion that the General Inspection of Corporations had already adopted regarding corporate acts performed by attorneys-in-fact of foreign companies. In this regard, the General Inspection of Corporations established that documents related to acts in which foreign companies have been involved will only be registered with the Public Registry of Commerce if such foreign companies may provide evidence that they have acted through their registered representative or through an attorney-in-fact exclusively empowered by the registered representative.

For further information, please contact Guillermo Malm Green, telephone number (54-11) 4891-2717, e-mail: gmalmgreen@brons.com.ar

## Capitalization of Irrevocable Contributions and Consideration of Fiscal Year's Profits/Losses

General Resolutions 25/04 ("GR 25/04") and 1/05 ("GR 1/05") of the General Inspection of Corporations laid down certain provisions governing the implementation, capitalization and registration of irrevocable contributions on account of future subscription of ownership interests in corporations and limited liability companies (hereinafter "ICCs").

GR 25/04 established specific regulations applicable to ICCs made after the effective date of such Resolution (December 22, 2004) and the requirements and documents needed in order to register capital increases implemented by capitalizing ICCs. Among other requirements, a fixed term of not more than 180 days is established during which the contributor must maintain the ICC, and within which a shareholders' meeting must be held in order to resolve its capitalization or its return. Furthermore, GR 25/04 provides that the return of ICCs will be subject to the creditors' opposition procedure set forth in the Argentine Companies Law for voluntary reduction of capital and in case the company becomes insolvent, the subordination of the contributors' credit in the amount of the ICCs to not less than the aggregate corporate liabilities existing on the date in which the shareholders' meeting is held resolving the capitalization or return of the ICCs.

GR 25/04 provides that return of ICCs may be demanded in case of failure to hold a shareholders' meeting within 180 days after the board of directors' meeting resolving the acceptance of the ICCs, non-approval of capitalization or lack of express treatment thereof, or approval beyond the stated term and/or not in accordance with the agreed conditions for the issuance of the shares. In any of the above cases, the amount of the ICCs will be accounted for among the corporate liabilities.

GR 1/05 (supplementary to GR 25/04) extended the provisions of GR 25/04 to ICCs made prior to December 22, 2004, and fixed *August 8, 2005* as a deadline for companies to decide upon the return or capitalization of ICCs pending capitalization.

Furthermore, GR 25/04 set forth that, prior to or simultaneously with the registration of capital increases before the General Inspection of Corporations, it will also be necessary to register the issuance of shares in the amount of the aggregate balance of the "capital adjustment" account existing as of the date of the shareholders' meeting approving the actual capital increase.

GR 25/04 further established that shareholders' meetings considering financial statements which show fiscal year's profits and/or retained earnings of previous years must expressly deal with and resolve upon the actual allocation of such profits in each specific case. In other words, such profits may not be carried forward and must either be allocated to the distribution of dividends or to the creation of a special voluntary reserve fund.

For further information, please contact Guillermo Malm Green, telephone number (54-11) 4891-2717, e-mail: gmalmgreen@brons.com.ar

## Argentine Supreme Court of Justice Declares Pesification of Bonds Constitutional

In its judgment rendered on April 5, 2005 in the case *"Galli, Hugo Gabriel et al. v. National Executive Branch – Law 22,561 – Decrees 1570/01 and 214/02 in re action for protection of constitutional rights,"* the Argentine Supreme Court of Justice (*Corte Suprema de Justicia de la Nación – CSJN)* resolved that emergency regulations that provided for the *"pesification"* of government bonds are constitutional.

In the opinion of the CSJN, Section 17 of the Argentine Constitution (dealing with the right to property) is not violated if, due to emergency reasons, regulations are enacted and such regulations do not deprive indi-

viduals of financial benefits nor deny their right to property but just temporarily restrict receipt of such benefits or limit the use of property.

Through this ruling, the CSJN has upheld the majority criterion of the Justices in the "Bustos" precedent. At that time, the CSJN had also declared the constitutionality of the emergency regulations that provided for the *"pesification"* of bank deposits.

For further information, please contact Guillermo Malm Green, telephone number (54-11) 4891-2717, e-mail: gmalmgreen@brons.com.ar

### National Appellate Court Confirms General Inspection of Corporations Criterion

As from the last semester of 2003 several resolutions were issued by the General Inspection of Corporations (which is the entity that controls companies in the City of Buenos Aires) ("GIC") amending previous criteria that had been in full force for over ten years. One of these criteria refers to the concept of "plurality of partners" established by our Companies Law ("ACL"). According to Section 1 of the ACL, "*a commercial company comes into being when two or more persons in an organized manner, adopting one of the corporate types provided for in the law, undertake to make contributions allocating them to the production or interchange of goods or services, sharing the profits and bearing the losses."* The ACL does not set forth any minimum threshold of equity for the partners.

On December 15, 2003 the GIC rejected a request for registration of common formalities filed by a corporation whose majority shareholder was a foreign company duly registered to act as shareholder in a local company (Coca Cola Femsa de Buenos Aires S.A.), as provided for in Section 123 of the ACL.

The rejection in question was based on the fact that the foreign company held 99.9999% of the equity of the local corporation (Coca Cola Femsa de Buenos Aires S.A.). Therefore, in the IGJ's opinion, the local company should have been registered as a *branch* of the foreign company. The resolution provided that the GIC would only handle routine formalities of the corporation once it was verified that (i) the local company was registered in Argentina as a branch, as provided for in Section 118 of the ACL, or (ii) the local company was formed by *"an effective and substantial plurality of partners."*

This resolution became a precedent on the GIC's criterion that was further applied to other proceedings of companies registered with the GIC.

3. On May 3, 2005, the National Appellate Court on Commercial Matters (Panel E) confirmed the GIC's criterion in *in re Fracchia Raymond S.R.L.* In *Fracchia*, the GIC had resolved to deny registration of a company where one of the partners held 99.99% of the corporate capital, since the company lacked "*an effective and substantial plurality of partners."*

The Court of Appeals sustained that the plurality of partners required by the ACL is not a mere formal requisite, but rather a substantial requirement for the existence of a company. In this sense, the Court of Appeals sustained that an effective will to associate, share profits, bear losses and make contributions is an essential requisite to form a company; and concluded that all such essential requisites were absent in "*Fracchia.*"

Even though it does not arise from the resolution itself, nor from the Court of Appeals' ruling, the criterion followed so far by the GCI is that at least two-thirds of the capital must be held by other persons different from the controlling partners.

**Guillermo Malm Green**
**Brons & Salas**
**Buenos Aires, Argentina**

* * *

## Chile

### Main Chilean Laws and Amendments Introduced to Chilean Law Published in 2005

This document contains a description of the main laws and legislative changes published during year 2005, in matters such as Industrial Property, Regulation of Gaming Casinos, Sport Corporations, Health Insurance Law, amendments to the Water Code, electric sector legal framework, mining tax, and finally the double taxation treaty between Chile and Canada.

#### I. Amendments to the Industrial Property Law

Law Nr. 19.966, which modified the Industrial Property Law, was published in the Official Gazette on March 11, 2005.

The purpose of this law is adapting the national legislation to the commitments established with the OMC in ADPIC or Trip's Agreement.

The main changes are the following:

1. Incorporation of new categories of industrial property rights: drawings, schemes of layouts or topographies of integrated circuits (applicable in the electronic industry to protect the three-dimensional design of chips and cards), geographic indications and denominations of origin.

2. Regulation of the protection of industrial secrets and the test data filed with the sanitary authority (ISP or SAG) for the obtaining of sanitary pharmaceutical product registries and chemical agriculturists.

   The law states the conducts considered disloyal in the scope of protection of the undisclosed information.

   The undisclosed nature of the information is satisfied if the data has been the object of reasonable measures to maintain them in such condition, and generally are not known by people pertaining to the circuits in which normally the type of information at issue is used. The competent authority will not be able to disclose these data by a term of 5 years for pharmaceutical products, and 10 years for agricultural chemical agents.

3. Reconstruction of the Industrial Property Court called to know in second instance these procedures with greater faculties, and increasing the dowry of its members (six holders and four substitutes).

4. Incorporation of a special title referred to the observance of industrial property rights in which civil actions and measures, "preemptive measures," are destined to guarantee the effective protection of said rights.

## II. Law Nr. 20,005 Characterizes and Punishes Sexual Harassment

Law Nr. 20,005, which characterizes and punishes sexual harassment, was published on March 18, 2005 in the Official Gazette. This law introduces amendments to the labour code characterizing sexual harassment and establishes the conducts that fall under sexual harassment. It imposes obligations on employers in order to prevent sexual harassment. This law makes it mandatory for employers to have an internal conduct regulation which establishes a procedure for claims of sexual harassment as well as ruling the investigation of said claim. Frivolous sexual harassment claims are punished.

## III. Law Nr. 19,995 Gaming Casinos

Law Nr. 19,995 allows corporations to own, operate and manage gaming casinos. For this purpose, the Superintendents of Casinos, a new, autonomous regulator was created. This regulator is in charge of carrying out the public bidding process stated in the law for the granting of 14 new gaming permits throughout Chile's territory. It is also in charge of supervising the operation of the casinos as well as revoking said permits.

Pursuant to the law, there will be up to three casinos per region (12 regions in Chile). Gaming casinos are not allowed by law to operate in the Metropolitan Region (Santiago).

## IV. Nr. 20.019 Sport Corporation Law

Law Nr. 20.019 creates Sport Corporations and was published in the Official Gazette on May 7, 2005.

Professional sporting clubs shall be incorporated as special corporations (e.g., soccer clubs). The purpose of this law is to allow sporting clubs to have access to new sources of financing through the incorporation of new partners and shareholders.

These corporations will have more efficient internal controls, by means of the shareholders meetings, external auditors, and will be subject to the supervision of the *Superintendencia de Valores y Seguros* (SVS).

