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New York International Chapter News

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A Word from Our Immediate Past Chair

This has been an incredible year for me. I had the special honor and pleasure of having been the chair of this wonderful Section.

Of all the work we have done, I am particularly pleased and proud of a program especially prepared for the Brazilian community on U.S. immigration law. We received heartwarming acknowledgment for the difference that our advice has made in some of the participants' lives. This is true *pro bono* work.

(Continued on page 2)

A Word from Our New Chair

On behalf of the Executive Committee and the entire membership of the International Law and Practice Section, I would like to offer heartfelt thanks to Isabel Franco for her extraordinary leadership as Chair over the past year. Undaunted by the increasing need to spend time at Demarest e Almeida in Brazil and the budgetary constraints faced by the Section here in New York, Isabel was ever-present and able to organize a stream of revenue to support an outstanding collection of programs and events.

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Not less important, we were extremely happy with how the Fall Meeting in Rio turned out. It was a success despite the difficulties created by the hideous terrorist attacks of the previous month. We attracted friends from all over the world including Ahmed Abdulla from Bahrain, Harry Shannon from Germany, Efren Cordero from the Philippines and Lucio Velo from Switzerland, to name just a few, and not to mention Dianna Kempe, head of the International Bar Association, who honored us with her presence. This shows the networking capability that we share and the opportunity of establishing new friendships anywhere we go. There would be so many people to thank here for the success of this meeting but let me just mention Marcia Haddad, Joel B. Harris, Thomas N. Pieper and Soraya E. Bosi.

On a different note, I was also particularly pleased with the creation of WING—the Women's Interest Networking Group. The large turnout for our first meeting is proof that there is a need for such a group in New York. We are working to promote and protect the interests of women attorneys and law students by achieving full participation in rights, benefits and privileges of the legal profession and in the area of international law.

Just as great, our program of floating internship brought to our Section two great additions, Dan Hulea and Samia Khamis, whose assistance was so appreciated by all of us. I hope that the Section continues this fabulous program next year.

Finally, I would like to thank all of the Executive Committee members for their support during my year as Section Chair, where I have learned so much and have made so many dear friends. Again there are too many to thank but I particularly want to acknowledge Jim Duffy, John Zulack and my everyday inspiration, Soraya Bosi. In addition I must thank the staff in Albany to whom I feel so much closer this year: They have been really good friends. May God bless you all!

Isabel C. Franco, Immediate Past Chair
NYSBA International Law and Practice Section
Demarest e Almeida
New York, N.Y.

We have all long known Isabel to be an advocate for women practicing in the field of international law and participating in the activities of our Section. This past year she arranged for an ambitious event, to promote these objectives, that proved successful far beyond her expectations. Jack Zulack graciously offered to have his firm host an affair for women members in the Section to meet, network and hear words of encouragement from various practitioners including Isabel, Helena Tavares Erickson, Joyce Hansen and Marcia Haddad, as well as Steven Krane, President of NYSBA. Isabel worked with the Membership Department in Albany and the response from the invitees was so overwhelming that the venue had to be changed to accommodate a much larger crowd than had been anticipated. The event was rescheduled for the University Club and Isabel turned to law firms in New York City for sponsorship. A prestigious group of firms were extremely impressed with the proposed program and made substantial contributions. News of the event spread by word-of-mouth and attendance had to be limited, even with the expanded capacity of the larger venue. Despite the considerable number of people, there was an unusually warm and inspirational spirit at the event and numerous women expressed enthusiastic interest in actively participating in the Section's affairs. Isabel continues to follow up with the attendees and the Section can look forward to further events designed to raise the profile of the Section among women and draw them into the fold.

Isabel has numerous other accomplishments over the past year that she can well be proud of, including the "Floating Internship" program providing opportunities for law students to work with members and get a glimpse of practice in an international environment. There has also been increased activity by the committees; the Section's publications continue to excel; and our Annual, Spring and Fall Meetings have featured impressive programs and great camaraderie. Isabel has also kept a watchful eye on the bottom line and the Section's financial affairs are in good order.

Isabel would, of course, be the first to say that all of her accomplishments were attributable to the contributions of our members and the contributions have, indeed, been many. However, Isabel has provided the leadership and initiative necessary to stir the membership and bring out its best. We are grateful to Isabel for her year of service as Chair, and for a job remarkably well done.

During the coming year, I intend to carry on with Isabel's initiatives and further the growth and reach of the Section. In addition to increasing the involvement of women, the Section needs to increase its efforts to attract upstate members. One strategy is for each committee chair to schedule a teleconference, for example, with a leading government figure in the committee's substantive area, and arrange for members in a number of upstate cities to get together at a host firm to participate in the conference. The committee can provide access to key officials and use this benefit to bring members together in cities throughout New York at nominal cost.

I am also hopeful that our committees will take a more active role in identifying issues in which the Section should have a voice. In the wake of the tragic events of September 11, it is inevitable that we will be facing increasing legislative and regulatory activity impacting our clients. We need to be prepared to speak out on proposed legislation and regulations, and to turn to the House of Delegates from time to time to muster the strength of the NYSBA.

Additionally, I would like to add a one-day event to our annual agenda. The program would be held on a Saturday, in New York City, and consist of an afternoon lecture or presentation by a panel on a topic of general interest to the international bar, followed by a social event. The objective will be to attract young lawyers, as well as lawyers from outside the metropolitan area, looking for an opportunity to spend a productive and enjoyable weekend in New York. The Executive Committee is an exceptionally collegial group and, I trust, will also welcome another occasion to get together.

Isabel has artfully led the Section through a year of ups and downs with enthusiasm and aplomb. The success of the conference in Rio de Janeiro, following in the wake of September 11, was a true measure of the strength and resolve of Isabel, Joel Harris, Marcia Haddad and our entire Section. Year 2002 may very well be another unusually challenging year, marked by anxieties over terrorism and economic pressures, to be countered by our innate optimism. Whatever the complications, the talent and commitment of our membership assure the Section of continuing progress and success. I'm honored to have the opportunity to carry on the duties of the Chair, and look forward to advancing the interests of the Section as Isabel has so ably done before me. As the world grows smaller and more interconnected, the significance and role of our Section expands concomitantly. Our future continues to look very bright.

Kenneth A. Schultz, Chair
NYSBA International Law and Practice Section
Satterlee Stephens Burke & Burke LLP
New York, N.Y.

IL & P Country News

Argentina

New Zero Deficit Law

By Guillermo Malm Green, Buenos Aires

Law No. 25,453, approved on July 30, 2001, establishes a series of criteria and acts aimed at balancing the economic, financial and budgetary situation of the government, particularly by cutting down on government expenses.

Hence the so-called zero deficit guideline has been adopted whereby the budgetary resources that the government may have available are restricted to those collected during the financial period. That is to say, the purpose of this "zero deficit" is that the government should not incur disbursements exceeding the resources it obtains.

For this reason government agencies must program all their budgets, adapting them to this guideline, and in the event estimated budget resources do not suffice to defray planned disbursements, authorization is granted to lower them (including salaries, wages, additional payments, family allowances, pensions and retirement pay) in order to retain the balance between expenses and resources.

Law No. 25,453 is of public order and *per se* modifies any legal statute to the contrary—it further clarifies that the existence of acquired rights may not be invoked against its provisions.

The stipulations contained in Law No. 25,453 refer only to the national, and not to the provincial, government.

In order to supplement the "zero deficit" guideline and ensure the flow of collections and resources by the government (and prevent distortions thereto), it was decided to amend the Codes of Procedure insofar as they refer to precautionary measures ordered against the government. It is stipulated that the courts may not order precautionary measures when the budgetary resources are affected, hindered, compromised, detoured or in any other way disturbed.

Guillermo Malm Green is a partner with the Buenos Aires-based law firm of Brons & Salas.

Scope of Argentine Antitrust Law Reduced

By Ricardo W. Beller, Buenos Aires

Recent modifications of the Argentine antitrust regulations have reduced the scope of transactions which are required to be reported to the Argentine Comisión Nacional de Defensa de la Competencia (the "Antitrust Committee").

I. Economic Concentration

Argentine Antitrust Law No. 25,156, published in the B.O. on September 20, 1999 (the "Antitrust Law"), restricts any "economic concentration" which is intended to, or has the effect of, reducing, restricting or distorting competition in such a manner that could result in damage to the general economic interest.

"Economic concentration" is defined as the takeover of one or more companies, which may be implemented by a variety of transactions, including, among others, mergers of companies; bulk of assets sale; purchase of shares or rights to subscribe or acquire shares when the purchaser gains control or significant influence on the company; and any other agreement or act whereby the assets of a company are transferred either legally or in fact to a person or economic group, or that gives decision-making control over ordinary or extraordinary management decisions of a company.

II. New Scope of Reporting Requirements

Certain "economic concentration" transactions are required to be subjected, before execution or within one week from their execution, to a notice and approval procedure before the Antitrust Committee.

The transaction which is required to be submitted to the Antitrust Committee will not be effective among the parties or vis-à-vis third parties until such transaction has been approved. Additionally, the Antitrust Committee may apply fines of up to $150 million, and daily fines of up to $1 million, to those who violate the obligation to report relevant economic concentration transactions.

The scope of the "economic concentration" transactions that are required to be reported has recently been reduced by National Executive Power Decree No. 396/2001, published in the B.O. on April 5, 2001 ("Decree 396/2001"), which has modified the Antitrust Law.

Decree 396/2001 eliminated the requirement to report to the Antitrust Committee those "economic concentration" transactions that would result in the total worldwide volume of the business of the relevant group of companies exceeding the amount of $2,500 million.

Therefore, under the current antitrust law, the only "economic concentration" transactions which require approval of the Antitrust Committee are those which would result in the total volume of business in the Republic of Argentina of the relevant group of companies exceeding the amount of $200 million.

III. Exempted Transactions

Even in the event the "economic concentration" transaction falls within the $200 million threshold mentioned above, it would not require authorization from the Antitrust Committee if it falls within the scope of a list of exempted transactions.

Decree 396/2001 added another exempted transaction that does not require approval of the Antitrust Committee, which is listed as point (5) below.

Currently, the exempted transactions are:

(1) acquisitions of companies, when the purchaser already holds more than 50% of the shares;

(2) acquisitions of bonds, debentures, non-voting shares or debt securities of companies;

(3) acquisition of only one company, by only one foreign company that does not have any assets or shares of other companies in Argentina;

(4) acquisitions of liquidated companies (which have not performed any activity in Argentina during the preceding fiscal year); and

(5) transactions where each of the total local assets of the acquired company or the local amount of the transaction is lower than U.S. $20 million, and in which the involved companies have not participated in economic concentrations for an aggregate of U.S. $20 million in the last 12 months, or U.S. $60 million for the last 36 months (both amounts refer to the total value of the local assets or to the total amount of the local transaction).

IV. Recent Opinions of the Antitrust Committee

The following are opinions passed by the Antitrust Committee, in response to specific consultations filed before it, which may illustrate its criteria in connection to enforcement of the provisions of the Antitrust Law:

- A four-year option to acquire shares does not require notification until such option is exercised.
- A transfer of a trademark to a third party for a monetary value must be notified.
- In order to consider that a company is acquiring a "substantial influence" over another, which would be subject to the notification requirement, the purchaser must have veto power on decisions related to commercial policies and competitive strategy of the target company.
- Any transfer of a company's asset or group of assets that permits the transferee to carry out an economic activity and have a volume of business must be notified to the Antitrust Committee.
- If a company exports products to Argentina on a habitual basis and such exports constitute a substantial portion of the total exports of such products in the country (e.g. from 34% to 62%), such company is deemed to have activities in Argentina for purposes of the Antitrust Law.
- Notification is not required in the acquisition of a company in Europe, where the buyer has a branch only in Argentina and the seller has no activity in the country, if the products sold domestically by the acquired company (1) bear an insignificant market share, (2) are not habitual, and (3) there is no vertical or horizontal integration of the products commercialized by both the buyer and the seller.

Ricardo W. Beller is partner in the Buenos Aires office of Marval, O'Farrell & Maizal.

New Capital Markets Transparency Law in Argentina

By Juan Martín Arocena, Buenos Aires

Introduction

President Fernando de la Rúa, using the powers granted to the federal executive branch by Congress under Law 25.514, has passed new regulations towards a more transparent and efficient capital market.

Decree 677-01 has established a so-called Regime of Capital Markets Transparency and Best Practices, which modifies current laws of public offer of securities and increases, in general, the rights of minority shareholders. This decree, which applies to legal entities and physical persons acting in public offering, has already been published and most of its regulations are now in effect.

Taking into account the primary goals of financial markets, such as promoting their own development, encouraging liquidity, stability, solvency and transparency, and creating mechanisms to ensure an efficient reallocation from savings to investments, the government, by passing these new regulations, aims to adjust the legal framework so that the Argentine capital market can adequately perform its own goals.

Today there is also a global awareness of the importance of having adequate corporate governance practices and a proper legal framework to enforce principles such as "full information," "transparency," "efficiency," "public investor's protection," "fair treatment among investors" and "protection of stability of financial entities and intermediaries." Two inevitable conclusions from recent global and regional financial crises are before our eyes: First, that countries seeking to promote economic growth by attracting foreign capital will not be able to avoid the discipline set by global market standards, and second, the less transparent capital markets' policies are, the less capital that will be effectively attracted to them, and the higher their cost will be. Thus, the reforms introduced by these new regulations in Argentina are in line with global trends pertaining to corporate governance practices that have been recently adopted by many emerging markets around the world.

"Negotiable Values"

In accordance with our public offering regime, this concept now includes:

(i) ***Securities.*** These include promissory notes, debt securities, equity securities and obligations;

(ii) ***Investment Contracts.*** This is a new instrument with a concept much closer to the term "security" as defined by the U.S. Securities Act of 1933. This new instrument will enable Argentine issuers to identify new instruments within the financial markets.

In addition, any legal entity may now create or issue negotiable values grouped in series to be negotiable on stock markets pursuant to types and conditions chosen by it, including the rights granted to holders and other conditions established when issuing them, as long as there is no confusion with regard to the type, name and conditions of the values, as specified under the current law.

New Concept of Control

Decree 677-01 has also established new concepts and new parameters with regard to the concept of control, such as:

(a) ***"Controlling," " Controlling Group" or "Groups of Control"*** (the "Group") are the legal entities or physical persons that, either directly or indirectly, individually or jointly, have a participation in the capital stock of a company or in other securities enjoying voting rights that, *de jure* or *de facto*, in this case if it is stable, grant to that Group enough votes to make a corporate decision in regular shareholders' meetings or to elect or revoke the majority of the directors or auditors.

(b) ***Quasi-total Control*** means that the Group or a cascade of companies controls 95% of the subscribed capital of a company. Under such a scenario, the minority shareholder is able to force the majority shareholder to purchase its participation in a fair equitable value. If the value offered by the controlling shareholder is not equitable, the minority shareholder can bring a lawsuit or force an arbitration award in such respect under a summary proceeding. Fair equitable value shall be never lower than the mean price of the securities during the semester immediately before the execution of the withdrawal agreement.

(c) ***Significant Stake*** is deemed under section 23 and 73-a-II as a percentage of not less than 35% in either the equity or the voting rights of a company, and such participation becomes relevant in the case of public offers.

(d) ***External Control***. The decree considers that such control exists whenever a listed company has executed contracts for the administration or management of its assets. The law seems to establish a distinction between the administration and management, although we hope further regulations may clarify this point. The decree requires that such contracts be approved by the meeting of shareholders. It is not clear whether operations agreements are deemed managing agreements or not. However, the effects are serious because external control may make the company liable for the acts of the company that are controlled by a corporation law, creating some sort of lifting of the corporate veil.

Auditing Committee

The auditing committee is a bizarre creation of the new decree which requires that any company subject to public offering have at least a three-member committee formed by members of the board of directors of the company. At the same time, it requires that the majority of the members of the committee be independent of either the Group or the listed company. The law also forbids that any person having executive functions in the listed company participate in this committee. The National Securities Commission (CNV) is authorised to regulate the conditions of independence of the directors. This new auditing committee will play a key role in guaranteeing the authenticity of the disclosed information.

The functions of this committee are various and of some importance, as follows:

(1) To give opinion with regard to the proposal of the board of directors as to the appointment of external auditors to be hired by the company;

(2) To supervise the functioning of the system of internal controls and the trustworthiness of the internal administration and accounting systems of the company and reliability of all the information to be supplied to the CNV;

(3) To supervise the enforcement of the policies related to the information on the management of risks of the company;

(4) To provide the market complete information with respect to operations in which conflicts of interest may arise with members of management or shareholders;

(5) To give opinion on the reasonability of fee proposals for directors, and stock option plans for directors and managers of the company, as submitted by the board;

(6) To give opinion on the fulfillment of legal requirements about the reasonability of the conditions to issue shares or convertible securities in the event of a capital increase with or without pre-emptive rights;

(7) To verify the fulfillment of the ethical norms of behaviour that become applicable;

(8) To answer directly to the CNV on matters of conflict of interest.

In order to obtain a much better performance of the powers and functions mentioned above, this committee may request the counseling of attorneys and other professionals and even hire their services on behalf of the company, within the budget established by the shareholders meeting.

Public Offering Duties

Duty to Inform the CNV

An obligation to report and disclose shareholders' agreements or syndication agreements, including the granting of options or first refusals, is placed on the shoulders of all members of the board of directors. The duty to inform shall remain in force during the term for which the members have been appointed, and during the six months after the effective discontinuance of their functions.

Duty of Secrecy

Any person with access to information concerning events that have not been publicly disclosed and, that due to its importance, may affect the underwriting or negotiations of the negotiable values in an authorised public offering or forward contracts and options, shall keep the information strictly confidential and shall refrain from negotiating it until that information is publicly disclosed.

Loyalty and Diligence Duty

A significant regulation has been enacted with respect to the duties of loyalty of directors and managers to the company for which they work, as follows:

(1) Directors, managers and syndics shall, without exception, place the interests of the corporation for which they work and the common interest of the shareholders above any other interest, including the interest of the controlling group;

(2) Directors, managers and syndics shall refrain from obtaining any personal benefit other than their salary or remuneration for their functions from the corporation for which they work;

(3) Directors, managers and syndics shall organise mechanisms and systems in order to prevent the protection of the corporate interests, reducing the risks of permanent or occasional conflicts of interest in their personal relationship with the corporation or in connection with the personal relationship of other people with the corporation. This duty shall refer to activities in competition with the corporation, the use of corporate assets, the determination of compensations or the misuse of corporate information for personal benefit; and

(4) Directors, managers and syndics shall act with the diligence of a good businessman or businesswoman in the preparation and disclosure of the information supplied to the market, and in the observation of the independence of external auditors.

Tender Offers

The decree introduces a compulsory public offer mechanism, to operate prior to the takeover. Its purpose is to allow shareholders' participation in the decision making of the transaction, and to provide the minority shareholders with a buyout option by means of a fair procedure. Thirty-five percent will be the threshold participation at which this new compulsory mechanism will apply. The tender offer will have to be performed by the acquirer prior to the takeover.

The above-mentioned tender offer is based on the intention to acquire control, thus it excludes unexpected takeovers.

Transparency Violations in the Public Offering

The decree establishes that the following conduct violates transparency in the Public Offering.

Use of inside information for self-benefit or third parties benefit

There is an obligation to refrain from the use of inside information concerning events that have not been publicly disclosed and that may affect the underwriting or negotiations of the negotiable values in an authorised public offering or forward contracts and options, by persons with access to it seeking to obtain for themselves or for others, any type of advantage, deriving from the purchase or sale of negotiable values or of any other transaction related to the public offering regime.

Fraud or deceit in the market

Issuers, intermediaries, investors or any other party taking part in the markets of negotiable values or forward contracts, futures and options of any type whatsoever, shall desist from carrying out practices or conducts that may intend or allow the manipulation of prices or volumes of the negotiable values, rights or forward contracts, futures and options, altering the normal development of supply and demand.

Errors or omissions of material information unauthorised in Public Offering

Decree 677-01 goes into detail of the conditions of prospects and, in case of misrepresentations or errors or omissions of material information, it gives purchasers of securities the right to sue the company for damages, establishing the inversion of the rules of evidence and special terms for promoting any such actions.

Corporate Responsibility Action

The new regulation also contemplates an action for corporate responsibility allowing an individual or shareholder to bring an action on an individual basis or to claim damages for all of the shareholders. A very important distinction is that directors may define their area of responsibility when they are appointed to reduce their liability following the instructions to be established by the CNV. I am of the opinion that, in spite of the lack of regulation, such area of responsibility may be defined with the approval of the shareholders in a regular shareholders' meeting.

