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New York International Chapter News

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

Message from the Past Chair

Moving Through 2010 and Into 2011

Michael W. Galligan

Our goals of deepening the presence and service of the NYSBA International Section to the international bar of New York, while expanding its outreach around the globe, continued to motivate and energize new programs and projects through the end of 2009 and now well into 2010.

I. Service to the International Bar in New York. Here in New York, the Section was, I submit, by far the most active co-sponsor and cooperating

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Message from the Chair

Carl-Olof Bouveng

It is a great honor to have been appointed Chair of the NYSBA International Section. The Section has successfully evolved over more than 20 years. During the leadership of my predecessor, Michael Galligan, we have seen a tremendous amount of activity and energy. Michael has instituted new and successful programs such as the "Fundamentals of International Practice" and energized our Committees and Chapters. Michael has also given new life to the overall long-term missions of the Section, namely (i) "Custodian" of New York Law

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Inside

In Memoriam:
Steven C. Krane

On June 23, 2010, Steven C. Krane Esq., the immediate past Chair of this Section and the 104th President of the NYSBA , passed away. Steve's untimely passing is a loss to our Section and the legal community at large. While everyone is grieving this loss in his or her own way, please find below the words of two of our executive members who had the privilege of knowing and working with Steve.

Thoughts of Michael Galligan

Past Chair of the International Section

(originally circulated as an e-mail to the Section on June 26, 2010)

It was perhaps more than just sheer coincidence that I learned of Steve Krane's almost unthinkable death at a meeting last Wednesday morning at the office of NYSBA President Stephen Younger to meet NYSBA International's new Chapter Chair for Bahrain, Aymen Almoayed. Steve Krane was a strong proponent of a vigorous engagement by NYSBA International with the many countries of the Middle East and Africa. Andrew Otis, our First Vice Chair and CTO, and Steve made an important joint visit to Dubai in early 2009 for that very purpose. I well remember the breakfast meeting hosted by Steve, here in New York last February, for the Senior Officers to welcome the chair of our new Algeria Chapter, Karim Khouki. As Steve was about to assume the chairmanship of our Section last January, I reminded him of ideas I was discussing with Eric Sherby, Chair of our Israel Chapter, and others about the possibility of an Israel Chapter Meeting analogous to our recent India Chapter Meetings, to which Steve replied, "Let's make the trip to Israel together!"

Similar to our late treasured colleague, Michael Sher, who preceded Steve in death earlier this year, I had the privilege of getting to know Steve really well only in the last years of his life. Perhaps most memorable among our collaborations was our joint appearance before the Executive Committee of the entire New York State Bar Association last April 9 to urge the adoption of NYSBA International's recommendation that NYSBA apply to be accredited as a non-governmental observer before the agencies of the United Nations chiefly responsible for the shaping of private and public international law. For Steve, this was but another in a long series of such appearances—Steve, after all, presided over the NYSBA Executive Committee as NYSBA President from 2001 to 2002! For me, it was the first. The respect and admiration for Steve among the Executive Committee members was palpable and no doubt greatly contributed to the Committee's decision to unanimously accept our recommendation.

Then there was the extraordinary meeting Steve arranged for the officers of NYSBA International with Fernando Peláez-Pier, President of the International Bar Association, just before our Annual Membership Lunch last January 27—at which time we had the opportunity to talk at length about the relevance of state bar international sections not only to the international bar of the United States but to international bars the world over. Many of us were looking forward to working with Steve, who was our official liaison to the IBA and who was recently named to a number of IBA Committees, in building up and extending these connections and relationships. Here, too, I should mention the grace and thoughtfulness with which Steve navigated the transition from my Chairmanship to Steve's all-too-brief Chairmanship to the now well-established and flourishing Chairmanship of Carl-Olof Bouveng.