Finally, the sporting clubs could use the tax benefits established in Law Nr. 19,768, for investing in emerging markets.

The minimum capital of the professional sport organizations is 1.000 *Unidades de Fomento* (USD 34,000 approx.)

## V. Amendments to the Health Insurance Law

Law Nr. 20,015 was published in the Official Gazette on May 17, 2005.

Several amendments have been introduced to the Health Insurance Law. The purpose of these amendments is to enhance affiliates' benefits.

Some of the implemented changes are the following:

- Health insurance providers are not allowed to unilaterally terminate contracts with affiliates, unless serious breaches by the affiliate have occurred, e.g., not declaring a preexisting disease, not paying premiums, etc.
- Plastic surgeries are included in the health provider coverage.
- Increase in the fines applicable to the health insurance providers.

## VI. Amendments to the Regulatory Frame of the Electrical Sector

On May 19, 2005, Law Nr. 20,018 was published in the Official Gazette.

In order to entice the investment in alternative energy sources to the Argentine natural gas, and to ensure the energy supply in Chile, Congress passed a law that

grants incentives for investing in the electrical sector in Chile. The purpose of this law is to strengthen the regulatory framework as well as diversify the energetic matrix.

### VII. Specific Tax to the Mining Activity Law Nr. 20,256

Law Nr. 20,256 was published in the Official Gazette on June 16, 2005.

This law, referred to as "Royalty II," establishes a specific tax to the operational revenues from mining operations.

This law establishes a tax for mining companies with annual sales above 12 thousand metric tons of fine copper.

The price of the metric ton of fine copper will be determined according to the average value of A degree copper in the Metal stock-market of London.

### VIII. Amendments to the Water Code

Law Nr. 20,017, modifying the Water Code, was published in the Official Gazette on June 16, 2005.

The main objective of this amendment is to improve the mechanism of water rights allocation, favoring the competition. In addition, it has the allocation rights by volumes indeed required; the registry of existing water rights; the protection of the associated environment; the fortification of the organizations of water users and the granting of new powers to the authority for better management of the hydro resource.

Another change of great importance consists of the establishment of a tax for those water rights granted but not used.

### IX. Amendment to Chile's Constitution

Law Nr. 20,050, which amends the Constitution, was published on the Official Gazette on August 26.

The most relevant amendments are:

a) Reduction of the presidential period from six to four years;

b) Elimination of designated senators;

c) The Constitutional Court goes from eight to ten members. Three appointed by the President, three by the Supreme Court and four appointed by Congress; and

d) All sons of a Chilean father or mother born abroad will be Chilean.

## Double Taxation Agreement: Chile-Canada Application of Most Favored Nation Clause to Services Rendered by Individuals

The agreement executed between Chile and Canada to avoid double taxation provides that, after the signature of the Chile-Canada Agreement, the Republic of Chile concludes an Agreement with a State which is a member of OCDE, by which it limits taxation in the source country on payments for independent personal services carried out without the fixed base referred to in paragraph 1 of Article 14, to an aliquot lower than that set forth in the Chile-Canada Agreement, such aliquot (including an exemption) shall be automatically applied for purposes of the Chile-Canada Agreement, as of the date in which the provisions of the new Agreement are applicable, as the case may be.

The above circumstance was complied with when the Double Taxation Agreements executed by Chile with Norway and Poland, respectively, came in force.

As a consequence of the above, the Chilean IRS issued Ruling Nr. 30, published in the Official Gazette of July 6, 2005, which provides the following:

1. The Chile-Canada Agreement, in its Article 14 Nr. 1, establishes that income received or accrued by individuals for the rendering of professional services carried out in the other Party State are taxed as follows:

   (a) If there is no fixed base for purposes of carrying out its activities, the applicable tax may not exceed 10% of the gross amount received; and

   (b) If there is a fixed base, income may be subject to taxes under the internal legislation of the corresponding country but only to the extent that such income may be attributed to the fixed base.

2. In the Double Taxation Agreements executed by Chile with Norway and Poland, the parties agreed to limit or exempt from taxes income received at the payment source in the case of independent personal services carried out without a fixed base.

3. In fact, the Double Taxation Agreements with Norway and Poland distinguish according to the length of the person's permanence in the country; if the length of stay is for a period or periods which, as a total, are equal to or exceed 183 days within any 12-month period, income may be

subject to taxes at the source without any restrictions whatsoever; but if the term of permanence is lower, income may not be subject to any taxes at the source.

In the first case (permanence for 183 days or more in any 12-month period) the tax situation is not different than that contained in the Chile-Canada Agreement since such income may be subject to taxes in the other Party State where services were rendered, with a maximum rate of 10%; however, the second case amends the situation contemplated in the Chile-Canada Agreement because it exempts from taxes the income received by individuals who render professional services for less than 183 days.

4. As a consequence of the above, Chile and Canada agreed to apply the most favored nation clause and amended Article 14 Nr. 1 as follows:

   "Income obtained by an individual resident in one Party State with respect to professional services or other independent activities carried out in the other Party State, may be subject to taxes in the latter State, provided such person stays in such State for a period or periods which, as a total, are equal to or exceed 183 days in any 12-month period, but the maximum tax applicable may not exceed 10% of the gross amount received for such services or activities, except in the case where such resident has a fixed base in such other State to carry out its activities. In this last case, such income may be subject to taxes in such other State, provided it may be attributed to said fixed base."

   Consequently, taxation of independent professional services under the Chile-Canada Agreement is the following:

   (a) If there is no fixed base and the individual rendering services stays in the country for 183 days or more in any 12-month period, its income may be subject to taxes not to exceed 10% of the gross amount received;

   (b) If there is no fixed base and the individual stays for less than 183 days in the country, income obtained may not be subject to taxes, *even if the activity in the country proceeds for a longer period*; and

   (c) If there is a fixed base, income is taxed pursuant to the internal legislation, provided it may be attributed to such fixed base.

5. The Double Taxation Agreements executed by Chile with Norway and Poland are in force as of January 1, 2004, so the new tax rules under the Chile-Canada Agreement must be applied as of that same date. However, and due to the fact that the agreement between both countries in order to apply the most favored nation clause was reached much later, it is possible that there may be excess withholdings both in Chile and in Canada, with respect to which the taxpayers have the right to request reimbursement.

6. To request reimbursement in Chile, taxpayers domiciled or resident in Canada must apply the provisions of article 126 of the Chilean Tax Code.

7. The Competent Authority of Canada has issued instructions in order that Chilean taxpayers may obtain the reimbursement of excess withholdings made by Canada, which may be accessed in the Canada Customs and Revenue Agency's website: http://www.cra-arc.gc.ca/E/pbg/tf/nr7-r/README.html

**Gonzalo Delaveau S.**
**Guerrero, Olivos, Novoa y Errázuriz**
**Las Condes, Santiago, Chile**

* * *

# European Union

## Unlawful SOX Helplines

The international corporate governance community has been greatly troubled this year by the reporting of decisions from France and Germany which have been said to make the running of SOX helplines unlawful in Europe. One of the panels at the ILPS meeting in London covered these developments. Much of the furore has been caused by mistranslations of the decisions in both of these countries and a misunderstanding of the ability of the authorities in one country in Europe to make cross-border rulings. As we will see, the decisions taken in France and Germany affect only those two countries and are not in themselves of pan-European effect. Problems do, however, remain in particular for U.S. corporations that run whistleblowing hotlines in Europe.

### France

On May 26th, the French privacy regulator (known as CNIL) refused requests from CEAC (an affiliate of Exide Technologies) and McDonalds France to authorize the use of anonymous whistleblower hotlines. In order to comply with SOX requirements, both companies intended to set up anonymous employee hotlines and had contacted CNIL to register them under the French system of mandatory prior registration with CNIL of databases containing personal information. It is important to stress that certainly in McDonalds' case the hotline was not yet running in France—they were

simply seeking prior authority from the CNIL. The proposed hotlines allowed employees to 'blow the whistle' on perceived wrongdoings by colleagues using telephone, fax, post or email. The CNIL thought that these hotlines were "*disproportionate in view of the objectives pursued and of the risks of slanderous denunciations. . . .*" Although both companies had apparently complied with the 1978 French Data Protection Act as modified in 2004, the CNIL decided that hotlines would be illegal for the following reasons:

- **Lack of transparency:** individuals who are the subject of a whistleblower's allegations may not be able to hear or reply to the accusations made against them. In their decision, the CNIL said that French personal data protection laws are designed to make sure that individuals whose data is being processed know who has that data and can have access to it, and if necessary, correct it. The hotlines under consideration, however, were designed to ensure anonymity. Employees were not to be informed that information concerning them had been received. The hotlines were then not 'transparent' in the manner that French law requires.
- **Natural justice:** accused employees would not have the means to defend themselves or oppose the proceedings which may involve criminal charges.
- **Professional ethics:** the hotlines were said to be disproportionate to the aim they sought to achieve.

The CNIL said it was aware of the conflict with SOX and asked the French Employment Minister and the competent authorities in the US to resolve this issue. In its decisions the CNIL did provide some short-term comfort in pointing out that French law already allows employees to report bullying, sexual harassment or discrimination. They can complain to their management, to their employee representative (delegues du personnel or comite d'entreprise) or even complain directly to the Labor Inspector (Inspection du Travail). For example in the event of bullying, the Labor Code (Code du Travail) allows the employee to request a 'mediator' to resolve the issue.

## Germany

Less worrisome for many U.S. employers was the German decision from the Arbeitsgericht Wuppertal (the German Labor Court in Wuppertal) on 15 June. The German and French decisions are however not nearly as similar as some earlier reports had suggested.

The Wuppertal case involved the unnamed German subsidiary of a U.S. stores group referred to in court as "Firma X.-Stores, Inc." and was also said to make whistleblowing hotlines "illegal" in Germany. However, closer examination of the German court's decision reveals that the court did not make any general finding of the unlawfulness of whistleblowing hotlines. It did not address any issues of data protection or privacy laws. The decision deals solely with question of German Works Council rights.

