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New York International Chapter News

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

A Word from the Past Chair

Glenn Fox

It has been a privilege to serve as Chair of the International Section for the past year. Needless to say, the year passed by very quickly. I am very proud of all of our accomplishments as a Section over the past twelve months and thank my fellow senior officers, Thomas Pieper, Neil Quartaro, Diane O'Connell and Nancy Thevenin, as well as the entire Executive Committee for their tremendous support. I would like to briefly summarize this past year's events.

The inaugural meeting of the International Section's Latin American Council (the "Council") was held in Antigua, Guatemala in May of 2013. Since then, the Council has had two other meetings, one during the Annual Meeting in New York and another in Uruguay in March. The

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A Word from the Chair

Thomas N. Pieper

On June 1, I assumed the position of Chair of the New York State Bar Association's International Section—or short "NYSBA International." I thank my predecessor, Glenn Fox, for the true leadership he has displayed over the past 12 months. My gratitude also goes to those who have preceded both Glenn and me, and who have made the Section what it is today. On a personal note, I would like to mention Joel B. Harris and Oliver J. Armas, who have also been my mentors.

This is a critical time for our Section. Due to our growth over the years, we need to adjust our structures to facilitate continued success. This includes, first and foremost, the many Committees and Chapters we have, which distinguish our Section from other organizations.

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Inside

A Word from the Past Chair

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Council has already attracted over 40 new members to NYSBA from Latin America. The purpose of the Council is to promote principles of ethics, integrity and the rule of law throughout Latin American and the Caribbean.

During this year, the International Section became a founding member of the New York International Arbitration Center, headquartered in Manhattan. The foundation for NYIAC was in no small part due to the extended efforts of the Section and we are very happy to be a part of it.

The Section held a very successful seasonal meeting in Hanoi, Vietnam in October 2013. The meeting attracted attendees from throughout Asia and Europe. The cooperation of local lawyers and the considerable participation of the U.S. ambassador to Vietnam demonstrated how far relations have come between our two countries since they were normalized by President Clinton in 1994.

The International Section also had a wonderful joint meeting with the Israel Bar Association in February, which would not have happened without the tremendous cooperation of the New York Supreme Court and Judge Sherry Klein Heitler, Gregory Murray of the New York Court System, and Karen Milton of the Federal Courts. This group arranged for the event to take place at the New York and Federal court houses, with a special address by Attorney General Eric Schneiderman. This was followed by a joint meeting of our two bar associations in June of this year in Tel Aviv. The Section also had an extremely successful second Cross Border Summit with the Ontario Bar Association in March and was pleased to again run the International Law “Bootcamp” at the ABA Section of International Law’s Spring meeting in April.

The Section continued to strengthen the role of NYSBA with the United Nations Committee on International Trade Law (UNCITRAL). In particular, the Section provided extensive comments with respect to the micro-small- and medium-enterprises (MSMEs) project of UNCITRAL’s new Working Group I. We also worked with the ABA to provide suggestions for proposed legislation for international signature verification.

Throughout the past year one of the other signature projects of the Section was to enhance the understanding by the legal community of non-lawyer ownership of law firms. This topic was featured at both our seasonal and Annual Meetings. At the latter meeting we were addressed on this subject by President-elect William Hubbard of the ABA and President Nicholas Fluck of the U.K. Law Society (who has contributed an article on this subject to this publication).

During our Annual Meeting in January, the Section presented its Award for Distinction in International Law and Affairs to attorney Fiona Sampson of Toronto, Executive Director of the Equality Effect. Ms. Sampson has used international human rights law to help women and children across the world, notably in Sub-Saharan Africa.

I wish my successor, Thomas Pieper, all the best in the coming year. I know that he is up for the challenge and I will be there to support him in any way that I can.

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A Word from the Chair

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Reconnecting the Committees and Chapters to the Section as a whole will be a focus of my term. To that end, I have created a task force to study this issue and make recommendations.

According to its by-laws, our Section "shall in the field of public and private international and transnational law and practice (1) plan and conduct continuing legal education programs; (2) collect, publish and distribute educational and professional materials; (3) promote interest, activity and research; (4) formulate professional opinion; (5) study and comment upon the impact of foreign, federal and state laws and treaties; (6) develop and recommend policy and improvements in the law; (7) serve as a resource to business, civic and governmental organizations; (8) enhance the skills and competency of New York lawyers; and (9) undertake all such other activities as may be authorized from time to time by the Association and the Executive Committee of the Section for the purpose of accomplishing the foregoing." Exercising the latter right, the Section's Executive Committee adopted three long-range Missions: (i) Custodian of New York Law as an International Standard, (ii) Guardian of the New York Convention on the Enforcement and Recognition of Arbitral Awards and the international arbitral process, and (iii) Monitor of International Law Development at the United Nations. These Missions are non-exclusive and I envisage a review in order to identify additional Missions for the future.

As the Section's Chair, I want to encourage all members to make the most of their membership by actively participating in Section activities and taking advantage of the valuable benefits and opportunities that membership provides. This starts with our many meetings:

- One of my first official acts as Chair was to attend a meeting of the Latin American Council—akin to a "super-chapter" within the Section, with members in virtually every country in Latin America promoting the rule of law—in New York on June 12.
- I also had the honor of speaking at our Regional Meeting in Tel Aviv, Israel on June 25-26, 2014, which provided some 120 participants the opportunity to learn from each other and to network.
- I am writing these lines after meeting with the local organizing committee for our Seasonal Meeting in Vienna, Austria, to take place October 15-17, 2014. I promise it will be a great event—so please mark your calendars. Sponsorship opportunities are still available; contact me if you are interested.

And the series of events will continue in 2015:

- Our Annual Meeting at the New York Hilton Midtown Hotel in New York City in January 2015.
- Our Regional Meeting in Zurich, Switzerland on March 12-13, 2015.
- Global Law Week 2015, featuring the Fundamentals of International Practice (dates to be announced).
- Our Seasonal Meeting in São Paulo, Brazil in October/November 2015 (exact dates to be announced).

In addition, each Committee and Chapter will be holding their own meetings—a great opportunity for you to participate. I look forward to welcoming you in person at one of our events.

Again, I invite all of you to fully participate in all of the activities offered by NYSBA International and its Committees and Chapters. This is *your* Section—so please get involved!

With my best personal regards,
Thomas N. Pieper
Chair, NYSBA International
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A Word from the Editor

Dunniela Kaufman

As we close out another year and welcome a new Chair, we review the past year with the outgoing Chair, Glenn Fox. I commend Glenn on a very active, and proactive, year. I hope that this edition of the *Chapter News* reflects all of the activity and growth that our Section, and individual Chapters, have experienced. While I always find the country-specific legal contributions interesting, this edition also contains a lot of content from various programs that were held over the course of the year, as well as reports from some of our committees. In addition, a special thank you to John F. Zulack who has taken the time to provide us with a very thorough and useful review of Robert L. Haig's book on commercial litigation in New York State Courts.

It is always my pleasure to connect our members through the *Chapter News*, and I hope you enjoy this edition. In that regard, the *Chapter News* is only as good as the contributions that we receive, so please consider contributing to the next edition. We are currently accepting contributions for our next edition. I look forward to hearing from you.

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Legal and Investment Updates from Around the World

Non-Lawyer Ownership: The View from England and Wales

It is now two years since the first Alternative Business Structures (ABS) were licensed. The Law Society's regulatory arm, the Solicitors Regulation Authority (SRA), has now issued over 250 licenses making "non-lawyer ownership" a reality in England and Wales.

As President, I have spoken to my counterparts around the world about the English and Welsh experience of ABS. We were not the first jurisdiction to go down this route, and we will not be the last, but we have certainly received a lot of international attention.

Our story starts over a decade ago and it is worth recapping to understand how we reached this point.

In 2001, the Office of Fair Trading recommended that unjustified restriction on competition in the legal services market should be removed. A subsequent government report concluded that the then framework was "outdated, inflexible, over-complex and insufficiently accountable or transparent." A later independent review by Sir David Clementi recommended, among other things, the establishment of ABS that could see different types of lawyers and non-lawyers managing and owning legal practices. The following legislative process resulted in the Legal Services Act (2007).

The Legal Services Act changed the regulatory landscape in England and Wales. It introduced a new oversight regulator, the Legal Services Board, and bodies such as the Law Society and Bar Council created independent structures to deal with regulation and discipline. We lobbied hard and worked with government during this time to make sure that there was a robust and level regulatory playing field. When it came to ABS, we made sure that non-lawyers would be regulated to the same high standards that solicitors are. We could do this thanks to the introduction of entity-based regulation.

Entity-based regulation means our regulatory system does not only target solicitors, but also the structure in which they practise. The SRA regulates and authorises non-solicitors working in authorised legal service providers. If you are a body which provides, as any part of your services, reserved legal activities, you need to be authorised and regulated to exactly the same high-standards and robust framework as a firm comprised solely of solicitors—including privilege, financial and professional compliance. Both the SRA and the Solicitors Disciplinary Tribunal have power to impose sanctions on non-solicitor managers and employees of any type of legal practices.

So who are the ABS? The 250 ABS licensed by the SRA vary widely from large new entrants to the legal market, to existing firms tying up with other service providers such as wealth management firms, or firms seeking external investment from private equity companies and firms wishing to promote non-lawyers to partnership level.

I have spoken to Law Society members about why they chose to become an ABS. Some want to bring external business expertise into the partnership to allow solicitors to focus on legal services and leave the management to those better suited. Others want to promote to partnership a non-lawyer who has been with the firm for years such as the office manager or IT director. Some want to join up with other professions to offer a seamless service to clients. Some want to raise external capital to grow their firm. Everyone has a different story to tell.

It is still early to assess the impact on the legal services market but the signs are positive. The Legal Services Board recently published an initial report and concluded that ABS were associated with more frequent reports of new innovations when compared to other providers regulated by the SRA. In addition, turnover per fee-earner at ABS is on average higher than at legal disciplinary practices (LDPs) and other law firms. The review also reported that ABS were found to be better at resolving customer complaints and, critically, they make greater use of technology to deliver legal services.

Of course, none of these individual elements: innovation, higher turnover, customer service or technology are limited to ABS. More traditionally structured firms can embrace and achieve one or all of them, but the initial evidence is that ABS can be one efficient way to do so.

The development of integrated services (legal and bank, funeral and probate, barristers and solicitors, for example) offers solicitors' clients the opportunity to shop from a single provider, perhaps one with an established presence locally—this helps businesses reap economies of scale, potentially helping to bring down their costs. This is particularly relevant in the global context of economic downturn. But none of this is revolutionary. Today, people shop smarter and differently from before. They expect to be able to shop around for the best value and most convenient service for them.

Traditionally structured law firms and ABS both provide an attractive package for businesses and clients looking for lawyers. In combination they showcase all that is best about the English and Welsh legal services and solicitors. The fact is foreign firms are starting to come to England and Wales to take advantage of the business models offered by our jurisdiction and the new channels to market. They are confident in the regulation we offer and the many ways in which they can structure their businesses to best serve the changing needs of their clients, which, after all, is what law firms exist for.

We believe the continued innovation of legal practice and regulation allows law firms in England and Wales a competitive advantage over jurisdictions with more conservative approaches, giving firms access to outside capital and business expertise in the partnership.