Compulsory Arbitration

The decree creates a permanent arbitration court for all self-regulated markets, such as stock exchanges markets. All actions derived from the Argentine Companies Law (Law 19.550) with respect to public companies will be subject to the jurisdiction of the arbitration court.

Penalties

New sanctions on persons and institutions are introduced by the decree, such as fines of up to U.S. $1.5 million, that could be raised up to five times the amount of the obtained benefit or damage suffered as a consequence of the illegal action, to be applied to directors jointly in case of noncompliance with the provisions of the law.

Final Remarks

The delay in adopting these principles probably would have placed Argentina in a disadvantageous position in the competition to attract investors. The development of the capital market in Argentina was in need of the strengthening of investor's rights and the available public information system. The principles focus on the hierarchical arrangement of regulations and the sanctioning of conduct adverse to the public offering procedure; a greater transparency in the control transfers among stock issuers; the regulation and creation of specific solutions for those listed companies under an almost total control that affects liquidity; the amelioration of weak aspects within current regulatory and legal framework; the creation of efficient conflict resolution methods within the market; and the improvement of regulations of the traditional operations of the capital markets.

Juan Martín Arocena is a partner in the Buenos Aires office of Allende & Brea. He's also a Chapter Chair of the International Law and Practice Section of the New York State Bar Association.

Argentina Crisis: Useful Legal Guidelines for Financial, Nonfinancial and Trade Transactions

By Carlos E. Alfaro

Nonfinancial Credits Arising out of Transactions Among Private Parties

Outstanding Credits in Foreign Currency Against an Argentine Company or Individual

a. Outstanding credits payable in Argentina, as a result of obligations that existed prior to or on February 3, 2002, shall be converted into pesos at a U.S. $1 = $1 exchange rate. These sums are adjusted through an indexation mechanism denominated Reference Stabilization Coefficient (CER in Spanish). If, as a result of the application of the CER, the value of the good or service paid in pesos exceeds or is lower than the value of said good or service at the time of payment, then any of the parties may require an equitable adjustment of the price. If the parties do not reach an agreement with respect to the equitable price adjustment, then any of them may commence a lawsuit.

b. Outstanding credits payable in Argentina, subject to foreign law and jurisdiction, shall not be affected by the conversion to pesos ("pesification") and, therefore, the debtor will have the duty to reimburse said loan in the currency agreed to by the parties.

c. Outstanding credits payable in Argentina, after February 3, 2002, as a result of obligations originated after February 3, 2002, may be agreed upon in foreign currency with an option in favor of the debtor to pay in pesos at a U.S. $1 = $1 exchange rate. Payments received in pesos under the conditions described in this paragraph should be taken into account towards full payment, while creditor and debtor—by law—have until June 6, 2002, to negotiate in good faith the equitable distribution of the effects arising from the application of the aforementioned exchange rate.

Credits of Argentine Financial Entities, in Foreign Currency Against an Argentine Company or Individual

a. Law 25,561 ("Public Emergency and Exchange Regime Amendment") compulsorily converted, at a U.S. $1 to $1 exchange rate, outstanding foreign currency denominated indebtedness taken with Argentine financial facilities of an original principal amount not exceeding U.S. $100,000, arising from: (a) mortgage loans—the proceeds of which were used for the acquisition of the borrowers' home; (b) construction, repair and/or extension of the borrowers' home; (c) personal unsecured loans; (d) chattel mortgage loans—the proceeds of which were used to purchase automobiles; and (e) loans of borrowers qualified as micro, small or medium businesses.

b. Decree 214/2002, converted into pesos at a U.S. $1 = $1 exchange rate, any debts originally agreed upon in dollars or other foreign currencies—whether judicial or nonjudicial and independent of their amount or origin—that had not been already "pesified." These sums are also adjusted through the indexation mechanism denominated CER. Debts in installments are adjusted by the CER, but only after August 3, 2002.

International Trade Transactions

Exports

Exporters must repatriate funds obtained from the export of goods and services.

With respect to the term for the repatriation of funds related to the above-mentioned transactions, the existing regulations establish terms from 5 to 360 days, depending on the type of transaction and of products involved.

Export transactions must be done through the intervention of a financial entity. The intervening financial entity shall be responsible for establishing that a real international trade transaction is occurring and not a mere cover for the illegal transfer of funds abroad. In addition, said financial entities shall be responsible for the correct categorization of each transaction.

Imports

On February 8, 2002, Argentina's Central Bank issued Communication "A" 3471 ("Communication 3471"), establishing a single free exchange market, and repealing all exchange rules contrary to its provisions. Therefore, all exchange transactions shall be conducted in said market. The exchange rate for the U.S. dollar will be determined by the supply and demand of the U.S. dollar. Exchange transactions shall only be made at institutions authorized by the BCRA to intermediate in such transactions.

On February 12, 2002, the Ministry of Economy issued resolution No. 61 by means of which it established a list of critical products. The resolution divides critical products into two groups. Products included in the first group can be paid in advance. In this case, the importer has a term of 90 days from the date of payment to provide the intervening financial entity with evidence that the products have been nationalized. Payment of all critical products included in the second group will be authorized within 45 days of their shipment.

Carlos E. Alfaro is the founding partner of Alfaro-Abogados with offices in Buenos Aires, New York, London and Madrid. He co-chairs the International Law and Practice Section's Committee on Inter-American Law including Free Trade in the Americas.

Canada

Recent Developments in Class Actions in Canada

By Wendy M. Matheson and Frank J. Cesario, Toronto

The recent proliferation of class actions in Canada has caught the attention of not only the business community, but also the Supreme Court of Canada. In three recent decisions, the Court explicitly confirmed the importance of the class action as a procedural tool in modern litigation and addressed key class actions issues. Also, additional provinces, and the Federal Court of Canada, are moving to permit class actions, which may mean a further increase in the number of class actions in Canada.

In the Supreme Court of Canada

In three recent decisions, the Supreme Court established important principles that will shape the way class actions and other representative actions are pursued and defended.[1] The Court has for the first time considered class action legislation in Ontario and British Columbia, and has addressed the more rudimentary form of representative action available in most other provinces.

The Court confirmed that class action legislation is to be interpreted generously, not restrictively, to give full effect to its goals: to improve access to justice; to ensure judicial economy through efficient use of court resources when group claims are addressed; and to act as an incentive for actual and potential wrongdoers to modify their behaviour.

The Supreme Court decisions focus on the certification stage, in which a court must decide whether to allow an action to proceed as a class action. The Court held that certification is not a test of the merits of the action. When considering whether to allow an action to proceed as a class action, however, courts must strike a balance between fairness and efficiency. The Court made the following observations:

- In assessing whether a claim should proceed as a class action, it is important to adopt a practical cost-benefit approach that takes into account the impact on class members, defendants and the court.
- The representative plaintiff must present sufficient evidence to support certification, and the opposing party may respond with evidence of its own.
- Claims of class members must raise common issues that are necessary and substantial to the resolution of each class member's claim.
- The existence of a compensatory scheme to provide relief to class members will be taken into account. While not dispositive, this provides an incentive for companies that may face class actions, and those named as defendants, to use alternative dispute resolution procedures to show that the complaints can be resolved fairly, without resort to a class action.

The Court certified as a class action a case involving sexual assault claims, but it did not certify an environmental tort class action. Some commentators predicted the opposite outcome. The particular facts of each case appear to have been very significant in the Court's determination. The ultimate impact of these cases can be fully assessed only once courts on the front line of class actions litigation have interpreted these cases. Nonetheless, the Supreme Court's decisions will certainly affect the way in which litigants and the courts approach class actions, particularly at the certification stage.

Representative Actions

Quebec, Ontario and British Columbia are the only provinces that have comprehensive class action legislation. In other provinces, a plaintiff can bring a "representative action" under court rules, "where numerous persons have a common interest in the subject of an intended action." Generally, these representative rules have been applied restrictively, and few representative actions have gone forward. The first of the three Supreme Court cases involved a representative action in Alberta. The Court took an expansive view of representative actions, applying class action law principles and analysis to allow broad scope for the use of representative actions. This may signal an increase in class action-type actions in provinces that do not have comprehensive class action legislation.

Other Provincial and Federal Initiatives

Comprehensive class action legislation is also being considered by other provinces, including Manitoba (where the Law Reform Commission proposed legislation in 1999), Saskatchewan (where a bill received royal assent and took effect on January 1, 2002) and Newfoundland (where the first reading of a bill is slated for the next legislative session). The Federal Court of Canada's Rules Committee has also produced for comment recommended changes to the Court's rules (which currently provide for representative actions), to modernize and expand class proceedings in the Federal Court.

On all fronts there are indications that class actions will become a fact of life for Canadian business. This will necessitate that greater attention be paid to issues that may result in class actions, and this will shape approaches to defending these actions.

Endnote

1. *Hollick v. Toronto (City)*, 2001 SCC 68; *Rumley v. British Columbia*, 2001 SCC 69; *Western Canadian Shopping Centres v. Dutton*, 2001 SCC 46.

Wendy M. Matheson is a partner in the Toronto office of Torys LLP and Frank J. Cesario is an associate in the same office.

Understanding Litigation in Canada

By Steven R. Schoenfeld, Michael A. Penny, and John A. Terry, New York and Toronto

With the exponential growth of cross-border commerce and investment, U.S. businesses are increasingly likely to find themselves having to deal with litigation in Canada. They may be sued or need to sue there, or seek tactical or strategic advantage by choosing to sue in Canada instead of the U.S. Knowing the key differences between commercial litigation in the two countries allows litigants to avoid surprises and misunderstandings that can occur when a U.S. company or its Canadian affiliate is in litigation in Canada. This knowledge should also result in faster and more effective responses by defendants to lawsuits in Canada; better communication between U.S. and Canadian counsel and clients involved in cross-border litigation; and more effective litigation strategies, particularly when a United States business has the option of—and may be better off—litigating in Canada instead of doing so here.

This article discusses these key differences and the strategic considerations of litigants who are faced with the choice between litigation in one country or the other.

Specific focus will be on differences between the two countries' court systems and judicial selection, pre-trial discovery, trials and juries, civil damage awards, recovery of legal fees, contingency fees and class actions.

Courts and Judicial Selection

Canada has federal and provincial court systems, just as the United States has federal and state court systems. There are, however, significant differences between the two systems in how they divide jurisdiction and select judges.

The vast majority of Canadian commercial litigation is commenced in the superior courts of the provinces, before federally appointed judges. The superior courts of each province have inherent jurisdiction over most civil and criminal proceedings, including commercial matters such as corporate and securities law, breach of contract and products liability. The Federal Court of Canada has no diversity jurisdiction comparable to that of U.S. federal courts that would permit it to hear matters under provincial law. The Federal Court of Canada is a statutory court with limited jurisdiction over specified federal matters such as maritime law, immigration, antitrust, certain intellectual property and judicial review of federal administrative tribunals.

The selection of judges in Canada differs from their selection in the U.S. Canadian judges are not elected, but rather, all are appointed. Significantly, the Canadian federal government appoints judges to the provincial superior and appellate courts as well as to the Federal Court and the Supreme Court of Canada. The federal government also sets and pays these judges' salaries. Federally appointed judges serve for an indefinite term and are removed only for significant misconduct or upon retirement or resignation.

As a result of this appointment system, Canadian judges tend to be less susceptible to political and local concerns than are elected judges in the U.S. Depending on the nature of the suit, the judicial selection system may be a significant factor in a litigant's choice between a federally appointed judge in a Canadian court and a local judge and jury in a U.S. state court.

Pretrial Discovery

Pretrial discovery is generally more restricted in Canada than it is in this country. Litigants in Canada do not have the same rights and opportunities as do U.S. litigants to search for and assemble evidence prior to trial. This difference is an important consideration for any litigant involved in or contemplating Canadian legal proceedings.

In most Canadian provinces, the parties must make full disclosure of all relevant documents after the pleadings are served. The scope of documentary discovery of parties is roughly the same in Canada as in the U.S. In Ontario, for example, each party must serve an affidavit listing every document "relating to any matter in issue" that is or was in the party's possession, power or control. The "matter[s] at issue" are defined by the pleadings. A document must be produced if it has "some semblance" of relevance. The existence, but not the content, of privileged documents must also be disclosed in the affidavit of documents. All non-privileged documents must be promptly produced for inspection and copying. As do courts in the United States, courts in Canada resolve any disputes over documents withheld on the basis of privilege.

Depositions tend to be more limited in Canada than here. Oral examinations under oath for purposes of discovery are called "examinations for discovery" in Canada.

In most Canadian jurisdictions, including Ontario, there is only the automatic right to examine each individual party and one representative of each corporate party. Additional witnesses can be examined with leave of court, but leave can be difficult to obtain. These oral examinations are essentially the same as depositions in the United States, except that in some provinces witnesses may refuse to answer questions that are objected to on the basis of form or relevance until the witnesses are ordered to answer them by the court.

In addition, a corporate representative is accountable for obtaining and supplying relevant information from others in the company, including all relevant information not within the corporate representative's personal knowledge. The corporate representative may also be required, by way of an "undertaking," to obtain relevant information from other companies in a corporate group or from non-parties who were connected in some way to the corporate party in the circumstances underlying the litigation.

In contrast to the civil procedure rules in the United States, there is generally no *prima facie* right in Canada to secure documents and depositions directly from non-parties. In most provinces, including Ontario, a party seeking documents from a non-party must apply for a court order. Upon such an application, the courts consider whether the information is unavailable from other sources, including the parties, and the production is necessary to avoid unfairness.

Most Canadian provinces also do not permit non-party oral discovery without leave of court. A party seeking non-party discovery has the burden of showing that

- the information cannot be obtained from a person whom the requesting party is entitled to examine;

- it would be unfair to force the requesting party to proceed to trial without the examination;
- the trial would not be delayed; and
- the examination would not cause unreasonable expense to the other parties, or be unfair to the non-party.

Canadian courts, however, permit cross-examination of witnesses in connection with motions. These examinations may include parties and non-parties, regardless of whether the witness has filed an affidavit on the motion. The cross-examination is conducted out of court, like a deposition, and the transcript is filed with the court as part of the record on the motion; the scope of these examinations is restricted to matters that are relevant to the pending motion. The motion cross-examination procedure is not considered part of discovery in Canada, but it can open the door to the broad discovery of information, particularly on, for example, a motion for summary judgment where the merits of the claim or defense are at issue.

One other difference that should be kept in mind is that, unlike in the U.S., discovery obtained in a proceeding in Canada cannot be freely used in other proceedings. Most Canadian jurisdictions impose an express or implied undertaking on the parties and their counsel, which prohibits them from disclosing or using evidence or information provided during discovery in an action for any purpose other than the prosecution or defense of that action. Violations of this undertaking can be punished with monetary sanctions and contempt-of-court orders.

A party may apply to a court for relief from the undertaking, but the desire to use the information in another lawsuit is not generally considered sufficient grounds for such relief. The effect of the undertaking is that the kind of information-sharing that occurs among plaintiffs' lawyers in the United States is not likely to be acceptable in Canada.

Trials and Juries

There is no constitutional right in Canada to trial by jury of civil claims. A party may request a jury, but the courts have broad discretion to deny a jury trial if the legal or factual issues are complex or if a defendant might be prejudiced. Thus, civil jury trials tend to be rare in Canada except in personal injury and insurance litigation. Although theoretically available, jury trials are virtually nonexistent in complex commercial litigation.

The infrequency of civil jury trials in Canada results in greater certainty in litigation outcomes, less bias against a deep-pocket or foreign defendant and lower damage awards, all of which are significant strategic considerations for all sides.

Civil Damages in Canada

General damage awards in Canada are substantially lower than those in the United States, even in cases tried by a jury. The Supreme Court of Canada has capped damages for pain and suffering in personal injury actions at an amount that, in today's dollars, represents a ceiling of Cdn. $250,000, or U.S. $150,000. Multi-million dollar compensatory damage awards in personal injury actions are, as a result, much less frequent in Canada than in this country.

Punitive damage awards in Canada are also less common and tend to be smaller than they are in the U.S. In addition, Canada has no statutes providing for treble damages, as antitrust and RICO statutes do in the United States. When awarded, punitive damages typically do not exceed $50,000. Punitive damage awards for $1 million or more are unusual, and billion-dollar awards like those sometimes seen here have never happened in Canada. With substantially lower damage awards, litigation is less risky, and settlements of claims tend to be considerably less costly for defendants in Canada than they are in the U.S.

Recovery of Legal Fees

In Canada, unlike in the U.S., there is a general rule that the party who loses litigation must pay the winning party's legal costs. The definition of "costs" in Canada is broader than it is in the U.S. and includes legal fees and expenses. This loser-pays rule creates a dynamic in Canadian litigation that differs from that in U.S. litigation, except in large cases, where the legal costs are proportionately small in relation to the amount in issue. By partially compensating a winning party and increasing the monetary risk to the losing party, the Canadian courts discourage weak or questionable claims.

The procedure for assessing costs varies from province to province. Costs usually follow the event, but they can be awarded on motions and at other interlocutory stages.

In Ontario and most other provinces, legal fees can be recovered at two levels. First, "party-party costs" are awarded based on a prescribed tariff, with fixed amounts of reimbursement for specific tasks performed by counsel, such as discovery, examinations, court appearances and motions. Party-party costs do not fully indemnify the winning party, but may result in the recovery of approximately one-third to one-half of the winning party's actual legal costs.

Second, the court may award "solicitor-client costs," which are intended to indemnify the winning party fully for all reasonably incurred costs. Solicitor-client costs may result in the recovery of two-thirds to three-fourths of the winning party's actual legal costs. Solicitor-client costs are usually limited to cases in which a party or counsel has been guilty of misconduct (by, for example, asserting a claim without any basis or taking steps that unreasonably protract the proceedings), or in which a party has rejected a settlement offer that was better than the result at trial. The threat of such awards in Canada plays a more significant role than do sanction rules in the United States in discouraging parties from asserting frivolous claims. This threat is one reason, for example, that fraud claims are not as common in Canada as they are in the U.S.

As a further protection for defendants, Canadian courts in most jurisdictions may order a plaintiff to post security for a potential award of costs. Security may be required if the plaintiff is from outside the province (an important fact for potential U.S. litigants to keep in mind) or if there is reason to believe that the plaintiff has insufficient assets to pay a costs award. The court has discretion to deny a request for the posting of security if requiring security would have the effect of preventing the prosecution of a meritorious claim. In addition, courts often order that security for costs be posted in installments as the litigation proceeds, rather than as one up-front lump sum.

Contingency Fees

Lawyers are permitted to use contingency fee arrangements in most Canadian provinces. In Ontario, however, lawyers are not permitted to use them except that in class actions, contingency fees are permitted but subject to court approval.

For some plaintiffs, this can make it more difficult financially to retain capable counsel and prosecute an action in Ontario than to do so in this country. A plaintiff's difficulty financing an action makes it more likely that the action may not be brought or may not be prosecuted as effectively. Even though contingency fee arrangements are permitted in most Canadian provinces, they are not used as much in Canada as they are here.

Class Actions

Class actions have been a major part of civil litigation in the United States for a long time. They are a more recent, but growing, phenomenon in Canada. Plaintiffs' class action lawyers in Canada have begun to copy actions first brought in this country and often make cross-border arrangements to work with plaintiffs' lawyers in the United States.

Only three provinces (British Columbia, Ontario and Quebec) have modern class action legislation. Class action rules have been proposed for the Federal Court of Canada, but these are still in the study phase. Among the three provinces with class action legislation the rules vary, but Ontario's class action regime is fairly representative.

The test for class certification in Ontario is easier than the test in the United States. The easier certification threshold is significant because defendants are more likely to settle class actions once certification is granted.

Under Rule 23 of the U.S. Federal Rules of Civil Procedure, class members must be sufficiently numerous to justify a class action, common issues must "predominate," a class action must be "superior" to other available means of adjudication, and the representative plaintiff's claims must be typical of the claims of the entire class. In contrast, a class action in Ontario requires only two or more plaintiffs. Common issues are required, but they need not predominate. A class action merely needs to be a "preferable," but not necessarily a superior, means of adjudication. The representative plaintiff's claims need not be typical of the claims of the entire class. Ontario courts have the flexibility to allow for the creation of subclasses at any stage of the proceedings.