The circumstances leading to the litigation were these: "Firma X," a NYSE-listed entity had issued a detailed "Code of Business Conduct and Ethics" on a global basis by placing it on its Intranet and issuing a communication to employees summarizing the key points of the Code and informing them that all employees were obliged to adhere to the Code. They also had posters made to bring the Code to the attention of employees. Crucially, when doing so in Germany they did not involve their Works Council (a designated employee representative body which exists in much of Europe) which then applied to the Labor Court in Wuppertal to order it not to implement the Code as well as the telephone hotline for global company ethics.

The Works Council argued that the relevant parts of the Code and the telephone hotline regulated conduct and order in the German business and therefore required its consent under the Betriebsverfassungsgesetz—the German legislation dealing with Works Councils. In the absence of this consent the Code and hotline had not been lawfully implemented and should not be allowed. The employer argued that the Code contained only abstract guidance and no mandatory conduct rules which in many instances reflected only pre-existing obligations under German law, either under statute or under implied duties under the employment contracts.

The German case goes into considerable detail, dealing with reporting on the wrongdoing of others, whistleblower anonymity, gifts and bribes, sexual harassment, workplace romance, violation of laws in general, abuse of drugs and alcohol, press releases, privacy, protection of trade secrets and company confidential information. The Court's decision, which stretches to around 27 pages, examines each contested provision of the Code in turn and holds that some, but not all of them, did in fact require prior Works Council consent. In relation to the telephone hotlines specifically, the Court states that:

(1) because the Code contained a specific whistleblowing procedure and threatens disciplinary action in case of breach it sets out mandatory conduct rules which require Works Council consent, and

(2) the telephone hotline constitutes technical equipment designated to monitor employee conduct—the introduction of which also requires consent.

In reality then, the case does not make any new point of law. It does not ban SOX hotlines per se. It merely applies long-standing principles of German labor law requiring the involvement of the Works Council in the process of implementation. Interestingly the French CNIL decisions also stressed the need to consult the Works Council or staff delegates on the implementation of internal regulations regarding health and safety, disciplinary procedures, harassment and discrimination issues.

### UK

In the UK, Works Councils are less of a concern and the UK Information Commissioner's office has said that their initial reaction is that they would decline to follow the French approach. In contrast to the French decision, their view is that the appropriate use of hotlines would not, in principle, raise data protection concerns. However, where organizations misuse anonymous hotlines for inappropriate information gathering purposes (for example recording details of employees' romantic relationships or other out-of-office activities) there may be data protection implications. To date the Information Commissioner has not received any complaints from individuals affected by anonymous hotline reporting.

The rulings are still likely to be of concern to corporations employing in the UK, however, since anonymous hotlines are commonly used to enable compliance with UK whistleblowing laws in addition to requirements under SOX. Under the Public Interest Disclosure Act, any employee who is dismissed or subjected to a detriment on grounds of "blowing the whistle" can be awarded unlimited compensation, regardless of age or length of service.

## Recent Developments

Both the French and German cases were back in the news in November. In France, following discussions with French, European and U.S. authorities, CNIL published a guidance document issued on November 10, 2005, with the aim of defining compliance conditions for whistleblowing tools. Opponents of the guidance document feel that it does not provide the clarity sought since the earlier decisions. The CNIL's position is, however, interesting as it clearly states that its decisions in May were specific to the two applications before it and that it is not opposed to whistleblowing per se.

On November 14th the appeal was heard by the Landesarbeitsgericht Düsseldorf Beschluss (Düsseldorf Labor Appeal Court) of the Wuppertal decision. "Firma-X" was identified in court as Wal-Mart. The written judgment has only just been released (this time stretching to around 36 pages and almost 8,000 words) but the appeal court would seem largely to confirm the findings of the tribunal at first instance.

### Conclusions

These cases are clearly a concern to any corporation operating a hotline with operations in Europe. While the German decision is not as worrying as first reported, it does emphasize the fact that proper care must be taken in adopting helplines and that a "one size fits one" approach to each country in Europe must be considered. Around 33 countries in Europe have some form of data protection or privacy law in place. While there are commonalities between most of these sets of regulations, each nation state appoints its own privacy regulator to enforce its laws. There are local variations and importantly, even where the law looks the same, interpretation and enforcement will vary from country to country.

The French case is more of an immediate concern with an objection in principle to the type of hotlines most U.S. corporations operate. Organizations that deal with all calls in the U.S. are likely to be particularly at risk—for them, in addition to issues caused by the collection of data, additional issues with the transfer of that data outside Europe will have to be managed. While steps can be taken to mitigate the effects of the French decisions (for example by putting proper agreements in place with the operators of an outsourced hotline and by a proper legal audit of the data flow) this will remain a significant issue even after CNIL's "clarification" document. CNIL had at one stage asked the NYSE, SEC and NASDAQ for leniency for French-based, U.S. listed companies in an effort to resolve any conflict—those companies relying on that leniency, however, may be unwise!

**Jonathan Armstrong**
**Eversheds LLP**

**Katell Berthou, Christel Cacioppo, Kate Flower, Constanze Hewson, Kristine Karsten and Geoffrey Morson at Eversheds LLP contributed to this article.**

* * *

# Germany

## German Courts Question U.S. Employee Ethics Codes

Recent German court rulings against discount retailer Wal-Mart's German subsidiary have found that U.S.-style employee behavior codes violate the country's labor laws and Constitution when they attempt to

regulate personal conduct in the workplace. However, such codes may be permissible in certain cases where companies consult with their works councils and gain their approval in advance of implementing ethics rules.

Wal-Mart introduced a code of ethical conduct for its 10,500 German-based employees in February 2005. In addition to regulating behavior toward competitors, local communities and shareholders, the code also established rules regarding employees' personal behavior in the workplace. The code prohibited employees from going to dinner or otherwise dating or falling in love with a colleague in "a position of influence." The exchange of "lustful glances," suggestive jokes, and sexually explicit communications were equally impermissible. Additional rules forbade "inappropriate behavior" and regulated the acceptance of gifts by workers. Finally, the 28-page code of conduct required employees to report anyone observed to be breaking the rules to the company via a special telephone hotline. Failure to comply with the code could lead to dismissal.

Wal-Mart has stated that its policies were intended to protect employees against exertion of influence, corruption and sexual harassment in the workplace. Moreover, regulations against employee dating were directed primarily at preventing relationships between superiors and their subordinates that could lead to workplace favoritism.

The company's *Betriebsrat*, or works council, filed suit against the code in Wuppertal Labor Court earlier this year, alleging that their *Mitbestimmungsrecht*, or consultation rights, were violated when the company failed to confer with them in regard to various provisions of the ethics code. Under Germany's Works' Council Constitution Act of 1972, all companies of considerable size are required to consider the views of their employees through such a works council (a body distinct from the labor union that negotiates wages and hours). Section 87 of the Act gives the works council a right of co-determination in "matters relating to the rules of operation of the establishment and conduct of employees." On June 15, 2005, the lower court found that Wal-Mart violated the law when it failed to consult with its works council regarding ten of the ethics code's provisions.

An appeals court in Düsseldorf, Germany largely upheld the lower court's ruling on November 14, 2005. The Düsseldorf labor court recognized that employee codes of conduct were accepted and even common practice in U.S. workplaces, but noted that they were neither compatible with German labor law nor with the personal rights of employees. The court acknowledged that a company had a duty to protect its employees from sexual harassment, but ruled that many of the regulations promulgated by Wal-Mart could not be put into place without approval of the works council. The court divided the ethics code into three categories: regulations it deemed constitutionally impermissible, regulations that required approval of the company's works council, and regulations that could be implemented without any approval.

The appeals court held that provisions of the ethics code whose purpose was to regulate private relationships between employees violated Articles 1 and 2(1) of the German Constitution. Article 1 states that human dignity is inviolable. Under Article 1, the state has an affirmative obligation to create the conditions that foster and uphold human dignity. Article 1 is closely linked to article 2's personality clause. Article 2 guarantees the individual's right to freely develop his or her personality. Jointly these constitutional articles have served as the basis for much of Germany's privacy law.

In addition, the court found that several provisions of the corporate ethics code could not be put into place without the express approval of the works council. Rules regulating sexual harassment and inappropriate behavior (including the exchange of "lustful glances," suggestive jokes, and sexually explicit communications), as well as the acceptance of gifts, required works council approval, as did the procedures by which violations of the ethics rules were to be reported, such as the telephone hotline.

The court found that a rule permitting the issuance of press releases in the name of the company without the approval of individual departments did not require works council consultation. In addition, the company did not need to confer with the works council about a regulation that allowed authorized employees to access workers' medical records for a business-related purpose.

Wal-Mart has said it plans to appeal the decision to Germany's Federal Labor Court. If upheld, the rulings could prove problematic for publicly traded U.S. companies operating in Germany—but only if they fail to adjust codes of ethical conduct to local standards.

Codes of Ethical Conduct, such as the one implemented by Wal-Mart, have become commonplace among U.S. corporations since the enactment of the Sarbanes-Oxley Act in 2002 and the implementation of new listing requirements by the New York Stock Exchange (NYSE) that same year. Section 301 of the Sarbanes-Oxley Act requires public company audit committees to establish procedures for handling so-called whistleblower complaints, submissions made anonymously and confidentially by company employees to report questionable accounting or auditing matters. Many U.S. companies have established reporting mechanisms that

go beyond the Sarbanes-Oxley requirements, providing mechanisms through which a much wider range of breaches of company policy can be reported.