The UK legal system is one of the most traditional in the world, but tradition and innovation are not exclusive. ABS are just a vehicle that allow law firms to innovate in new ways. The debate around external involvement in law firms across the world will not go away and therefore we have a duty to constantly consider the status quo, given the importance of maintaining an independent, ethical, legal profession.

The Law Society has long been in favour of choice, open markets and competition. We believe it is good for solicitors and clients. But there must be a caveat—any alternative to the traditional legal model is subject to the same requirements in order to protect the interest of consumers. The legal profession is robustly regulated, and the UK is a global leader in selling legal services to the world. We have got here by providing reliable, high quality services and it is in everyone's interests that this standard is maintained.

The UK consumer also has the security of the Office of Fair Trading (OFT). The OFT is the UK's consumer and competition authority. It was established by statute in 1973 and its mission is to make markets work well for consumers. It promotes and protects consumer interests throughout the UK, while ensuring that businesses are fair and competitive.

In a 2009 independent review commissioned by the Law Society, Lord Hunt said, "Successful ABS will not be those firms that look and behave least like traditional law firms; they will be those that demonstrate the most admirable qualities of current practices."

The Law Society echoes his view as we look to adapt to and help shape the future of legal services.

Nicholas Fluck,
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How Can Mediation Rather Than Arbitration Bridge the Gap Between Common Law and Civil Law Jurisdictions?

Arbitration plainly has much to commend it over litigation. It is, for example, private and allows for party control over procedure and choice of arbitrator.

However, it would be a mistake to believe that having decided to arbitrate, or being compelled to do so by the existence of an arbitration clause in a contract, the parties need not first attempt mediation.

It was Abraham Lincoln who said:

> Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.

Lincoln was speaking of negotiation rather than mediation but he would surely have agreed that mediation as a concept is a no-brainer. Mediation can be set up at short notice, the parties choose the mediator as they may an arbitrator, and the process is private as well as informal.

Nothing said or done in the mediation can (with some limited exceptions on grounds of public policy) be referred to in open court or in a subsequent arbitration—the parties will sign a Mediation Agreement to such effect.

Costs are contained. The process can be confrontational or non-confrontational, involving joint and caucus sessions or merely caucus sessions alone.

If the parties wish to continue with their commercial relationship, then plainly mediation is more likely than litigation or arbitration to assist them to do so.

Mediation produces an enforceable outcome. Both sides can reach resolution without the ordeal of cross-examination, or the ignominy of the public damnation of one of them.

Like arbitration, mediation can be held in any country and in suitable locations of the parties' or mediator's choosing.

Mediation may be attempted at any time and should always be considered as an add-on to the arbitration process and, preferably, long before arbitration is actively embarked upon.

It is indeed the aim of the EU in its Directive 2008/52 that cross-border civil and commercial disputes should be subject to mediation and that there should be an EU-wide harmonisation of dispute resolution through mediation rather than litigation.

Since 2011, in England, a mediation agreement reached in a cross-border mediation can be made enforceable by a fast track procedure under CPR Part 78.24. A judge will consider a simple application on paper and without a hearing, and order that the mediation agreement is enforceable as a contract in England.

Whilst the basic format of mediation is similar in different countries, the approach to mediation may of course differ quite markedly even *within* different countries.

In England, we have mediation providers, most notably perhaps CEDR, and they may be regarded as the *conventional* providers. They also tend to be far more expensive than freelance mediators, as the provider takes a cut of the fees charged.

Quite often, the most effective and accomplished mediators in England are freelance mediators whose work is generated based on reputation alone. Their costs are usually much lower than the costs of those provided by organisations such as CEDR.

Ten years ago, I trained at London's School of Psychotherapy & Counselling (or "SPC"), which is accredited as a mediation training organisation, just as CEDR or JAMS are accredited.

SPC graduates are trained by a barrister and a psychologist and psychotherapists to mediate domestic and international commercial disputes.

The reason why their skills can be adapted to almost any international dispute is that they are trained to do the very thing that would be anathema to most lawyers—that is, to put the *legal* issues in the case second and before something far more significant.

So what is that significant feature?

It is the thing that drives almost all disputes between human beings and groups or entities of human beings. In one word—emotion.

Think of the average corporate Claimant and how you would describe the demeanour of its Directors, or of the client, if a human being, and how you would describe or observe the demeanour of that client?

Aggrieved?

Angry?

Vengeful?

Wounded?

Offended?

Insulted?

Outraged?

Each of these descriptions is a description of a human reaction, a human emotion or combination of emotions.

Now think of the average Defendant and its or his or her likely state of mind:

Provoked?

Embarrassed?

Ashamed?

Threatened?

Guilty?

It is in fact almost impossible to think of a dispute, domestic or international, in which there are not strong human emotions involved—and very often strong emotions on both sides.

Litigation and arbitration based on the common law model of confrontation can thus be seen as dispute resolution devices that fuel and galvanise the emotions underpinning disputes, rather than attempt to manage and assuage them in some different way.

These models both end with a determination in which there is an ostensible loser and a winner—but how many winners feel fully vindicated and how many do not end up out of pocket due to the burden of legal expenses?

There are, of course, other costs to both litigation and arbitration to be measured, even for the ostensible winner, in terms of loss of management time, damage to human relations and to mental and physical health.

If you are facing an international arbitration and wondering how to bridge the gap between a civil law contestant on one side and a common law contestant on the other, then surely Psychotherapeutic Mediation engages with the very thing that such disputants have in common—namely their emotional reaction to each other and to the dispute in which they are engaged.

So how is this achieved?

From the start of the mediation, the parties are seen not merely as parties with legal rights and duties, but primarily as human beings or corporate groups or entities of human beings, with their comparative quotients of anger and offence and embarrassment and guilt.

It is these factors that prey on and preoccupy the human mind and so it is these factors that stop people thinking rationally and pragmatically in terms of finding some way to settle their disagreement.

The mediation day is spent identifying and unlocking the emotional content of the dispute—for example, an angry litigant is encouraged to be angry; a guilty litigant is confidentially encouraged to share the burden of his thoughts.

Once the emotional elements have been identified and articulated and laid bare, it is a statistical fact that parties are then—but *only* then—far more likely to consider a rational and pragmatic approach to the settlement of their differences and, ultimately, to embrace some workable compromise.

So what is the role of the law in this process? Some psychotherapeutic purists might argue that it has little or no role at all. But I disagree. Yet the law is not the *paramount* consideration.

A mediator may ask the parties questions designed to identify and lay bare their respective emotions. These questions may well have little relevance in strict *legal* terms—much to the consternation or even the irritation of the lawyers in the case.

Although not paramount, the law IS relevant as a backdrop. The legal issues in the case are issues, albeit not the ONLY issues that will be explored.

In the international context, the gap created by differing legal systems has to be bridged. A claimant from a Civil Law jurisdiction will have the same emotional make-up as a claimant from a common law jurisdiction. If there is a knowledge gap in terms of law, so far as the mediator is concerned, it will be made up by the parties' Position Statements lodged in advance of the mediation.

The mediator does not have to decide anything and so the legal background is just that—a background. An English psychotherapeutic mediator should be able to mediate a French, or German, or Russian, or American dispute. What is far *more* significant than the legal principles that govern the dispute is how to get the parties to move from dispute mode to solution mode.

So before costs are incurred in taking a dispute through the process of arbitration, and especially if that process may strain to accommodate the differences in the civil and common law traditions, all lawyers should fully consider with their clients a day of mediation.

Arbitration may bridge national differences in international disputes, but mediation can do the same thing before the high costs of arbitration are incurred.

This subject matter was part of a program delivered at the NYSBA's Spring meeting in Paris, France, on March 7th 2014.

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Better Late Than Never: The Start Up in Italy

For many years Italy was not considered to be at the forefront of innovation and inducement of new business opportunities; therefore, many young Italians with brilliant ideas were forced to leave the Country to pursue their dreams. Fortunately, since the former Prime Minister Mario Monti began to enact laws to stimulate the development of the Country's economy, this negative trend has changed. Just a few months after his nomination, on January 24th 2012, Mr. Monti issued a Decree Law named "Provisions for the Development of Infrastructures and the Competitiveness" ("Disposizioni urgenti per la concorrenza, lo sviluppo delle infrastrutture e la competitività"), which contained a set of urgent measures to promote the economic growth and competitiveness of Italian enterprises. Article 3 of this Decree introduced a new corporate form into the Italian legal system, called "Società a responsabilità limitata semplificata" (*Simplified limited liability company*) under new article 2463-bis of the Italian Civil Code. This provision, titled "Accesso dei giovani alla costituzione di societa' a responsabilita' limitata" (*Access of young people to the establishment of simplified limited liability company*), allows people under 35 to incorporate a company with a share capital of not less than 1 euro (the minimum share capital for common Limited Liability Companies is 10.000,00 Euros). These companies are incorporated under standard articles of incorporation issued by the Ministry of Justice and are exempted from the notary fees and duties for the inscription at the Chamber of Commerce. According to the new provision, when the members reach their thirty-fifth birthday, the company is transformed into a Limited Liability Company.

Subsequently, Mr. Monti's government, on June 22nd 2012, enacted a new decree n. 83 called "Decreto Sviluppo" (*i.e., Development Decree-Law*), introducing another corporate form that allows persons over 35 to incorporate a company more easily. The new corporate form, called "Società a responsabilità limitata a capitale ridotto" (*Limited liability company with reduced capital*), was governed along the lines of the aforesaid simplified limited liability company with few significant differences: the power of management could be conferred to non-members, the articles of incorporation could not adhere to the government standards and the company could not benefit from any fees waiver or tax exemption connected with its incorporation. Both company forms mentioned above had a further constraint; members' contributions had to be made in cash.

The conversion law of the Development Decree (Law n. 134/2012) introduced a further benefit for young people who wanted to incorporate a limited liability company with reduced capital: the Minister of Economy, in order to facilitate access to credit for young entrepreneurs, promoted an agreement with the Italian Banking Association to provide credit at favourable conditions.

The coexistence of the two forms of company mentioned above did not last for a long time. Decree Law n. 72/2013 removed the limited liability company with reduced capital from the Italian company law, consequently entitling young people over 35 to incorporate a simplified limited liability company.

In April 2012, while the aforementioned reforms of the corporate law were being introduced, Mr. Passera, Minister of Economic Development in Mr. Monti's Cabinet, entrusted a group of experts in innovation to issue a report on the current state of start-ups and possible future developments (the "Task Force"). The Task Force began its work under the slogan: *Restart, Italia!*. The Task Force defined the concept of innovative start up as a company that

i. is not listed on the stock exchange;

ii. is owned or controlled (51% at least) by individuals;

iii. has been running for no longer than 48 months;

iv. is having a turnover not exceeding 5 million Euros;

v. does not distribute dividends;

vi. does not use cash; and

vii. has as a corporate purpose aimed at the development of goods and services having a high technological value.

According to the Task Force, the most important issues that needed to be addressed were taxation, employment, access to credit and bureaucratic streamlining.