In retrospect, it seems that Steve's "monument" was his contribution, in what we now know were the last years of his life on this earth, to the restatement and revision of the ethical rules guiding the professional activities of all New York attorneys. At first glance, these rules may seem to be relevant only to the practice of law within the physical boundaries of New York. But, as we have recently come to appreciate with even greater force and clarity, there is no strictly "domestic" arena for New York law in a world where New York law is often the law of choice for matters that far transcend the borders of our State and where New York attorneys represent and advise clients around the globe. These and related rules about the authorization to practice law in the transnational context were special concerns of Steve, both in his role as Co-Chair of the NYSBA Committee on Cross-Border Legal Practice and of his more recent involvement with the IBA. We honor Steve, who has so untimely been taken away from us, by ensuring that the leadership of the New York bar in these vital areas, united with our NYSBA International colleagues around the world, continues unabated and undiminished.

Permit me to conclude with a variation on an ancient prayer:

May Steve join in paradise the immortal souls
of Abraham, Isaac, Sarah, Rebekah, Rachel, Leah,
and all the righteous leaders of our bar who have gone before him.

Thoughts of Andrew D. Otis

Executive Vice Chair of the International Section

On June 23 the international legal profession lost one of its leading lights. Perhaps best known to New York lawyers as the youngest President of the New York State Bar Association, Steve was well known to lawyers around the world as a lawyer's lawyer: a world-class scholar and adviser on legal ethics and law practice management. He devoted countless hours to various committees and task forces at the local, state, national and international levels dedicated to legal ethics, the regulation of lawyers and the practice of law. Professionally, he represented and advised lawyers and law firms all over the world on ethics and business issues. Steve also devoted considerable effort to coordinating the complementary work of various bar associations. He was the driving force behind the January 2010 meeting between the senior officers of the International Section and the President of the International Bar Association, Fernando Paláez-Pier. Steve was also very interested in the interaction of the International Section with the various jurisdictions in the Middle East. I had the opportunity to travel with him to Dubai in January 2009 on behalf of the International Section and not only did he wish to engage with the jurisdictions in the region that had good relations with the United States, he also sought, using his personal network, to engage with jurisdictions with which the United States did not have close relationships, such as Iran.

Steve's desire to reach out to and engage lawyers from other jurisdictions was typical of how Steve practiced law. His mentor, Judge Judith Kaye, stated that Steve took over her husband's office at Proskauer Rose and the table at which her husband had practiced law. Steve had told me about the round table in his office and its provenance during our trip to Dubai and how the open and collaborative discussions that it fostered with associates and colleagues to vet issues was a treasured lesson from Mr. Kaye. He continued that tradition, in part as a daily tribute to an honored guide and counselor. One of the tragedies of Steve's untimely passing is that he will no longer be able to pass that tradition on to younger lawyers. I met with him only once around that table but on at least two occasions I worked through challenging issues with Steve. Each time, he was straightforward, thoughtful, goodhumored and wise.

Although Steve was a leading lawyer and I very much enjoyed working with him, it's the person our Section will miss most. Many of us have a particular memory of Steve's good nature and sense of humor. I saw them both most clearly when I tested them. During our trip to Dubai, Steve had rented a car and had done a masterful job negotiating the Dubai traffic and getting us around the city to our crowded agenda of multiple meetings. One afternoon, I had suggested that we walk from one meeting to another because the buildings appeared to be just across the road from one another on the map on my BlackBerry and it looked shorter than driving. Steve was game. I was sadly mistaken; the buildings were a considerable distance from our car. Steve walked the entire way, all the way making dry remarks in response to my apologies. We took a cab back to the car.

Steve's tastes and interests were diverse and genuine. He loved music. He enjoyed not just opera and musical theater but also heavy metal and reveled in keeping up with the latest bands. Another lawyer might try to hide those preferences, concerned that they might not appear sufficiently professional. Steve proudly displayed his impressive collection of band t-shirts. While in Dubai we talked about favorite groups and concerts that he had recently attended. Steve loved movies and baseball. These interests, his good nature and thoughtfulness and his humor made Steve wonderful company when it was needed most, such as a long pre-dinner speech or a 13-hour plane flight in economy class. I will miss that and him.

Note from the Editor

I am pleased to bring to you this edition of the *Chapter News*. With each passing edition, the evolution of our Section and the maturing of our Chapters are exemplified by the growth in the news sections of this publication, where Section and Chapter programs are chronicled.