The general loser-pays rule applies to class actions. One might expect that this would create a strong disincentive towards acting as a representative plaintiff, because the liability for the costs of a class action may be large, while the representative plaintiff's individual recovery in the event of success may be small. This has not, however, been the Canadian experience.

Ontario has a Class Proceedings Fund that will, under certain circumstances, fund a plaintiff's disbursements and cover any adverse costs award. In addition, courts are more likely to exercise their discretion and deny or limit costs awards against a representative plaintiff in a class action than against a plaintiff in a non-class action. Ontario's class action rules specifically allow courts to consider whether the class proceeding involves a test case, raises a novel point of law or involves a matter of public interest in their decision whether to impose costs on a losing plaintiff. The risk of an adverse award of costs is a significant consideration for a defendant in a class action and may create a further incentive for a defendant to settle, particularly after class certification.

One of the biggest uncertainties of class actions in the United States is the outcome of a jury trial, particularly the potential for a jury to award astronomical compensatory and punitive damages. The absence of jury trials and the likelihood of lower damage awards are undoubtedly the most significant factors favoring a defendant in a class action proceeding in Canada.

Conclusion

Increased cross-border commerce and investment have also increased the likelihood that American companies doing business in Canada will be exposed to litigation there. The differences between litigating in Canada and litigating in the United States discussed in this article should be considered by general counsel and business executives that may do, or that already do, business in both jurisdictions.

This article first appeared in the April 16, 2001, issue of the *New York Law Journal*. Steven R. Schoenfeld is a partner in the Litigation Department of Torys LLP New York. Michael A. Penny and John A. Terry are partners in the Litigation Department of Torys LLP Toronto.

Hong Kong

PRC: New Patent Law, Accession to WTO

By George A. Ribeiro, Hong Kong

Payment of Maintenance Fees and Annuities for Patents

Effective from 1st July 2001, a new Chinese Patent Law has come to force. Among other things—

It is no longer necessary to pay maintenance fees every year until the application is granted. Instead, all annual maintenance fees due are payable at the time of issue of certificate, together with the registration fee, printing fee and annual fee of the year in which the patent right was granted.

If an annuity is not paid at all or in full, within six months after the prescribed time limit, the patentee may still restore the same by paying the annuity plus a surcharge at 5% for each month after expiration.

If the annuity is not paid even within the six months' grace period, the patentee may still file a request, together with supporting reasons and payment of outstanding fees and surcharges, to restore its right.

China's Accession to WTO—Acquisition of a Foreign Investment Enterprise (FIE) in China

Due to China's accession to the World Trade Organization and introduction of more relaxed business laws, there will undoubtedly be growth in mergers and acquisitions in China by foreign investors as a means for expansion of business in China. Subject to the foreign investor's business objectives, acquisition of an existing FIE with an established business structure is often regarded as cost effective, and hence a preferred route for immediate access into the China market.

The following sections of this article set out various modes of acquisition of an FIE in China, and points worth noting in the exercise.

The following are the frequently adopted modes:

1. Acquisition of Assets in an FIE

- Foreign investors may choose the particular assets in an FIE that they wish to acquire. They may assume the liabilities under express agreement, but care should be taken over assets with encumbrances. Under PRC law, however, a foreign investor is not permitted to acquire assets of a PRC domestic company (which includes an FIE). Accordingly, if a foreign investor chooses to do so, it has to form a new FIE to hold the acquired assets.
- Governmental approval is required for the establishment of the new FIE and the acquisition of assets. Where state-owned assets are involved, due to the FIE being a Sino-foreign joint venture with a state-owned enterprise as the local party which had injected state-owned property as capital, valuation of the assets has to be made in accordance with prescribed rules.
- If employees have to be transferred to ensure immediate operation, attention has to be paid over labor laws to avoid disruption of transfer and labor claims.
- Foreign investors acquiring the assets in an FIE should also pay special attention to various potential taxes. These may include tax on gains derived from the assets sale, the retroactive abolition of tax incentives/holidays enjoyed by the transferee or FIE, business tax (on transfer of any intangible or real property), stamp duty, repayment of previously exempted customs duties and VAT for exports and imported equipment/raw materials, VAT on the value of movable property, and LVAT (land value added tax) on immovable property which may affect title.

2. Acquisition of Equity Interest in an FIE

- There may be acquisition of shares in an FIE through direct or indirect purchase.
- Indirect purchase is where the foreign investor acquires the shares in the foreign company holding shares in the FIE. Such purchase may be governed by the laws of the jurisdiction of choice, and PRC governmental approvals are not required unless a change in the FIE's articles of association is necessary.
- A direct purchase means that the foreign investor directly acquires shares in an FIE. Such purchase requires approval of the original governmental authority which approved the establishment of the FIE.

- Withholding tax (10% on any capital gains on the sale of the equity interest) may be reduced if there is available relief under applicable income tax treaties, and hence restructuring of ownership prior to sale may be advantageous. On the other hand, business tax (5%) may also apply, depending on whether the shares were initially acquired through an intangible contribution exempt from business tax, e.g., technology and patent rights.

3. Transformation of the Joint Venture into a Wholly Owned Foreign Enterprise

- Foreign investors may choose to acquire its local Chinese partner's interest in the existing joint venture and then transform the entity into a wholly foreign owned enterprise. This is permissible, as long as the business scope of the joint venture is one allowed to be conducted by a wholly foreign owned enterprise. Approval from the original approving authority is required. As a result of the transformation, the foreign investor may obtain full management and control of the FIE.

- The business of the wholly foreign owned enterprise will be treated as a continuation of the pre-existing joint venture. Care should be taken that tax advantages (such as unused tax holidays) will not be disturbed, and all title to all assets, to include land use rights that should be contributed by the local party are fully vested in the pre-existing joint venture prior to transformation.

4. Transfer of Assets into a New Entity

- This applies to an existing FIE, where the foreign investor may choose to either (i) form a new company as a subsidiary of the existing FIE and then contribute capital to the new company through transfer assets from the existing FIE or (ii) form a new company that is an FIE and then transfer part of the assets of the existing FIE to the new company.

- The foreign investor is thus able to spin-off part of its existing business into a new entity, and hence providing an alternative of merging the new company with, or selling it to, a third party, or using the new company to joint venture with a third party.

- In (i) above, apart from the requirement that the transferor must be a Chinese Holding Company or the transferee must be a Western Enterprise (a Western Enterprise is a company established in the PRC Western Regions) for the new company to qualify as an FIE, the existing FIE may not invest more than 50% of the FIE's net assets in other companies (if the transferee is a Western Enterprise but the transferor is not a Chinese Holding Company).

- Another restriction is that the new FIE's business scope must fall within that permitted by foreign investment.

- Where the transfer is made in exchange for value in excess of the cost basis of the assets transferred, there will tax charged on the gain.

George A. Ribeiro is a partner with the Hong Kong office of Vivien Chan & Co. He is also a Chapter Chair of the NYSBA International Law and Practice Section.

Mexico

Recent Changes to the Mexican Electricity Regulations

By Mark O'Donoghue, Mexico City

I. May, 2001 Amendments

- On May 24, 2001, President Vicente Fox issued a decree enacting amendments to Mexico's electricity regulations (the "May Amendments") which significantly expanded the flexibility of the state-owned electricity monopoly, *Comisión Federal de Electricidad* (CFE), to contract with private entities for the supply of electrical generation capacity and electrical energy.

- Under current law, CFE may purchase excess energy from IPPs, co-generators and self-supply companies on a short term basis, but it may not make a capacity commitment or acquire more than 20 MW without conducting a public bid.

- The May Amendments will permit CFE to purchase, without a public bid (but subject to a pricing methodology to be determined by the Ministry of Energy):
    - all of the excess production of co-generation facilities; and
    - up to half of the total installed capacity of self supply facilities.

- These provisions, although technical in nature and limited to CFE's procurement program, are significant in the current Mexican environment for both political and practical reasons.

- The Mexican Congress, which will soon be asked to consider a comprehensive program for opening up the electricity industry to private participation, has challenged the May Amendments in the Supreme Court.

- The constitutional challenge is institutional in nature, drawing support both from members of the President's PAN party and his opponents, who object to changes by regulation which, they contend, should have been enacted by law.
- The Supreme Court's decision, which is expected within several months, may produce a partial victory for each side, requiring additional regulatory provisions by the President and affecting the broader political debate over the comprehensive proposal submitted to Congress.

- At the same time, Mexico has urgent need for the development of more than 26,000 MW in new generation capacity over the next ten years, which CFE alone will have great difficulty in satisfying.
- Although there is an expectation that large electricity infrastructure projects in the medium term will be carried out under a privatized industry governed by a new regulatory scheme approved by the Congress, the May Amendments reflect the most significant government initiative to encourage additional development in the short term.
- The outcome of the Supreme Court's decision, as well as the government's implementation of the May Amendments, will have an important impact on how large infrastructure projects in the electricity sector are developed in Mexico over the next few years.

II. Mexican Electricity Sector

- Mexico's electricity sector is dominated by the CFE, a state-owned company which accounts for virtually all of the country's capacity in generation (36,155 MW) and transmission (35,697 km), and operates the various distribution networks outside of Mexico City. The Mexico City area is served by a separate state company, *Luz y Fuerza del Centro* (LFC).
- The state's monopoly role in electrical generation, transmission and distribution is established by the Mexican Constitution. It is defined in the Public Service Electrical Energy Law (the "Law"), as well as the Regulations to the Public Service Electrical Energy Law (the "Regulations"). CFE's monopoly in the electricity sector is mirrored by the monopoly of Petróleos Mexicanos (PEMEX) in the oil and gas sector.
- In 1992, the Electricity Law was amended to permit private sector investment in four types of generation, which were defined as outside the scope of public service: (i) independent power production, (ii) co-generation, (iii) self-supply and (iv) small production (less than 20 MW).
- Little was done to exploit these modalities until 1995, when the Mexican Congress enacted a set of initiatives designed to promote private ownership of natural gas pipelines and private participation in the marketing and distribution of natural gas. The laws included a reform in the Electricity Law limiting the scope of the PEMEX monopoly in natural gas and a new law establishing a regulator, the *Comisión Reguladora de Energía* (CRE), with jurisdiction over the electricity and natural gas sectors.
- Since 1996, CFE has executed various power purchase agreements for IPP projects (PPA) that have resulted in the construction of privately owned plants with generation capacity of more than 6,500 MW. CFE currently has projects in the pipeline over the next year which would add more than 3,300 MW in new capacity.
- Although the PPA utilized by CFE has attracted a number of developers from the U.S., Europe and Japan, and has proven to be readily financeable in the international market, its investment program has long been viewed by the government as an interim measure designed to meet current needs while the electricity sector is restructured.
- The fundamental conclusion reached by the administration of President Ernesto Zedillo in 1999, and now adopted by the current administration of President Vicente Fox, is that the state monopoly in the electricity sector should be drastically curtailed and replaced by a competitive market in which energy can be bought and sold by generators, distributors and large consumers.
    - A comprehensive set of reforms embodying this approach was submitted to the Congress in 1999 but was quickly caught up in the political jockeying preceding the 2000 Presidential elections and never acted upon.
    - Although President Fox promised during his campaign not to pursue the provisions of the Zedillo reforms that would have required CFE to privatize its assets, his administration does intend to submit its own comprehensive proposals to the Congress for restructuring the electricity industry and, insofar as natural gas is concerned, the energy sector.
- The details of these reforms are still being negotiated with the Congress but the general elements follow the Zedillo model:
    - A competitive wholesale electricity market will be developed under the aegis of a new state-owned entity which will control the dispatch of the national grid—generators, distributors,

marketers and large consumers will participate in this market.

  - The private sector will have the right to participate in all aspects of the electricity industry, including generation, transmission, distribution and marketing. Concessions will be granted to private parties to permit them to utilize publicly owned assets.
  - The state will maintain ownership of the transmission and distribution network, as well as nuclear power.

- The legislative proposal may also contain provisions designed to promote greater private participation in the natural gas market and increased natural gas production. Because Mexico has principally focused on development of combined-cycle, gas-fired plants, these changes would somewhat reduce the current dominance of PEMEX. However, any such proposals are likely to be very controversial because of their perceived impact on PEMEX's broader role.
- The impetus for these changes is a shortfall in generation capacity that poses immediate threats to the reliability of Mexico's electricity system, but the complexity and scope of any systematic reform—which will require changes to the Mexican constitution as well as new legislation—mean that other methods will be required to satisfy demand.
- Mexico is currently confronting a shortage in electrical generation capacity which has reduced its margins to dangerously low levels. In the last few years, the reserve margin has been exhausted and demand has exceeded available supply on a number of occasions.
  - CFE's procurement program has not kept pace with growing demand.
  - While CFE can access funds to make the necessary investments, its requirements for funds in the debt markets will compete with other Government priorities.
  - At the projected 6% annual growth rate over the next ten years, almost U.S. $6 billion will be required to construct the required infrastructure for generation, transmission and distribution. Those financial resources needs will siphon off resources required for programs in education, health and welfare.
- The response of the government, as reflected in the May Amendments, has been to search for means by which CFE's commitments to IPP developers under its PPAs can be leveraged to promote private plants which will not be entirely dependent on its credit.

III. Leveraging CFE's Capacity Commitments

- In awarding PPAs, CFE is subject to bidding requirements established both by specific provisions of the Electricity Law, and the Acquisitions Law, applicable generally to entities of the federal government.
- The Electricity Law requires CFE to select the qualified bidder who offers the lowest long-term cost of energy and also offers the best stability, quality and reliability for public service.
- In issuing its requests for bids, CFE utilizes a standard contract format under which it commits to purchase capacity and energy on a long-term basis.
  - CFE's capacity commitment is fixed to a maximum quantity specified in the invitation to bid (generally, 200–500 MW for a single project). The developer may oversize the plant up to the maximum capacity of the grid at the specified interconnection point.
  - The term is 25 years. The developer operates the plant and retains full ownership after the end of the contract term.
  - Capacity payments for plant amortization are denominated and paid in U.S. dollars; other capacity payments are payable in U.S. dollars and pesos.
  - Energy charges are tied to a U.S.-indexed reference price for natural gas.
  - No level of dispatch is guaranteed but developers are given flexibility to mitigate risks by allocation of costs to different charges.
  - Permitting, *force majeure* and other risks are appropriately allocated.
- The Electricity Law and the Regulations reflect an open-ended approach to CFE procurement which allows a bidder to select the sizing, location, fuel supply and modality (IPP, co-generation, self-supply) of the plant which will supply CFE's requirements.
  - In practice, however, the CFE has determined the locations of plants by offering "optional sites" for which it obtains all rights of way and assumes *force majeure* risks.
  - CFE has also dictated the types of plants (generally combined cycle, gas-fired) and modality for suppliers (generally IPPs) through requirements contained in the bidding specifications.

- In its initial projects, CFE contracted with PEMEX for supply of natural gas and bore any risk of mismatch between dispatch of the plant and nomination of gas supply. It now requires the developer to contract with the fuel supplier—which may be PEMEX or a private party. For plants located in the north of Mexico, U.S. gas suppliers are increasingly able to compete with PEMEX, although PEMEX remains the dominant player.
- CFE is obligated under the PPA to purchase the plant facilities from the IPP developer if the contract is terminated for a CFE default or governmental *force majeure*. It also has the right—but not the obligation—to purchase the plant when the developer defaults or CFE elects to terminate the contract for a non-governmental *force majeure*.
    - The buyout price is tied to the capacity commitment made by CFE in the IPP contract.
    - At the same time, CFE's right to acquire the plant in a buyout scenario means that any investment in the plant for capacity exceeding CFE's commitment may be jeopardized unless the developer can segregate the incremental assets without adversely affecting the operation or efficiency of the assets purchased by CFE.
- In spite of this complication, IPP developers have built projects which are oversized in relation to the CFE capacity commitment under the PPA, by utilizing the modality for self-supply authorized by the 1992 reforms to the Electricity Law.
- The self-supply modality has been interpreted by the CRE, as regulator of the electricity sector, to permit incorporation of a company owning a plant or otherwise controlling generation capacity in which the various equity owners may purchase capacity and energy in quantities that do not correspond to their equity stake in the company.
    - The result is that a self-supply company may be structured to mimic a private independent power producer under which the equity owners have only nominal stake in the company and, for all practical purposes, are customers of an independent power producer.
    - If the offtakers are located adjacent to the plant, this model is a convenient way of increasing the size of the plant so as to serve both CFE and the industrial offtakers.
    - It is possible to "wheel" energy to the offtakers from the plant over the CFE grid, but the self-supply company and its participants must execute various contracts with CFE which have a number of complexities, making it difficult to secure commitments from customers when the initial investment decision must be made.
- Similar rigidities have been present in co-generation projects that have sought to sell energy to CFE.
    - As a practical matter, co-generation facilities have been unable to compete for CFE requirements because the bidding guidelines have not been adapted to their special features.
    - In addition, the buyout provisions in the standard PPA has been ill-suited to facilities which are tied to particular industrial processes.
- The absence of a convenient vehicle for CFE purchase of energy from co-generation facilities has been a significant obstacle to the development of sizable projects both by the public sector (principally PEMEX) and private companies.
- The current law allowing CFE to purchase energy on a short-term basis has not been attractive, for several reasons, to developers requiring long-term finance.
    - The pricing methodology to be utilized by CFE, as established in the Regulations, has resulted in prices that are often below the developer's cost of capacity and energy.
    - The uncertainty associated with future pricing has been unattractive to banks.
- The purpose of the May Amendments, then, is to provide a backdrop of relatively attractive CFE pricing that will support long-term financing, but also leave open the possibility of the self-supply schemes when additional profits justify the structuring complexities.

IV. Details of the May Amendments

- As noted above, the essence of the May Amendments is to permit CFE to purchase energy and capacity without a public bid. It authorizes CFE to purchase:
    - all of the excess production of co-generation facilities; and
    - up to half of the total installed capacity of self-supply facilities.
- CFE is to pay a price established by a methodology to be issued by the Ministry of Energy for each type of facility.
- Note that the regulation refers to "capacity" for self-supply entities and "excess production" for co-generation facilities.

- The amendments to the Electricity Law took effect on May 26, 2001, but the methodologies have not yet been issued by the Ministry of Energy.
- Therefore, the significance—if any—of these different terms is not yet clear.

- Under the prior Regulations, if the CFE required more than that level of capacity, it was required to contract it through a bidding process in which all modalities of private power generation contemplated by law could participate in the bidding process.
- With the amendment, this limitation was eliminated for those instances in which private parties holding self-supply and/or co-generation permits have excess capacity.
- On June 27, 2001, the Mexican Congress filed, before the Mexican Supreme Court, a constitutional dispute regarding the amendments to the Regulations.
  - According to the complaint filed by Congress, the amendments to the Regulations enacted by the President invaded Congress' jurisdiction and exceeded the regulatory authority granted in the Constitution to the president.
  - In addition, the complaint maintains that the amendments violate article 134 of the Constitution, which mandates that all contracts executed by the federal government be awarded through a bidding process to guarantee the best conditions available in the market.
  - This dispute has not yet been resolved by the Supreme Court. Although the Supreme Court by law does not have a specified time period to issue its decision, it is expected that a decision will be issued within the next year.
- The constitutional challenge is a new legal vehicle which represents a significant check on the hitherto dominance of the Mexican presidency. The Supreme Court has issued rulings in several other constitutional cases over the last year.
- There is a substantial possibility that the Supreme Court will issue a ruling that is not entirely favorable to either side.
  - Although there is little precedent for any decision because of the novelty of this legal vehicle, it is thought that the overall thrust of the Regulations appears to be within the President's power or, if subject to challenge, untimely.
  - However, some commentators have questioned whether the President was entitled to delegate to the Ministry of Energy the task of establishing a pricing methodology, rather than establish that methodology in the Regulations.
  - If the Supreme Court rules that the delegation of the President's powers to the Ministry of Energy was improper, a further decree will be required in order to flesh out the details.

V. Conclusions

- The speed and content of the Supreme Court's ruling will determine whether the May Amendments can be relied upon by private parties to structure more ambitious projects based on PPAs with CFE.
- In addition, the pricing and contractual details elaborated by the Ministry of Energy (or the President, if the Supreme Court's ruling strikes down this aspect of the decree) will be critical to the success of the May Amendments.
- However, if properly implemented, the May Amendments do have the potential to trigger a significant stream of projects over the next few years, which will add much needed generation capacity to Mexico's overall system.