A few months after the publication of the *Restart, Italia!* report, the Italian Government, prompted by the excellent work done by the Task Force, issued additional provisions to promote the establishment of start-ups in Italy, namely Law Decree n. 179/2012 "Ulteriori misure urgenti per la crescita del Paese" (*Further urgent measures for Italy's economic growth*), also known as "Decreto Crescita 2.0" (*Development Decree 2.0*), converted, with amendments, into law n. 221/2012 and subsequently amended by Labour Law Decree (Decree Law n 76/2013). Articles 25 to 32 of the Decree contain specific provisions for start-ups. The first article of the Decree clearly defines the scope of application of the provisions, underlining that they refer to a business linked to innovation and technology fulfilling the following requirements:

a. established for no longer than 48 months;

b. principal place of activity and interests in Italy;

c. no turnover or a turnover not exceeding 5 million €;

d. does not distribute dividends;

e. scope of activity must consist of innovative goods and services of high technological value; and

f. does not originate from a merger, demerger or disinvestment process.

Moreover, a new business may be defined as an innovative start-up if:

i. 15% of its costs are related to Research & Development;

ii. at least one third of the team is made up of people who either hold a PhD or are PhD candidates at an Italian or foreign University or have conducted research work for at least three years;

iii. at least two-thirds of the team is made up of people holding a Master's degree; or

iv. it is the owner or the licensee of a patent or registered software.

The start-ups having the aforementioned requirements must also register in the special register of the Chamber of Commerce and, moreover, they are exempted from the payment of registration fees.

The actual advantage that the start-ups can benefit from are related to employment terms, taxation and access to credit. The start-ups, in fact, can hire personnel through fix-time contracts, which last for at least 6 months and no longer than 36 months. During this period, contracts can be renewed more than once. After three years the contract can be further renewed for an additional year; although the total duration of the contract must not exceed 48 months. After this period, the employee must be employed under a permanent contract. The new entrepreneurs may remunerate their employees through stock options and the providers of external services under a "work for equity" scheme.

Regarding taxation, the Italian Government introduced different benefits for corporate and personal investments in start-ups for the period between 2013 and 2016. Art. 29 of the Decree Law n.179/2012 allows individuals and companies, investing directly or indirectly in start-ups, to deduct from their taxable income respectively 19% and 20% of the amount invested in start-ups, provided that the investment is lower than € 500.000 for individuals and € 1.800.000 for companies and that the investment will be maintained for at least two years.

One of the most important novelties introduced by Law 221/2012 is the possibility for start-ups to raise venture capital via an online portal operated by professional managers registered in a special register maintained by CONSOB (Italian Securities and stock exchange commission) or by bankers. On June 2013 CONSOB published the "Regolamento sulla raccolta di capitali di rischio da parte di start-up innovative tramite portali on-line" (*Regulations on the collection of risk capital by innovative start-ups through online portals*) in order to provide guidelines for equity crowd funding. Italy is therefore the only European nation to have a uniform set of rules on this matter. A few months after the CONSOB Regulation was issued, several platforms became available for this type of fund raising.

The last but not least incentive for start-ups to be reviewed is the fast-track, simplified and free of charge access to the "Fondo Centrale di Garanzia," the Government fund supporting access to credit thought guarantees on bank loans. The guarantee covers up to 80% of the loan provided by the bank to a start-up, with a maximum of 2,5 million Euros. Moreover, the Italian Trade Promotion Agency (ICE) supports start-ups looking to international markets by providing a 30% reduction on its assistance services, which include legal, fiscal, corporate and real estate issues.

As evident from all of the above, the Italian government is focused on inducing and supporting Italian start-ups and this positive trend is being supported by the new Italian Prime Minister, Mr. Matteo Renzi, as one of his first official visits was to one of Italy's most prominent incubators.

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Connecting the Dots: The Proposal for a New EC Insurance Mediation Directive

The development of the internal market in insurance services has notably been facilitated by European Parliament Directive 202/92/EC and by the Council of December 9, 2002 on insurance mediation (collectively the "Regulations"). This cornerstone has proven to be effective; however, several facts call for a renewal. Although quite complete, the Regulations appear to require certain amendments. Initially, The Directive was essentially made up of general principles as it was destined to be a tool of harmonization of the law. But, according to the Commission, it was, in fact, applied in extremely different manners in all 27 Member States. Secondly, the European Union's recent economic hardships has only deepened the importance of efficient protection for financial sectors, notably that of insurance. The combination of these elements fuelled a growing desire for its reform and in this context the Proposal for a Reformed Directive was communicated on the 3rd of July 2012 (the "Proposal"). To date, we are waiting for the European Union to finalize and promulgate the Proposal. The several improvements contained in the Proposal are detailed here below.

Extending the Scope of Mediation to All the Distribution Channels

Firstly, the concept of activity of insurance mediation is redefined in the Proposal as "*the activities of advising on, proposing or carrying out other work preparatory to the conclusion of contracts of insurance, concluding such contracts or assisting in the administration and performance of such contracts, in particular in the event of a claim, and the activity of professional management of claims and loss adjusting*." In an effort to harmonize the different distribution channels, these activities are also considered to be insurance mediation if they are practiced by insurance companies without the interference of an insurance intermediary.

The Commission considered extending the scope of the Directive on the basis that different types of persons or institutions, such as traditional insurance intermediaries (agents, brokers), bank-insurance traders, travel agencies, car rental companies or even insurance companies that themselves distribute insurance products, and their clients must benefit from the same level of protection regardless of the distribution channel from which the insurance product is bought. This revised definition also brings numerous changes, notably on the question of the contours of regulated activity and the obligation to register insurance intermediaries.

Regarding the contours of the activity of insurance mediation, the analysis of the Proposal shows that the notion of "*introducing*" insurance operations is erased and replaced by the "*activity of professional management of claims and loss adjusting*." Although this would not necessarily bring great change to the contours of the regulated activity that is distributing insurance products, it marks a turning point from the concept of "*the introduction of insurance operation*," a notion found in the French Insurance Code since 1976.

Moreover, in the Proposal the activity of insurance mediation includes the sale of insurance contracts by insurance companies without the interference of an intermediary (art. 2). The contractual obligations of the intermediaries should thus lie directly with the insurer, allowing a similar level of protection for policyholders, whether they directly subscribed to the insurance or not. Another novelty is that claim managers' activity, defined as "*the activity of professional management of claims and loss adjusting*" (art. 2), is considered by the Proposal as insurance intermediation activity, hence subject to the directive's provisions. What is more, the Proposal considers insurance aggregators to be subject to insurance mediation's regulations.

Regarding registration conditions, the Directive required insurance intermediaries to be registered insofar as they practiced an activity for which they were remunerated. This obligation meant that all interested parties could easily check whether the intermediary was entitled to offer an insurance product. Although this obligation was meant to remain, the Proposal brings simplified modes of registration for some of the actors.

According to article 4 of the Proposal, there is no obligation of registration for claims by administrators or intermediary insurers who practice insurance mediation as an accessory, insofar as the practice meets certain requirements: (i) insurance mediation is not the main professional activity of the intermediary, (ii) the intermediary only acts as such for insurance products, when it is completing a product or service and (iii) the relevant insurance products do not cover life insurance or civil liability, except in cases of accessory coverage. Albeit not bound by the obligation of registration, the intermediaries must communicate a declaration of their identity, address, and professional activities to the relevant authority of their Member State of origin.

Mitigating Conflicts of Interest

In order to mitigate conflicts of interest, the Proposal requires the policyholder to communicate various pieces of information. Essentially seeking to strengthen the pre-existing contractual relationships, the Commission intends for clients to receive, in advance, clear information on the status and remuneration of the person selling the insurance product.

Firstly, as far as the status of the person selling insurance products is concerned, the Directive requires the communication of various pieces of information by the intermediary regarding the possible ties with the insurance company and notably the existence of a capitalistic tie. It was feared that this tie would influence the choice of the proposed product. The Proposal extends the amount of information that must be communicated. The intermediary must specifically state whether he represents the client or whether he is acting for and on behalf of the insurance company (article 17). The alternative wording can raise questions for the commissioned intermediaries of the insured and the insurer.

Secondly, there are important changes on the subject of remuneration. Indeed, according to article 17:

- the intermediary must communicate the nature of the remuneration received in relation to the insurance contract; whether it works on the basis of a fee (that is, the remuneration paid directly by the customer), or on the basis of a commission of any kind (that is, the remuneration included in the insurance premium), or on the basis of a combination of both;
- in the cases in which the intermediary will receive a fee or a commission of any kind, he must communicate the full amount of the remuneration concerning the insurance products being offered or considered. If the precise amount is not capable of being given, he must communicate a basis for calculation (it being noted that a exemption exists for non-life insurance for a transitional period of 5 years);
- in the cases in which the amount of the commission is based on the achievement of agreed targets or thresholds relating to the business placed by the intermediary with an insurer, the intermediary must communicate the targets or thresholds as well as the amounts payable on their achievement.

Article 17 also requires the insurance undertaking or insurance intermediary to inform the customer on the nature and the basis of calculation of any variable remuneration received by any of its employees for distributing and managing the insurance product in question. Furthermore, comprehensive information must be provided for the payments taking place after the conclusion of the contract. The delivery of this information and the new requirements of transparency are designed to mitigate and prevent conflicts of interest, especially regarding "insurance investment product" (i.e., unit-linked life insurance product), which has special provisions. In a strong response, agents, brokers and insurers, through their professional federations, declared that this duty to provide information was not an appropriate measure. It will be interesting to see if these defensive actions are successful and if this transparency requirement will be maintained in the final version of the Directive.

Strengthening the Suitability and Objectivity of the Advice Given

The Proposal also addresses the obligations regarding advice. In article 25 of the Proposal, obligations concerning the insurance investment products are set out. When providing advice, the insurance intermediary or insurance undertaking must obtain the necessary information regarding the customer's or potential customer's knowledge and experience in the field relevant to the specific type of product or service, as well as regarding the customer's or potential customer's financial situation and his investment objectives. It is on this basis that the insurance intermediary or insurance undertaking will recommend the insurance products that are suitable for the customer or potential customer.

Strengthening the Professional Qualifications of Sellers of Insurance Product

One of the aims of the Directive was to guarantee a high level of professionalism and competence amongst the various actors in insurance mediation. The Proposal leaves to the Member States the responsibility of determining the appropriate knowledge and ability required by the actors to efficiently complete their tasks and adequately perform their duties. It is, however, required that the actors demonstrate appropriate professional experience relevant to the complexity of the products they are mediating (art. 8). Member States may adjust the required conditions with regard to knowledge and ability in line with the particular activity of insurance or reinsurance mediation and products mediated, particularly if the principal professional activity of the intermediary is not insurance mediation.

However, in order for these qualifications not to become obsolete, the Proposal is considering a new obligation to update knowledge. Article 8 of the Proposal falls within the scope of Member States' competence, as they must ensure that insurance and reinsurance intermediaries and members of staff of insurance undertakings carrying out insurance mediation activities update their knowledge and ability through continuing professional development, maintaining an adequate level of performance.

Enhancing the Harmonizing of Administrative Sanctions and Measures Applicable in the Case of a Violation of the Essential Dispositions of the Directive

The Commission noted a lack of harmonization between the applicable sanctions in the various countries of the Union. It considers that, in the spirit of better competition between operators of different Member States, Member States should be required to provide for administrative sanctions and measures which are effective, proportionate and dissuasive in order to ensure that the operators are subject to similar treatment across the European Union (recital 43). To this end, the Proposal fixes various measures meant to harmonize the applicable sanctions.