Dunniela Kaufman

While the *Chapter News* is very much a publication that strives to provide our members with a global perspective, informing them about recent changes in the legal and policy climates in the countries where our fellow colleagues reside, it is also an important venue to inform one another about what our geographically dispersed Chapters and Members are up to. While I treasure the contribution that the substantive authors make to this publication, I am delighted by the growth of reporting from our Chapters and do hope that all the Chairs, including the new ones, will continue to use this vehicle to keep their colleagues updated on their activities.

I hope that you are enjoying your summer (if it is in fact summer where you live), and that you will find this edition of the *Chapter News* both informative and engaging. As always, I welcome your contributions for the next edition, as well as your thoughts on how we can improve the *Chapter News* to better serve and inform one another.

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Enforcing Foreign Judgments in the U.S.: New Opportunities in New York

It has been said that "banking is not really about lending money at all, but about getting paid back." Peter Schiff, *The Little Book of Bull Moves in Bear Markets*, p.xxxv (2008). In the same sense, successful litigation depends not so much on winning a judgment, but on collecting it. Often the court that enters a monetary judgment is powerless to compel the defendant to satisfy it—for example, when the defendant has no attachable assets in the jurisdiction. In those situations, it becomes necessary for the judgment creditor to initiate a second phase of litigation in a jurisdiction where it may collect.

When the judgment is issued by a state or federal court within the United States, the U.S. Constitution's full-faith-and-credit clause protects judgment creditors by requiring all U.S. courts to honor and enforce each other's judgments. U.S. Const. Art. IV, § 1. 28 U.S.C. § 1963 prescribes the means to register any U.S. federal court's money judgment in any other judicial district, and provides that "[a] judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner."

Domesticating foreign judgments in the United States is a trickier business, because "no federal law governs the enforcement of foreign-country judgments, and indeed…even in federal courts, state law rather than federal law applies to this subject." Andreas F. Lowenfeld & Linda J. Silberman, *United States of America*, *Enforcement of Foreign Judgments Worldwide*, 123 (2d ed. 1994). In 1895, the U.S. Supreme Court established the principle that foreign judgments should "be given full credit and effect" in U.S. courts so long as "the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proof, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record"—unless "principles of international law" or "the comity of our own country" dictates otherwise. *Hilton v. Guyot*, 159 U.S. 113, 205-06 (1895).

One principle of comity that sometimes dictates otherwise, as it did in *Hilton*, is where the courts of the foreign jurisdiction would not give reciprocal treatment to a judgment entered in the United States. *See* Brian Richard Paige, Comment, *Foreign Judgments in American and English Courts: A Comparative Analysis*, 26 Seattle Univ. L. Rev. 591, 593 (2003) (noting that "at least seven states (Florida, Georgia, Idaho, Maine, Massachusetts, North Carolina, and Texas)…continue to insist that reciprocity be established"). But, in general, "[a] valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying claim are concerned." Restatement (Second) of Conflict of Laws § 98. Most states in the United States have enacted some form of the Uniform Foreign Money-Judgments Recognition Act, which makes a "foreign judgment…enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit," subject to a few exceptions to guard against "case[s] of serious injustice." Unif. Foreign Money-Judgments Recog. Act, § 3, § 4 cmt. (1962).

The laws regarding the recognition of foreign judgments in the United States are not the only consideration in selecting a jurisdiction in which to seek enforcement of a judgment. The main consideration, of course, is finding a jurisdiction in which the judgment debtor's assets can be attached. A judgment creditor can seek to enforce the judgment in any jurisdiction where the judgment debtor's assets are located, since the courts of a state may properly exercise their jurisdiction over any property within that state. *See Shaffer v. Heitner*, 433 U.S. 186, 210 (1977). Until recently, however, it was unclear what recourse a judgment creditor might have in the United States against a judgment debtor with assets offshore.

On June 4, 2009, the New York Court of Appeals, the state's highest court, issued a decision which one commentator observed has "the potential of making New York a mecca for judgment creditors pursuing assets of their judgment debtors." In *Koehler v. Bank of Bermuda Ltd.*, 12 N.Y.3d 533 (2009), the court held that New York law permits federal and state courts to order banks subject to personal jurisdiction in New York to turn over assets owned by customers who have outstanding judgments against them, regardless of whether those assets are located in New York or even within the United States. Thus, the presence in New York of a third party holding a judgment debtor's assets can provide the hook to attach those assets even if they are outside the United States and not subject to the *in rem* jurisdiction of any court in the United States.