Mark O'Donoghue is a partner with Curtis, Mallet-Prevost, Colt & Mosle LLP. He is a member of the firm's Corporate International Department, managing partner of the Mexico City office and Chairman of the Personnel Committee.

United States

New Rules for Determining the Jurisdiction in Which a Foreign Organization Must File a Financing Statement to Perfect a Security Interest Under the Revised Uniform Commercial Code

By William H. Hagendorn, New York

The recent adoption by almost all of the United States of a revised Article 9 of the Uniform Commercial Code has made major changes in the law applicable to the creation and perfection of security interests in tangible and intangible personal property. Of particular interest to international practitioners are the rules which determine the jurisdiction in which an organization must file its financing statements in order to perfect the security interests that they grant to secured lenders or vendors (or to perfect the title to accounts receivable that they sell to financiers). At least initially, U.S. lawyers will need the assistance of foreign attorneys to determine the applicable rule.

By way of background, U.S. lenders, factors and their attorneys have historically sought a method by which they could discover the existence of security interests in tangible and intangible personal property that is in the possession or control of, and presumably owned free-and-clear by, a potential borrower or seller. Secret security interests were frowned upon by the courts and held invalid under various circumstances. The Bankruptcy Act in effect invalidated security interests which were not "perfected" against the claims of unsecured creditors and the trustee in bankruptcy at least 90 days prior to the commencement of bankruptcy, but the laws and decisions that perfected the security interests (other than by possession and control) varied from state to state and were not consistent or clear.

With the adoption by the states of the first Uniform Commercial Code (the "Code"), earlier provisions in various states for non-possessory perfection by the recording of chattel mortgages, the marking of books of account and the posting of notices of factoring were replaced by a uniform system requiring the filing of a simple notice called a Financing Statement, which identifies the debtor, the creditor and the specific property or the type of property then or thereafter to be subject to the security interest. The amount of the secured debt was not stated and could fluctuate, and the filing was effective for six years, unless terminated or renewed by another filing. Because a sale of accounts receivable to factors and the like so closely resembled a secured loan (except for the ultimate risk of nonpayment), the sale of a substantial amount of accounts was treated as a secured loan and required a similar filing.

Since the Code is state law, the filings are made in state and county offices, and the Code made certain provisions as to the place of filing, as well as the law applicable to perfection. In the case of tangibles such as equipment and inventory, it was the location of the *property*; in the case of general intangibles and mobile equipment, it was the jurisdiction in which the *debtor* was "located." In the case of multi-state and foreign debtors, the Code provided that a debtor company was located at its "principal executive office." Initially the filing office for accounts was in the jurisdiction where the account *records* were located, but this proved impractical in many cases, as where the debtor kept its account with each customer at the store nearest the customer, or at a computer remote from its headquarters. So the Code was amended to make the filing office for accounts coincide with the filing office for general intangibles and mobile equipment, i.e., the jurisdiction in which the *debtor* was located.

Some difficulties arose in determining which executive office was "principal," as in holding companies and conglomerates, where executive authority is divided between parent and subsidiary. A particular problem exists with ship owning companies, which are frequently organized in a flag state such as Liberia or Panama, have no management there except the nominee directors provided by the local attorneys or service companies, and little or no executive management apart from the shareholders, who delegate commercial and operational management to separate specialist companies in different parts of the world.

The Code recognized that some foreign debtors would have trouble complying with the filing requirement if they were located in a jurisdiction "which does not provide for perfection of security interests by filing or recording in that jurisdiction," and as an exception provided that the filing should then be made in the jurisdiction in which it has its "major executive office in the United States." This, of course, was not a complete solution, because lenders to foreign organizations were still required, *first* to determine whether the foreign jurisdiction had the recording or filing system required by the Code, and *second*, if the debtor did not have any office in the U.S., to make filings in the foreign jurisdiction.

The Code offered as an alternative, if the debtor was not located in the U.S. or Canada *and* the collateral was only accounts (or certain general intangibles), that the security interest could be perfected by notice to the account debtor(s). This was a regression to the pre-Code common law practice, which was useful to the secured creditor if there were not too many account debtors, but did not serve the primary purpose of the Code of informing other creditors and potential creditors that the accounts had been encumbered. In the shipping industry, for example, a lender could give notice to a charterer that all charter hire had been assigned to the lender, but could not effectively give notice to the thousands of shippers of goods or containers that their freights had been assigned.

The newly revised Code sets forth in Article 9, Part 3, a completely new statement of the "Law Governing Perfection and Priority," which determines the jurisdiction whose law will govern perfection, the effects of perfection and nonperfection, and priority of security interests, and thus determines the filing jurisdiction. The revised Code continues, in Sections 9-301(a) and 9-307(b), the previous basic rules that jurisdiction (and thus filing location) for intangibles should be determined by the location of the *debtor*, and that an individual is located at his or her residence, an organization, place of business, or, if he or she has more than one place of business, at his or her "chief executive office."

The revised Code has also increased the importance of the rules relating to filings where the debtor is located. In addition to security interests in accounts, intangibles and mobile equipment, security interests in other equipment and inventory will now be perfected by filing where the debtor is located.

The revised Code has made a number of specific exceptions and changes in the defined location of certain organizations. The most important is Section 9-307(e) which provides that a *"registered organization* that is organized under the law of a state is located in that state." "Registered organization" is a newly defined term that means "an organization organized under the law of a state [or the United States] as to which the state . . . must maintain a public record showing the organization to have been organized." This would include U.S. corporations, limited liability companies, limited partnerships, etc., but probably not partnerships and joint ventures. Thus the most important filing office for this large class of major U.S. debtors has been moved from the location of the "principal executive office" (now "chief executive office") to the state of organization. Note, however, that this does *not* apply to foreign organizations.

The special provisions for foreign debtors described above, i.e., filing at the location of its major U.S. office, or giving notice to account debtors, are completely replaced in Section 9-307(c), which provides that if a debtor is

> . . . located in a jurisdiction whose law generally requires information concerning the existence of a nonpossessory security interest to be made generally available in a filing, recording or registration system as a condition or a result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral. . . ["Lien creditor" is defined in Section 9-102(a)(52) as: "(A) a creditor that has acquired a lien on the property involved by attachment, levy or the like; (B) an assignee for the benefit of creditors from the time of assignment; (C) a trustee in bankruptcy from the date of the filing of the petition; or (D) a receiver in equity from the time of appointment."]

then the debtor must follow the rule of subsection (b) and utilize the filing, registration or recording system of the (foreign) location of its chief executive office. A foreign debtor that is not located in a jurisdiction that meets these definitions is deemed by subsection (c) to be "located" in the District of Columbia and is required to file there.

It seems most likely that U.S. lenders to foreign debtors, and their U.S. counsel, will need to consult foreign counsel as to (a) the foreign jurisdiction in which the debtor has its chief executive office, (b) whether the jurisdiction has a system that falls within the above definition, and (c) if so, the procedure for filing. Foreign counsel may need assistance from U.S. counsel in interpreting the new language, including the reasons the drafters substituted the concept of "obtaining priority over the rights of a lien creditor" for the previous concept of "provide the perfection for security interests by filing" as quoted earlier, and also in accomplishing the foreign filing, if required.

The author and/or the editors would welcome comments from our foreign members as to the extent that their local systems will meet the 9-307(c) test, and their availability to assist with such filings.

William H. Hagendorn is a member of Burlingham Underwood, LLP in New York City. He chairs the Admiralty & Maritime Law Committee of the NYSBA International Law and Practice Section.

Attorney's Fees: Is the "American Rule" Applicable to International Sales Law Cases?

By Vikki M. Rogers, Frankfurt/New York

A party that files a claim in a U.S. state or federal court is reasonably assured that a judge will not order it to pay the other party's costs in the event that it does not prevail. This so-called American Rule provides that parties involved in litigation will generally only bear their own expenses, including attorney's fees. This rule is contrary to the applicable law in many other jurisdictions around the world, which embodies a standard that costs ought to be apportioned between the parties, resulting in circumstances in which a loser can be ordered to bear all of the prevailing parties' costs, including attorney's fees.[1] In international commercial arbitration it is also very common that a tribunal will order the loser to pay the "successful" party a large percent of the winner's costs, if not all of them.[2] Given the money that can be expended by the parties in a lawsuit, the allocation of costs in most domestic courts and international commercial arbitrations is not an ancillary aspect of the proceeding, but rather an important, and often neglected, part of the legal process.

The recent decision issued by the U.S. District Court for the Northern District of Illinois, *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc., etc.*,[3] appears at first sight to abandon the "American Rule" in international sales law cases and carves an exception that is generally in accordance with international practice. In *Zapata*, the court ordered the loser (the buyer) to pay all of the winner's (the seller's) attorney's fees. The court derived its authority to issue the award from Article 74 of the UN Convention on the International Sale of Goods (CISG),[4] the applicable substantive law in the case. Although the court rightfully ruled that the buyer to pay the seller's costs, *Zapata* should not be used as precedent for similar propositions in international sales law cases in U.S. courts.

In *Zapata*, a jury ordered a U.S. buyer to pay a Mexican seller $857,796.90 to compensate the seller for tins that it delivered to, and were used by, the buyer.[5] The award also included an additional amount for interest that accrued on the buyer's indebtedness, totaling $355,560.91. After the jury rendered its decision, the seller moved for an award of attorney's fees on three alternative grounds. Two of the three grounds were advanced directly against the buyer.[6] The third ground was addressed against buyer's counsel.

With regard to fees claimed against the buyer's counsel, the court refrained from providing a final conclusion until it received the seller's final reply memorandum relating to its claim against the buyer.[7] The court did definitively order, however, in a separate Memorandum and Order of August 29, 2001, that the buyer bear all of the seller's attorney's fees.

The seller, in support of its request to be reimbursed for fees, relied upon the exception built into the "American Rule." This exception provides that attorney's fees are not ordinarily recoverable *unless* there is a statute or enforceable contract providing thereof.[8] The court was persuaded that the "American Rule" could not shield the buyer from liability in this case, and that the seller was entitled to attorney's fees as an exception under the CISG. The court drew its conclusion from an analysis of the two stipulations that the parties had agreed to. Specifically:

a. The parties entered into a stipulation that provided in relevant part:

> "1. As of the dates when [buyer] issued its purchase orders for the tins described in the invoices attached as Group Exhibit A to [seller's] Complaint in this case, [buyer] foresaw or should have foreseen that if [buyer] failed to pay for the tins that it ordered, received and accepted, [seller] would incur litigation costs including attorneys fees, to seek payment of the invoices for said tins.
>
> 2. The Court shall determine if attorney's fees are recoverable as a matter of law.
>
> 3. The amount of litigation costs, including attorney's fees, to be assessed as consequential damages in this case, if any, will be for the Court to determine on a fee petition, rather than for the jury to decide."

b. The parties also agreed that their claims and counterclaims were governed by the CISG.

With regard to the second stipulation, the court drew attention to the controlling provision in this case, CISG Article 74. It states:

> Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

The court reasoned that these two stipulations read in conjunction with each other do form a valid basis for its conclusion. It stated that attorney's fees could be awarded as foreseeable consequential damages because, by virtue of the stipulations, the parties intended to include litigation costs in the purview of CISG Article 74.

Although this court has apparently taken great strides to present a universal interpretation of the CISG, resisting temptation to be lured in by domestic law connotations, Judge Shadur does give some impression that the underlying rationale of the decision could extend beyond the confines of the facts of this case and be applicable to international sales law cases in U.S. courts generally. This impression is given through the court's inclusion of rhetoric that suggests that despite the party's stipulations, the "American Rule" should not be applied in any international sales law case, as it does not coincide with international practice. The court cites *MCC Marble Ceramic Ctr., Inc. v. Ceramica Nuova D'Agostino, S.F.A.*,[9] which supports the proposition that courts should not apply familiar domestic law when the CISG clearly requires a different result. In this case, the CISG requires a different result only by virtue of the stipulations. Accordingly, the abandonment of the "American Rule" in international sales law cases generally in an attempt to achieve international uniformity with regard to the award of costs would be misplaced. These elucidations by the court should remain in their proper place—as supportive verbiage for the conclusion emanated from the specific facts. Of course, autonomous interpretations of the CISG that are not drawn from domestic law preconceptions are desired and necessary to obtain transnational uniformity in interpretation. However, in my view, CISG Article 74 should not be used as an authority to extrapolate the principle that in international sales law cases in the U.S., costs follow the event and consequently, in instances where the above stipulations have not been made, a loser can still be ordered to pay the attorney's fees pursuant to the CISG.

Applicable Interest Rate under the CISG

In addition to the seller's motion to be reimbursed attorney's fees, the buyer filed a motion under the Federal Rules of Civil Procedure Rule 50, for judgment as a matter of law, and under Rule 59, for a new trial. The court did not ultimately disturb the jury's decision on the merits in light of these two motions; however, it did make a slight modification to the jury's award of interest.

The buyer argued throughout the proceeding that interest should not be awarded because the parties' course of dealings demonstrated that there was never a "sum in arrears" pursuant to CISG Article 78.[10] The court did not analyze the buyer's reasons for claiming that interest was not due; rather it only questioned the jury's quantification of the interest awarded.

The jury based its calculation on the interest rate specified in seller's invoices as applied to the entire amount that seller had claimed, including invoices that the jury ultimately rejected. The buyer did not present the jury with an alternative proposal for the calculation of interest, but only asked the court in the later motion to take judicial notice of the Illinois statutory 5% per annum prejudgment interest rate[11] and the U.S. Treasury bill rate, which was pegged at 3.78% per annum. The court concluded that it "understood" why the jury made the decision it did; i.e., the buyer did not give it another alternative. The court did, however, modify the interest due pursuant to seller's revised calculation, which reduced the amount to $319,893.30. Although it is not expressly stated, it can be assumed the reduction reflects a subtraction of the invoices that were ultimately rejected by the jury.[12]

Endnotes

1. For discussion on varying rules in different countries see John Gotonda, *Awarding Costs and attorney's Fees in International Commercial Arbitrations*, 21 Mich. J. Int'l (1997).
2. *See generally*, Fouchard Gaillard Goldman, *On International Commercial Arbitration*, § 1255 (1999); Klaus Peter Berger, *International Economic Arbitration*, Studies in Transnational Economic Law, vol. 9, pp. 615–20 (1993).
3. 2001 U.S. Dist. LEXIS 15191. *Also available at* 2001 WL 1000927 (N.D. Ill); <http://cisgw3.law.pace.edu/cases/010829u1.html> (This URL provides the August 29, 2001, Memorandum Opinion and Order. Under the Case History section, links are provided to get to the other parts of this proceeding. *See infra*, notes 6 and 7).
4. For the full text of the CISG, legislative history, scholarly commentaries and case law, an excellent source is the Institute of International Commercial Law's Web site at <http://www.cisg.law.pace.edu>.
5. Subsequent to the jury's verdict on June 19, 2001, the court issued a number of Memorandum Opinions and Orders. On July 19, 2001, it issued a Memorandum and Judgment Order, denying buyer's alternative Rule 50 and Rule 59 motions. This Order was followed by a July 20, 2001 Supplement to Memorandum Opinion and Judgment Order. On August 16, 2001, a Memorandum Opinion and Order was issued denying buyer's revised Rule 59 motion that sought to attack the revised judgment. See *infra*, note 7 for information on the August 22, 2001 Memorandum Opinion and Order issued by the court. Lastly, the court issued a Memorandum Opinion and Order on August 29, 2001, regarding an award on costs discussed within this article.
6. The second of the two grounds, which will not be analyzed in this article, concerned the seller's entitlement to recover its attorney's fees because of bad-faith conduct by the buyer. The court also determined that the seller was entitled to its fees based on this ground, citing *Chambers v. NASCO*, 501 U.S. 32, 45–46, 111 S. Ct. 2123, 2133 (1991), to support its conclusion.
7. Memorandum and Order of August 22, 2001. Seller sought to collect attorney's fees directly from buyer's counsel pursuant to 28 U.S.C. § 1927, which applies when an attorney "multiplies the proceedings in any case unreasonably and vexatiously" and consequently requires "to satisfy personally the excess cost, expenses, and attorney's fees reasonably incurred because of such conduct." *Zapata* at 1.
8. The court cites *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257 (1975) as support for this exception.
9. 144 F.3d 1384, 1391 (11th Cir. 1998).
10. Article 78 provides: "If a party fails to pay the price or any sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74."

    The court makes reference to a Mexican banker that charged nothing for the extension of a line of credit. No further facts, however, are provided to assess buyer's argument as to why the sum was not in arrears.
11. These are the statutory rates that cover liquidated obligations or situations where a debtor engaged in unreasonable and vexatious delay.
12. The court also issued post-judgment interest to cover the gap between the jury verdict and the actual final judgment day.

Vikki M. Rogers is admitted to practice in New York and Connecticut, an Associate at Shearman & Sterling's Frankfurt office and a Fellow at the Institute of International Commercial Law at Pace University School of Law, New York.

Immigration Law Change Affecting Business Visas: INS Premium Processing Program

By Ellen G. Yost, Buffalo

A significant change has been made to the U.S. immigration laws to speed the approval of petitions filed by U.S. companies on behalf of foreign employers. The Premium Processing Program has been working well.

The U.S. Immigration and Naturalization Service (INS) established the Premium Processing Program via an interim rule in the Federal Register on June 1, 2001, for certain employment-based petitions and applications. If an entity pays the required $1,000 fee, INS will process the application or petition within 15 calendar days. New filings arriving at the INS service centers may receive premium processing handling, and already-filed cases may be upgraded to such handling if an INS I-797 receipt is available. So far, the program has been a tremendous success, with case turnaround often reduced to just a few days. The addition of H-1B cases is expected to result in a deluge of filings, though INS is optimistic that it will continue to process applications and petitions within the required 15 calendar days. INS must refund the $1,000 fee if it does not adjudicate a case within the required 15 calendar days.

Types of Cases Where Premium Processing is Permitted: INS designated Form I-129, Petition for Nonimmigrant Worker, for premium processing beginning on July 30, 2001, for the following classifications:

1. E-1 Treaty Trader;
2. E-2 Treaty Investor;
3. H-2A Agricultural Worker;
4. H-2B Temporary Worker;
5. H-3 Trainee;
6. L-1 Intracompany Transferee;
7. O-1 and O-2 Aliens of Extraordinary Ability or Achievement;
8. P-1, P-2 and P-3 Athletes and Entertainers;
9. Q-1 International Cultural Exchange Visitors;
10. H-1B Specialty Workers;
11. R-1 Religious Workers; and
12. TN NAFTA Professionals.

These designations will continue until INS publishes a notice amending or terminating them. INS has already suspended H-2A cases from the program. INS contemplates that most employment-based cases, including permanent residence cases filed on Form I-140, will eventually be folded into the Premium Processing Program. No definite date for the inclusion of Form I-140 has been offered as of yet.

Dependents: If an application for a family member is concurrently filed with a petition where premium processing is requested, the INS will process the application within the 15 calendar days without requiring an additional fee.

Impact of the H-1B Cap: When the INS has received sufficient H-1B petitions to reach the 195,000 cap, the premium processing program for H-1B petitions will be temporarily terminated for the fiscal year, and petitions (regular and premium together) will be adjudicated in the order received. In the case of H-1B petitions where premium processing is requested but not available, INS will issue refunds. The cap was not reached this fiscal year ending September 30, 2001.

Aspects of the Premium Processing Program: Premium processing begins on the day INS physically receives a petition or application and ends the day that INS issues a notice or request. If INS does not issue a notice or request within 15 calendar days, the premium processing fee will be refunded, but the case will continue to be expeditiously handled. If a given application or petition is not eligible for premium processing, the fee will be refunded and the case will be processed under regular circumstances.

Form I-907 and $1,000 Fee: A completed Form I-907, Request for Premium Processing Service, may be filed with a new application or petition, or filed for pending application or petition. The fee for the premium processing service is $1,000, which must be paid by separate check, and is set by law and cannot be waived for any reason. Again, the fee will be refunded if a notice or request is not issued within the 15 calendar day period, or the program cannot be utilized because of the H-1B cap or is otherwise suspended.

Upgrading to Premium Processing: One may upgrade cases already filed, including H-1B cases, to the Premium Processing Program. If the I-907 is filed after the petition or application is filed, the 15 days will begin when the INS receives the form. When submitting a Form I-907 after a related petition, a copy of the receipt notice (Form I-797) must be included.