These various sanctions are a framework that must be respected by the Member States. The framework is as follows:

- the Member States are required to ensure that effective, proportionate and dissuasive administrative sanctions and measures are established in case of a breach of national provisions regulating insurance mediation (art. 26);
- a publication by the competent authority of any sanction or measure that has been imposed for breaches, including information on the type and nature of the breach and the identity of persons responsible for it (unless the disclosure seriously jeopardizes insurance and reinsurance markets, which seems quite restrictive), will henceforth be required (art. 27);
- some of the breaches that must be penalized as well as some of the applicable administrative sanctions are specified, notably withdrawal of registration, bans against persons responsible for the exercise of management functions, and pecuniary sanctions (up to twice as much as the benefit derived from the breach if that benefit can be determined) (art. 28);
- the factors to take into account in imposing sanctions (notably benefits derived from the breach, losses caused to third parties, and the level of cooperation of the responsible person) are more explicitly developed (art. 29).

Simplifying and Approximating the Procedure for Cross-body Entry to the Insurance Markets Across the EU

Lastly, the Commission notes that despite the existing single passport systems, the European insurance market is very fragmented. In order to facilitate cross-border business and enhance transparency for consumers, the Proposal provides that Member States should ensure publication of the general good rules applicable in their territories, and that a single electronic register and information on all Member States' general good rules applicable to insurance and reinsurance mediation should be made publicly available (art. 3).The Proposal is undoubtedly an effort from the European Legislator to harmonize the rules governing insurance mediation within the European Union in the view of bringing fluidity between professional insurance intermediaries and consumers.

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Amendment to the Argentine Income Tax Law. Taxation of Proceeds Resulting from the Transfer of Shares and Quotas and Dividends

Effective September 2013, as a result of Law No. 26,893 (the "Law"), which amended the Argentine Income Tax Law, any proceeds resulting from the sale (transfer, disposal and/or exchange) of shares, quotas and ownership interest, by: (i) Resident individuals and undivided estates; (ii) Non-resident individuals and undivided estates; and (iii) Non-resident entities, is subject to Income Tax. The special applicable rate in the case of resident individuals and undivided estates is 15%.

Also, the Law includes a specific provision imposing a withholding and payment obligation for the buyer in case of sales or transfer between non-resident parties.

Moreover, the Law also introduced significant changes to the Income Tax Law in connection with taxation of dividends, which shall be effective for all dividends payable since September 2013. Prior to the enactment of the Law, dividends were not subject to any Income Tax withholding. Now, as a consequence of the Law, a 10% Income Tax withholding is applicable, as a "sole and definitive tax."

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Minimum Mandatory Deposit Requirements for Direct Investments and Financial Loans. Recent Flexibilization by the Argentine Central Bank's Regulations

Foreign exchange regulations in force require local companies who receive funds of foreign origin (either by means of a foreign direct investment or a financial loan) to demonstrate, within a specific term, that the resulting capitalization of such funds has been effectively registered before the Public Registry of Commerce. A recent Argentine Central Bank communication has extended the term to demonstrate such registration, aligning foreign exchange regulations with certain practical aspects related to the registration of capital increases.

1. Introduction

Foreign companies who bring funds into Argentina to carry out capital contributions in an Argentine company (as direct investments or by granting financial loans), are required to make, a "mandatory deposit" (*encaje*) in a local financial institution. Such mandatory deposit is to be made in U.S. funds for a calendar year and is to consist of a non-remunerated mandatory deposit that amounts to 30% of the funds brought into the country.

2. Capital Increase: Corporate Resolutions and Registration Thereof Before the General Inspection of Corporations

Once the local company has received the funds, such amounts shall be capitalized in the company. This will require the local company to hold a Shareholders' Meeting (in the case of a Corporation— *Sociedad Anónima*) or a Quotaholders' Meeting (in the case of a Limited Liability Company— *Sociedad de Responsabilidad Limitada*), to resolve to capitalize the investment or loan (converted into Argentine Pesos at the applicable exchange rate) and, consequently, increase the capital of the company and amend its bylaws/articles of association accordingly.

Such corporate capital increase is valid and binding *vis-à-vis* the company and its Shareholders as of the date of the meeting that resolves upon the corporate capital increase.

However, for such capital increase to have effect regarding third parties,[1] it is necessary to register such capitalization before the General Inspection of Corporations (*Inspección General de Justicia*—"GIC"), which is the administrative agency in charge of the Public Registry of Commerce for the City of Buenos Aires.

Filing for registration of a capital increase will generally require, among other documents, the filing of a certificate, signed jointly by the legal representative of the local company and a certified public accountant, evidencing the inflow of the total amount of the capital contribution in cash.

3. Mandatory Deposit. Exception

As an exception to the 30% mandatory deposit to foreign remittances of investments and loans, Argentine Central Bank (the "ACB") regulations require that, within a certain time frame, the local company which has received the funds demonstrates the final registration of the capital increase before the GIC.

If this evidence is not provided in due time, the recipient is required to deposit in the local bank (*banco de seguimiento*—which has received the funds) an amount equal to the mandatory deposit (*i.e.*, 30% of the amount remitted) until the registration of the capital increase is finally achieved.

Prior to January 2014, under Communication "A" 4762, the local company had a term of 240 calendar days (as from its date of filing) to demonstrate such registration before the GIC. This term could be extended for another 180 calendar days on a per case basis, with justification. Upon expiration of this term, the local company was required to make the deposit within the following 10 business days.

This system proved cumbersome, as it did not take into account certain day-to-day aspects of the GIC, mainly as follows:

The GIC provides for two distinct types of filing: (i) a normal filing; and (ii) an expedited filing. Under current GIC regulations, the expedited filing (which has an increased associated fee) shortens the term for the GIC to analyse and review the filings. However, the GIC *does not allow for an expedited filing* for registration of capital increases (which require both a legal and accounting analysis by the GIC's inspectors). As a result, the internal review process by the GIC normally takes several months.

In addition, it is not uncommon that the GIC makes observations and/or requests for additional information/documentation regarding the origin of the funds that are being capitalized. This generally requires the preparation of additional accountant's certificates, attorney's explanations and clarifications, informal meetings with the inspectors in charge of the filings, etc., which may significantly extend the time frame for the GIC to review and finally approve the registration.

In this context, in many cases, the 240-calendar day term (and its 180-calendar day extension) required by the ACB (to avoid making the mandatory deposit) was not met. As stated above, this forced local companies to immediately make a large transfer of funds to the relevant bank (*i.e.*, 30% of the funds remitted). This situation was especially difficult in cases where the original capitalized funds had already been used by the local company (for instance, to purchase land, cover a negative net worth, repay a loan, etc.).

4. The Argentine Central Bank Responded

On January 29, 2013, the ACB issued Communication "A" 5532 (the "Communication"), which amended Communication "A" 4762. Specifically, the Communication restates and amends the rules regarding the application of the exceptions to the mandatory 30% deposit.

The Communication addresses the issues arising from the tight time frame for registering capital increases before the GIC, by extending to 540 days (from 240 days) the term to demonstrate the final capitalization of the funds that have entered Argentina by way of direct investments or loans in local companies.

Under the Communication, once the 540-day term has expired, the mandatory deposit must be made within 10 days following the date on which the company becomes aware that the contribution has not been accepted or has been rejected and/or suspended.

Finally, the Communication provides that any deposits made in U.S. dollars that are released by a local company (whether due to the expiration or to any other reason specified in the regulations) must be reimbursed by the ACB to the relevant bank, in Argentine Pesos (and not in the original currency), which then must give to the local company the amount of Argentine Pesos according to the prevailing exchange rate.

5. Conclusion

In conclusion, the newly adopted changes in the mandatory deposit exception procedure by the ACB have aligned and made its provisions consistent with the practical, day-to-day administrative aspects of the registration of capital increases by local companies before the GIC, favoring compliance by local companies with ACB regulations by granting more realistic terms for registration of capital increases before the GIC.

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Endnote

1. In this regard, Section 12 of the ACL provides that "Unregistered amendments (…): Inappropriately registered amendments are binding on the partners who approved them. They cannot be invoked against third parties who, nevertheless, can invoke them against the company and the partners, except in the case of stock companies and limited liability companies."

* * *

The Brazilian Clean Company Act: Good News or No News?

Brazil is divided: while the Brazilians in the streets are celebrating the entry into force of the new "Clean Company Act" (the "Act"), scholars and practitioners remain concerned about its effectiveness and content.

The Act is undoubtedly a victory, in light of the demonstrations in Brazil in recent months about a great variety of issues, all of which had one thing in common—governmental corruption. According to Transparency International, a non-governmental organization that monitors and publicizes corporate and political corruption in international development, Brazil is considered a highly corrupt country, ranking 72nd on the list of the Corruption Perceptions Index 2013. It is clear that corruption is at the heart of Brazil's dreadful quality of education, health care, transportation, infrastructure and everything else.

The Act will try to reduce the degree of corruption in Brazil and will punish legal entities for acts of corruption against domestic or foreign public officials. It provides for the civil and administrative responsibility of such companies. Entities will be strictly liable for the illegal acts committed in their own interest or benefit.

Prior to the passage of the Act, there were already a number of statutes in force aimed at preventing corruption, such as the Criminal Code and the Administrative Improbity Law, among others, but Brazil only punished the individuals who received the bribes, not the entity who paid them. Moreover, it has always been hard for Brazilian courts to enforce such provisions as the Public Prosecutors had the burden of proving that the parties had intentionally violated the law. With the Act, it is now easier for authorities to punish the paying entities.

The Act provides that the following entities are subject to the law: (i) Brazilian entities and simple companies incorporated or not, irrespective of the form of organization or corporate type adopted; (ii) foundations, associations of persons or entities, joint ventures in general; and (iii) foreign companies with an office, branch, or representation in Brazil (incorporated by fact or by law, even if temporarily).

Furthermore, the liability of the entity does not exclude liability of the controlling, controlled or affiliated entities, which will be jointly liable for the wrongdoing under the law. Likewise, the offending entity's liability does not exempt the individual liability of its directors or officers or any natural person, author, coauthor or participant in the offence.

The Act establishes the conduct that is considered harmful and prohibited as follows: (i) to promise, offer or give, directly or indirectly, an undue advantage to a public official, or third person related to him/her; (ii) to finance, fund, sponsor or in any way subsidise the practice of illicit acts under the law; and (iii) to use an intermediary legal entity or individual to conceal or disguise its real interests or the identity of the beneficiaries of the wrongdoings.

Specifically with regard to acts relating to public tenders and governmental contracts, any kind of bid-rigging will be considered harmful conduct under the law. Such acts include: (i) defrauding the competitive nature of a public bidding procedure; (ii) preventing, hindering or defrauding the performance of any act of a public bidding procedure; (iii) diverting or trying to divert a bidder by fraudulent means or by the offering of any type of advantage; (iv) defrauding a public bid or its resulting contract; (v) deceitfully forming an entity to participate in a public bid or contract; (vi) illegally benefiting from changes or extensions of government contracts; (vii) defrauding the financial–economic balance of government contracts; or (viii) hindering the investigation or audit by public agencies, entities or agents, or interfering with their work, within the scope of the regulatory agencies and supervisory bodies of the national financial system.

With respect to sanctions, the Act creates stiff penalties and establishes the strict liability of the offending entity. Once the offense is determined, the offending entity will be subject to sanction even if (i) it has not obtained any benefit from its wrongdoing under the law; (ii) its employees or agents act on its behalf without authorization; and/or (iii) a third party, whether a natural person or a legal entity, is used for wrongdoing.