NYSE rules mandate that every company listed on its exchange adopt and disclose a Code of Business Conduct and Ethics for *all* employees that addresses—among other issues—conflicts of interest, corporate opportunities, and fair dealing. Each code of business conduct and ethics must contain compliance standards and procedures that facilitate the effective operation of the code. Accordingly, the standards are supposed to ensure prompt and consistent action against violations of the code. To encourage employees to report violations of laws, rules, regulations or the code of business conduct to appropriate personnel, listed companies must ensure that employees know that the company will not allow retaliation for reports made in good faith.

In countries such as France, compliance with Sarbanes-Oxley and NYSE listing standards have proved problematic, as companies conforming to U.S. rules have found they may be violating French data protection laws. However, the German appeals court decision indicates that companies listed on the NYSE will be able to comply with both U.S. and German law, provided certain precautions are taken to protect the privacy of individual employees and to ensure that the consultation rights of the works council are respected.

Like Wal-Mart, many U.S.-based multinationals have implemented ethics rules that exceed the requirements of U.S. law. Moreover, these rules are often implemented globally and applied to subsidiaries based around the world. In order to comply with local laws, such as those in Germany, a company may have to decide between implementing different codes of business conduct and ethics in different regions or drafting a code that is less comprehensive so that it can be applied universally without violating local laws. In the case of Germany, only small revisions to the code may be necessary. The German appeals court struck down as unconstitutional only the ethics rule that banned personal relationships in the workplace. Rules related to sexual harassment, the acceptance of gifts and the implementation of a telephone reporting hotline were permissible provided the company's works council approved. It is recommended that U.S. companies operating in Germany consult closely with works councils about a prospective ethics codes to ensure it meets their approval before it is implemented.

**Nicole Jacoby,**
**Fulbright Scholar**
**University of Münster, Germany**

* * *

# Sweden

## New Swedish Companies Act

A new Swedish Companies Act entered into force on January 1, 2006. The previous Swedish Companies Act was from 1975 and although a number of changes have taken place through the years, there was a need to modernize, and in particular to increase the flexibility. The new statute does not give rise to any changes in basic principles of Swedish corporate law. For example, although there have been discussions relating to the concept of "piercing the corporate veil," no such concept is introduced and therefore the room for arguing liability for shareholders for the liabilities of the company remains very limited.

Sweden has for some time allowed that the share capital can be denominated not only in the Swedish currency SEK but also can be converted into Euro. It has also been a requirement that each share has a nominated value (par value) and this has sometimes given rise to complications, in particular upon conversion of the share capital from SEK to Euro, but now the concept of par value is abandoned and each share is only allocated a quote value in relation to the aggregate share capital of the company. Although par value thereby is technically abandoned it remains a requirement that payment for shares does not fall below the shares quote of the total share capital.

It remains allowed to issue different classes of shares and it is also possible to give different voting rights to different classes of shares, though no share may have more than 10 votes.

One of the more important changes is that the Articles of Association may allow limitations of the right to transfer shares in several ways. Currently, the articles of association may only contain a so-called right of pre-emption clause to the effect that a purchaser (rather than the seller) of shares in the company may be required to offer the other shareholders, after the shares have been acquired by the purchaser, to acquire his shares. This is somewhat impractical and it is in the new act permitted also to include provisions in the articles of association to the effect that the other shareholders shall be given a right of first refusal to acquire the shares before the shares are transferred or that the company must consent to a transfer of the shares. In the past the right of first refusal or the requirement of a consent to transfer have typically only been included in shareholders' agreements.

As regards the shareholders' meeting, it has been clarified that public companies can allow non-shareholders to participate in the meeting upon a simple

majority vote, or it may even be generally permitted in the Articles of Association. It has also, as a novelty for Swedish law, been stated that the board of directors may solicit proxies to vote at the shareholders' meeting and this solicitation can be made at the expense of the company if it is provided therefor in the Articles of Association. Also shareholders meeting on-line and other technical means for conducting shareholders meeting are now provided for. The rules for the Board of Directors remain generally unchanged but it shall be noted that the appointment, replacement or resignation of a director under the new law will not be effective until filing with the Registration Authority rather than, e.g., already upon decision being taken by the shareholders meeting.

In relation to rights issues, there are some interesting developments of which the following should be mentioned. In the past, warrants, always as a formality, had to be issued in connection with the issue of a debenture, but this practice can now be abandoned as warrants may be issued separately. As regards convertibles, Swedish law will now also allow convertible debentures to provide for a mandatory conversion rather than only as a right for the holder to convert. It also clarified that warrants actually may be acquired by the company itself and subsequently resold to the market. In the past, participating debentures, with the amount of interest being based on the financial position of the company, have been permitted but not participating debentures with amount of capital repayable based on the company's financial position. However, under the new act, also participating debentures with amount of capital repayable based on the company's financial position will be permitted. This opens a number of new instruments, particularly in the area of mezzanine financing.

It shall be noted that Swedish law requires that listed companies issuing shares or selling shares in the company itself or a subsidiary to the management of the company or its directors need to comply with certain formalities including obtaining resolution by nine-tenth of the votes and capital of the company. This rule remains in effect and is extended to cover all "public" companies, whether listed or not, which is somewhat disappointing to the persons expecting the rules to be narrowed in the new law.

The rules on distributions have been entirely reworded but there are, in effect, only limited changes. It has been clarified that the company may distribute assets at its book value and thereby disregard any hidden over-values in such assets. Quite importantly it has also been clarified that the company is permitted to make dividend distributions also after the ordinary shareholders' meeting with any amount not distributed at such ordinary meeting but which remains available for distribution thereafter and prior to the next ordinary shareholders' meeting.

Another fairly important change relates to the reduction of the share capital. Reduction of share capital was previously permitted to cover an incurred loss, or for allocation to unrestricted equity or distribution to shareholders subject to a number of other formalities including court approval in certain cases. The new act allows a reduction of the share capital also to cover a current loss and not only loss relating to previous years.

Swedish law contains restrictions as to loan to shareholders of the company and in particular there are restrictions relating to loans to acquire shares in the company. This has, to a large extent, prevented shares in its subsidiary being sold on credit. It has now been clarified that such restrictions apply only upon acquisition of shares in the company making the loan or a superior company within the same group.

An entirely new feature in the Swedish Companies Act is the possibility to split or de-merge the business of the company into two separate companies. Swedish law provides for a squeeze-out procedure enabling a 90 % shareholder to acquire the shares of the remaining minority holders at a price to be established in an appraisal procedure. In the past, this procedure has only been triggered upon 90% shareholding being a Swedish company, but it is now set out that any legal or natural person holding 90% of the shares in the company may initiate such a squeeze-out procedure. In counting the 90% also indirect holding shall be taken into account. Also warrants and convertibles may become subject to the squeeze-out procedure.

**Carl-Olof Bouveng**
**Advokatfirman Lindahl**

# Committee News

## U.S./Cuban Affairs Subcommittee

The U.S./Cuban Affairs Subcommittee of the ILP Section, under the leadership of NYSBA Past President A. Thomas Levin, organized two professional research trips to Cuba. The trips were scheduled for March and April 2006, and were conducted under license from the United States Department of the Treasury Office of Foreign Asset Control. Participation was limited to lawyers admitted to practice law in New York who are members of NYSBA. The trip itineraries included meetings with various government officials, legal educators, and lawyers in Havana, as well as related organizations. A report on the trips is expected for inclusion in the next newsletter.

## Is Ukraine a Good Place to Do Business?

A roundtable under this title dedicated to the business environment in Ukraine took place on March 7, 2006 in the midtown offices of a major law firm. The event was co-sponsored by the Committee on Central, Eastern European and Central Asian Law of the International Law and Practice Section of the New York State Bar Association, the Ukrainian Consulate in New York and the Committee on Emerging Markets of the United State Council on International Business.

The event took place on the eve of Ukraine concluding its negotiations on the World Trade Organization (WTO) accession and removing the trade barriers with the U.S. Ukraine, along with Russia, is among the last countries of Central and Eastern Europe which are not members of this organization.

Over 40 consultants, businessmen, attorneys and other professionals with an interest in Ukraine attended the event. The panel of speakers included a representative of the U.S. government, the Ukrainian Consulate in New York and a major credit rating agency. The event was held under the Chatham House Rules which would allow the participants to use the information but not to disclose the identities and affiliations of the participants.

The event focused mainly on the issues of whether the post-Orange Revolution Ukrainian government fulfilled its promises of opening up the country and fighting corruption and providing stability and the business-friendly environment necessary for attracting foreign investments. The conclusion was that although major improvements had been made, still a lot needs to be done to lift Ukraine from the years of neglect and bring it closer to the family of developed and democratic countries of the world.

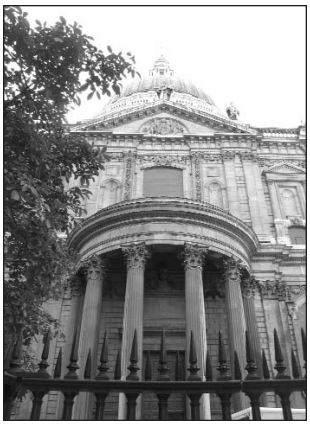
For more information please contact:
**Serhiy Hoshovsky**
Chair, Committee on Central, Eastern European and Central Asian Law
33 West 19th Street
New York NY 10011
tel: (646) 619 1123
e-mail: shoshovsky@ghslegal.com

## Request for Contributions

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

**Oliver J. Armas**
**Editor**

**Richard A. Scott**
**Co-Editor**




The Section's Fall Meeting **"Cross Atlantic Legal Practice in a Time of Global Change"** was held in London, England from October 18-23, 2005. The meeting was kindly sponsored by the Law Society of England and Wales, as well as by the Bar Council of England and Wales.

Thank you and congratulations to the Co-Chairs of this informative program: Michael W. Galligan (Phillips Nizer LLP) and Gerald J. Ferguson (Baker & Hostetler LLP).

Join us for the International Law and Practice Section's 2006 Fall Meeting in Shanghai, China, October 17-21, 2006. See page 38 for more information.