Koehler arose from a dispute between two former business partners in a Caribbean resort, Lee Koehler and A. David Dodwell. The Bank of Bermuda had acted as a lender to the partners and held their shares in the resort as collateral. In 1993, Koehler obtained a $2 million judgment against Dodwell in the U.S. District Court for the District of Maryland. Koehler then commenced an action in the U.S. District Court for the Southern District of New York seeking an order requiring the Bank of Bermuda to turn over the shares it held for Dodwell even though those shares were held by the bank offshore, relying on a provision of New York law permitting judgment creditors to bring proceedings against third parties holding judgment debtors' assets and empowering courts to issue a "delivery order" requiring the third party to deliver the property or convert it to monetary form to satisfy the judgment. *See* N.Y. CPLR 5225(b).

The federal district court dismissed the petition, citing the "well established principle that a New York court cannot attach property not within its jurisdiction." *Koehler v. Bank of Bermuda Ltd.*, 2005 U.S. Dist. LEXIS 3760, *33 (S.D.N.Y. Mar. 9, 2005). The court rejected the argument that "nothing more than a valid money judgment is necessary," holding that "the law…requires that the property sought to be levied against exist within the jurisdiction." On appeal, however, the Second Circuit held that it was unsettled whether New York law required *in rem* jurisdiction over the property or whether *in personam* jurisdiction in New York over the party holding the property was sufficient to sustain a garnishment under Section 5225(b) of the New York Civil Practice Laws and Rules ("CPLR"). *See Koehler v. Bank of Bermuda Ltd.*, 544 F.3d 78, 80 (2d Cir. 2008). The Second Circuit certified that question to the New York Court of Appeals.

New York's status as a global financial center rendered the question certified in *Koehler* one of significant consequence to financial institutions. Nearly any institution maintaining a branch or office in New York is subject to personal jurisdiction there. *Koehler* thus exposed such institutions to the possibility that any property they held for their customers anywhere in the world could be subject to garnishment in a New York court.

The Clearing House Association, a trade association affiliated with Bank of America, Citibank, JPMorgan Chase, and numerous other lending institutions, filed an *amicus curiae* brief siding with the Bank of Bermuda. In that brief, Clearing House submitted that "[r]equiring a foreign bank to deliver tangible assets into the State to satisfy a judgment against a jurisdictionally absent debtor would not only be wrong on the law, but would set a precedent that could profoundly affect the business of financial institutions and the role of New York as a leading financial center." Specifically, Clearing House argued that the rule would subject banks to "the substantial burden of searching for, restraining, collecting and delivering remote property into the State," and that "[i]nstitutions would face significant financial and legal exposure, particularly when asked to choose between obeying court orders here in New York and adhering to applicable law in foreign jurisdictions." Clearing House also raised the specter that foreign customers of banks maintaining New York branches "would undoubtedly reconsider whether to continue to deal with [those] institutions," "inevitably adversely affect[ing] the State's economy and tarnish[ing] New York's reputation as a global financial center." Finally, Clearing House argued that making New York such a hospitable forum for judgment creditors would burden the state's courts with numerous foreign disputes lacking any connection to the state.

In deciding the certified question presented by the Second Circuit, the New York Court of Appeals held that under New York law, "a New York court with personal jurisdiction over a defendant may order him to turn over out-of-state property regardless of whether the defendant is a judgment debtor or a garnishee." 12 N.Y.3d at 541. The Court of Appeals did not grapple with the practical implications raised by the Clearing House. Rather, the Court based its opinion on the fact that a CPLR 5225 turnover action proceeds "against the garnishee, rather than by a device operating on the property alone," and is thus distinct from alternative devices such as prejudgment attachment requiring *in rem* jurisdiction over the property. *Id.* at 538. While a court may not exercise *in rem* jurisdiction unless "the *res* [is] within the jurisdiction of the court issuing the process," a "court[] can compel observance of its decrees by proceedings *in personam* against the owner within the jurisdiction" even if the property is outside of it. *Id.* at 538-39.