The administrative sanctions establish fines of 0,1 percent to 20 percent of the offending entity's gross revenues in the fiscal year prior to the initiation of the enforcement proceedings and publication of the punishing decision in a newspaper of wide circulation.

The judicial sanctions encompass, in addition to full disgorgement of the benefits illegally obtained, (i) forfeiture of assets, rights or other values obtained as a result of the wrongdoing; (ii) partial suspension or interdiction of corporate activities; (iii) compulsory dissolution; and (iv) debarment, which includes the prohibition from receiving incentives, subsidies, grants, donations or loans from public financial institutions for one to five years.

Although the new law holds promise, in an effort to change the culture, as previously mentioned, scholars and practitioners in the area are highly concerned about certain aspects of the new law, such as who shall be the competent authority, which raises questions such as who will establish and conduct administrative proceedings and enter into leniency agreements.

Competent Authorities

The Act neglected to designate a specific single government authority to establish and conduct administrative proceedings. Scholars and practitioners have criticized this failure. Such designation would have allowed this agency to become a qualified body, to develop the relevant technical expertise and to make consistent and equal decisions. Rather than establish a specialized agency, the Act allows any of the highest authorities of the Executive, Legislative and Judicial branches, of each county, state and Union, to be a competent authority. Therefore, jurisdiction to enforce the Act is diffuse, which will provide for much inconsistency and no standard in the application of the law, not to mention that it may empower the very authorities that may possibly be involved in the cases of corruption.

Leniency Agreement

Following the example of the Brazilian Antitrust Act, the Act authorizes the execution of leniency agreements with entities responsible for infringement of the Act, and who cooperate effectively with the investigation and administrative proceedings. Such agreements may reduce the fines up to two-thirds. Although the Act permits such agreements, it is silent as to the appropriate time for the execution of the agreement (if only permitted, for example, after the conviction or also in the course of the investigation). Further, given past experience in Brazil, companies may be hesitant to seek leniency given that, in practice, confidentiality of such legal agreements is not guaranteed.

Beyond that, the agreement has no impact on the criminal sphere: the charged entity may naively provide an administrative authority all evidence of the illicit act in seeking leniency from such administrative authority, but this agreement will not protect its executives from a criminal case.

Finally, practitioners doubt that the Brazilian authorities have the sophistication needed to secure a leniency agreement.

In conclusion, we now have to wait and see what will prevail: will we see the reduction of corruption or a lack of effectiveness of the law in a country known for not applying its own rules. Our hope is that the decrees that will regulate the Act will solve some of the controversial issues listed above and that Brazil one day becomes a reference in combating corruption.

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* * *

CASL Is Coming!

(Editor's Note: This article was submitted prior to the relevant legislation coming into force. Rather than changing the tense of the article, we decided to keep it as it was submitted. Please keep this in mind when reading the article and please contact the author directly should you require more up-to-date information.)

I. Introduction

On December 4, 2013 Canada's federal government announced that Canada's Anti-Spam Legislation, ("CASL" or the "Act"),[1] one of the world's most rigorous pieces of internet and e-commerce legislation, will finally come into force on July 1, 2014.[2] While CASL received royal assent in 2010, it has not yet come into force. The first rules that will come into force will be those restricting the sending of Commercial Electronic Messages ("CEMs"), to be followed by those provisions related to the unsolicited installation of software, which will come into force on January 15, 2015. Lastly, the sections of the Act allowing for a private right of action will come into force on July 1, 2017.[3]

The objective of CASL is to encourage the growth of electronic commerce by promoting confidence and trust in the online marketplace by "effectively [combatting] spam and other related electronic threats." [4] The Act sets out to punish individuals and entities that use spam and malicious software, in an effort to ensure that the significant cost consequences of such disruptive activities are internalized by the parties employing them.[5]

The impact of CASL on individuals, e-commerce and business, both in Canada and abroad, will be widespread and profound. As Canada aims to become "a leader in anti-spam legislation," organizations that operate in Canada or market to Canadians must take measures to acquaint themselves with CASL and adapt to its effects.[6]

The following article provides a high level review of CASL and its regulations in an effort to guide businesses seeking to ensure compliance with this new and aggressive piece of legislation. The article will focus on the earliest of restrictions to come into force (those related to CEMs) and will not be discussing those provisions of the Act pertaining to the installation of software.

II. CASL's Structure

Simply put, CASL prohibits the sending of CEMs and installation of software on the computers of recipients/owners absent their prior consent. Absent limited exceptions, CASL requires individuals that are the subject of CEMs to actively and expressly "opt in" to receive such email, placing the onus on the sender to seek the recipient's consent to receive CEMs before taking any further action.[7]

The Act has also been clarified over the past several years by accompanying regulations. The first of these clarifying regulations were prepared by the Canadian Radio-television and Telecommunications Commission. The *Electronic Commerce Protection Regulations (*the "CRTC Regulations"*)* prescribe various content requirements for CEMs and requests for consent. Non-compliance with the CRTC Regulations' content requirements exposes individuals and organizations to substantial liability.[8]

Additionally, in response to concerns over the onerous obligations and restrictiveness of CASL, Parliament and Industry Canada prepared a second set of regulations. The *Electronic Commerce Protection Regulations* (the "IC Regulations") aim to limit the effect of CASL by providing various exemptions from the express "opt-in" regime, some of which are discussed in greater detail below.[9]

Unfortunately, the only meaningful guidance regarding the impact and scope of CASL provided to date has been Industry Canada's Regulatory Impact Analysis Statement (the "RIAS"), which was issued along with the IC Regulations. While the RIAS does offer some helpful guidance regarding the interpretation of CASL, and endeavours to offer certain clarification of difficult provisions, it is critical to remember that the RIAS ultimately does not have the force of law and thus its usefulness is quite limited.

III. Risk of Non-Compliance

CASL is legislation with teeth, particularly from a Canadian perspective. Non-compliance with either CASL or the Regulations may result in severe penalties for both organizations and individuals. Once the Act is in full force, non-compliant parties will be subject to the following sanctions:

1. Maximum administrative penalties of $1,000,000 and $10,000,000 ordered against individuals and other "persons," respectively, who fail to comply with CASL;[10]
2. A private right of action against any allegedly non-compliant party for an amount equal to the actual loss or damage suffered by the applicant/recipient of non-compliant CEMs. The maximum monetary awards that may be ordered pursuant to such actions vary, but in some cases may exceed $1,000,000;[11] and
3. Criminal sanctions may also apply.[12]

Furthermore, officers, directors or agents who acquiesce or participate in the violation of CASL will be held *personally* liable for such violations, whether or not an action is commenced against the organization on whose behalf the CEM was sent.[13]

IV. Commercial Electronic Message Prohibition

Under CASL, CEMs are electronic messages that encourage participation in "commercial activities," irrespective of any expectation of profit.[14] Such electronic messages need not take the form of text or E-mail messages. In fact, sound, voice or image messages also constitute CEMs.[15]

(a) Commercial Activities

Consistent with the broad scope of CASL, "commercial activities" are broadly defined to include not merely offers of purchase or sale, but also the advertising of offers, investments, and the promotion of persons who participate in such commercial activities.[16] Thus, any form of communication that encourages participation in a commercial activity could ostensibly constitute a CEM. However, the mere fact that a message involves commercial activity, hyperlinks to a person's website, or business-related electronic addressing information does not make it a CEM under the Act. If none of its purposes is to encourage the recipient in additional commercial activity, it is not considered a CEM. Needless to say, there remains a certain amount of confusion as to the exact meaning of this term, which may cause some compliance difficulties.

(b) Request for Consent

To facilitate overall compliance with the Act from the outset, the legislation also treats a "request for consent" for the sending of CEMs as CEMs.[17] In theory, individuals should begin their correspondence with other persons by first requesting consent from a proposed recipient in a manner that complies with CASL. This step must be taken in advance of sending what would otherwise be considered a CEM.

As a result, it remains unclear where the limits of the term CEM lie. What is certain, however, is that implied consent acquired in compliance with the *Personal Information Protection and Electronic Documents Act* ("PIPEDA") may no longer constitute adequate consent and will be offside the consent provisions of CASL.[18] On the other hand, express consents, obtained before CASL comes into force, to collect or use email addresses to send CEMs will be recognized as compliant with CASL. Organizations and individuals seeking to establish correspondence with potential recipients must therefore review their existing databases of electronic addresses and request for consent protocols to ensure they are consistent with CASL.

V. Consent

No person may send CEMs, or cause or permit such messages to be sent, without first obtaining the intended recipient's express or implied consent.[19] Where a claim or allegation is brought pursuant to CASL, the evidentiary burden of proving the consent was granted and that the sender complied with the Act lies with the sender of the CEM.[20] Accordingly, consent, whether verbal or written, must be properly documented.

(a) Express Consent

When seeking express consent, the sender is not merely required to outline the purpose for which consent is being sought or "clearly and simply" identify themselves and, if sending the message on another's behalf, identify that other person.[21] The identification obligations for the "request for consent" additionally require the following:

1. The sender must outline the name by which the person seeking consent carries on business;[22]
2. If the sender is seeking consent on another's behalf:
   (a) the name by which that person carries on business; and
   (b) a statement indicating which person is seeking consent (i.e., the sender or the other named party);[23]
3. The mailing address, and either a telephone number or voice messaging system, email address or web address of the person seeking consent;[24] and
4. The contact information must be valid for the period covered by the consent.[25]

The purpose of incorporating these requirements in the original request for consent, according to CASL, is to enable the recipient of the message to readily contact the sender.[26] This obligation to provide contact information, together with the requirement that the request for consent include a statement informing the recipient that it can withdraw consent,[27] ensures that the recipient is apprised of its right not only to "opt-in" to the CEMs, but also to "opt-out" at any time.

(b) Implied Consent

Consent can only be *implied* in very specific circumstances and within strict timelines. In fact, according to CASL, consent can only be implied where:

1. there is an existing, business or non-business, relationship between the sender and recipient;
2. the recipient's electronic address is conspicuously published and the recipient has not indicated that it does not wish to receive unsolicited CEMs; or
3. the recipient has disclosed, to the sender, its electronic address, to which the CEM was sent, without having indicated a desire not to receive unsolicited CEMs and the messages are relevant to the person's business, role or duties.[28]

(c) Implied Consent in Existing Business Relationships

The "existing business relationship" rule requires that, in the *two* years preceding the sending of a CEM, the recipient,

- Purchased, leased, or bartered for, a product, good, service, land, or interest in land from the sender;
- Accepted a business, gaming or investment opportunity offered by the sender;
- Entered into a contractual arrangement with the sender and the contract is currently effective or had expired within two years of sending the CEM; or
- Sent the sender an inquiry or application related to any of the aforementioned matters within six months of the CEM being sent.[29]

Additionally, notwithstanding the fact that a person has previously "unsubscribed" or "withdrawn" its consent to receive CEMs, "implied consent due to an existing business relationship is reinstated with every new or subsequent transaction" that satisfies the definition of "existing business relationship" above.[30]

(d) Implied Consent in Existing Non-Business Relationships

Alternatively, the recipient and sender will be deemed to have been in an existing *non*-business relationship where, in the *two* years prior to the sending of a CEM, the recipient has:

- made a donation or gift to the sender registered charity, political party or a political candidate;
- volunteered for, or attended a meeting organized by the sender, that is a registered charity, political party, or candidate for political office; or
- held a membership in the sender, which is a club, association or voluntary organization.[31]

Where the sender and recipient are not in one of the aforementioned relationships, or where the conditions that would permit the implication of consent are no longer present, the sender must revert to the basic request for *express* consent rules of CASL.