# Event News


# IL&P Section Annual Meeting, Luncheon and Reception


On January 25, 2006, our Section, in conjunction with the Corporate Counsel Section, held a fabulous morning of panels, all of which pertained to the North American relationship and, most specifically, reviewed **"NAFTA: 12 Years Later."**

A big hearty thank you to Marco Blanco, who served as the Program Chair and put in countless hours of work to ensure that the panels were informative, relevant, representative and most of all, interesting and engaging.





# Wednesday, January 25, 2006 • Marriott Marquis • New York City











**New York State Bar Association**
**International Law and Practice Section**

*SAVE THE DATES*

# 2006 FALL MEETING

# SHANGHAI, CHINA

## JW Marriott Hotel • October 17-21, 2006

# "China: Engine of Growth for the 21st Century"

The capital of China's flourishing commerce, finance and industry sectors is home to the world's busiest port and the world's fastest Maglev (magnetically levitated) train AND host of the International Law and Practice Section's 2006 Fall Meeting.

Please join us on October 17-21, 2006 in Shanghai as we explore this fascinating city, discuss the financial, commercial, trade and other legal aspects of China's emergence as an engine of growth in the 21st Century and meet lawyers from China, Asia, Europe and North, Central and South America.

Shanghai is a city of breathtaking contrasts between history and modernity, where East meets West. We invite you to explore Shanghai's cultural relics dating back over 1,000 years, its architectural treasures of teahouses, temples and ancient pagodas, and its beautiful Southern-Chinese gardens. Equally stunning is modern Shanghai, which boasts the 460-meter tall Shanghai Orientation Pearl Tower, the New Bund, and China's premier shopping destination—Nanjing Road.

***Mark your calendar now and plan to attend!!***

# Firm News

## Thacher Proffitt Boosts Arbitration Team in Mexico

Thatcher Proffit & Wood SC has hired arbitration specialist Luis Enrique Graham and a reported eight associates. Graham, 44, joined the Mexico City office as a partner on 5 December 2005.

"Thacher Proffitt is a unique firm with a clear understanding and vision toward dispute resolution in Mexico and throughout Latin America," said Graham. "I am looking forward to working with their key partners in the region, such as Oliver Armas and Joel Harris."

Graham, previously a partner at Jáuregui Navarrete Nader y Rojas SC, is a leading Mexican arbitration lawyer, with broad experience in dispute resolution. For example, he led the team advising Infored in its successful arbitration against Grupo Radio Centro, in which Infored was awarded US $21 million. He was nominated in the LATINLAWYER survey of the top arbitration specialists in Latin America and is profiled in the December issue of the magazine.

"Thacher Proffitt's established Latin American practice and cross-border platform will be greatly enhanced by Luis Enrique," said Boris Otto, managing partner at the Mexico City office. "His extensive experience and respected profile in the litigation and arbitration community will complement the principal focus of our Mexico City office."

Graham is the president-elect of the Mexican Bar Association, where he chaired the commercial law committee from 1999 to 2001. He also serves as the Mexican delegate to the United Nations Commission on international trade law.

The associates have also come from Jáuregui Navarrete Nader y Rojas SC.

Thacher Proffitt has a strong profile in Latin American arbitration, led from both the New York and Mexico City offices. "We've been looking to grow our Mexico City office for quite some time," says Paul Tvetenstrand, the firm's managing partner. "We are one of the few firms that can now offer truly integrated cross-border advice on litigation, bankruptcy and arbitration matters."

* * *

## Fraser Milner Casgrain LLP Names Michel Brunet as Chairman

As one of Canada's leading business law firms, Fraser Milner Casgrain LLP understands the impact superior leadership has on its clients' success. FMC is proud to announce the appointment of Michel Brunet as Chair of the Firm. Michel is one of Canada's leading corporate lawyers, and brings to FMC over thirty years experience in selling, acquiring and financing businesses. He is a widely respected leader and mentor in the Canadian legal community, and sits on the board of several charitable organizations. Together with over 550 FMC lawyers, Michel provides a greater depth of experience and trusted legal advice to help clients succeed.

* * *

## Fraser Milner Casgrain LLP Names Our Co-Editor, Richard (Rick) Scott, as Managing Partner of their New York Office

As one of Canada's leading business law firms, Fraser Milner Casgrain LLP understands that cross-border relationships drive its clients' success. FMC is pleased to appoint Richard (Rick) Scott as Managing Partner of its New York office. Rick, Co-editor of this publication, is widely recognized for his strength in handling mergers and acquisitions in both Canada and the United States. He is one of the firm's best corporate lawyers and will be instrumental in energizing its business development south of the Canadian border. Rick's depth of experience will help FMC become the cross-border Canadian legal and business authority.

# New International Law and Practice Section Members

Ayman Hasan Abdel-Khaleq
Stephanie S. Abrutyn
Donald R. Adair
Femi A. Aderohunmu-Adeniyi
Roger B. Adler
Arjun Ahluwalia
Faradina Ahmad
Tae Yong Ahn
Ali Ahsan
Zulfiya Akchurina
Ariel A. Alarcon
C. Christopher Alberti
Christin Jill Albertie
Aarta Alkarimi
Rita Allen
Jonathan D. Almonte
Fernando A. Alonso
Alfred L. Amato
Stephen B. Amdur
Jeong-Hoon An
Randall K. Anderson
Richard N.M. Anderson
Nina Elisabet Andersson
Carska Andrea
Raphael Apelbaum
Cassandra Genevieve Aquart
Kimberley Tamara Tokunboh Arigbede
Matthew D. Asbell
Philip Ashley
Messeret Assefa
Alicia Mrotek Atik
Robert S. Attardo
Frederick G. Attea
Kadesha Eddye Bagwell
Sheila Anne Bahl
Erin Elizabeth Bahn
Robert D. Balin
Leni Dylan Battaglia
Peter M. Beattie
Julie Bedard
Robert M. Beecher
John Bekian
George Benaur
Susan Ann Benesch
Jeffrey L. Benner
Dana Barika Bennett
Maia Laurence Bensimon
Myma Bentsi-Enchill
Thomas J. Benz
Rosanna Berardi
Henry S. Berman
Robert Bruce Bernstein
William C. Bieluch
Ivan W. Bilaniuk
James M. Black
John K. Blake
Joel B. Blank
Dennis A. Bodden
Irina Bondarenko-Hoffman
Michelle Booker
Christina Heather Bost-Seaton
Vivian Breier
Edith Ann Brous
Darlene Debra Brown
Heidi Marthanna Brown
Jason Phillip Brown
Dana Roxana Bucin
Eric John Buckvar
Stefan Buettner
Ricardo Burgos
Anissa Burnley
Richard Allen Burns
Nelson Camacho
Thomas Teige Carroll
Barbara A. Casey
Franco Castelli Villa
Rudyard W. Ceres
Ricardo Augusto Cevallos
Calvin Chan
Sudwiti Chanda
Chi Chang
Georganne Chapin
Benoit Charriere-Bournazel
Lai Lee Chau
Chia-ching Cheng
David G. Chesters
Sandy Ching
Erin Rebecca Chlopak
Dannie Cho
Niovi Christopoulou
Kathryn Cimone
Stephane Cliche
Jacqueline I. S. Clifford
John Robert Cohn
Debra Rachel Cole
Erika C. Collins
Flor Maria Colon
Mariano Axel Conde De Frankenberg
Courtney Connell
Michael Connolly
William M. Cornachio
Patricia Ellen Corrigan
Amanda Lynn Cortese
Christopher Clinton Costello
Wayne A. Cumberbatch
Michelle Chiara D'Amico
Jeffrey C. D'Angelo
Brett Dakin
Lhosa Anne Daly
Michael David Daniels
Cheryl Renee David
Kenya K. Davis
Richard J. Day
Vadim Daynovsky
Luciane Solidea De Andrade
Luis Miguel De Camps
Sarah Marie De Haro
Andrea De Pieri
Pieter G. De Witte
Susan J. Deith
David W. Denton
Michael B. Devine
Ann Marie Diaz
Aristides Diaz-Pedrosa
Robert Dale Doerfler
Rico V. Domingo
Geraldine Donovan
Katerina Ioulia Duarte
Florence Dubosc
Justin S. DuClos
Anne Sophie Dufetre
Fiona M. Dutta
Leah M. Eisenberg
Amina M. El-sayad
Marc Daniel Ellenbogen
Jeremy C.R. Entwisle
Daniel Erskine
Jack Evans
Roberto Felipe Facundus
Joseph Israel Farca
Janice Michelle Farrell
Olutobi D. Fayemiwo
Joahnne Carmelle Ferrus
Holly Elizabeth Files
Michael R. Finder
Leonard A. Fink
Robert E. Finn
Andrea Fiocchi
Dorothee M. Fischer-Appelt
Lindsay A. Florek
Doriana Fontanella
Daniel L. Forman
Heather Ann Forrest
Francine O'Neill Forster
Jennifer I. Foss
Savvas Antonios Foukas
Miri Keren Frankel
George Freeman
Jason W. Friedman
Kathryn Bryk Friedman
Kenneth P. Friedman
Morgan Lenn Frohman
Yingxi Fu-Tomlinson
Jeannie Gallego
Brigitte Gambini
Lisa Michelle Gans
Juan Antonio Garcia
Maria E. Garcia
Maricruz Garcia
Eileen Hope Garren
Nathan Charles Gaudio
Denis Gebhardt
Steven Mark Gee
Lisa Maude Geli
Kay C. Georgi
Diba Ghamkhar-Nassiri
Manjit S. Gill
Gary Ginsburg
Carlo Giovannetti
Derek Gluckman
Cristina A. Godinez
Priyneha Singh Gohil
Mark Goldenberg
Oren Goldhaber
Richard S. Goldstein
Evelyn Gong
Miguel Gonzalez Marcos
Abigail E. Gordon
Mitchell H. Gordon
Ronnie P. Gouz
Kathryn S. Grant Belleau
Leonardo Grebler
Olena V. Green
Eliezer Mendel Greenbaum
Steven Greenfield
John D. Greenwald
Christian Gregersen
Stanley Griswold
Stuart George Gross
Melanie Grover
Daniel Grunberg
Tanja Grzeskowitz
Elizabeth Guinup
Gayathri Gunasekaran
Michael S. Haber
Robert Jay Haber
Frances Pierson Hadfield
Christopher David Hale
Junping Han
Youn-Joon Han
Samaa A.F. Haridi
Nicole M. Hartnett
Adarsh Ashwin Hathi
Keiji Hattori
Geoffrey Henderson
Michael Hendrick
Elodie Herbel
Elsa Hernandez
Sabine J. Hertveldt
William K. Hill-Edgar
Angelina Wei Yuen Hing
Chika Hirata
Philip Hirschler
Grace Yuen Wah Ho
Younsook Hong
David Stephen Hope
Marsha M. Hordines
Shu-Fen Huang
David Huebner
Paula Hufschmid
Jessica Helen Hugabone
Robert J. Hundertmark
Martin Stephen Hupka
Christopher B. Hynes
Robert Clark Insani
Christopher Isaacs
Jurdana Izaguirre
Nicole E. Jacoby
Lidija Jankovic
James Yi-Wei Jiang
Clinton G. Johnson
Craig B. Johnson
Erin M. Jordan
Mancharee Junk
Gabriel David Kader
Mildred Kalik
Genevieve A. Kamel
Kristine Kassekert
Neriman Fulya Kazbay
Bradley Michael James Kellogg
Imelda Brid Kelly
Michael J. Khorsandi
Raymonda Khoury
Hokyeom Kim
Michael S. Kim
Si-yeon Kim
Charles Howard King
Danielle Janine Kiwak
Benjamin Hansel Kleine
Ana Maria Kleymeyer
Martin Franklin Klingenberg
Danny Knight