Ellen G. Yost is the Managing Partner of the Buffalo office of Fragomen, Del Rey, Bernsen & Loewy. Ms. Yost was engaged in the establishment of the International Law and Practice Section of the New York State Bar Association and was a founding member of its Executive Committee. She also chaired that Section's Canadian Law Committee.

Will Anthrax Poison Global Intellectual Property Rights?

By Philippe Bennett and Amy Manning, New York

In response to recent concern in the U.S. about the cost and availability of Cipro, Bayer's patented medication for anthrax infections, some U.S. legislators have proposed overriding the Bayer patent and immediately importing generic equivalents from India at one-thirtieth of the cost (a proposal ultimately rejected by the Bush administration). While the U.S. government has negotiated with Bayer to obtain affordable supplies of Cipro to fight a potential anthrax threat, an effort some say parallels Africa's attempt to secure AIDS medicines, the government also opposes Brazil's and other developing countries' efforts to secure broad rights to override patents and lower prices of drugs. Thus, much attention is focused on the upcoming WTO summit in Doha, Qatar, where policymakers from around the world will debate global patent rules, known as the Trade-Related Intellectual Property aspects (TRIPs) agreement. Essentially at issue is the long-running controversy between strong IP rights, i.e., allowing companies to recoup their research and development costs, and a need felt mostly by developing countries, such as India, to supply their citizens with cheaper drugs to treat epidemics such as AIDS, malaria and tuberculosis.

To understand how a company in India can supply a two-month dosage of generic Cipro for $20, while an identical dosage in the U.S. would have cost $693 prior to September 11th, one need not look further than India's patent system. Under India's current patent system, domestic drug companies are able to manufacture generic versions of many drugs currently under patent elsewhere in the world. The Indian Patent Act (IPA), introduced in 1970, is an intentionally weak intellectual property regime designed to keep domestic drug prices low and reduce the power of multi-national companies. Under the IPA, for example, substances used in food and pharmaceuticals cannot be granted product patents, and only process patents are allowed for a period of five years or seven years. Domestic firms, therefore, are able to reverse-engineer drugs subject to patent protection elsewhere in the world, and to produce these drugs at a fraction of the cost.

Under the 1994 WTO TRIPs agreement, India and other developing countries agreed to bring their patent laws into compliance with WTO-recognized standards. On March 10, 1999, for example, the Indian parliament passed a law permitting the filing of patent applications relating to substances for use as a medicine for humans or animals, insecticide, germicide, etc., but disallowing examination of such applications before December 31, 2004. The law also extends the period for patent protection to 20 years. Additionally, for the period before full patent rights become available in 2005, exclusive marketing rights for substances of these types may be provided.

Under India's new patent laws, multi-national companies (MNCs) will be free to introduce top-of-the-line new products, i.e., those patented after 2005 in the domestic market. However, these are expected to be priced at a significant premium in line with the MNCs' global policy of earning returns on their R&D investment. Within a therapeutic segment, therefore, the Indian population likely will continue to resort to the older, less efficient and cheaper medicines. As a result, local companies will continue to make and market in India the popular generics and pre-patent reform products, which may still be under patent overseas.

India and other developing countries are still in the process of amending their patent laws. In part motivated by the high prices drug companies charged for AIDS medicines in poor countries, these countries are seeking a declaration in Doha that nothing in TRIPs prevents governments from taking measures (e.g., suspending a patent or issuing a compulsory license) to protect public health. Such language reflects the unhappiness within the developing world with intellectual property rules which many officials in developing countries contend bestow enormous economic benefits on advanced countries where sophisticated products are developed, while imposing great costs on poor nations.

The U.S., along with Canada, Switzerland, Australia, Japan and other countries, feels that such language is too strong and would seriously undermine worldwide intellectual property protection. Most recently, however, the U.S. Trade Representative decided to drop a WTO-based challenge to Brazil's compulsory patent licensing provision. The provision states that newly patented drugs in Brazil must be manufactured locally within three years, or be subject to a compulsory license. Analysts feel that other developing countries may view the U.S.'s action as an opportunity to model their patent system on that of Brazil. Developing countries hold out further hope that, after the anthrax health crisis, the U.S. may be willing to make concessions, especially in light of the Bush administration's eagerness to boost the global trading system and advance international cooperation for the fight against terrorism.

Philippe Bennett is a partner in the New York office of Coudert Brothers LLP. Amy Manning is an associate with the firm.

Do Your Trade Secrets Follow Your Ex-Employees to Their New Jobs?

By Lora A. Moffatt, Catherine Rimokh and Emily M. Spectre, New York

Particularly in the United States, more and more domestic and multi-national companies are taking unprecedented steps to ensure that their trade secrets are protected to the greatest extent possible when an employee leaves the company to join a competitor or potential competitor. Companies that never previously sought to require their employees to sign agreements restricting post-employment competition, solicitation of customers or employees, or use of confidential information (referred to collectively as "restrictive covenant agreements"), are now finding new opportunities to do so.

This trend is of great interest to multi-national companies, especially those operating in Europe and the U.S., who generally find that U.S. courts will give much broader protection to trade secrets, and, correspondingly, much broader enforcement to restrictive covenant agreements, than is available in other parts of the world. This trend impacts employers on both sides of the equation: Those wishing to protect their trade secrets when employees leave, and those wishing to hire employees away from their competitors (even when, as discussed below, those employees may not be subject to any specific written restrictive covenants).

1. What Are a Company's Protectable Trade Secrets?

Essentially, any category of information that exists can potentially be a trade secret, so long as that information is not disclosed to the public.[1] Information as mundane as customer lists, or complex as high-tech know-how, can be protected as trade secrets.

Information sought to be protected as a trade secret is not required to be novel or unique; however, it is generally presumed novel because it is not publicly known. Of course a company only has incentive to keep information a secret when that information is unknown to the general public and would provide the company with some kind of value.

In order for something to be a legally protectable trade secret, the company must derive value from its secret status, and the company must have taken reasonable efforts to maintain its secrecy. The Uniform Trade Secrets Act (UTSA) defines "trade secrets" as:

> [I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process, that (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[2]

To be a trade secret, the information cannot be ordinary "tricks of the trade," but must be particular to the company.[3] Based on the UTSA definition, information that is readily ascertainable by proper means from public resources cannot be a trade secret, even if the individual who discovered the information was not aware of it previously.[4] Proper means are defined in the comments section to the UTSA as discovery by independent invention, reverse engineering, under license from the owner and observation in a public display or in published literature.[5] Improper means are such activities as theft, bribery, misrepresentation, breach or espionage.[6] "Independent economic value" tends to be found where the owner has an edge over competitors, the information is vital to the business or a great deal of time and money was required to develop the trade secret.[7]

Some factors to consider in determining whether information is a trade secret are:

- the extent the information is known outside of the business;
- the extent it is known by employees and others involved in the business;
- the extent of measures taken to guard the secrecy of the information;
- the value of the information to the business and its competitors;
- the amount of effort or money expended in developing the information;
- the ease or difficulty with which the information could be properly acquired or duplicated by others.[8]

What constitutes a company's trade secrets frequently becomes an issue when an employee is leaving a company and wishes to take information that he or she gained during employment. A delicate balance must be struck between allowing a former employee to compete in the industry while permitting a company to maintain its competitive edge and continue to protect its information as a trade secret.

2. How Far Do Courts Go to Restrain Former Employees from Competing?

Companies attempt to protect their trade secrets by requiring employees, when first hired, to sign restrictive covenant agreements. In general, U.S. courts will not act to enforce a restrictive covenant agreement simply for the purpose of restraining competition. Instead, there must be some legally protectable interest (i.e., a protectable trade secret) at stake.[9] This rule is particularly enforced in California, where there is a statute disfavoring noncompetition agreements.[10] The approach taken in New York represents more of a middle ground and is more representative of other U.S. jurisdictions.

For example, 18 years ago, in the widely publicized case of *American Broadcasting Companies, Inc. v. Wolf*, the New York Court of Appeals denied ABC's request to enjoin its "colorful and unique" sportscaster, Warner Wolf, from moving to CBS after his contract with ABC expired, as it noted there was no protectable interest at stake.[11] The Court of Appeals explained:

> [N]ormally [courts] will not decree specific enforcement of an employee's anti-competitive covenant unless necessary to protect the trade secrets, customer lists, or good will of the employer's business, or perhaps when the employer is exposed to special harm because of the unique nature of the employee's services. And, an otherwise valid covenant will not be enforced if it is

> unreasonable in time, space, or scope or would operate in a harsh or oppressive manner.[12]

New York courts are still fond of repeating the mantra that restrictive covenants "are disfavored by the law, are enforced only to the extent necessary to prevent disclosure or use of trade secrets or confidential information . . . or where the employee's services are unique or extraordinary. . . ."[13]

On occasion, while something short of fully protectable trade secrets may suffice or a court may enjoin a truly "unique and extraordinary" employee from competing,[14] courts require a demonstration that the core asset the employer seeks to protect indeed rises to the level of a protectable trade secret. Once a protectable trade secret has been identified, courts will carefully scrutinize the restrictive covenant agreement to ensure that it imposes no greater restrictions than necessary to protect the employer's legitimate interests.

A case arising in the Internet industry provides a useful example of this analysis:

> [T]his Court finds that the one year duration of Earthweb's restrictive covenant is too long given the dynamic nature of this industry, its lack of geographic borders and Schlack's former cutting edge condition with Earthweb, where his success depended on keeping abreast of daily changes and content on the Internet.[15]

Rather than "blue pencil" the restrictive covenant agreement to a shorter period of restriction—as other courts have done on similar facts—the *Earthweb* court labeled the entire agreement overreaching. Thus, while the *Earthweb* case found the particular restrictive covenant at issue unenforceable, each restrictive covenant agreement will be scrutinized in light of the protectability of the trade secrets and the potential harm to the employee.

Finally, it is also worth noting another line of cases where restraints on competition have been imposed even without written restrictive covenant agreements. The "inevitable disclosure" doctrine, first widely recognized in *Pepsico v. Redmond,* restrained a departing employee only on the basis of a confidentiality agreement with his former employer.[16] The court found that the employee's relatively high position at Pepsico gave him access to the company's trade secrets and warranted six months of injunctive relief specifically precluding him from working for the competition. The court reasoned that because of the "demonstrated inevitability" that the employee would rely on Pepsico's trade secrets in his new job, injunctive relief was necessary to protect Pepsico's trade secrets.

In New York, the doctrine was applied in *DoubleClick, Inc. v. Henderson.*[17] When two top executives planned to leave to form their own competing venture, the former employer obtained a preliminary injunction to block those plans. As in *Pepsico*, there were no written restrictive covenant agreements, other than standard nondisclosure agreements. DoubleClick proceeded instead on theories of misappropriation of trade secrets, unfair competition and breach of duty of loyalty. The New York court applied the Restatement (First) of Torts definition of trade secrets and held that, given their senior positions at DoubleClick, these two employees clearly had access to DoubleClick's trade secrets. The employees argued that DoubleClick had never sought to keep the information at issue confidential, and in fact published the information on DoubleClick's own Web site. The court disagreed, finding that DoubleClick's Web site did not contain the specific sorts of sensitive proprietary information to which these employees had access.

The court then adopted the "inevitable disclosure" rationale with respect to the probable future misuse of those trade secrets: "[T]here is a high probability of 'inevitable disclosure' of trade secrets in this case. Injunctive relief may issue where a former employee's new job function will inevitably lead her to rely on trade secrets belonging to a former employer."[18] The court therefore enjoined the employees for six months from engaging in competitive activities.[19]

3. Conclusion

In any action to enforce a noncompetition agreement, nondisclosure agreement or other restrictive covenant, the lawyers must first determine (and convince the Court) that a protectable trade secret exists. Only after the parameters of the protectable interest are defined can the question as to the appropriate breadth and scope of a restraint on competition be resolved.

Endnotes

1. L.M. Brownlee, *Intellectual Property Due Diligence in Corporate Transactions* § 11:7 (2000).
2. Uniform Trade Secrets Act § 1(2)(1985), 14 U.L.A. 372 (1985) (Supp. 1989).
3. Brownlee, *Intellectual Property Due Diligence in Corporate Transactions* § 11:9.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* § 11:8.
8. *See e.g.*, Robert C. Dorr and Christopher H. Munch, *Protecting Trade Secrets, Patents, Copyrights and Trademarks* § 1.2 (1990).
9. *See e.g., Reed, Roberts Assoc. v. Strauman*, 40 N.Y.2d 303 (1976) (holding former employees' knowledge did not encompass trade secrets, so noncompetition agreement would not be enforced).

10. Calif. Bus. & Prof. Code § 16600: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in any lawful profession, trade, or business of any kind is to that extent void." There are limited statutory exceptions for sale of a business or dissolution of a partnership or LLC. However, despite this broad statutory prohibition, California courts will still protect trade secrets in appropriate cases. *See e.g., American Paper & Packaging Prods., Inc. v. Kirgan*, 183 Cal. App. 3d 1318 (1986) (analyzing protection of customer lists under trade secret law).

11. 52 N.Y.2d 394 (1981).

12. *Id.* at 403 (internal citations omitted).

13. *Business Networks of New York, Inc. v. Complete Network Solutions, Inc.*, 696 N.Y.S. 2d 433 (1999) (internal citations omitted) (denying preliminary injunction and enforcement of nonsolicitation agreement where plaintiff-employer made only conclusory allegations that former employees had misappropriated allegedly confidential database and were using it on behalf of a competitor). *See also BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 387 (1999); *Wolf*, *supra* ("[T]here is, in short, general judicial disfavor of anticompetitive covenants contained in employment contracts"); *Columbia Ribbon & Carbon Mfg. Co. v. A-1-A Corp.*, 42 N.Y.2d 496, 499 (1977); *Reed, Roberts Assocs., Inc. v. Straumann*, 40 N.Y.2d 303, 308 (1976); *Purchasing Assocs. v. Weitz*, 13 N.Y.2d 267, 272 (1963); *Chernoff Diamond & Co. v. Fitzmaurice, Inc.*, 234 A.D.2d 200, 201 (1st Dept. 1996).

14. *See Ticor Title Ins. v. Cohen*, 173 F.3d 63 (2d Cir. 1999).

15. *Earthweb, Inc. v. Schlack*, 1999 WL 980165 (S.D.N.Y. Oct. 27, 1999).

16. 54 F.3d 1262 (7th Cir. 1995).

17. 1997 WL 731413 (Sup. Ct., N.Y. Co., Nov. 7, 1997).

18. *Id.* at *5.

19. *Id.* at *7.

Lora A. Moffatt is a partner, and Catherine Rimokh and Emily M. Spectre are associates, in the New York office of Salans Hertzfeld Heilbronn Christy & Viener.

President Signs Anti-Terrorism Legislation

By Allen E. Kaye, New York

On Friday, October 26th, 2001, President Bush signed the USA PATRIOT Act into law. The law is less restrictive than the proposal the Administration had presented to Congress. However, the measure that the President signed into law includes several troubling provisions. The law contains provisions that expand the definition of terrorism for the purposes of inadmissibility and removal, provides for mandatory detention of aliens who the Attorney General suspects have engaged in terrorist activity and limits judicial review. The law also includes some provisions that will preserve immigration benefits for the families of victims of the terrorist attacks and others impacted by the attack.

Following is a section-by-section summary of the law.

The "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT)" Act of 2001

Section-By-Section Summary Immigration Provisions

TITLE IV—PROTECTING THE BORDER

SUBTITLE A—Protecting the Northern Border

Section 401: Ensuring Adequate Personnel on the Northern Border

- Waives FTE cap on personnel

Section 402: Northern Border Personnel

- Authorizes funds to triple Border Patrol on Northern Border

Section 403: Access by DOS and INS to FBI Criminal History Records

- Provides access to FBI National Crime Information Center's Interstate Identification Index (NCIC III) files
- Mandates development and certification within two years of a technology standard that can be used to verify the identity of persons applying for a visa or seeking to enter the United States.

Section 404: Limited Authority to Pay Overtime

- Authorizes overtime pay for INS employees

Section 405: Report on Automated Fingerprint System

- Mandates report on feasibility of enhancing the FBI's Automated Fingerprint Identification system (IAFIS)

SUBTITLE B—Enhanced Immigration Provisions

Section 411: Definitions Relating to Terrorism

- Adds new grounds of inadmissibility for representatives of foreign terrorist organizations or any group that publicly endorses acts of terrorist activity, and spouses and children of aliens who are inadmissible on any of the terrorism-related grounds;
- Provides new unreviewable authority to Secretary of State to designate any group, foreign or domestic, as a terrorist organization, upon publication in the Federal Register;
- Makes any fundraising, solicitation for membership, or material support (*even for humanitarian projects*) of groups that are designated terrorist

organizations by the Secretary of State a deportable offense (without regard to whether such activities were in furtherance of actual terrorist activity);

- Makes solicitation of funds or other material support for groups NOT officially designated as "*terrorist organizations*" a deportable offense unless the person can prove that he "did not know, and should not reasonably have known, that the solicitation would further the organizations' terrorist activity . . .";

- Certain limits on retroactivity are provided in cases where a person previously provided material support to the humanitarian projects of a terrorist organization before it was designated as such by the Secretary of State.

Section 412: Mandatory Detention of Suspected Terrorists; *Habeas Corpus*; Judicial Review

- Provides that the Attorney General or the Deputy Attorney General (with no power of delegation) may certify an alien as a terrorist if they have reasonable grounds to believe that the alien is a terrorist or has committed a terrorist act;

- Requires mandatory detention of a person so certified. Certified persons shall remain in custody irrespective of any relief from removal that they may be eligible for or granted. If the person is finally determined not to be removable, they may no longer be detained under this section;

- Allows the INS to detain a suspected terrorist alien for seven days before bringing immigration or criminal charges. Aliens not charged within seven days shall be released;

- Provides *habeas* review of the detention and the basis for the certification;

- Provides judicial review by *habeas* in any district court otherwise having jurisdiction to entertain it. Decisions in any district will be based on the rule of law in the U.S. District Court for the District of Columbia, and all appeals will be made to the Court of Appeals for the District of Columbia;

- For any person with a final order for removal who is detained under this section beyond the removal period, Attorney General must review such detention every six months. Continued detention is allowed only upon a showing that "*the release of the alien will endanger the national security of the United States or the safety of the community or any person*";

- The Attorney General shall review the certification of any person every six months. If, in the Attorney General's discretion, it is determined that the certification should be revoked, the person may be released. Any certified person may request a reconsideration of their certification every six months and submit documents or evidence to support that request;

- Requires that the Attorney General must submit a report to Congress on the use of this section every six months.

Section 413: Multilateral Cooperation Against Terrorists

- This section provides that State Department records can be provided to a foreign government on a case-by-case basis for the purpose of preventing, investigating or punishing acts of terrorism. Under current law, the records of the State Department pertaining to the issuance of, or refusal to issue, visas to enter the U.S. are confidential and can be used only in the formulation and enforcement of U.S. law.

Section 414: Visa Integrity and Security

- Expresses the sense of Congress that the integrated entry and exit data system (*Section 110 of the INA*) should be fully implemented at all ports of entry "*with all deliberate speed and as expeditiously as practicable*," and that the establishment of the Integrated Entry and Exit Data System Task Force should begin immediately. It also authorizes the appropriation of funds to accomplish this goal.

- The development of the system will focus on the use of biometric technology and tamper-resistant documents. The system must also interface with law enforcement databases to identify and detain individuals who pose a threat to the national security of the United States.

- Within 12 months, the Office of Homeland Security is required to report to Congress on the information that is needed from various government agencies to effectively screen visa applicants and applicants for admission.

Section 415: Participation of Office of Homeland Security on Entry-Exit Task Force

- Authorizes the Office of Homeland Security to be included in the Integrated Entry and Exit Data System Task Force established in section 3 of the Immigration and Naturalization Service Data Management Improvement Act of 2000.

Section 416: Foreign Student Monitoring Program

- Requires the full implementation of the Foreign Student Visa Monitoring Program established by Section 641(a) of IIRAIRA. The program is expanded to include all education institutions that are approved to receive foreign students.

Section 417: Machine Readable Passports

- Requires all countries designated to participate in the Visa Waiver Program to satisfy the requirement of issuing machine-readable passports by October 1, 2003, instead of 2007. The Secretary of State is required to perform annual audits of the designation of countries participating in the visa waiver program.

Section 418: Prevention of Consulate Shopping

- The Secretary of State shall review how consular officers issue visas to determine if consular shopping is a problem.