A dissenting opinion protested that "[s]uch a broad garnishment remedy is unsupported by any precedent in New York or, apparently, in any other jurisdiction." *Id.* at 542 (Smith, J., dissenting). The dissent pointed out that the precedents the majority had relied upon entailed exercises of *in personam* jurisdiction over judgment debtors, not third parties which may have legitimate interests "independent of the judgment debtor" for keeping property outside the jurisdiction. *Id.* at 543. By extending the reach of those cases to third parties, the dissent submitted, "the majority's holding opens a forum-shopping opportunity for any judgment creditor trying to reach an asset of any judgment debtor held by a bank (or other garnishee) anywhere in the world." *Id.* at 542. That forum-shopping opportunity applies to New York uniquely inasmuch as no other state had interpreted any of its own garnishment statutes as broadly as the New York Court of Appeals did in *Koehler*.

The New York Court of Appeals has the final say on questions of New York law, so *Koehler* will remain the law unless the U.S. Supreme Court indulges an appeal on federal constitutional grounds or otherwise has occasion to address the issue. The dissenting opinion sketched out one theory on which such an appeal might proceed. The dissent expressed concern that "[t]he majority's broad view of New York's garnishment remedy may cause it to exceed the limits placed on New York's jurisdiction by the Due Process Clause of the Federal Constitution." *Id.* at 544. The due-process standard requires "all assertions of state-court jurisdiction" to be evaluated according to "traditional notions of fair play and substantial justice." *Id.* (*quoting Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). The U.S. Supreme Court had already held that "the traditional *in rem* approach of such proceedings—permitting judgments to be enforced against property wherever it may be located—is constitutionally acceptable," but no court has yet held that "the novel *in personam* approach to judgment enforcement" represented by *Koehler* satisfies due-process requirements. *Id.*

If the approach remains "novel" and is not later overturned on constitutional grounds, judgment creditors have a potent new tool in their arsenal when it comes time to collect on foreign or domestic judgments. And whatever effect it might have on New York's standing as a leading financial center, it seems likely to cement New York's status as the leading litigation forum for judgment creditors hoping to collect.

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What You Don't Know *Can* Hurt You: FCPA Risks in Cross-Border M&A Deals

In cross-border transactions, risks under the Foreign Corrupt Practices Act (FCPA) should never be taken lightly. Although international acquisitions often involve many complexities, time pressures and significant business interests, U.S. companies and issuers should always include an FCPA due diligence checklist as part of their overall pre-acquisition due diligence. Failing to undertake proper FCPA due diligence in the pre-acquisition phase can result in big headaches, ranging from delays or possible cancellation of the deal to the unwitting buyer being exposed to successor civil and criminal liability for prior FCPA violations, irrespective of whether or not they were known at the time of the sale.

Background

The FCPA, 15 U.S.C. §§ 78dd-1, *et seq.*, was first enacted in 1977 to ban U.S. persons and issuers from bribing foreign officials to obtain or retain business abroad. The statute has a broad reach and covers all U.S. companies and citizens doing business abroad as well as some foreign companies with sufficient contacts in the United States (e.g., those companies trading on U.S. exchanges or that use U.S. banks to transact business). The statute also contains books and records provisions requiring companies to keep appropriate records and have adequate internal controls to prevent and detect possible FCPA violations.

The FCPA prohibits corrupt payments, gifts or giving anything of value to foreign officials in order to get or keep business (whether or not the bribe resulted in any actual business). It also outlaws improper payments or gifts through agents, consultants or other third parties that are made for the benefit of or done at the behest of foreign officials (note that this may include charitable, social or political contributions solicited by foreign officials). The definition of foreign official is also quite broad and covers not only those holding public office but also local citizens affiliated with state-run or owned organizations (e.g., doctors at a state-run hospital or employees at a state-owned oil company). Depending on the geographic market and industry involved, the FCPA risks can be high and should be addressed. Any violations identified should be resolved in the pre-acquisition phase.