Joachim Knoll
Pamela R. Ko
Kevin T. S. Kong
Adam Kotok
Diane F. Krausz
Maria Kraybill
Jean-Leonid Krymkier
Michael G. Kushner
Robert J. La Rocco
Pascale Lagesse
Monica Lamb
John Michael Lambros
Thomas M. Lancia
Elisabeth Larsen
Carolyn Joy Lee
Eun Kyeong Lee
Hoon Lee
Marion T.D. Lewis
Yvonne Lewis
Lingli Li
Anne Ligon
Sarahi R. Lim Baro
Sheau Chyng Lin
Michael R. Lindburg
Elicia Ingrid Ling
Sharon F. Linzey
Charlotta Ljungdahl
David Y. Loh
Julie Christina Lombard
George H. Lowe
Guido A. Loyola
David P. Luci
Carlos E. Lugo
Ana Luna
Roland Luo
Richard A. Luthmann
Peter Ian Mack
Lucy MacKinnon
Jennifer Beth Magida
Mhairi Eloise Main Garcia
Michael Makarius
Edoardo M. Maligno
Rajwant Mangat
Harpreet K. Mann
Paul C. Marks
Cynthia Marshall
Jeremy Marshall
Kathleen L. Martens
Ananda Martin
Jose Martin-Davila
Len Matsunaga
Adam Mauntah
Bolanle Mayowa
Timothy Robert McCormick
Darrell Roy McDaniel
Janet McEneaney
Jill-Ann F. Medlow
Edward Z. Menkin
Suzanne M. Mentzinger
Helen O. Mephis
David Mercado
Albert M. Mercury
Idalia Mestey-Borges
Kimmo Juhani Mettala
Katina E. Metzidakis
Anita Mignone
Catherine Dong Soon Miller
Evelyn Miller
Frederica L. Miller
Tatia L'kae Miller
John B. Mitchell
Donald P. Moore
Anna Morawiec Mansfield
Russell Scott Moriarty
Jennifer D. Morton
Daniel R. Murdock
James C. Murray
Teresa Musolino
Jessica M. Myers
Georges Clement Nama
Alfredo Héctor Navarro
Katarina Nedeljkovic
Yemisi Nelson
Gheiza Michella Neves Dias
Lawrence W. Newman
W. Simone Nicholson
Claire M. Nicolay
Elisabetta Nicotra
Dharmaputhiran P. Niles
Fengguo Niu
Theo Ngozi Nkire
Andrea T. Novick
Shigeyoshi Nozaki
Xavier Jean Nyssen
Thomas P. O'Connor
Cynthia R. L. O'Donoghue
Christiana Ochoa
Blaise Omondi Odhiambo
John C. Ohman
Fiona Oliphant
Donna Oren
Joanne Elisabeth Osendarp
Robert M. Osgood
Silvia Noemi Ostrower
Euguenia Eugenieuna Otchkovskaia
Megan OToole
Christopher Martin Paparella
Robert Alton Parker
Marc Thomas Parrino
Juan Carlos Partida
Alina Simona Pastiu
Carol B. Pauli
George Christian Pelaghias
Sarah Jean Pelud
Jennifer M. Pendleton
Sheila F. Pepper
Rose Nadine Perrault
Alexander F. Peter
Maxwell S. Pfeifer
Alexander D. Phillips
Scott Nelson Pierpont
George John Pierson
Rajan K. Pillai
Scott A. Pilutik
Michael S. Pixley
Beth Bird Pocker
Claudia Poernig
Olga A. Posmyk
Charlotte Claire Powell
Fabrizio Maria Prandi
Maria Protopapa
Khaldoon Qubain
Laura Siegel Rabinowitz
Supriya Rao
Lydia Nicole Reed
Laura Anne Reeds
Danhoe Reedy-Girard
Steven Matthew Rees Davies
Elke Rehbock
Volinka Reina
Alison M. Rende
Natalia Restivo
Aisha Mohamedi Richard
Deborah Richards
Sharlene Sharmila Richards
Lee K. Riffaterre
Shirley CS. Rivadeneira
Michelle Roberts
Ann Theresa Robinson
Margo A. Rocklin
Daniel C. Rodgers
Teresita Dejesus Rodriguez
Marcus Roemer
Eduardo J. Roman
Christopher S. Ronk
Alissa Miriam Rossman
John F. Roth
James Rozsa
Debra Jill Rubenstein
Anne Rubesame
Cynthia B. Rubin
Nicholas J. Rubino
Mary Catherine Ryan
Michael P. Ryan
Jay G. Safer
Charles J. Sahlia
Jawad Salah
Zeinah Salahi
Frank Charles Salamone
Christina Salib
Claudia T. Salomon
Olivia Mcmillan Sanson
Roy Santana-Ott
Fouad Georges Sayegh
George Sayen
Norka M. Schell
Robert Schiazzano
Lawrence M. Schimmel
Miriam R. Schindel
Dennis Schlenker
Luzius O. Schmid
Cliff S. Schneider
Natalya Katherine Scimeca
Ralph J. Scola
Stephen Scorziello
Farhid Sedaghat-Pour
Jay W. Seeman
Robert W. Seiden
Shane J. Serkiz
Elnaz Seyedian
Matthew G. Shaw
Faisal H. Sheikh
Takashi Shimokado
James E. Siegel
Dean L. Silverberg
Kenneth D. Silverman
Emily Mancina Simon
Adam Christian Sipos
Jane R. Slavin
Maxine Gail Sleeper
Toby William Smith
Mei Y. Song
Jack H. Sousa
Eric A. Spindel
Kenneth G. Standard
William T. Stevens
Boukje Maria Stoelinga
Jill Strickland
Andrey Strutinskiy
Talia J. Sundby
Jayant Waman Tambe
Shichun Tang
Michael G. Tannenbaum
Nicole A. Tartak
Alexis Maria Taylor
Susan Elizabeth Taylor
Annick W. Tchokonte Kamga
Anita S. Teekah
Penny P. Tehrani-Littrell
Miguel Angel Terc
Michelle C. Thompson
James Mckenzie Thurman
Daniel John Thwaites
Simon Tiemtore
John C. Timmermann
Cyndee Todgham Cherniak
Joyce Ling-shing Tong
Tommaso Tosi
Rosemary A. Townley
Patrick A. Train-Gutierrez
Brendan M. Trombly
Tomohiro Tsuchiya
Erin K. Tucker
Catherine M. Turgeon
Maria Marious Tzokova-Natseva
Michael E. Uhl
Stacey Robin Van Hooven
Elizabeth Van Schilfgaarde
Carla A. Varner
Hernan Jose Velarde
Rodrigo Vilardo Vella
Nadi Ganesan Viswanathan
Heike M. Vogel
Alison Von Rosenvinge
Kenneth A. Votre
Heather Weckel
Hsiang-Ling Wee
Robert A. Weiner
David A. Weinstein
Warren Yong Wen
David S. Wenger
Dave Merwin Wharwood
G. Warren Whitaker
Janet Mary Whittaker
Agnieszka Wilewicz
Bradley D. Williams
Njoki K. Williams
Shaquala R. Williams
Christina Marie Wilson
Henry Winetsky
Roger Michael Witten
Edward J. Wojcicki
Sermin Saglam Womack
Maria W. Wong
Zhao Yang
Zengjian Yao
Christos George Yatrakis
Dina Jie Yin
Sandora Yoshikawa
Reuven Benjamin Young
Rosa M. Yun
Angela Zagreda
Gonzalo Salinas Zeballos
Ma'anit Tzipora Zemel
Xuan Zhang
Xilin Zheng
Jian Zhou
J.H. Jerry Zhu
Patricia E. Ziminski

# NEW YORK STATE BAR ASSOCIATION COMMITTEES
## International Law and Practice Section
# Great Opportunities for Involvement!