Subtitle C—Preservation of Immigration Benefits for Victims of Terrorism

Section 421: Special Immigrant Status

- Provides special immigrant status to any alien whose family- or employment-based immigrant petition, fiancé visa, or application for labor certification was revoked or terminated (or otherwise rendered null) due to the death, disability or loss of employment (*due to the physical damage or destruction of the business*) of the petitioner, applicant or beneficiary as a direct result of the terrorist attacks.
- The relief is also available to the spouses and children who were either accompanying the principal applicant, or who are following to join the principal applicant up to two years later (*September 11, 2003*).
- The grandparents of any child whose parents died in the attacks may also qualify for this status if either of the parents were U.S. citizens or legal permanent residents.
- In determining eligibility for an immigrant visa, the public charge grounds of inadmissibility shall not apply to these special immigrants.

Section 422: Extension of Filing or Reentry Deadlines

- Provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or one year after the death or onset of disability.
- Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks.
- An alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks.
- An alien who was lawfully present as a nonimmigrant at the time of the attacks, but was then unable to timely depart the U.S. as a direct result of the attacks, will be considered to have departed timely if the departure occurred before November 11, and will not be considered to have accrued unlawful presence during that period.
- An alien (*and his or her spouse and children*) who was in a lawful nonimmigrant status at the time of the attacks but not in the U.S. at that time, and was prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks, will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.
- Under current law, winners of the fiscal year 2001 diversity visa lottery must have entered the U.S. or adjusted status by September 30, 2001. This Act provides that such an alien may enter the U.S. or adjust status until April 1, 2002, if the alien can establish that he or she was prevented from doing so by September 30th, as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program.
- If a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program until June 30, 2002. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.
- Any immigrant visa that expires before December 31, 2001 shall be extended until that date, if an alien was unable to timely enter the U.S. on the visa as a direct result of the terrorist attacks.
- In the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.
- In the case of an alien granted voluntary departure that expired between September 11 and October 11, 2001, voluntary departure is extended an additional 30 days.

Section 423: Humanitarian Relief for Certain Surviving Spouses and Children

- Current law provides that an alien who was the spouse of a U.S. citizen for at least two years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. This section provides that if the citizen died as a direct result of the terrorist attacks, the two-year requirement is waived.

- If an alien spouse, child or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11th, but had not yet been petitioned for, the alien can self-petition for permanent residence. These family members may be eligible for deferred action and work authorization.

- This section further provides that an alien spouse or child of an alien who (1) died as a direct result of the terrorist attacks, and (2) was a permanent resident (*petitioned for by an employer*) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (*if the application was filed prior to the death*).

- The grounds of inadmissibility related to public charge shall not apply to an applicant for permanent residency under this section.

Section 424: "*Age-Out*" Protection for Children

- Provides that an alien whose 21st birthday occurs September 2002 and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien's 21st birthday. For an alien whose 21st birthday occurs after this September, the alien shall be considered to remain a child for 45 days after the alien's 21st birthday.

Section 425: Temporary Administrative Relief

- Provides that temporary administrative relief may be provided, for humanitarian purposes or to ensure family unity, to an alien who was lawfully present on September 10, and who was on that date the spouse, parent or child of someone who died or was disabled as a direct result of the terrorist attacks, and is not otherwise entitled to relief under any other provision of Subtitle B.

Section 426: Evidence of Death, Disability or Loss of Employment

- The Attorney General shall establish appropriate standards for evidence demonstrating that a death, disability or loss of employment due to physical damage to, or destruction of, a business, occurred as a direct result of the terrorist attacks on September 11. The Attorney General is not required to promulgate regulations prior to implementing Subtitle B.

Section 427: No Benefit to Terrorists or Family Members of Terrorists

- No benefit under Subtitle B shall be provided to anyone culpable for the terrorist attacks on September 11 or to any family member of such an individual.

- The term "*specified terrorist activity*" means any terrorist activity conducted against the government or the people of the U.S. on September 11, 2001.

TITLE X—MISCELLANEOUS

Sec. 1006: Inadmissibility of Aliens Engaged in Money Laundering

- Makes inadmissible any person who a consular officer or the Attorney General knows, or has reason to believe, has engaged, is engaging or will engage in an offense relating to money laundering.

- Requires the Secretary of State to establish, within 90 days, a watch list that identifies individuals worldwide who are known or suspected of money laundering, which is readily accessible to, and shall be checked by, a consular or other federal official prior to the issuance of a visa or admission to the United States.

Allen E. Kaye is an attorney residing in New York City, practicing United States immigration, naturalization, visa and consular law. Mr. Kaye co-chairs the Membership Committee of the International Law and Practice Section of the New York State Bar Association.

Member News

Leslie N. Reizes

Former Section Chair Leslie N. Reizes announced the relocation of Leslie N. Reizes, P.C. to One Observatory Circle, Ithaca, NY 14850, Tel. (607) 275-0200, Fax (607) 275-0814, and the opening of Reizes Law Firm, Chartered, 1177 George Bush Boulevard, Suite 308, Delray Beach, Florida 33483, Tel. (561) 276-2600, Fax (561) 276-7300.

Thacher Proffitt & Wood

Relocation of New York City Office

TPW relocated its New York City office, formerly at Two World Trade Center, to 11 West 42nd Street, Tel. (212) 789-1200, Fax (212) 789-3500. All of the firm's 300 employees who worked in the WTC office survived the September 11th attack.

Charles D. Bethill

On October 15, 2001, TPW announced the addition of Charles Douglas "Chuck" Bethill as a partner to the Corporate & Financial Institutions Group in its New York City office. Mr. Bethill comes to TPW from Milbank, Tweed, Hadley & McCloy with over 25 years of broad corporate, securities, banking, leasing, licensing and litigation experience. Mr. Bethill represents a variety of domestic and foreign businesses and financial institutions, including the principal clearing corporation and securities depository in the United States. He has also advised a number of foreign governments on matters relating to securities processing and the formation of central securities depositories and registries. Mr. Bethill has handled a variety of M&A transactions for his clients, including a significant number of transactions in the financial services industry. Mr. Bethill received his A.B. *magna cum laude* in 1969 from Columbia College and his J.D. in 1974 from Columbia Law School, where he was an editor of the *Columbia Journal of Transnational Law*. He also earned an M.A. and M. Phil in International Relations from Columbia Graduate School.

Louis H. Nevins

Louis H. Nevins, responsible in 1983 for launching TPW's office in Washington D.C., rejoined the firm as counsel in the Corporate & Financial Institutions practice. Mr. Nevins rejoins TPW after having served from 1993 to 2001 as President of the Western League of Savings Institutions, which merged in October 2001 with California Bankers Association (CBA), making CBA one of the largest state banking associations in the country. The Western League itself represented 25% of the assets in the thrift industry and was a powerful and respected force on Capitol Hill. Mr. Nevins will serve as federal legislative counsel to CBA. Prior to his joining TPW in 1983 as managing partner of the firm's Washington, D.C. office, Mr. Nevins was senior vice president and director of the National Association of Mutual Savings Banks for over 12 years and, prior to that, worked for the Federal Housing Administration. He holds a B.S. degree in economics from the Wharton School, and a law degree from the University of Pennsylvania Law School.

Eduardo Ramos-Gómez

Ambassador Eduardo Ramos-Gómez joined the firm's Mexico practice as a partner resident in the New York City office. Mr. Ramos-Gómez came to TPW after three years of having served as Mexico's Ambassador to Singapore, Negara Brunei Darussalam and the Union of Myanmar, with residence in Singapore. Prior to becoming Ambassador in 1998, Mr. Ramos-Gómez was head of the New York offices of one of Mexico's largest law firms, Bryan González Vargas y González Baz. Mr. Ramos-Gómez principally advises multinational and foreign companies in North America, Europe and Asia regarding direct foreign investment, privatization, mergers and acquisitions, and competition issues in Mexico. He also advises Mexican and other Latin American companies wishing to do business in the U.S. and elsewhere. Mr. Ramos-Gómez received his law degree in 1980 from the Escuela Libre de Derecho in Mexico City, and his LL.M. from the University of Virginia in 1985. He was elected President of the US-Mexico Chamber of Commerce of the North East chapter effective January 1, 2002. Mr. Ramos-Gómez is an active member of the International Law and Practice Section.

Committee News

International Investment Committee / International Banking, Securities, and Financial Transactions Committee

On November 8, 2001, the International Law and Practice Section of the New York State Bar Association invited its members to a program entitled "Mexican Securities Law—Changes and Reforms for the Global Markets." The featured speaker was Jorge Familiar Calderón, Vice Chairman of the Securities and Derivatives Markets Supervision of the National Banking and Securities Commission (Comisión Nacional Bancaria y de Valores), Mexico City. The program was held at the Federal Reserve Bank of New York. Lawrence Shoenthal, M.R. Weiser & Co., and Aureliano González-Baz, Bryan González Vargas y González-Baz, are Co-Chairs of the International Investment Committee. Joyce Hansen, Deputy General Counsel, Federal Reserve Bank of New York, and Eberhard Röhm, Donahue & Partners, are Co-Chairs of the International Banking, Securities and Financial Transactions Committee.

International Litigation Committee

On November 13, 2001, the International Litigation Committee, in cooperation with New York University School of Law, organized a program titled "Recent Developments in International Litigation." The program was held at NYU's Tishman Auditorium. Panelists included Thomas N. Pieper (Thacher Proffitt & Wood, Chair, International Litigation Committee), James H. Carter (Sullivan & Cromwell), John Fellas (Hughes Hubbard & Reed LLP), Joel B. Harris (Thacher Proffitt & Wood), Prof. Andreas F. Lowenfeld (NYU School of Law), Nina Nagler (Weil Gotshal & Manges LLP) and Joseph D. Pizzurro (Curtis, Mallet-Prevost, Colt & Mosle LLP). The speakers covered a variety of topics, such as Strategies in International Litigation; *Forum Non Conveniens*; Parallel Proceedings; Antisuit Injunctions; Freezing Assets; Service and Taking Evidence Abroad; The Hague Proposal (Convention on Jurisdiction and Foreign Judgments); and Litigation in Relation to Arbitration. The program has been videotaped for educational purposes; copies can be requested from NYU Law School.

More than 150 participants registered for the event, which was followed by a networking reception in Golding Lounge, sponsored by Weil Gotshal & Manges LLP and Curtis, Mallet-Prevost, Colt & Mosle LLP.

International Banking, Securities, and Financial Transactions Committee/ Central and Eastern European and Asian Law Committee

On November 15, 2001, the International Law and Practice Section of the New York State Bar Association, along with the Erie County Bar Association, sponsored a program called "Changing Financial Markets in a Connected World" at the Federal Reserve Bank of New York, Buffalo Branch. The program was free of charge and eligible for MCLE credits. Invitations were sent to all members of the International Law and Practice Section from Buffalo, Rochester and Syracuse.

Joyce Hansen, Deputy General Counsel and Senior Vice President at the Federal Reserve Bank of New York, along with Susanne Heubel, an attorney at the Richard S. Goldstein law firm, and Eberhard Röhm, a partner at Donahue & Partners LLP, hosted the program. Joyce and Eberhard are Co-Chairs of the International Banking, Securities and Financial Transactions Section, and Susanne is the Chair of the Central & Eastern European and Central Asian Law Committee.

Western European Law Committee

On November 26, 2001, Tomaso Cenci of Linklaters & Alliance hosted another Breakfast Meeting. The topic was "January 1, 2002: A single currency in Europe. The banking and legal perspectives." Featured speakers included Fabio Matti, Vice President & Treasurer, IntesaBCI, New York branch; Rutger de Witt Wijnen, Partner, DeBrauw Blackstone Westbroek, New York; and Caird Forbes-Cockell, Partner, Linklaters, New York. Tomaso Cenci serves as Chair of the Western European Law Committee.

New Committee “WING” Launched at Women’s Networking Reception

By Dan Hulea, New York

At the initiative of the Section Chair, Isabel Franco, the International Law and Practice Section held a networking reception on September 6, 2001, at the University Club. The purpose of the meeting was to promote the involvement of women in international law, to stimulate their participation in Section activities and to allow women members of the profession to interact with each other in an informal setting. Although initially the organizers intended to use the space generously provided by Fleming, Zulack & Williamson at the firm’s offices, in light of the response received, the reception was moved to the University Club. The reception was attended by over 100 individuals, and provided a wonderful networking opportunity. The evening’s proceedings began with welcoming remarks by Isabel Franco, during which she recognized the President of the New York State Bar Association, Mr. Steven Krane, who was in attendance.

Isabel Franco greets the President of the NYSBA, Mr. Steven Krane, and introduces the event’s sponsors to the participants.

Ms. Franco also thanked the organizers of the event for their efforts, as well as the sponsors, whose generosity made the event possible: Coudert Brothers, Demarest e Almeida Advogados, Epstein, Becker and Green, Holland & Knight LLP, Latham & Watkins, and Salans, Herzfeld, Heilbronn, Christy & Viener. She then turned the podium over to Mr. Krane, who extended his good wishes and words of encouragement on behalf of the New York State Bar Association. The program continued with brief speeches by representatives of the Section and of the sponsoring firms. The evening continued with lively discussion among the guests, and the event extended for several hours beyond the scheduled time. In response to the desire of the participants and at the initiative of the Section chair, the Women’s Interest Networking Group (WING) is currently being formed. This new committee of the Section will be aimed at promoting women’s involvement in the field of international law and in activities of the Section. Once formed, the committee intends to seek the active participation of women members of the profession.

Attendees listen to speeches by Section members.

Dan Hulea is a law student at Brooklyn Law School. He is assisting the Section as one of the “floating interns.”

Meeting News

International Law and Practice Section Fall Meeting
Rio De Janeiro, Brazil—October 17–21, 2001

The annual Fall Meeting of the New York State Bar Association International Law and Practice Section took place October 17–21, 2001, at the wonderful Copacabana Palace Hotel in Rio de Janeiro, Brazil. Both the spectacular setting and the overall topic of the meeting, "Latin America in the New Millennium: Law and Business," attracted a great deal of interest. The event was endorsed by the American Bar Association (ABA), the American Corporate Counsel Association (ACCA), the Inter-American Bar Association (IABA) and the Union Internationale des Avocats (UIA).

In light of the events of September 11, 2001, the members of the Section debated extensively in deciding whether to hold the meeting at this time. The conclusion of these discussions was that holding the meeting as scheduled would send a very strong and positive signal not only to other members of the Section, but also to the various other countries represented by participants in the conference. And indeed, the message was well received by non-U.S. participants, who came not only from virtually all of the Latin American countries, but also from Western Europe, and from as far away as the Philippines. The bad weather couldn't prevent the meeting from becoming a great success.

The meeting started on Wednesday, October 17 with an Attorneys' Luncheon sponsored by Donahue & Partners, LLP of New York. During this event, the participants were welcomed to Rio by the Section Chair, Isabel C. Franco, by the Program Co-Chair, Joel B. Harris, and, on behalf of Donahue & Partners, by Eberhard Röhm. In addition to welcoming the attendees and to stressing the presence of not less than five federal Judges, the speakers expressed their gratitude to the members of the event's Planning Committee, which also included Marcia Haddad, Carlos E.M. Hapner, Soraya E. Bosi and Thomas N. Pieper.

Isabel C. Franco, then Section Chair, is welcoming the participants.

Joel B. Harris, Program Co-Chair, delivering his welcoming address.

Eberhard Röhm, addressing the attendees on behalf of the sponsor of the luncheon, Donahue & Partners.

After the welcome luncheon, the substantive panels started. The hotel provided state-of-the-art technology. Many of the panel participants used PowerPoint to enhance their presentations. Also, simultaneous translation was made available to all of the participants.

The first program of the meeting was entitled "Intellectual Property Protection for E-Commerce and Business Methods in South America." It was chaired by Albert L. Jacobs, Jr. of Greenberg Traurig, New York. The attendees were addressed by Juan Carlos Ojám of Bruchou, Fernandez Madero, Lombardi & Mitrani, from Buenos Aires, Raul Hey, of Dannemann Siemsen Bigler & Ipanema Moreira, of Rio de Janeiro, and José I. de Santiago of Olivares & Cía, Mexico City.

Raul Hey (second from the right) giving his presentation. Also on the panel (from the left): Ojám, de Santiago, Jacobs.

The second program of the day was entitled "International Capital Markets—Cross-Border Securities Transactions Under The Proposed Hague Convention." The panel was co-chaired by Eberhard Röhm of Donahue & Partners, New York, and Eduardo Amaral Gurgel Kiss, of Demarest e Almeida Advogados, São Paulo. The other panel Co-Chair, Joyce Hansen of the Federal Reserve Bank of New York, was unfortunately unable to attend, but due to her efforts the attendees were treated to a very interesting slide show during the program. The program featured presentations by Amarilis Sardenberg of the Brazilian Clearing and Depository Corporation, São Paulo, and Silvio de Salvo Venosa, of Demarest e Almeida Advogados, São Paulo. Messrs. Aguiar and Fonseca completed the panel. The program was followed by a coffee break sponsored by Curtis, Mallet-Prevost, Colt & Mosle.

Eberhard Röhm (standing) making a point. On the panel (from the left): Aguiar, Fonseca, de Salvo Venosa, Sardenberg, Gurgel Kiss.

After the break, the third program of the day discussed the topic of "International Business Risks: Foreign Corrupt Practices Act, Money Laundering, Export Controls, etc." The panel was prepared and supposed to be chaired by Deborah R. Srour, of Srour & Fischer, LLP, New York. Unfortunately, Deborah as well as one of the scheduled speakers, Ahmed Jassim Abdulla from Manama, Bahrein, could not attend. The always-ready-for-action James P. Duffy, III, of Berg & Duffy, Garden City, kindly covered for them. Other speakers on the panel included Carole L. Basri of Deloitte & Touche, New York, Michael J. Pisani, of Reliance Insurance Company, New York, and Carlos Roberto Siqueira Castro of Siqueira Castro Advogados, Rio de Janeiro.

Carole Basri (standing) making a statement. On the panel (from the left): Siqueira Castro, Pisani, Duffy.

The first day's events were concluded with a welcoming reception and dinner at the Yacht Club, sponsored by the Brazilian Bar Association. Before the dinner, introductory remarks were made both by Steven C. Krane, President of the New York State Bar Association, as well as his Brazilian counterpart, Rubens Approbato Machado, President of the Ordem dos Advogados do Brasil. Their addresses were followed by a ceremonial candle-lighting in remembrance of the victims of the September 11th attacks, and a speech by Program Co-Chair Joel B. Harris in his capacity as a member of Thacher Proffitt & Wood, one of the firms with offices formerly located in the World Trade Center.

Attendees listening to the speeches. Simultaneous translation was provided.

Section Chair Isabel C. Franco giving a crystal apple, symbol of New York City, to Rubens Approbato Machado, President of the Ordem dos Advogados do Brasil.

Steven C. Krane, President of the New York State Bar Association, thanking the Brazilian hosts.

Program Co-Chairs Marcia E. Haddad and Joel B. Harris, during their touching yet optimistic speech about the events of September 11th.

Participants lighting candles in remembrance of the victims of the September 11th attacks…

. . . and holding a minute of silence.

The events of the second day commenced with a continental breakfast sponsored by Brons & Salas, and were followed by the plenary session entitled "E-Commerce in Latin America: Minimizing the Risk of Doing Business Online." The attendees were addressed by the largest number of speakers of any panel during the meeting. The co-chairs of the session were Jaime Malet of Malet Abogados, Barcelona, and Jose Antonio Santos, Jr. of Greenberg Traurig, Miami. Gerald J. Ferguson of Thacher Proffitt & Wood, New York, who had helped planning the panel, was unable to attend, as was his partner of Thacher's Mexico office, Boris A. Otto. Manuel Campos Galván of Thacher Proffitt & Wood covered for them. Other featured speakers included Paulo Frank Coelho da Rocha of Demarest e Almeida Advogados, São Paulo, Eugênio da Costa e Silva, of Machado, Meyer, Sendacz e Opice, São Paulo, Marun Jazbik, of Allen & Overy, New York, L. Donald Prutzman, of Tannenbaum, Helpern, Syracuse & Hirschtritt, New York, Lawrence E. Shoenthal of M.R.Weiser & Co., New York, Alberto Navarro Castex of G. Breuer Abogados, Buenos Aires, and Maria Luiza de Saboia Campos, Legal Counsel in Media Communication, New York. The panel was completed by Mr. Quintas of Jupiter Media Metrix.