Big Penalties for FCPA Violations

In recent years, U.S. law enforcement authorities have given heightened priority to FCPA investigations and prosecutions, which have resulted in record-breaking fines, penalties and untold damage to the business reputations of the violating companies and individuals. Law enforcement authorities have assessed large penalties in civil and criminal fines for FCPA violations occurring in the M&A context. For example, in February 2009, the U.S. Department of Justice (DOJ) and Securities and Exchange Commission (SEC) assessed $579 million in civil and criminal fines and penalties relating to an FCPA investigation stemming from a reorganization of a corporate subsidiary through an initial public offering. These stiff fines were levied even though there was no evidence that the new board or management of the reorganized subsidiary had actual knowledge of any FCPA violations found to have been committed by the old subsidiary. The clear lesson is that companies should understand that FCPA successor liability is very real and cannot be avoided by a corporate reorganization or other M&A activity, even when there is no actual knowledge of the FCPA violations.

FCPA successor liability can also be minimized by utilizing the DOJ's advisory opinion process. For example, in FCPA Opinion Procedure Release 08-02, the DOJ provided a six-month post-acquisition "grace period," agreeing not to prosecute the company at issue for any post-acquisition FCPA violations occurring within the first six months of closing. The DOJ conditioned the grace period on the company providing DOJ with a comprehensive post-acquisition due diligence work plan within ten days of the closing, and agreeing to retain outside counsel and forensic accountants to perform a detailed compliance review of FCPA risk areas throughout the business and to report back to DOJ by a certain date. The company also had to agree to initiate a stringent compliance program and to disclose any pre-acquisition conduct it discovered.

In order to avoid costly enforcement actions, FCPA due diligence should become a routine part of the overall due diligence process in any cross-border deal involving U.S. persons or issuers.

What's at Stake?

FCPA successor liability in the M&A context is not solely an issue for those investors acquiring a majority equity stake in a deal. FCPA enforcement risks exist even for investors who acquire less than a 50 percent ownership interest, depending on the level of control acquired in a deal (e.g., board seats or involvement in managing the investment). FCPA violations can result in high fines and penalties, criminal sanctions, disbarment, collateral civil or shareholder lawsuits, and long-standing damage to a company's business reputation. In the M&A context, failure to detect, isolate and resolve FCPA violations at the pre-acquisition stage can also result in expensive and lengthy investigations, intrusive compliance monitors, involvement of U.S. and / or foreign law enforcement authorities, negative tax treatment and a host of other unpleasant consequences such as a dramatic downward swing in the market value or stock price of the asset(s) recently purchased. In order to prevent this parade of horribles, it is important for FCPA due diligence to be an integral component of the overall pre-acquisition due diligence plan.

What Are FCPA "Red Flags"?

Knowing what FCPA "red flags" to look for can help streamline the due diligence process. The level of FCPA due diligence that needs to be undertaken will vary depending on the level of FCPA risks involved. For example, if the deal involves business dealings in a high-risk country or in an industry that the U.S. government has already signaled poses FCPA concerns, then more due diligence should be performed. However, in preparing a basic FCPA due diligence checklist, the following are examples of FCPA "red flags" that should signal that further review is needed:

- Target company has been subject of a prior FCPA or corruption-related investigation;
- Target company has prior allegations relating to business integrity, ethics or other violations of local law;
- Business performed in a high-risk industry or high-risk country (as reflected on the Transparency International Corporation Perception Index);
- Excessive or unusually high compensation without sufficient supporting detail;
- Payments to third parties not well known in the industry;
- Payments made to third parties outside of the country where the goods / services are to be provided;
- Use of shell companies or cash transactions;
- Lack of anti-bribery policies, trainings or code of conduct at target company;
- Lack of written agreements with consultants, agents or business partners;
- Close relationships to government officials or significant interaction with government regulators;
- Misrepresentation or failure of the target company to cooperate in due diligence process.