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

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

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

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

### Committees

__ Asian Pacific Law
__ Awards
__ Central and Eastern European and Central Asian Law
__ Corporate Counsel
__ Customs and International Trade
__ Immigration and Nationality
__ Inter-American Law Including Free Trade in the Americas
__ International Banking, Securities and Financial Transactions
__ International Dispute Resolution
__ International Employment Law
__ International Entertainment Law
__ International Environmental Law
__ International Estate and Trust Law
__ International Human Rights
__ International Intellectual Property Protection
__ International Investment
__ International Litigation
__ International Matrimonial Law
__ International Privacy Law
__ International Sales and Related Commercial Transactions
__ International Trade Compliance
__ International Transportation
__ Multinational Reorganizations and Insolvencies
__ Publications / Editorial Board
__ Public International and Comparative Law/ Arms Control and National Security
__ Real Estate
__ Seasonal Meeting
__ South Asian Law
__ Tax Aspects of International Trade and Investment
__ U.N. and Other International Organizations
__ U.S.-Canada Law
__ Western European Law
__ Women's Interest Networking Group

Name _____

Office Address _____

Home Address _____

Office Phone No. _____ Office Fax _____ Home Phone No. _____

E-mail Address _____

**Please return this application to:**

**Membership Department**
**New York State Bar Association**
**One Elk Street**
**Albany, NY 12207**
**Telephone: 518 487-5577**
**E-mail: membership@nysba.org**

## INTERNATIONAL LAW & PRACTICE SECTION OFFICERS—2006

**Chair** .....John F. Zulack, Flemming Zulack Williamson Zauderer, LLP
One Liberty Plaza, 35th Floor, New York, NY 10006-1404

**Chair Elect** .....Oliver J. Armas, Thacher Proffitt & Wood LLP
Two World Financial Center, New York, NY 10281

**Vice-Chairs**

Mark H. Alcott, Paul, Weiss, et al.
1285 Avenue of the Americas, New York, NY 10019

Jonathan P. Armstrong, Eversheds, LLP
85 Queen Victoria Street, London EC4V 4JL UK

John E. Blyth
1115 Midtown Tower, Rochester, NY 14604

Prof. Sydney M. Cone, III, New York Law School
57 Worth Street, New York, NY 10013

David W. Detjen, Alston & Bird, LLP
90 Park Avenue, 14th Floor, New York, NY 10016-1302

Gerald J. Ferguson, Baker & Hostetler LLP
666 Fifth Avenue, New York, NY 10103

Kathryn Bryk Friedman
51 Lancaster Avenue, Buffalo, NY 14222

Joyce M. Hansen, Federal Reserve Bank of NY
33 Liberty Street, 7th Floor, New York, NY 10045

Allen E. Kaye, Law Offices of Allen E. Kaye, PC
111 Broadway, Suite 1304, New York, NY 10006

Jennifer K. King, Flemming Zulack et al.
One Liberty Plaza, New York, NY 10006

Steven C. Krane, Proskauer Rose LLP
1585 Broadway, Room 1778, New York, NY 10036

A. Thomas Levin, Meyer Suozzi English & Klein, PC
1505 Kellum Place, PO Box 803, Mineola, NY 10051

Michael M. Maney, Sullivan & Cromwell
125 Broad Street, New York, NY 10004-2498

Eduardo Ramos-Gomez, Duane Morris LLP
380 Lexington Avenue, 48th Floor, New York, NY 10168

Saul L. Sherman
PO Box 820, 221 Mecox Road, Water Mill, NY 11976

Lorraine Power Tharp, Whiteman Osterman & Hanna LLP
One Commerce Plaza, Albany, NY 12260

**Executive Vice-Chair**.....Marco A. Blanco, Curtis, Mallet-Prevost, Colt & Mosle
101 Park Avenue, New York, NY 10178

**Secretary** .....Michael W. Galligan, Phillips Nizer LLP
666 Fifth Avenue, New York, NY 10103

**Assistant Secretary**.....Nava Bat-Avraham
Greenwich, CT 06831

**Treasurer**.....Lawrence E. Shoenthal, Weiser LLP
135 West 50th Street, 12th Floor, New York, NY 10020

**Immediate Past Chair** .....Robert J. Leo, Meeks & Sheppard
330 Madison Avenue, 39th Floor, New York, NY 10017

**Delegates to the NYSBA House of Delegates**.....James P. Duffy, III, Berg & Duffy, LLP
3000 Marcus Avenue, Suite 1W02, Lake Success, NY 11042

Paul M. Frank, Alston & Bird LLP
90 Park Avenue, 15th Floor, New York, NY 10016

Robert J. Leo, Meeks & Sheppard
330 Madison Avenue, 39th Floor, New York, NY 10017

**Alternate Delegate**.....John Hanna, Jr., Whiteman Osterman & Hanna LLP
One Commerce Plaza, Albany, NY 12260

## INTERNATIONAL LAW & PRACTICE SECTION COMMITTEES

**Asian Pacific Law** .....Lawrence A. Darby, III
(212) 836-8235
Junji Masuda
(212) 258-3333

**Awards**.....Jonathan I. Blackman
(212) 225-2000
Michael M. Maney
(212) 558-3800
Lauren D. Rachlin
(716) 848-1460
Saul L. Sherman
(631) 537-5841

**Central and Eastern European and Central Asian Law** .....Serhiy Hoshovsky
(212) 370-0447

**Corporate Counsel** .....Carole L. Basri
(212) 982-8243
Michael J. Pisani
(516) 849-0508

**Customs and International Trade** .....Claire R. Kelly
(718) 780-0398
Stuart M. Rosen
(212) 310-8000

**Immigration and Nationality** .....Jan H. Brown
(212) 397-2800
Nina Juncewicz
(716) 884-2558

**Inter-American Law Including Free Trade in the Americas** .....Carlos E. Alfaro
(212) 698-1147

**International Banking, Securities and Financial Transactions** .....Joyce M. Hansen
(212) 720-5024
Eberhard H. Rohm
(212) 484-3900

**International Dispute Resolution** .....Peter Hyde Woodin
(212) 239-9106

**International Employment Law**.....Aaron J. Schindel
(212) 969-3090

**International Entertainment**.....Gordon W. Esau
(604) 443-7105

**International Environmental Law**.....John Hanna, Jr.
(518) 487-7600
Andrew D. Otis
(212) 696-6000
Mark F. Rosenberg
(212) 558-3647

**International Estate and Trust Law**.....Michael W. Galligan
(212) 841-0572

**International Human Rights** .....Arthur L. Galub
(212) 595-4598
Rachel L. Kaylie
(212) 406-7387

**International Intellectual Property Protection** .....Gerald J. Ferguson
(212) 589-4238
L. Donald Prutzman
(212) 355-4000

**International Investment** .....Aureliano Gonzalez-Baz
52 (55) 5279-3601
Lawrence E. Shoenthal
(212) 375-6847

**International Litigation** .....Thomas N. Pieper
(212) 912-8248

**International Matrimonial Law** .....Rita Wasserstein Warner
(212) 593-8000

**International Privacy Law** .....Nava Bat-Avraham
(212) 217-0088
Laura Becking
(212) 773-6021
Andre R. Jaglom
(212) 508-6740

**International Sales and Related Commercial Transactions**.....John P. McMahon
(803) 980-1800

**International Trade Compliance**.....Timothy M. Ward
(212) 899-5560

**International Transportation** .....William H. Hagendorn
(914) 337-5861
Alfred E. Yudes, Jr.
(212) 922-2211

**Multinational Reorganizations and Insolvencies** .....Robert W. Dremluk
(212) 696-8861

**Publications /Editorial Board** .....Oliver J. Armas
(212) 912-7627
Prof. Charles Biblowit
(718) 990-6760
David W. Detjen
(212) 210-9416
Lester Nelson
(212) 983-1950
Richard A. Scott
(212) 218-2995

**Public International and Comparative Law / Arms Control and National Security**.....Prof. Charles Biblowit
(718) 990-6760
Hon. Edward R. Finch, Jr.
(212) 327-0493

**Real Estate**.....Thomas Joergens
(212) 284-4975

**Seasonal Meeting**.....Lawrence A. Darby, III
(212) 836-8235
Joel B. Harris
(212) 912-7785
Xingxi Fu-Tomlinson
86-21-5298-4268

**South Asian Law**.....Babar Sattar
(212) 859-8776

**Tax Aspects of International Trade and Investment** .....Javier Asensio
(212) 784-8800
Marco A. Blanco
(212) 696-6128

**U.N. and Other International Organizations** .....Jeffrey C. Chancas
(212) 431-1300
Edward C. Mattes, Jr.
(212) 308-1600

**U.S.-Canada Law**.....David M. Doubilet
(416) 865-4368

**Western European Law**.....Stefano Crosio
(212) 424-9174
Michael L. Sher
(212) 421-1311

**Women's Interest Networking Group**.....Jennifer K. King
(212) 412-9537
Meryl P. Sherwood
(212) 644-2343

# INTERNATIONAL DIVISION OFFICERS—CHAPTER CHAIRS

**Jonathan P. Armstrong** (Co-chair)
Eversheds LLP
Senator House
85 Queen Victoria Street
London EC4V 4JL United Kingdom
44-0-113-200-4658
jonathanarmstrong@eversheds.com

**Gerald J. Ferguson** (Co-chair)
Baker & Hostetler LLP
666 Fifth Avenue
New York, NY 10103
(212) 589-4238
gferguson@bakerlaw.com

**Eduardo Ramos-Gomez** (Co-chair)
Duane Morris LLP
380 Lexington Avenue, 48th Floor
New York, NY 10168
(212) 692-1074
eramos-gomez@duanemorris.com

**Amsterdam**
Steven R. Shuit
Allen & Overy
Postbus 75440
Amsterdam 1070 AK Netherlands

**Athens**
Niovi P. Christopoulou
Arnold & Porter LLP
399 Park Avenue
New York, N.Y. 10022-4690
212-715-1044

**Barcelona**
Jaime Malet
Malet, Abogados
Avda. Diagonal 490, Pral.
Barcelona 08006, Spain
(34) 93 238-7711

**Beijing**
Liu Chi
Zhong Lun Law Firm
Floor 12, Bldg 1, China Merch. Tower
No. 118 Jiangua Road
Beijing 100022
People's Republic of China