From the left: Shoenthal, Campos Galván, Jazbik, Coelho de Roca, Prutzman, Malet, da Costa e Silva, Quintas, Duffy, de Saboia Campos, Navarro Castex.

Immediately thereafter, meeting participants had the opportunity to attend a program on "Litigation v. Arbitration in the Americas: Advantages and Disadvantages." The program was chaired by Helena Tavares Erickson of Dewey Ballantine, New York, who stressed the fact that Brazil recently signed the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The panel included Selma M. Ferreira Lemes, of Advocacia José Del Chiaro, São Paulo, Emilio Nicolás Federico Jorge Vogelius, of Estudio Beccar Varela, Buenos Aires, Ricardo Travis Arias of Bryan, González Vargas & González Baz, Mexico City, and Jorge Posada-Villaveces of Parra, Rodríguez & Cavellier, Bogotá. Following the panel, the participants enjoyed a coffee break sponsored by Oliveira Neves Advogados Associados.

Helena Erickson (far right) introducing the panelists: Posada-Villaveces, Arias, Vogelius, Ferreira Lemes (from the left).

Following the break, meeting attendees were offered two very interesting programs. One of the programs addressed the subject of "Multi-Jurisdictional

Law Firms—Ethics," and was chaired by James P. Duffy, III of Berg & Duffy, Garden City, and Ernani de Almeida Machado, of Machado, Meyer, Sendacz e Opice, São Paulo. The program featured presentations by Carlos Ferreira of C.R. & F. Rojas Abogados, La Paz, Carlos Fradique-Mendez, of Brigard & Urrutia Abogados, Bogotá, and Francisco M. Castillo of Hoet, Peláez, Castillo & Duque, Caracas. The other program offered insight into "Latin Leasing." The Co-Chairs of the program were James R. Shorter of Thacher Proffitt & Wood, New York, and Antonio Corrêa Meyer of Machado, Meyer, Sendacz e Opice, São Paulo. The speakers that held presentations during the program were Harry A. Shannon of Ernst & Young, Munich, Thatcher A. Stone, of Rosenman & Colin, LLP, Marco A. Blanco of Curtis Mallet-Prevost, Colt & Mosle, New York, Emilio Argüelles of Argüelles & Associados, Buenos Aires and Carlos Rameh of Basch & Rameh, São Paulo. The panel was completed by Camila Galvão. Unfortunately, Manuel A. Pérez Luna Bunimovitch of Pérez Luna, Paoli, Planchart & Asociados, Caracas, was unable to attend.

Carlos Ferreira (second from the left) giving his presentation, while the other panelists are paying attention: Fradique-Mendez, de Almeida Machado, Duffy (from the left).

From the left: Rameh, Argüelles, Blanco, Stone, Meyer, Galvão, Shannon, Shorter.

Thursday afternoon featured no further programs, and the participants had the opportunity to visit the city of Rio de Janeiro. During the evening, the attendees were invited to a cocktail reception on Sugarloaf Mountain, sponsored by Greenberg Traurig, LLP. The clouds that had blocked the sunset finally went away, so the participants could enjoy the breathtaking view. Later on that night, the participants attended dinner at Porcâo Restaurante, sponsored by Alston & Bird and Thacher Proffitt & Wood.

From the left: Christian Reber, Linda Castilla, Al Jacobs, Jim Duffy.

The new boss: Ken Schultz.

From the left: Guillermo Malm Green, José Urrutia, Paul Frank.

From the left: Laura Zulack, Rita Wasserstein, Ken Warner, John Zulack.

From the left: Manuel Campos Galván, Ana Trigas, Alberto Navarro Castex.

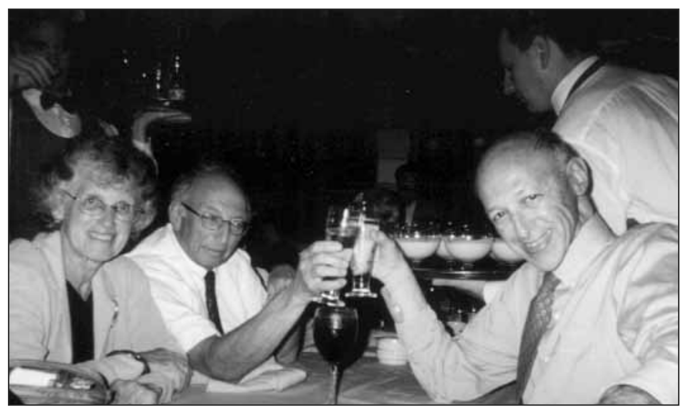
Even the monkeys were enjoying the view.

From the left: Eduardo E. Represas, Guillermo Malm Green, José Urrutia.

Experts at work: Jose Antonio Santos, Rick F. Morris and Matthew J. Brennan (from the left) giving their opinions on the different types of desserts.

Mr. and Mrs. Aaron J. Schindel.

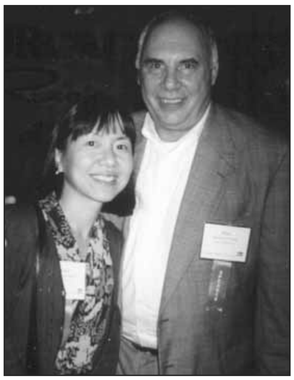
The smiling contest: Jaime Malet, Marco A. Blanco and his wife Brigid Leary, Alberto Navarro Castex (from the left).



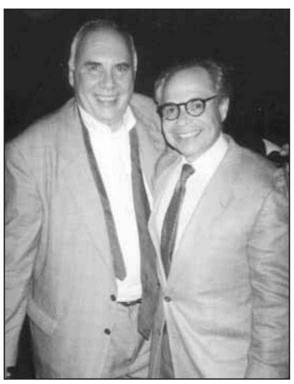
Cheers to the regulars: Jean and Lauren D. Rachlin toasting to Wayne D. Wisbaum.

"Who's eaten from my plate?"—Manuel Campos Galván, Bob Leo, Calvin Hamilton, Bob's wife Debbie (from the left).

"Do I really have to eat all this?", Carlos Alfaro wonders.



Mike Pisani in a hugging mood: Annie Jen Wang . . .



. . . and Ken Schultz.

Friday morning, the program commenced with a continental breakfast sponsored by Epstein, Becker & Green. Following the breakfast, the first program of the day featured a panel discussion on "Financing of Large Infrastructure Projects in Latin America." The panel co-chairs were Carlos E. Alfaro of Alfaro Abogados, New York, and José Emilio Nunes Pinto of Tozzini, Freire, Teixeira e Silva, São Paulo. The speakers featured at the panel were Ralph R. González of General Electric International, Mexico City, Alfredo Marquez of ABN Amro Bank, São Paulo, and Mark H. O'Donoghue of Curtis, Mallet-Prevost, Colt & Mosle, New York. Jonathan J. Green of Milbank, Tweed, Hadley & McCloy was unable to attend.

From the left: O'Donoghue, Marquez, González, Nunes Pinto, Alfaro.

That same morning also featured a program on "Labor Law and Immigration: Issues for Companies Doing Business in the Western Hemisphere." The program was chaired by Aaron J. Schindel of Proskauer Rose LLP, New York. Co-Chair Jan H. Brown, who had helped to organize the panel, was unable to attend. The panelists at this session included Paulo Mario Medeiros of Tozzini, Freire, Teixeira e Silva, Rio de Janeiro, the Section's new Chair Kenneth A. Schultz, of Satterlee, Stephens, Burke & Burke, New York, Annie Jen Wang of Wormser, Kiely, Galef & Jacobs, New York, and Virginia Sher Ramadan, the Consular Fraud Prevention Manager of the U.S. Consulate General in Rio de Janeiro.

From the left: Ramadan, Medeiros, Wang, Schultz, Schindel.

The program that followed offered an interesting discussion on "Division of Power and Profits in Latin American Joint Ventures." The panel was comprised of Paul M. Frank, Alston & Bird LLP, New York, Chair; Ronaldo Camargo Veirano, Veirano & Advogados Associados, Rio de Janeiro, Co-Chair; Hector A. Mairal, Marval, O'Farrell & Mairal, Buenos Aires; Michael C. Grasty, Grasty Quintana Majlis & Cía, Santiago de Chile; Manuel Campos Galván, Thacher Proffitt & Wood, S.C., Mexico City; Aureliano González-Baz, Bryan, González Vargas & González Baz, S.C., Mexico City; Jaime Durand Planas, Estudio Aurelio Garcia Sayan, Lima; and Javier Villasante, Cuatrecasas, New York. The panel discussed the issues faced by a multinational company wishing to make a significant investment in the Latin American countries represented on the panel. Hector Mairal, Michael Grasty and Jaime Durand discussed one or more aspects of the structure of the joint venture in their countries and the manner in which the revenues earned by the venture might be allocated, especially where the international partner expects to receive a share of the profits at least proportionate to its capital investment. Aureliano González-Baz and Manuel Campos Galván made a joint presentation relating to investment in Mexico. The panelists focused on the legality in their respective countries of such corporate vehicles as shareholder agreements, revocable proxies, different classes of stock, puts and calls and other devices that might enable the international investor to achieve its objectives in the division of voting control and the allocation of profits. Also discussed were related tax considerations, as well as the absence of restraints or controls on the payment or repatriation of dividends or other restrictions in the respective countries of the panelists on the form of the investment in which the joint venture would operate. The emphasis of the panelists was on actual transactions and practical approaches to achieving the investor's objectives based on their own experiences. Lastly, Javier Villasante explained the advantages of the Spanish holding regime (ETVE) that permitted foreign investors to use a holding company formed in Spain for the management of foreign securities held in Latin American companies. He explained how the Spanish holding company provided great flexibility to allocate voting and economic rights in the different countries without incurring significant costs or taxes in Spain. Ronaldo Veirano concluded the program by leading the panelists in commenting on the role their country's securities markets can play to deter their national companies from seeking to be traded exclusively on international securities markets in North America and Europe.

From the left: Campos Galván, González-Baz, Villasante, Durand Planas, Grasty, Mairal, Veirano, Frank.

At the same time with the previous program, the meeting featured a panel discussion on "Environment and Investment: Recent Developments in Environmental Legislation." Matthew Brennan from Sullivan & Cromwell, New York, and Guillermo Malm Green from Brons & Salas, Buenos Aires, were the panel chairs. The first speaker, Luis Sant'Anna of Demarest e Almeida Advogados, São Paulo, explained recent developments in Brazilian environmental legislation, pointing out new institutions, such as the concept of "adjustment of conduct" and criminal corporate liability. José Antonio Urrutia of Urrutia & Co., Santiago, submitted a presentation describing the status of Chilean legislation, which is still adapting the concept of fault-based liability for environmental damage. The following speaker was Marun F. Jazbik of Allen & Overy, New York, who, from the commercial viewpoint, explained the concerns of investors regarding environmental legislation and enforcement, and stressed the current importance of environmental issues. Finally, Camilio Sicherle of Ippolito, Rivitti, Duarte e Sicherle, São Paulo, offered a different perspective on how environmental issues may be an important investment opportunity, and explained the work performed for some environmental investment funds.

From the left: Sicherle, Jazbik, Urrutia, Sant'Anna, Malm Green, Brennan.

Following the programs, the participants took a coffee break, sponsored by Grebler, Pinheiro, Mourao e Raso Advogados. The break was followed by the keynote program of the meeting, entitled: "*Stare Decisis* and *Sumula Vinculante*." The program was moderated by Reginaldo Oscar De Castro, the Chair of the International Relations Commission of the Ordem dos Advogados de Brasil. The panel featured presentations by the Honorable Carlos Maria da Silva Velloso, Justice and former Chief Justice of the Supreme Court of Brazil, and Steven C. Krane, President of the New York State Bar Association.

From the left: Carlos Velloso, De Castro, Krane.

Simultaneously, a program on "South American Antitrust Law in Global M&A Transactions" was offered. The panel's discussions were coordinated by

Christian Roschmann (Linklaters) and Gesner Oliveira (Former President of the Brazilian Antitrust Agency—CADE) and presentations were given by Sérgio Varella Bruna (Goulart Penteado, Iervolino e Lefosse Advogados in cooperation with Linklaters), from Brazil, Rafael Castillo Triana (HR Abogados Corporativos S.A.), from Colombia, Eduardo E. Represas (Brons & Salas), from Argentina, and Geraldo Varela (Cariola Díez Pérez-Cotapos & Cía Ltda.), from Chile.

Since the beginning of the 1990s, a few developing countries have created antitrust systems aimed at controlling M&A transactions within their jurisdictions. However, as described by the speakers, Chile and Colombia have not yet enacted antitrust provisions relating to merger control. The audience was also informed about the legal aspects of antitrust regulation in Argentina, which has recently enacted its Antitrust Act. The Brazilian Antitrust Act and institutions were the main topics of Sergio Bruna's speech; aspects of the notification requirements such as thresholds, jurisdiction, timing of notifications and procedures were explained. Global M&A practitioners probably have heard about Brazilian antitrust regulations and the obligation of notifying the authorities there of transactions, and especially about the fines imposed if the tight deadlines are breached. Mr. Bruna concluded his talk by advising: "The triggering event for submission of transactions in Brazil must be interpreted with very conservative eyes." Concluding the overview of Brazil, Mr. Oliveira brought his considerable administrative experience to bear in an interesting discussion of statistics relating to CADE's performance in the last few years and talking about ambitions for modifications to Brazilian law. A most lively discussion with the audience concluded the panel.

From the left: Varella Bruna, Represas, Obach, Castillo-Triana, Oliveira, Roschmann.

The afternoon featured a ceremony during which Dianna P. Kempe, the resident of the International Bar Association, Hamilton, was awarded the Section's Award for Progress and Development in International Law.

Section Chair Isabel C. Franco giving the Section's Award for Progress and Development in International Law to Dianna P. Kempe.

That same evening the participants were invited to a reception on the hotel balcony overlooking the pool, sponsored by Veirano & Advogados Associados.

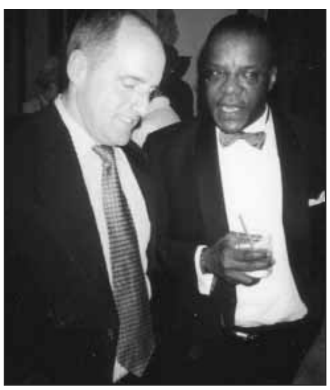
Attendees socializing during a cocktail reception on the hotel balcony.

On the early morning of Saturday, October 20, the Executive Committee members attended a very productive breakfast meeting. The further schedule of the day indicated that participants would be invited on a tour of the Tijuca Forest and Corcovado, but unfortunately, due to the weather, these tours had to be canceled. Later in the evening, however, the participants attended a gala reception and dinner at the Villa Riso, sponsored by Amaral Gurgel and Celso Botelho de Moraes. After dinner, the attendees were treated to a memorable Samba show. In conclusion, Joel B. Harris thanked everyone for participating and, in particular, the panel chairs and speakers for the outstanding programs offered to the attendees.

Jorge Posada-Villaveces receiving his "lucky charm."

"The Three Editors": Lester Nelson, David W. Detjen, Thomas N. Pieper (from the left).

Elegant couples (I): Isabel Franco and Jaime Malet.



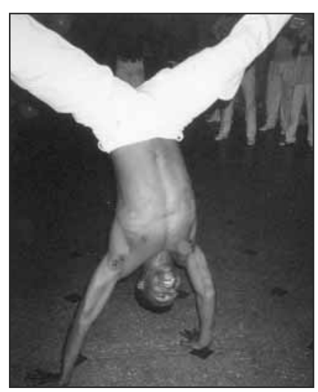
Elegant couples (II): Matthew Brennan and Calvin Hamilton.

Elegant couples (III): Ken & Jaylyn Schultz, Mike & Lynn Pisani, Paul & Jane Frank (from the left).

Elegant couples (IV): Joel Harris and Marcia Haddad, being thanked by Isabel Franco for the overall organization of the event.

These guys have the rhythm in their blood: The Samba band.

And these artists as well: The Samba girls.



To be a real caipoeira, it takes rhythm and body control.

There could be no real samba show without impressive costumes.

Spectacular view on the "Pão de Açúcar."

Lawyers as paparazzi.

The world-famous statue of "Christo Redemptor."

Who is that masked man?

A waterfall in a nature reserve.

Sunday was the final day, with no programs scheduled. Some participants took advantage of the better weather to explore the Tijuca Forest and the Corcovado, while others did some shopping or just enjoyed the pool. When it was time to say goodbye, the verdict was unanimous: A great program, in a great city, in a great country!

Joel B. Harris, doing research for a "Pooling" & Servicing Agreement.

Jim Shorter, Joel Harris, Marcia Haddad, Linda Castilla (from the left).

Calvin Hamilton, framed by Catherine Dolginko and Linda Castilla.

International Law and Practice Section

New Section Members

Adeboye M. Adenuga
Rajen Akalu
Turki I. Altamimi
Marybelle C. Ang
Louis I. Apker
Leigh A. Bacon
David J. Bailey
James Barney
Iovlia P. Belitskaia
Paola Bettelli
Philip Biondo
Gloria Bletter
Ernest Brod
William M. Buchan
Janeen Byron
David J. Calverley
J. Patrick Carley
Maria Castro
Jeffrey Catanzaro
Jihoon Cha
Georganne Chapin
Nicholas M. Cherot
Sabrina H. Cochet
David M. Cohen
Ziva Cohen
Jane L. Cooper
John C. Cuddy
Collette B. Cunningham
Tony L. D'Anzica
Jamie Susan Davis
Jutta M. Dissen
Wendy Dolce
Natalie Diane Everaert
Steven Fadeyi
Jaime Farrant
Ivonne M. Fleitas
Kimberly R. Fox
David S. Gasperow
Jennifer A. Gelain-Sohn
Gregory W. Gilliam
Sara R. Gonzalez
Ananias Grajales
Molly Graver
Andrea Roxana Guendelman
Glenn O. J. Hackter
Carolyn E. Hansen
Hebba Magdi Hassanein
Alon Holliday
Elizabeth I. Hook
Kenneth Huelskamp
Dan C. Hulea
William D. Hummell
Tamika Hurdle
Serkan Ictem
Patrick J. Iraca
Jason E. Johns
Alexandro J. Junco
Kristine Kassekert
LaShon Kimberly Kell
Angelene G. Kenton
Adrian Ketri
Aman Khalaf
Uswah Khan
Heejung Kim
Anita Koepcke
Mehmet Komurcu
Arete H. Koutras
Keith J. Kuhn
Anders Larsson
Sara L. LeCain
Myung J. Lee
Peter O. Lehman
Barry Leon
Juliana Li
Michael S. Loy
Hugh B. Macdonald
Anne M. MacGregor
Imitiyaz A. Mahida
Giovanni Marsili
Todd E. Martin
Janet McEneaney
Mara McNeill
Jorge E. Medina
Marc Ladlslau Mezey
John R. Moore
Gloria Mshelia
Ali Nassiripour
William G. O'Neill
Cortney M. O'Toole
Jiin Oh
Christopher J. Olson
Reda Oulamine
Angus Ying Kit Pang
Elaine D. Papas
Malte M. Pendergast-Fischer
Caroline Marie-Luise Presber
S. Morris Raji
Sophie Raven
Timo G. Rehbock
Asim Rehman
Leila Reynolds
Lina Reznikov
Kenneth S. Rivlin
Cristina M. Rodriguez
Vikki M. Rogers
Milan Saha
Marianna E. Salz
Heather L. Sanderson
Karl R. Schaffer
Javier Schiffrin
Allison Galena Schnieders
Neda Shahidyazdani
Jolynn M. Shoemaker
Oleksandr V. Shulzhenko
John Sifton
Ronald J. Silverman
Maria Luisa B. Simpson
Deborah A. Smith
Justin Smith
Anne E. Soh
Angelo Somaschini
Thomas J. R. Stadnik
Phyllis G. Stein
Shoshana R. Stein
Amy Sung
Ilana J. Sussman
Lorin Erik Swenson
Lisa Tavares
Susan T. Travis
Mami Ushio
George T. Vishnevetsky
Sabrina Walker-Cambridge
Monica Welt
Tally M. Wiener
Peter M. Wilner
Yunjian Yang
Kravtsova Yanina
Henry J. Young

New York State Bar Association—International Law and Practice Section

FALL MEETING

Rome, Italy

October 16–20, 2002

The Fall Meeting in the year 2002 will be held in Rome, Italy, from Wednesday, October 16 through Sunday, October 20, 2002, at the Grand Hotel Plaza on the Via del Corso.