Tips on How to Avoid FCPA Successor Liability

If any of the above FCPA red flags are noted, the FCPA due diligence team needs to undertake further review to be satisfied that there are no lurking FCPA issues. Having an FCPA-trained professional who has the background to know what to look for and, more importantly, what kinds of questions to ask is invaluable. While corporate counsel may be able to oversee the overall M&A due diligence process, FCPA due diligence is an area in which it is advisable to retain counsel experienced in FCPA matters, and who are knowledgeable about international regulatory compliance, securities law, and criminal law and procedure.

The following steps will prevent or at least minimize FCPA successor liability in cross-border deals:

Determine the FCPA risk level involved in the deal. The first step in any FCPA due diligence review should be to assess whether the FCPA risks presented by the deal are low, medium or high. Categorizing the risk level will dictate the amount of time, energy and resources that need to be spent on the FCPA due diligence process. Depending on the level of risk presented, build in enough time to do a sufficient FCPA risk review before the deal closes—no matter how attractive the returns or anticipated profits! While there are certainly time pressures involved in many cross-border deals, FCPA due diligence is not an area to be glossed over or overlooked. Involve knowledgeable counsel to advise on how to properly handle any FCPA red flags that may be present.

Conduct a reasonable risk-based FCPA due diligence review pre-acquisition. In order to know what FCPA risks are involved, it is important to ask the right questions. Look for any FCPA red flags and thoroughly investigate and resolve any FCPA violations that are uncovered. Utilize the DOJ advisory opinion process, if appropriate. The FCPA due diligence team should keep detailed documentation of all due diligence efforts when evaluating potential FCPA violations. FCPA due diligence review documentation should be timely, accurate and thorough. Remember, it is not enough to rely on information provided solely by the seller—independent verification of critical information (e.g., consultant contracts, ownership structure / interests of key business partners or customers, and third-party payment detail) is required.

Take appropriate action for all FCPA violations uncovered. Establish all relevant facts relating to any apparent, actionable FCPA violation. Determine whether a voluntary disclosure is advisable. If a voluntary disclosure is pursued, be thorough and involve the relevant law enforcement authorities, including local authorities, in any remediation plans or internal investigations contemplated. Early disclosure can mitigate or eliminate successor liability for any violations uncovered pre-acquisition or those that occur shortly after closing. To the extent practicable, all FCPA investigations should be concluded and any violations resolved prior to closing. When faced with the existence of possible FCPA violations, a buyer must decide whether to delay, renegotiate or even cancel the deal. Depending on the nature and extent of the violations uncovered, they may have a significant impact on the purchase price and the buyer's willingness to acquire the assets being purchased. Other remedial steps may include requiring the target company to make specific undertakings by set deadlines, broadening the investigation to other markets, individuals or time periods, and / or for the target company to pay the costs associated with investigating and remedying the violation(s).

Preserve relevant documents and do not create collateral damage. All relevant documents should be preserved and immediate action taken (e.g., litigation hold protocols) to ensure that employees do not destroy documents. Create an internal investigation plan to detail the document collection process (be aware of data protection and privacy laws in the relevant jurisdictions) and determine the order and priority of interviews to be undertaken. Deal counsel should also be mindful of any disclosure requirements that may be needed once an FCPA violation has been discovered. For example, if the seller or prospective joint venture partner is a publicly traded company, there may be disclosure requirements under the Securities and Exchange Act. Do not create collateral damage when addressing an FCPA violation—involve counsel knowledgeable of the local laws in the jurisdiction(s) involved, and if disciplinary action is contemplated, include employment counsel in that decision. Failure to make the necessary disclosures or making hasty decisions in response to an FCPA violation can further complicate the deal and invite unintended liability.

Ask for FCPA-related representations and warranties from the target company. The target company should be able to provide assurances that it does not have any employees who are foreign officials as defined under the FCPA and that no foreign official has any legal or beneficiary interest in the target company. Requiring employees and / or business partners to sign FCPA compliance statements is advisable. If there is foreign-official involvement in the target company, additional representations or certifications may be required.

Retain audit and termination rights. If any FCPA violations are uncovered in the pre-acquisition due diligence process, the acquiring company should retain audit rights to inspect the books and records of the target company as well as the right to terminate the deal or to be reimbursed for expenses relating to the resolution of any FCPA violation uncovered between signing the purchase agreement and closing. While these contractual protections are all negotiable, the buyer should also consider having the seller indemnify it for any FCPA violations it uncovers.