(e) Third Party Referrals ("TPR")

As a limited exception to the standard consent requirements of CASL, senders of CEMs are not obligated to seek consent in their *first* CEM to a recipient where that recipient was referred to the sender by a third party.[32] To take advantage of the TPR exception, both the sender and recipient must be in an existing relationship (personal, family, business, or non-business) with the third party.[33] To ensure the recipient is aware of the origin of the message, however, CASL obliges the sender to include a statement in the CEM noting that the message was sent pursuant to a referral and the full name of the referring third party.[34]

As the TPR exemption applies solely to the first message sent, that message should include a "request for consent" to ensure compliance with CASL moving forward.

(f) Three Year Transition Period

Consents obtained prior to the enactment of CASL may satisfy the requirements of the Act. However, where the form of prior requests for consent fail to comply with the Act, or where no consent was ever documented, the senders of CEMs will have three years from the day the Act comes into force to verify and confirm that they are CASL compliant.[35] Accordingly, to the extent that a sender and recipient are in an existing business or non-business relationship as of July 1, 2014, and the recipient has not expressly withdrawn its consent to receiving CEMs, consent is implied until July 1, 2017.[36] Senders of CEMs may, therefore, continue sending CEMs without first sending a request for consent to the recipient until the expiration of the three year transition period.

VI. Withdrawing Consent

All CEMs must incorporate an "unsubscribe mechanism" to protect a recipient's right to control the messages it receives, notwithstanding its prior consent.[37] This mechanism must specify that the recipient may, at no cost, "unsubscribe" from further CEMs by indicating such an intent by using either the same electronic means used to send the message or any other practicable electronic means.[38] To further simplify the process, CASL requires that the sender provide an electronic address or link to which the indication may be easily sent.[39] This unsubscribe mechanism, like the sender's contact information, must be valid for at least sixty (60) days after the day on which the message was sent, to ensure recipients have sufficient opportunity to readily terminate their subscription.[40]

Once either the "unsubscribe" or the "withdrawal of consent" mechanism is triggered, the sender has ten (10) business days to give effect to the recipient's intention. Failure to do so constitutes a violation of CASL, exposing the sender to substantial penalties.[41]

VII. Exemptions to the Consent Requirement

In addition to the implied consent exception, CASL and the Regulations provide for a number of other exemptions, which serve to relieve senders from the burden of adhering to CASL.

(a) Business to Business Exemption

The IC Regulations provide an exemption for CEMs sent by employees, representatives, consultants or franchisees "within organizations or sent between organizations that already have a relationship," where the messages concern the activities of the organization receiving or sending the message.[42]

These exclusions were enacted in response to "the most serious concerns raised" in relation to the broad, and potentially undesirable, effects of CASL.[43] The business-to-business exemptions, however, are intended to shelter businesses from the effects of CASL by excluding "ordinary, transactional business communications" and other "internal" communications concerning the "activities of an organization" from the scope of the Act.[44]

(b) Extra-Jurisdictional CEMs

The ambit of CASL extends exclusively to messages sent from, or accessed by, computer systems located in Canada. Therefore, messages that do not fall into those categories need not comply. CASL does not apply to CEMs that are simply routed through Canada.[45]

Faced with concerns that some businesses in Canada would be obliged to comply with both CASL and the laws of foreign jurisdictions,[46] an exclusion was incorporated into the IC Regulations explicitly exempting CEMs sent from Canada that a sender "reasonably believes" will be accessed in one of the *prescribed* foreign states (e.g., the United States, Spain etc.).[47] As a caveat to the use of the Extra-Jurisdictional CEM exemption, the IC Regulations require that the CEMs sent from Canada must comply with the local laws of that prescribed foreign state.[48] These particular IC Regulations were created to reduce the burden on businesses sending CEMs to recipients in prescribed foreign states by recognizing the existence of legislation in those states that regulates the conduct prohibited by CASL.[49] Unfortunately, all businesses that operate in Canada, including U.S. subsidiaries or foreign-owned companies, will have to undertake this analysis to determine whether CASL requirements apply to their email.

(c) Registered Charities, Political Parties and Candidates

The IC Regulations also exempt messages that are sent by or on behalf of registered charities, political parties or candidates, so long as the *primary* purpose behind such messages is fund-raising or soliciting contributions.[50] Not-for Profit Corporations, however, remain subject to CASL's consent and content obligations.

(d) Personal and Family Relationships

The rules regulating the transmission of CEMs relieve individuals that are in a personal or family relationship from having to comply with CASL.[51] The IC Regulations define "personal relationship" as a relationship where, taking into consideration any relevant factors such as the sharing of interests, experiences, and length of time the individuals have been communicating, it would be reasonable to conclude the individuals are involved in direct, voluntary, two-way communications as part of a personal relationship.[52]

In contrast, to be exempt from CASL on the basis of a "family relationship," the IC Regulations narrowly require that the parties be related to one another through "marriage, common-law relationship or any legal parent-child relationship."[53]

(e) Enforcing Legal Rights

The IC Regulations also contain an exemption for CEMs that are sent to "enforce legal rights."[54] Accordingly, where a message is sent to satisfy a legal or juridical obligation, to give notice of or enforce such an obligation, court order, judgment or legal right, the CEM need not comply with the consent and content requirements of CASL.[55]

(f) Other Exceptions to CASL

Finally, the following other forms of CEMs are exempt from CASL:

1. Messages sent to a person engaged in commercial activity containing an inquiry or application related to that commercial activity;[56]
2. Replies to requests by the recipient of the CEM for quotes or estimates for the supply of goods, property or services;[57]
3. Messages that facilitate, complete or confirm commercial transactions in which the recipient is involved;[58]
4. Messages that provide warranty, product recall, safety or security information regarding products or services the recipient uses or has purchased;[59]
5. Messages that provide factual information about products or services purchased by the recipient as part of an on-going subscription or membership, or information about that subscription or account;[60]
6. Messages pertaining directly to employment or benefit plans in which the recipient is involved;[61]
7. Messages delivering products, goods, services or updates to which the recipient is entitled under the terms of a transaction previously entered;[62]
8. Messages that are, in whole or in part, an interactive two-way voice communication between individuals, a voice recording sent to a telephone account or a facsimile sent to a telephone account.[63]
9. Messages sent over a limited-access secure and confidential account;[64] and
10. Messages sent in response to requests, inquiries, complaints or responses that are otherwise solicited by the recipient.[65]

VIII. Best Practices

Even though the initial provisions of CASL will be coming into force in July, it is clear that the interpretation of this Act remains a "work-in-progress." Accordingly, Industry Canada recommends that individuals and entities potentially involved in the sending of CEMs, and other activities within the scope of CASL, continue reviewing government websites for new developments. Nevertheless, only months remain before CASL takes effect. There is no question, given its substantial penalties, that affected organizations will need to be aware of this Act and take immediate steps to ensure that they are undertaking a compliance plan. If you think that CASL will apply to your clients, we recommend the following "best practices" to be prepared for CASL:

1. Select a compliance team. This may be the same person or people who look(s) after Privacy Compliance.
2. Audit current practices—review and categorize what types of emails and electronic messages are currently sent and why they are sent. The purpose is to identify which are CEMs and which are not.
3. Inventory existing databases for contacts who receive CEMs. Check all possible sources of electronic mailing lists in your organization—customers, business/association partners, suppliers, etc.
4. Review all current electronic mailing lists and CEMs that are sent to determine:
   (a) whether there is an "existing business relationship" that would qualify for the three year transition period in CASL;
   (b) what type of consent is required; and
   (c) what consent has been obtained.
5. Review your current express consent language and revise it to be compliant with CASL.
6. Request express consent from mailing lists using email. Remember, this has to be done before July 1, 2014 as after July 1, 2014, unless you fall into one of the classes of exemptions for consent, you cannot use a CEM to request express consent.
7. Update documents and templates that may be used with external contacts so they include express consent. Include wording in terms and conditions of use, purchase orders, contracts and other agreements to include express consent.
8. Keep a database of implied consents so you can identify when an implied consent expires. The database will need to be able to have a "stop send" date where CEMs will no longer be sent to a contact who has given implied consent after the expiration of the 2 year or 6 month period. Also, if express consent is subsequently given, there needs to be a mechanism to update this information.
9. Update your unsubscribe mechanism to ensure it is compliant with CASL.
10. Train employees regarding CASL and its compliance requirements.
11. Review compliance procedures with third party service providers who have access to or utilize electronic addresses/contacts. Make sure these third party suppliers are contractually obligated to comply with CASL. For example, if you purchase mailing lists, ensure the provider has obtained express consent. Do not assume U.S. providers will be compliant with CASL.
12. For new contacts, establish a mechanism to obtain express consent (not by CEMs).
13. Scrub/purge contacts for whom you do not have express consent, implied consent or for whom there is no exemption. These need to be disabled so that no CEMs are sent to them after July 1, 2014.
14. Document your CASL Policy. This will be very important to show due diligence, which is a defence for directors, officers and employees.
15. Check with your insurance provider to find out if you can purchase a special rider for CASL.

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Endnotes

1. An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act, SC 2010, c 23. ["CASL" or "the Act"].
2. James Moore, "Regulatory Impact Analysis Statement," Industry Canada: Electronic Commerce Protection Regulations, online: <http://fightspam.gc.ca/eic/site/030.nsf/eng/00271.html> . ["RIAS"].
3. *Id*.
4. *Id*. at p 1.
5. *Id*.
6. *Id*.
7. "Government of Canada Introduces Anti-Spam Legislation (CASL): Questions and Answers," online: Digital Policy Branch (February 15, 2013) <https://www.ic.gc.ca/eic/site/ecic-ceac.nsf/eng/gv00521.html>.
8. *Electronic Commerce Protection Regulations* (CRTC), SOR/2012-36 ["CRTC Regulations"].
9. *Electronic Commerce Protection Regulations*, SOR/2013-221. ["IC Regulations"].
10. CASL, *supra* note 1 at § 20(4).