**Berlin**
Jens Eggenberger
Freshfields Bruckhaus Deringer
Potsdamer Platz 1
Berlin 10785, Germany

**Brussels**
George L. Bustin
Cleary Gottlieb et al.
57 Rue De La Loi
Brussels 1040, Belgium
(322) 287-2000

Paul Van Hooghten
Linklaters De Bandt
Brederodestraat, 13
Brussels 1000 Belgium
322-501-9588

**Budapest**
Andre H. Friedman
Nagy & Trocsanyi, LLP
599 Lexington Ave., Suite 2328
New York, NY 10022
(212) 459-7070

**Buenos Aires**
Juan Martin Arocena
Rattagan Macchiavello Arocena &
Peña, Robirosa Avenida De Mayo 701,
Piso 18
Buenos Aires, Argentina
54-11-4010-5000

Guillermo Malm Green
Brons y Salas Abogados
Maipu 1210, 5th Floor
C1006ACT Buenos Aires, Argentina
54-11-4891-2707

Alberto Navarro
G. Breuer
25 De Mayo 460
C1002ABJ Buenos Aires, Argentina
54-11-4313-8100

**Cyprus**
Christodoulos G. Pelaghias
Law Offices of Chr. G. Pelaghias
27 Gregory Afxentiou Avenue
PO Box 40672
Larnaca, 6306, Cyprus
(357) 2465-4900

**Dublin**
Eugene P. Fanning
E P Fanning & Co.
71 Ailesbury Rd., Ballsbridge
Dublin 4, Ireland
(353) 1219-5935

**Frankfurt**
Rudolf Colle
Dewey Ballantine LLP
Reuterweg 16, D-60323
Frankfurt Am Main, Germany
49-69-636-930

**Geneva**
Nicholas Pierard
Borel & Barbey
2 Rue De Jargonnant
Case Postale 6045
Geneva 1211 6, Switzerland
4122-736-1136

**Israel**
Mitchell C. Shelowitz
Nixon Peabody, LLP
437 Madison Avenue
New York, NY 10022-7001
(212) 940-3000

Eric S. Sherby
Sherby & Co. Advs.
South Africa Building
12 Menahem Begin St.
Ramat Gan 52521, Israel
972-3-753-8668

**Istanbul**
Mehmet Komurcu
Birsel Law Offices
Inonu Caddesi No. 53
Ongan Apartmani K;4 Gumussuyu
Istanbul 34439, Turkey
90-212-245-5015

**La Paz**
Ramiro Guevara
Guevara & Gutierrez S.C.
Calle 15 Calacoto
Torre Ketal, Piso 4 / Officina 2
La Paz, Bolivia
59-12-277-0808

**Lima**
Guillermo Ferrero
Estudio Ferrero Abogados
Av. Victor Andrés Belaunde 395
San Isidro, Lima 27, Peru
511-442-1320

Jose Antonio Olaechea
Estudio Olaechea
Bernardo Montegudo 201
San Isidro, Lima 27, Peru
511-264-4040

Jose Miguel Morales
Estudio Aurelio Garcia Sayan
Av. El Rosario
San Isidro, Lima 27
511-440-7341

**Lisbon**
Pedro Pais De Almeida
PACSA Law Firm
VAT PT 503 655 511
Av. da Liberdade 144 / 7 Dt
1250-146 Lisbon, Portugal
351-21-324-1600

**London**
Jonathan Armstrong
Eversheds, LLP
Senator House
85 Queen Victoria Street
London EC4V 4JL, United Kingdom
44-113-200-4658

Randal J C Barker
Genworth Financial, 80 Strand
London WC2R OGR, United Kingdom
44-207-599-1514

Anne E. Moore-Williams
310 The Whitehouse, 9 Belvedere Rd.
London SE1 8YS, United Kingdom
44-7802-756-776

**Lugano**

Lucio Velo
Velo & Associati
Piazza Riforma #5
6900 Lugano 1, Switzerland
0041-91-924-0451

**Luxembourg**

Alex Schmitt
Bonn Schmitt & Steichen
44 Rue De La Vallee
L-2661 Luxembourg
352-45-5858

**Madrid**

Calvin A. Hamilton
Monereo, Meyer & Marinel-lo
C/ Bárbara De Braganza 11, 2°
Madrid 28004, Spain
(3491) 319-9686

Clifford J. Hendel
Araoz & Rueda
Castellana 164
Madrid 28046, Spain
(3491) 319-0233

**Manila**

Efren L. Cordero
No. 44 A. Periquet Street
Las Pinas City
Metro Manila, Philippines
(632) 631-1177

**Mexico City**

Aureliano Gonzalez-Baz
Bryan Gonzalez et al.
Seneca 425 Polanco
Mexico D.F., 11560, Mexico
52 (55) 5279-3601

**Milan**

Maurizio Codurri
Frau & Partners SLA
Via C. Poerio 15
Milano 20129, Italy
39-02-764-271

Alessandro Giuliani
Gianni Origoni & Partners
Piza Belgioioso 2
20122 Milan, Italy
39-027-63741

**Montevideo**

Nicolas Jorge Herrera
Guyer and Regules
Plaza Independenica 811
11100 Montevideo, Uruguay
5982-902-1515

**Moscow**

Mads R. Loewe
DLA Piper Rudnick Gray Cary
Ulitsa Pudovkina, Dom 3, Kv. 46
Moscow 119285, Russia
7095-790-7558

William R. Spiegelberger
White & Case LLP
1155 Avenue of the Americas
New York, NY 10036

**Panama**

Alvaro J. Aguilar
PO Box 55-1110, Paitilla
Panama City 99999, Panama
(507) 263-5333

Juan Francisco Pardini
Pardini & Associates
PO Box 9654, Zone 4
Panama City, Panama
(507) 223-7222

**Paris**

Yvon Dreano
Jeantet Associés
87 Avenue Klebér
75116 Paris, France
(331) 45-05-80-15

Douglas Glucroft
Nixon Peabody LLP
437 Madison Avenue
New York, NY 10022-7001
(212) 940-3716

**Quito**

Evelyn L. Sanchez
Corral-Sanchez Abogados S.A.
Republica De El Salvador #880, 8 Avo. Piso
Quito, Equador
5932-2469-300

**Rome**

Cesare Vento
Gianni Origoni & Partners
Via Delle Quattro Fontane, 20
Rome 00184, Italy
(0039) 06-478-751

**Santiago**

Francis Lackington
Baeza, Larrain & Rozas
Av. Apoquindo 3001, Piso 13
Santiago, 7550227, Chile
(562) 335-7340

**San Jose**

Hernan Pacheco
Pacheco Coto, Attorneys at Law
PO Box 6610
San Jose 01000, Costa Rica
(506) 258-1619

**Council of Licensed Legal Consultants**

Ramon Maria Segura

**São Paulo**

Pablo M. Bentes
Machado, Meyer, Sendacz e Opice
Rua Da Consolação, 247, 3º Andar
São Paulo, Brazil 01301-903
55-11-3150-7623

**Stockholm**

Carl-Olof Erik Bouveng
Advokatfirman Lindahl HB
PO Box 14240, SE-104 40
Stockholm, Sweden
(46) 670-5800

**Toronto**

David M. Doubilet
Fasken Martineau DuMoulin, LLP
Box 20, Toronto Dominion Ctr.
Toronto M5K 1N6, Canada
(416) 865-4368

**Vancouver**

Donald R. Bell
Davis & Company
2800 Park Place, 666 Burrard St.
Vancouver BC V6C 2Z7, Canada
(604) 643-2949

**Vienna**

Christoph Kerres
Baker McKenzie-Kerres & Diwok
Schubertring 2
A-1010, Vienna, Austria
(431) 516-60-100

**Zurich**

Erich Peter Ruegg
Schumacher Baur Hurlimann
Oberstadtstrasse 7
5400 Baden, Switzerland
41-56-200-0707

Martin E. Wiebecke
Anwaltsburo Wiebecke
Kohlrainstrasse 10 Kusnacht
Zurich CH-8700, Switzerland
41-01-914-2000

---

**Western New York**

Christine A. Bonaguide
Hodgson Russ LLP
One M&T Plaza, Suite 2000
Buffalo, NY 14203
(716) 848-1325

Kathryn Bryk Friedman
51 Lancaster Avenue
Buffalo, NY 14222

**Florida**

Leslie N. Reizes
Reizes Law Firm Chartered
1177 George Bush Blvd., Suite 308
Delray Beach, FL 33483
(561) 276-2600

## Request for Contributions

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

**Oliver J. Armas**
**Richard A. Scott**


# New York International Chapter News

**Editor:**
Oliver J. Armas
Thacher Proffitt & Wood LLP
Two World Finance Center
New York, NY 10281
(212) 912-7627
E-mail: oarmas@tpwlaw.com

**Co-Editor:**
Richard A. Scott
Fraser Milner Casgrain, LLP
One Rockefeller Plaza, Suite 1528
New York, NY 10020
(212) 218-2995
E-mail: richard.scott@fmc-law.com

The *New York International Chapter News* is a publication of the International Law and Practice Section of the New York State Bar Association. Members of the Section receive this publication without charge. The views expressed in articles in the *New York International Chapter News* represent only the authors' viewpoints and not necessarily the views of the Editor or the International Law and Practice Section.


ISSN 1085-4169

International Law and Practice Section
New York State Bar Association
One Elk Street
Albany, New York 12207-1002

**ADDRESS SERVICE REQUESTED**

NON PROFIT ORG.
U.S. POSTAGE
**PAID**
ALBANY, N.Y.
PERMIT NO. 155