The Grand Hotel Plaza, one of the oldest and most prestigious hotels in Rome, is located in the heart of the historical centre, just a few steps away from Trinita' dei Monti, otherwise known as the Spanish Steps, where most of the elegant shops are found. Established at the time of Italy's Unification, 1860, it has been a theatre of important cultural and social events. Throughout the years some of its guests have been: His Holiness Pope Leone X, Charlotte of Mexico, Pietro Mascagni, Ignazio Silone and many other authors and musicians. The Grand Hotel Plaza has also been a set for several important movies. The 19th-century ballroom, and adjacent rooms with all their stucco decorations and magnificent chandeliers, give a great atmosphere of "grand fin de siècle."

The Chair of the Meeting is Paul M. Frank of Walter, Conston, Alexander & Green, the New York Office of Alston & Bird LLP, and the Co-Chair is Francesco Gianni of Gianni, Origoni, Grippo & Partners, Linklaters & Alliance. A Planning Committee is being formed and will primarily include lawyers in New York and Rome.

The Meeting will have a European theme generally, but will include programs relating to legal developments in Italy and in the U.S. of interest to lawyers who practice in various areas of international law. Topics are likely to include the effects of the January 1, 2002, introduction of the single Euro currency in the European Union, initiatives of the Berlusconi Government in Italy, dual citizenship, legal issues in the war on terrorism and the growing implementation of restrictions on bribery, money laundering and other corrupt practices.

The Chairs plan to utilize some of the historic and cultural sites in and around Rome as venues for the social program. They also intend to provide a pre-Meeting trip in Italy following the practice of recent Fall Meetings (Barcelona before Madrid [2000] and Manaus before Rio de Janeiro [2001]). The Chairs hope to complete the organization of substantive and social programs by late Spring of 2002 and they welcome proposals for topics, social events and pre-Meeting locations at this time. Also, sponsorship opportunities for the Meeting are available. To obtain further details, please contact:

Paul M. Frank	Francesco Gianni
PMFrank@alston.com	Fgianni@gop.it
+1 (212) 210-9540	+39 (06) 478751

New York State Bar Association

International Law and Practice Section

Report and Recommendation on the Proposal of The Law Society of England and Wales Regarding The Ability of Solicitors to Sit for the New York Bar Examination

By letter dated April 3, 2001, The Law Society of England and Wales (the "Society") submitted to the President of the New York State Bar Association a request to support a change in the Rules of the New York Court of Appeals[1] governing eligibility to take the New York State bar examination ("bar exam"). The Society's proposal would permit anyone who is accredited by the Society as a solicitor, regardless of the nature and length of that person's formal study of common law, to sit for the bar exam based solely on the Society's certification of that person as a solicitor.

The President of the New York State Bar Association asked the Association's International Law and Practice Section (the "Section") to study the Society's proposal and to report the Section's conclusions and recommendations. Accordingly, the Section established a study committee to do so and the study committee periodically reported on its deliberations to the Section's Executive Committee. After due discussion of the study committee's report and deliberations on it over the course of several meetings, the Section's Executive Committee has determined that accepting the Society's position would make a significant exception to the intent of the regulatory scheme in New York. It has also determined that there is no justification for eliminating the requirement of a minimum of formal common law legal education as a prerequisite to sit for the bar exam. The reasons for these conclusions are set forth and discussed below.

Under the Rules of the Court of Appeals, any applicant may sit for the bar exam if the applicant meets at least one of several different tests. The most common is the completion of a three-year, full-time or a four-year, part-time program in an accredited U.S. law school.[2] This is the most relevant of the different tests for the purposes of the discussion of the Society's proposal.

An applicant who has not attended an accredited United States law school and obtained a J.D. degree, but who has studied law in a foreign country sufficient to qualify for admission to the bar of that country, may sit for the bar exam if the applicant meets one of the following two alternative conditions:

a) the applicant studied law in a country, the jurisprudence of which is based on the English Common Law, and the program of law study meets the *durational* equivalent of the United States law school curriculum, or

b) the applicant does not meet the above durational requirements, or does not come from a country based on the English Common Law, but has studied law abroad for at least two years (or has been admitted to practice in the foreign country) and takes a course in United States law at an accredited institution of not less than 20 semester hours of credit (equivalent to a one-year L.L.M. program).

". . . there is no justification for eliminating the requirement of a minimum of formal common law legal education as a prerequisite to sit for the bar exam."

These rules apply to all applicants, whether they are United States citizens or not, and whether they have attended law school in the United States or abroad. If the applicant has taken the equivalent of a three-year curriculum in common law training, the applicant can sit for the bar exam. In addition, non-N.Y. lawyers who pursue a common law course of study in certain civil law jurisdictions, such as Louisiana or Quebec, may likewise sit for the bar exam, based on their common law degree. All other foreign lawyers must obtain 20 or more semester hours of additional formal common law legal training before they can sit for the bar exam.

The rules governing admission as a solicitor are different for an applicant-solicitor who has an undergraduate degree with a law major and one who has an undergraduate degree that is not a law major:

1. An applicant-solicitor with an undergraduate law major from a recognized institution of higher learning (normally involving a three or four year program) must then complete: (i) a one-year practical course known as the Legal Practice Course, and (ii) a two-year clerkship in a firm of solicitors.

2. An applicant-solicitor who has an undergraduate degree that is not a law major, must: (i) take a one-year postgraduate course known as the Common Professional Examination (CPE), which "converts the non-law degree into a law degree"[3]; (ii) complete the Legal Practice Course; and (iii) complete a two-year clerkship in a solicitor firm. These latter two requirements are the same for all applicant-solicitors.

Under Rule 520.6, only a person who became a solicitor by fulfilling the requirements set forth in subparagraph 1 above qualifies to take the bar exam based on the durational equivalency of the undergraduate law program with a United States three-year law school program. A person who became a solicitor by fulfilling the requirements set forth in subparagraph 2 above does not qualify to take the bar exam for failure to meet the durational equivalency of the undergraduate law program.

The Society's proposal is that New York should make no distinction between one of its solicitors who studied law in an undergraduate program and one who took the one-year "conversion" course. The Society urges that New York should not look behind the Society's certification of qualification as a solicitor and permit any solicitor to sit for the bar exam. While this is a superficially appealing argument, it overlooks the fundamental intent of the regulatory scheme in New York, which requires all persons who sit for the bar exam to have a certain minimum of formal education in common law.

While the Section is mindful of the stature of the Society and the importance of its role in admitting persons to the status of solicitor in England and Wales, the Section believes this provides no basis for waiving the requirement that all candidates must have a certain minimum formal common law training to sit for the bar exam. The New York Rules apply to all candidates alike, regardless of whether they are United States citizens or non-citizens. Thus, adherence to the rules in New York does no violence to the notion of national treatment, as solicitors are treated no differently under the rules than anyone else, including U.S. citizens.

The Section further believes that, while New York has benefited considerably as an international legal center because of the liberal positions New York has taken regarding foreign licensed legal consultants and the ability of New York lawyers to form partnerships and other professional relationships with foreign licensed legal consultants and foreign lawyers, the issues that support such liberal views are separate and apart from the fundamental process of admission to the New York Bar itself. Only persons who have a certain minimum formal training in common law, as determined by the Board of Law Examiners and the New York Court of Appeals, should be permitted to sit for the bar exam and to be admitted to the New York Bar. Foreign lawyers are welcome to practice in New York as foreign legal consultants, to employ members of the New York Bar in their firms and, through these employed members of the New York Bar, to render opinions under New York law and practice New York law, but admission to the New York Bar itself is today governed by a uniform rule applicable to all applicants alike.

"Only persons who have a certain minimum formal training in common law, as determined by the Board of Law Examiners and the New York Court of Appeals, should be permitted to sit for the bar exam and to be admitted to the New York Bar."

The Section believes that the determination of the Society's proposal is essentially not a question of fairness to the English bar, but one of educational equivalency, and that should be determined on an objective basis by the Board of Law Examiners and the Court of Appeals. To the extent that fairness is an issue, the Section believes the rules are administered fairly because they apply to all applicants alike, U.S. citizens as well as non-U.S. citizens, based solely on educational equivalency. Accordingly, the Section recommends that the New York State Bar Association recommend to the New York Court of Appeals that there should be no change in Rule 520.6 and that the Society's proposal not be accepted.

Dated: New York, New York
October 23, 2001

Respectfully submitted

pp

Isabel C. Franco, Chair

Endnotes

1. The pertinent Rule is § 520.6 of the Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law, which can be found at <http://www.courts.state.ny.us/ctapps/520rules.htm>.
2. § 520.3.
3. Quoted from The Law Society Proposal.

Travel Advisory

By Allen E. Kaye, New York

Following a candid discussion with other immigration attorneys from across the United States, concerning travel in the aftermath of the terrorist activities of September 11th, we have formulated this travel advisory. This information is not meant to alarm or to inflame and has been verified to the best extent possible through U.S. government sources. You must be aware that the situation is very fluid and is subject to change without advance notice to the public. Therefore, this advisory is provided to give some guidance regarding expectations for international travel for the foreseeable future.

General Expectations

The recent attacks in the United States will impact immigration and consular processing of visas. The political reality in the United States is one of caution and each individual, whether citizen, permanent resident or foreign national, must be prepared for delays, inquiries and investigation whenever the INS and U.S. State Departments are involved. These activities are being justified under the demands of "national security."

- The INS' primary resources will be dedicated to whatever law enforcement role the federal government asks it to perform. You must be mindful, therefore, that travel during this period is undertaken without any guarantee of how your return to the United States will be handled by the INS—**even if you are in possession of all requisite documents.**
- Each time a non-U.S. citizen seeks to enter the United States, the INS has the legal right to review every aspect of the basis for that entry and to forbid entry if it believes that the applicant is excludable for any of over 30 reasons, including national security. Resolving problems at the ports of entry (land and air border crossings) will be difficult and time consuming, and we ask that you exercise good judgment in deciding whether you should travel internationally, and how you can best prepare for as uneventful a re-entry to the United States as possible under present conditions.

Expectations for International Travel

The United States government's reaction to recent events has caused all of the U.S. Embassies and Consulates, as well as the U.S. Customs Service, to operate on a "level one" alert. This means that each Embassy, Consulate and land and air border crossing may allocate any resources or take any action that it deems appropriate in furtherance of national security. In light of this information, expect the following:

- Delays in scheduling with any U.S. Embassy/Consulate, some of which are closed and all of which are on the highest security alert.
- Increased screening of all non-U.S. citizens at all ports of entry to the United States. You may expect to be fingerprinted, searched, asked for several pieces of identification, questioned by the FBI and have your conversations with INS, FBI or Customs officials videotaped.
- Increased secondary inspections, investigations and summary exclusion of any questionable requests for entry at all ports of entry to the United States. At the present time the airlines are providing manifests, to the INS and the FBI, of all individuals who are traveling into the United States. The purpose of this action is to allow these agencies to "profile" individuals when they come to a U.S. border. Airports that are most involved in profiling are: New York, Boston (Logan International), San Juan, Puerto Rico and Miami. The U.S. State Department has a list of forty countries that are designated for increased security measures (i.e., profiling). The State Department will not comment on this list; however, nationals of the following countries should expect closer scrutiny upon entry to the United States: India, Pakistan, Sri Lanka, Bosnia, Turkey and Taiwan.
- Reduced numbers of INS personnel to handle adjudications. Adjudications officers are being transferred from examinations to enforcement to reflect the increased concerns over national security.

Expectations for Domestic Travel

- INS officers have been asking for documents of people boarding domestic flights whether they are immigrants or non-immigrants. Non-immigrants should have their I-94 form, Form I-797 (when applicable) and passport. Immigrants should carry their I-551 "green cards" or their I-551 temporary stamp and passport.

What Does This Mean For You and Your Clients?

- Whether you are traveling on business or pleasure, do not schedule any Consular interviews or trips that are not essential. We cannot estimate when travel will be "normal" for anyone, but for foreign nationals it is now particularly difficult and laden with risks. If your travel is essential, and you need to obtain a visa while abroad, please indicate to us where you intend to make your application. If you are eligible for visa revalidation through the U.S. State Department, we urge you take advantage of that process.

- If you are planning to obtain your visa at a U.S. Consulate in Mexico, please be advised that nationals of certain countries who were previously required to obtain a visa to enter Mexico will now have their applications sent to the Ministry of Immigration in Mexico City for review before the visa will be issued. This procedure is expected to add an additional 30 days to the processing time, as the Mexican government is applying added security to those applications in light of the recent activities in the United States.
- Only travel abroad if you have every document in perfect order. This means that your passport should be valid for at least six months beyond your expected date of return to the United States; your visa stamp should be valid; for those traveling with advance parole, make certain that the parole document supports multiple entries and that you have the requisite number of copies. **This is not the time to expect flexibility from either the INS or the U.S. Embassies/Consulates.**
- If you are traveling on business, make certain that you have a letter from your employer explaining the reason for the trip. You should also carry any evidence of your employment in the United States such as: a company identification badge, a copy of a recent payroll check stub or a company credit or business card.
- If the investigation of the terrorist attacks results in arrests or in identification of countries that have harbored individuals involved, **expect that anyone from those countries will be subjected to intense scrutiny at every level of INS or Department of State review**. These activities will be justified under national security. Since the criminal investigation of the recent attacks is continuing, this part of our concern for pending cases and processing must be evaluated on an ongoing basis by anyone planning to travel abroad and re-enter the United States.
- A United States declaration of war against a particular country will result in suspension of most INS and Department of State procedures until Congress and the Executive office decide how and when to proceed. All services, except citizen services, may be suspended at the U.S. Embassies/Consulates in a particular country and visas may be summarily cancelled. Nationals of the affected country who are abroad may find that they cannot re-enter the United States.
- For all prospective applications, our clients should be very thorough in providing our offices with information on employment, education and personal background as the INS may consider any discrepancy to be deliberate misinformation rather than "harmless error."

Conclusion

Since the writing of this advisory, we have received numerous confirmed reports, from individuals who have traveled across the United States, of the ramifications of the increased security, including document verification, on domestic as well as international flights. In light of this information, it has become important to reiterate the need for all foreign nationals who undertake domestic or international air or rail travel, even those who are U.S. permanent residents, to carry documentation verifying their status in the United States. We recommend the following:

(1) U.S. permanent residents should carry both their passports and their alien registration cards.

(2) H-1B, L-1, O-1 visa holders and those in TN status should carry the following documents:

  (a) Passports

  (b) The original Notice of Action form indicating approval of the H-1B, L-1, or O-1 petition

  (c) Form I-94

  (d) Employer letter verifying current employment and most recent payroll check stub. Please note that the employer letter should simply state the person's name and confirm that he or she is employed with your company, and should be signed and dated by the individual within your company that usually signs immigration documents.

(3) Students in F-1 or M-1 status should carry their passports, the original Form I-20 and any other piece of documentation to verify that they are still enrolled in school. Those students who are in practical training status should be in possession of the EAD card, a letter from their most recent employer and their most recent payroll check stub.

(4) J-1 visa holders should carry their passports and the original Form IAP-66. Those J-1 visa holders who are employed in the United States should also be in possession of a letter from their employer verifying employment and their most recent payroll check stub.

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Charles Corwin Coward (Co-Chair)
Jorge Juan 6
Madrid 28001 Spain
(3491) 586-0332

Helena Tavares Erickson (Co-Chair)
Dewey Ballantine
1301 Ave. of the Americas
New York, NY 10019
(212) 259-8000

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

Barcelona
Jaime Malet
Malet, Abogados Asociados
Diagonal 478, 1 2
Barcelona 08006
Spain
34 93 2387711

Beijing
Liu Chi
Caterpillar (China) Investment Co., Ltd.
Tower A, Room 801
Full Link Plaza
Beijing 100020
China
(86-10) 6588-1618, x283

Berlin
Dr. Cord-Georg Hasselmann
Hengeler Mueller et al
Charlottenstrasse 35/36
D-10117 Berlin, Germany
(011-49 30 20 3740)

Brussels
George L. Bustin
Cleary Gottlieb et al
23 Rue De La Loi
Brussels 1040 Belgium
011-(322) 287-2000

Buenos Aires
Juan Martin Arocena
Allende & Brea
Maipu 1300
10th Floor
Buenos Aires 1006 Argentina
54-1-1-4318-9930

Cyprus
Christodoulos G. Pelaghias
27 Gregory Afxentiou Avenue
PO Box 40672
Cyprus 6306 Larnaca
(357) 465-8380

Dublin
Eugene P. Fanning
LK Shield Solicitors
39/40 Upper Mount Street
Dublin 2 Ireland

Frankfurt
Dr. Rudolf Colle
Oppenhoff & Raedler
Mainzer Landstrasse 16
Frankfurt 60325 Germany

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

Hong Kong
George Ribeiro
Vivien Chan & Co.
15th Floor, One Exchange Sq.
8 Connaught Pl.
Central Hong Kong
(852) 2522-9183

Israel
Mitchell C. Shelowitz
Ceragon Networks, Ltd.
24 Raoul Wallenberg St.
Tel Aviv 69719 Israel
(9723) 766-6770

Eric S. Sherby
Yigal Arnon & Co.
Azrieli Center
Tel Aviv 67021 Israel
972-3-608-7887

London
Randal J.C. Barker
Lovells
65 Holborn Viaduct
London EC1A 2DY UK
44-207 296 5202

Anne E. Moore-Williams
310 The Whitehouse
9 Belvedere Road
London SE1 8YS
England
(44020) 7655-1591

Lugano
Lucio Velo
Piazza Riforma #5
6901 Lugano 1 Switzerland
41-91-924-0451

Luxembourg
Alex Schmitt
Bonn Schmitt & Steichen
44, Rue De La Vallee
L-2661 Luxembourg
Germany
011-352-45-5858

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

Clifford J. Hendel
Araoz & Rueda
Castellana 15
Madrid 28046 Spain
(011) 3491-319-0233

Manila
Efren L. Cordero
Suite 1902-A, West Tower
Philippine Stock Exchange Ctr.
Pasig City, Philippines
(632) 631-1177

Mexico City
Aureliano Gonzalez-Baz
Bryan Gonzalez et al.
Monte Pelvoux 22, Piso 6
Lomas De Chapultepec
11000 Mexico City, Mexico
(551) 615-1515

Milan
Dr. Maurizio Codurri
Frau & Partners
Via C. Poerio 15
Milano 20129 Italy
(3902) 7600-3199

Montreal
Jacques Rajotte
Martineau Walker
PO Box 242
Montreal H4Z 1E9 QUE Canada
(514) 397-7400

Moscow
vacant

Paris
Philippe Xavier-Bender
Gide, Loyrette & Nouel
26 Cours Albert Ler
75008 Paris, France
(33-1) 40 75 60 00

Prague
Joseph C. Tortorici
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Krizovnicke Nam. 1
110 00 Prague1 Czech Slovak
(422) 2409-7300

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

Santiago
Juan Carlos Urquidi F.
Urquidi, Cumplido Ramirez
Lota 2257
Oficina 404
Santiago De Chile
Chile
(562) 335-0855

São Paulo
Pablo D'Avila Garcez Bentes
Suchodolski Advogados Associados
S/C
Rua Augusta, 1819-24 Andar
CEP
São Paulo 014413-000 Brazil
(5511) 3171-0177

Stockholm
Carl-Olof Erik Bouveng
Advokatfirman Lindahl HB
PO Box 14240
SE 104 40 Stockholm, Sweden
(468) 670-5800

Tokyo
vacant

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

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

Vienna
Dr. Christoph Kerres
Kerres & Diwok
Stubenring 18
Wien 1010 Austria
(431) 516-60

Warsaw
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Zurich
Dr. Erich Peter Ruegg
Schumacher Baur Hurlimann
Oberstadtstrasse 7
5400 Baden Switzerland
41 56 2000707

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

Council of Licensed Legal Consultants
Hernan Slemenson
Marval O'Farrell & Mairal
509 Madison Avenue
Suite 506
New York, NY 10022
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New York State Bar Association
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Thomas N. Pieper

New York International Chapter News

Editor:
Oliver J. Armas
Thacher Proffitt & Wood
11 West 42nd Street
New York, NY 10036
(212) 789-1200
E-mail: oarmas@tpwlaw.com

Co-Editor:
Thomas N. Pieper
Thacher Proffitt & Wood
11 West 42nd Street
New York, NY 10036
(212) 789-1200
E-mail: tpieper@tpwlaw.com

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

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