11. *Id.* at § 47(1) and 51.
12. *Id.* CASL amends the Competition Act, RSC 1985, c C-34, making prohibited conduct under CASL also reviewable under the Competition Act.
13. *Id.* at § 31.
14. *Id.* at § 1(1).
15. *Id.*
16. *Id.* at § 1(2).
17. *Id.* at § 1(3).
18. RIAS, *supra* note 2 at p 10.
19. CASL, *supra* note 1 at § 6(1).
20. *Id.* at § 13.
21. *Id.* at § 10; see also "FAQs: About the Law," Canada's Anti-Spam Legislation, (January 20, 2013) <http://fightspam.gc.ca/eic/site/030.nsf/eng/h_00050.html>.
22. CRTC Regulations, *supra* note 8 at § 4(a).
23. *Id.* at § 4(b)-(c).
24. *Id.* at § 4(d).
25. CASL, *supra* note 1 at § 11(4).
26. *Id.* at § 6(2)(b).
27. CRTC Regulations, *supra* note 8 at § 4(e).
28. CASL, *supra* note 1 at § 10(9).
29. *Id.* at § 10(10).
30. RIAS, *supra* note 2 at p 11.
31. CASL, *supra* note 1 at § 10(13).
32. IC Regulations, *supra* note 9 at § 4(1).
33. *Id.*
34. *Id.*
35. RIAS, *supra* note 2 at p 11.
36. CASL, *supra* note 1 at § 66.
37. *Id.* at § 6(2)(c).
38. *Id.* at § 11(1)(a).
39. *Id.* at § 11(1)(b).
40. *Id.* at § 6(3) and 11(2).
41. *Id.* at § 11(3).
42. IC Regulations, *supra* note 9 at § 3(a).
43. RIAS, *supra* note 2 at p 6.
44. *Id.*
45. *Id.* at p 3.
46. *Id.* at p 8.
47. IC Regulations, *supra* note 9 at § 3(f) and Schedule (Paragraph 3(f)).
48. *Id.*
49. RIAS, *supra* note 2 at p 8.
50. IC Regulations, *supra* note 9 at § 3(g)-(h).
51. CASL, *supra* note 1 at § 6(5)(a).
52. IC Regulations, *supra* note 9 at § 2(b).
53. *Id.* at § 2(a).
54. RIAS, *supra* note 2 at p 7.
55. IC Regulations, *supra* note 9 at § 3(c).
56. CASL, *supra* note 1 at § 6(5)(b).
57. *Id.* at § 6(6)(a).
58. *Id.* at § 6(6)(b).
59. *Id.* at § 6(6)(c).
60. *Id.* at § 6(6)(d).
61. *Id.* at § 6(6)(e).
62. *Id.* at § 6(6)(f).
63. *Id.* at § 6(8).
64. IC Regulations, *supra* note 9 at § 3(e).
65. *Id.* at § 3(b).

Of International Interest

Will the OECD Be Able to "Ringfence" Taxation of E-Commerce?

As most of the readers know, the OECD administers the Base Erosion & Profit Shifting Project (the "BEPS Program") and its fifteen action plans. Below are some comments regarding action plan no. 1—which is focused on the digital economy and the challenges it may create from a tax point of view. In this context, it is important to bear in mind that the end result of the BEPS Program is not to introduce proposals for new legislation in the member countries. On the contrary, but the BEPS Program modifies the OECD Guidelines, which means that the final changes effectively will become "applicable rules" by the tax authorities. The benefit—as seen by the politicians—is that this means that the changes will not need to be passed by the parliaments and legislative bodies of the different countries.

As most readers may also know, the time frame for the BEPS Program is very pressed, with very short periods for us outsiders to give comments on the different "Public Discussion Draft(s)," issued by the OECD. To further complicate matters these drafts are massive documents. The IBA Taxes Committee has, via a number of "subgroups," volunteered to comment on all of the 15 action plans. The first out were comments filed just before Christmas 2013 on the digital economy. March 24 a second discussion draft was distributed by the OECD, with comments filed April 14.

When studying the current two discussion drafts there is one very general comment that comes to mind; it seems that the OECD is leaning towards the opinion that the "digital economy" is a very new creature that needs special (tax) treatment—"ringfencing" from other parts of the economy. As is shown in the comments by the Taxes Committee, the reality is that what may be perceived as a "the digital economy" is in reality primarily a new—or additional—way of marketing and distributing goods and services simply by making use of the new tools (i.e., a combination of computers, software and the internet). So the idea that there is a special "digital economy" is, in the opinion of the Taxes Committee representatives, totally wrong and a misunderstanding. There is, at least from a tax point of view, no difference in the marketing and distribution of, e.g., a book in the old "analog" way or in the new digital way, and there should not be any difference in the taxation thereof. On the contrary, it is important to keep the tax rules neutral between different ways of doing business.

For those who will read the Taxes Committee's comments, it is clear that most of the commercial activities identified fall under the description where the digital way is simply another, more effective, and maybe more modern, way of arranging the logistics. In this regard the opinion is that there is a risk that relatively unique and highly visible commercial activities—like e.g. Google—will serve as an argument for creating new and complex rules, which, in reality will only disturb and distract what essentially is the majority of international business. In the opinion of the author of this article, this proves that a change of the tax rules must be made in a different way than considered under the BEPS program.

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Report of UNCITRAL Working Group II (Arbitration and Conciliation)

Preparation of a Convention on Transparency in Treaty-Based Investor-State Arbitration

The current UNCITRAL Working Group II's mandate is to develop new transparency rules on Investor-State covered arbitration conducted based on existing bilateral and multilateral investment treaties in force before 1 April 2014. The new Convention will provide a framework for States to adopt rules for future arbitral disputes without creating an expectation that non-contracting States would use the mechanism offered by the Convention.

The Convention seeks to reaffirm the belief that international trade, operating on the basis of equality and mutual benefit, is an important element in promoting friendly relations among States. It aims to encourage progressive harmonization and unification of international trade law while seeking to remove legal obstacles through facilitating universal economic co-operation and a fair and harmonized legal foundation for the settlement of investor-State disputes.

On 1 April 2014, UNCITRAL launched its new Transparency Registry, which serves as a repository for the publication of documents in Treaty-Based Investor-State Arbitration. The aim of this registry is to make the documents produced for these arbitrations available to the public. The registry will also facilitate public access to hearings and allow third parties, such as NGOs, to make submissions. It will publish decisions on Treaty-Based Investor-State disputes and aim to create greater legal certainty and predictability to this dispute resolution program.

The Working Group met in February 2014 to further deliberate unsettled issues on the new Transparency Rules for existing treaties and international arbitration and discussed matters, which included the flexibility to adopt declarations and reservations under the Convention and whether the Convention should apply on a reciprocal basis between contracting parties or on a unilateral basis by the responding State making an additional offer to arbitrate on transparent terms.

It was suggested that a unilateral offer to apply the new Rules on Transparency would broaden their application and bring the greater benefit of expanded acceptance of this new Convention. The Vienna Convention on International Treaties already provides that it is standard to include non-reciprocal obligations in investment treaties and the manner in which treaties themselves are generally drafted is unilateral. There was general concurrence at this Working Group that a reservation could be agreed to exclude unilateral operation of this Convention if necessary.

In the context of a multilateral treaty, there were concerns that contracting parties may be obliged to the Transparency Convention because one investor was from a State that was a party to the multilateral treaty but not a contracting party to the Convention. One or more of the parties may not be aware of their obligations under the new rules and there should be an obligation to notify of the modification to the investment treaty upon the adoption of the new Transparency Rules.

The new Convention will be applicable to all disputes arising under the relevant investment treaties irrespective of the arbitration rules selected. Where there are varying standards of transparency already under the treaty, the application of the higher standard of transparency should apply.

There was a suggestion that tribunals should have the discretion of adopting arbitration rules that provide the best promotion of transparency. However, concerns were raised that this may lead to issues relating to the interpretation of the will of the States, particularly if one has a reservation and the other does not. It was settled that the treaty would always prevail over the Transparency Rules and that arbitrators do not have jurisdiction to interpret the will of the States.

By reference, Article 1 of the Transparency Rules adopted in July 2013 for future investment treaties, unanimously settled that the application of the Rules must be agreed upon by each State individually through its Sovereign power.

There was also discussion on whether the Transparency Convention for existing investment treaties will be a successive agreement between contracting parties or whether it creates new obligations and therefore a requirement for a new or amended treaty. The general consensus at the Working Group was that the Transparency Convention is a successive agreement between Contracting Parties (however some countries were not entirely convinced). This was taken to be consistent with the wording of Article 30 of the Vienna Convention on the Law of Treaties[1] where *agreement* is defined as a successive treaty accepting no new obligations.

Concerns were raised that some of the reservations drafted in the Convention may allow contracting parties to the Treaty to withdraw from their substantive obligations. The Working Group held that it would be unacceptable for a State to accede to the Convention only to carve out the content by the use of the Reservations. Article 19 of the Vienna Convention on the Law of Treaties and also paragraph 3.14 of the (UN) International Law Commission Guide to Practice on the Law of Treaties, provides that *"a reservation may only be made if it is not incompatible with the treaty."* By applying these substantive provisions, it was agreed that there should be no need for specific wording in relation to this issue in the new Rules. Consensus was to call these reservations what they are in an effort to avoid creating an ambiguity and ensure their full and untainted application.

Territorial coverage and its effect on the international scope of the Convention was also reconsidered from the September 2013 meeting and the existing draft text was deleted on the basis that the provision was beyond the scope of this Convention and should be left to States to develop their own practices in the territorial application of treaties, as this is determined by national practice and not public international law principles.

The issue of including a MFN (Most Favored Nation) clause was raised at the Working Group meeting in September 2013 and was further discussed at the meeting in February this year. A proposal was made to include wording to the effect of *"This Convention shall not create any obligation under an MFN clause in an investment treaty."* It was agreed that the provision reflecting the principle in this suggestion would be retained but the drafting would require further consideration. The current draft of Article 3.3 in the new Rules on most favored nation provisions declares that *"A most favored nation provision cannot be invoked to avoid the application of the UNCITRAL Rules on Transparency under this Convention, nor render the Rules applicable would they otherwise not apply."*

Finally, the 3-7 February 2014 Working Group requested the Secretariat of UNCITRAL to prepare a draft Transparency Convention based on the deliberations of the previous Working Groups and asked for it to be circulated to Governments for consideration with a view to adoption at the UNCITRAL plenary session which was held in New York on 7-25 July 2014.

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Endnote

1. *Article 30*—Application of successive treaties relating to the same subject-matter;

   1. 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force Jan. 27, 1980. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

   2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

   3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.

   4. When the parties to the later treaty do not include all the parties to the earlier one:

      a. As between States parties to both treaties the same rule applies as in paragraph 3;

      b. As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

   5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty, the provisions of which are incompatible with its obligations towards another State under another treaty.

Section News

Cuba Announcement

The Special Projects Committee has obtained approval from the New York State Bar Association Executive Committee to organize law-related People to People travel to Cuba under the aegis of the International Section. Itineraries are being developed for this travel, and the Committee is considering various different dates for the Winter of 2014-2015. Announcements will be coming out soon so that those NYSBA members interested in participating will be able to sign up. Anyone wishing to receive further information can email cuba@nysba.org.

A. Thomas Levin
Vice-Chair, Special Projects

Chapter News

Change Has Come: What Every In-House Counsel Should Know About U.S. Export Law Reforms

On June 5, 2014, the Trade Committee and Corporate Counsel Committee co-sponsored a CLE program on the topic of U.S. Export Controls, which was hosted by BakerHostetler. The U.S. is currently undergoing major changes to its export control regime. These two Sections thought it incumbent upon them to provide a venue for both in-house and outside counsel to learn more about these changes, and the potential liability related to non-compliance.

The evening was moderated by Robert Leo, Co-Chair of the Trade Committee. After Barbara Levi, who Co-Chairs the Corporate Counsel Committee with Allison Tomlinson, welcomed everyone and introduced the panelists, Bob set the stage and invited Jerry Hanifin, Vice President, Global Compliance at Pall Corporation, to the podium. Mr. Hanifin, based on his experience as Vice President of Global Compliance, set the stage and explained to the audience the importance of export control compliance. Mr. Hanifin's presentation was followed by William J. Argue, Unit Chief, Counter-Proliferation Investigations, U.S. Department of Homeland Security, who advised the audience of the role of his agency, and underlined the importance of export control compliance. Mr. Argue was followed by Mel Schwechter of BakerHostetler who thoroughly explained and examined the changes that are being implemented. Mr. Schwechter also outlined some recent enforcement actions and major penalties, and provided the audience with some key compliance considerations. The last panelist, Dunniela Kaufman, Co-Chair of the Trade Committee and proprietor of Kaufman Trade Law, brought the audience up to speed on the Canadian export control system and recent changes that this regime has undergone. Ms. Kaufman also described some intersections between the changes that the U.S. is implementing and the Canadian system. The evening was capped off by a lovely reception, which was hosted by BakerHostetler, with Meeks, Sheppard, Leo & Pillsbury sponsoring the New York State wine.

The changes being implemented to the U.S. export control regime are quite considerable. Readers are encouraged to contact one of the co-chairs of the sponsoring committees if they would like to obtain the material from the program.

* * *

Brazil Chapter

The Brazil Chapter has six very active members. These members form the committee that organizes events and activities in São Paulo and Rio de Janeiro. The members of this committee are: Isabel Franco (Chapter Chair), Mauricio Mirandola, Helen Naves, Marcio Santos, Vinicius Jucá and Rafael Villac.

The Brazil Chapter organizes monthly happy hours to informally gather its members and plan its events. The group has also consistently organized breakfast meetings, hosted by various law firms, selecting speakers who present different topics, typically involving cross-borders issues. The happy hours and breakfast meetings have been very successful in promoting meetings and seeking prospective new members. The group has been organizing visits to law firms in São Paulo and Rio de Janeiro to promote its activities and to invite such firms to participate in the 2015 International Section Seasonal Meeting in São Paulo. In addition, the Brazil Chapter is planning to organize events in cooperation with law schools in the U.S. and Brazil, also with the view towards promoting its activities and seeking new members in Brazil.

News About Our March Event

Experts Discuss Arbitration Clauses in Brazilian Public Infrastructure Contracts

As part of the Brazil Chapter's monthly schedule of activities, on March 25th the Chapter hosted a breakfast meeting on arbitration and public contracts. The event, hosted by NYSBA and the Brazilian law firm TozziniFreire, brought together more than twenty interested persons, including partners, associates, in-house counsel and regulation experts from Brazil and U.S.

The speakers, Antonio Barbuto, partner at TozziniFreire, and Lisa Alfaro, partner at Gibson Dunn, discussed developments and perspectives in arbitration in Brazil as a relatively new subject vis-à-vis the U.S.'s long tradition in alternative dispute settlements. The Brazilian Arbitration Act dates from the late 1990s and, although judicial activity has been paving the way to a progressively broader use of arbitration in business relations, certain paths remain unclear. The incorporation of arbitration clauses in public infrastructure contracts is one of those areas in which uncertainty makes resorting to arbitration still controversial and doubtful.

In this context, the good news is that recent decisions of Brazilian courts have been instrumental in confirming that even government entities may be subjected to arbitral proceedings. The bad news, however, is that independent agencies, federal government, state owned companies and other branches of the government, such as the Audit Court, may be driving in the wrong direction. In reaction to the courts' decisions, such government entities are adding to government infrastructure contracts moot arbitration clauses. In the view of some practitioners, the greatest effect of such actions is to spook foreign investors. The discussion at the event was very engaging and interesting.

The panel on arbitration in infrastructure contracts was part of the Brazilian Chapter's series of monthly morning talks. In April, the Chapter hosted a panel on FATCA at Peixoto e Cury Advogados, and in May we partnered with KLA—Koury Lopes Advogados for a session on Anti-Corruption & Compliance. The organizing team for this project is composed of Isabel Franco (Chapter Chair, of KLA—Koury Lopes Advogados), Carlos Mauricio Mirandola (Guepardo Investimentos Ltda.), Helen Naves (Vieira Rezende), Marcio Santos, Rafael Villac Vicente de Carvalho (Peixoto e Cury Advogados) and Vinicius Jucá Alves (TozziniFreire).

Book Review

Commercial Litigation in New York State Courts

Robert L. Haig (New York County Lawyers' Association, West's New York Practice Series, 3d ed. 2010)

Robert Haig's seminal treatise, *Commercial Litigation in New York State Courts*,[1] is an indispensable resource for lawyers in New York and those outside the United States who adjudicate complex commercial disputes. Haig is a well-qualified authority on commercial litigation in New York state courts: he was among a handful of lawyers who were primarily responsible for creating the first Commercial Division in New York state courts in 1995. Now, New York state courts offer a comparable alternative to U.S. federal courts for the adjudication of commercial disputes. While mediation and arbitration are excellent procedures to resolve disputes, in many complex commercial matters, a judicial forum is the preferred option.

Unlike federal courts in New York, the Commercial Division has statutory authority to hear commercial disputes between parties to a contract who have no contact with New York or with the United States other than having included a New York choice of law and a New York choice of forum provision in their contract. The only other condition is that the applicable contract relate to a transaction having a value of at least one million dollars.[2] If these criteria exist and either party files a lawsuit in New York to enforce the contract, another statutory provision prohibits the New York court from dismissing the lawsuit on the ground of forum non conveniens.[3]

Haig's treatise is not only an essential resource for New York lawyers; it is also an invaluable resource for lawyers practicing outside of the United States who want to understand commercial litigation in New York or who are collaborating with New York counsel on a cross-border commercial matter in the Commercial Division.

Haig's easy-to-follow style, replete with outlines and checklists, makes it a helpful tool for practitioners who may not be familiar with the New York court system. This is the *only* treatise focusing on the interplay between the rules of procedure in New York courts and the substantive law that commercial litigators frequently encounter.

The Third Edition adds 19 new chapters to the 88 chapters and a sixth volume to the five volumes contained in the Second Edition. The authors improved the already excellent content of the Second Edition. They also focused on those areas of commercial litigation that have changed most significantly since 2004 and are of particular importance to commercial litigators. The areas of particular interest to cross-border lawyers include: Comparison with Commercial Litigation in Federal Courts; Coordination of Litigation Within New York and Between Federal and State Courts; Suing or Representing Foreign Corporations in New York State Courts; Litigation Avoidance and Prevention; Litigation Management by Law Firms; Litigation Technology; White Collar Crime; The Interplay Between Commercial Litigation and Criminal Proceedings; E-Commerce; and Information Technology Litigation. The substantive law chapters in the Third Edition include commonly encountered topics such as contracts, insurance, sale of goods, banking, securities, antitrust and intellectual property.

The authors of the chapters of Haig's treatise are among the most accomplished jurists in New York, including Chief Judge Jonathan Lippman and Court of Appeals Judges Victoria A. Graffeo, Robert S. Smith, Stewart F. Hancock Jr., and George Bundy Smith. Numerous Commercial Division

Justices have contributed chapters, as well as U.S. District Court Judge Brian M. Cogan.

This treatise is practical in its approach. It provides in-depth text on law and procedural matters, but also checklists of allegations and defenses, "hundreds" of essential litigation forms and jury charges, as well as strategies for the representation of both plaintiffs and defendants. Regardless of one's particular needs, this book is likely to have a useful chapter both for seasoned New York litigators and for international practitioners who may not be as familiar with many of the ins-and-outs of the procedures of the New York courts, or the substantive points of New York commercial law.

This work also highlights the importance of the Commercial Division to litigators in New York. As Haig accurately observes: "[In 1995] the business community did its best to avoid the New York courts, perceiving them as inefficient, unproductive, unpredictable, and unfair. The same business community is now united in its unqualified and enthusiastic support for the Commercial Division. In fact, when our business leaders are seeking to attract businesses to New York, they mention the existence of the Commercial Division as one of the attractive features of doing business here."[4]

New York's Commercial Division consists of 27 judges who have been selected for their commercial expertise. The Commercial Division handles, in addition to New York commercial matters, many international and cross-border disputes. Largely due to the creation of the Commercial Division, "New York is widely recognized as having an established, well-developed contractual commercial law equipped to deal with complex transactions."[5] New York's role as a center for commercial law only continues to increase in importance. Haig's treatise is the guide every practitioner needs to navigate in this constantly changing world.

When international parties do not consent to the jurisdiction of a New York forum, jurisdiction and forum non conveniens become important considerations. The Jurisdiction Chapter (Chapter 2) is a wealth of information on everything a practitioner should know when seeking to obtain, or avoid being subject to, jurisdiction in New York. It contains several sections on jurisdiction over foreign corporations. The chapter also contains a cogent discussion of challenges based on forum non conveniens. For example:

> Virtually all forum non conveniens motions seeking dismissal in favor of the courts of a foreign country will require (either by the defendant movant or the plaintiff opposing dismissal) litigants to identify, consult with, and almost always, submit an affidavit of a lawyer from the foreign jurisdiction to offer an independent expert's opinion (not the opinion of a litigant's foreign counsel) on the jurisdiction's legal system and its ability to adjudicate the issue in dispute. Accordingly, attorneys involved in such 'international' cases may need to assess early on the likelihood of making or defending against a forum non conveniens motion and make prompt preparations to pursue such relief or defend against requests for it.[6]

Also of particular importance to the international law community is Chapter 12 on Enforcement of Forum Selection and Arbitration Clauses, specifically § 12:4, which discusses New York's General Obligations Law § 5-1402 ("Choice of Forum"), and CPLR 327(b). CPLR 327(b) works in conjunction with New York General Obligations Law section 5-1402, and provides that a court may not stay or dismiss any action on the basis of forum non conveniens where the action arises out of a contract, agreement, or undertaking to which section 5-1402 applies, and where the parties to the contract have agreed that New York law is to govern the rights and duties, in whole or in part, under the contract. In such situations, the court is required to keep the action in the New York courts. The treatise devotes substantial attention to the discovery process in New York actions, a process which can be accused of frightening potential litigants, who may opt instead to litigate outside of New York, or even outside of the U.S. Chapter 22 does an effective job of putting potential practitioners' minds at ease, and helps to focus potential litigants on the benefits of New York's comprehensive disclosure process, such as how the thoroughness of the discovery process better facilitates truth-finding.

Mr. Haig and the many accomplished contributors to the Third Edition of this esteemed treatise should be commended on their remarkable achievement of improving an already invaluable source of information. The treatise also complements a major goal of the International Section: to encourage lawyers outside the United States to select New York law as the governing law for commercial agreements.

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Endnotes

1. Please note that two partners of Flemming Zulack Williamson Zauderer LLP are authors of chapters in the Haig Treatise: Richard A. Williamson is the author of Chapter 78 on Partnerships; and Gerald G. Paul is one of the four co-authors of Chapter 25 on Document Discovery.
2. See New York General Obligations Law § 5-1401 (Choice of Law) and § 5-1402 (Choice of Forum).
3. *See* CLPR § 327(b).
4. Robert L. Haig, *Commercial Litigation in New York State Courts* (3d ed. 2010) Foreword, at xvi.
5. Final Report of the New York State Bar Association's Task Force on New York Law in International Matters (April 18, 2011) at 6.
6. Haig, *Commercial Litigation in New York State Courts* § 2:13.

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Dunniela Kaufman

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