Tighten up internal controls post-closing. In order to ensure no FCPA problems crop up post-closing, assess whether the internal controls at the new entity are adequate to prevent, detect and address potential FCPA violations. Adopting an effective compliance program that meets the requirements set forth in Chapter 8, Section B.2.1 of the United States Sentencing Guidelines is highly recommended. Reviewing existing anti-corruption policies, trainings and contractual provisions to ensure FCPA compliance is also highly recommended. Again, depending on the investment, obtaining re-certifications of FCPA compliance from employees, key business partners and other third parties may also be recommended.

FCPA Implications for M&A Cross-Border Deals

As the credit markets begin to thaw and cross-border M&A activity heats back up, U.S. companies and issuers in search of that perfect opportunity to buy, merge or establish a joint venture with any company that has operations outside the United States should always be cognizant of the requirements of the FCPA when evaluating the deal. Doing proper FCPA due diligence in the pre-acquisition phase can save your company from big problems down the road. Following the tips mentioned above will also help mitigate against FCPA successor liability, particularly in this heightened FCPA enforcement environment.

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ACLI Statement Seeks to Ban Securitization of Life Settlements: But Should "Ban the Bomb" Be "Save the Whales" Instead?

Life settlements and securitization, two "hot button" issues, and the American Council of Life Insurers (the "ACLI") combined them in a Statement on February 3, 2010 (the "Statement"), recommending that the securitization of life settlements be prohibited by legislation or regulation. Consistent with its prior positions, the ACLI attempts to support the ban by arguing principally that since securitization transactions require large pools of eligible policies, such transactions will serve to encourage the growth of illegal stranger-originated life insurance, or STOLI, where insureds are encouraged to purchase life insurance policies for the benefit of third party investors who have no insurable interest in the life of the insured, in derogation of the insurable interest requirements of applicable insurance law.

The Life Insurance Settlement Association ("LISA") issued a rebuttal statement characterizing the ACLI position as "an affront to the principal (sic) of free and open capital markets," "sensationalistic nonsense, larded with half-truths leavened by outright lies" and "knowingly attempt[ing] to confuse not only the public but public policymakers by equating legitimate life settlements with…(STOLI) while characterizing the licensed and regulated intermediaries involved in the life settlement industry as 'STOLI promoters' preying upon seniors." [1]

The Institutional Life Markets Association ("ILMA") described the ACLI as mixing "apples and oranges" and its Statement as "misplaced and incorrect."[2] The Statement triggered a similar response from the joint chairman of the European Life Settlement Association, who noted the advantages that securitization provides to seniors who wish to transfer their unwanted policies and the responsibility of the life insurance industry to provide transparent disclosure.[3]

It is instructive to examine in greater detail the arguments set forth in the Statement to support a position as significant as banning the securitization of an entire asset class. One would expect significant global reasons, such as potential threats to the stability of, or systemic risk to, the capital markets, when weighed against the well-established benefits of securitization. However, the Statement appears to fail to make such a required strong case in any respect while failing to recognize the valuable role that the securitization of life settlements may play in allowing seniors to monetize unwanted policies.

ACLI Arguments

Securitization Promotes STOLI

The ACLI's principal argument rests on the problem of STOLI policies. The underlying premise seems to be that because the number of policies eligible for settlement is limited, promoters of life settlements artificially manufacture new life insurance sales to produce an inventory of policies for sale to third party investors with no insurable interest in the insured, so-called STOLI policies. Because securitization necessarily requires large numbers of policies, and the demand for product imposed by securitization will exacerbate the STOLI problem, such transactions should therefore be prohibited—to prevent STOLI. In addition, the Statement argues that promoters will use capital generated from securitization to create larger inventories of life settlement contracts which, in turn, will promote further securitizations, which will encourage more STOLI.

This reasoning is flawed on a number of grounds. As a conceptual matter, the banning of life settlement securitizations as a remedy to prevent STOLI attacks the issue at the wrong point in the transaction. STOLI, which arises at origination, not at the tertiary sale of the policy, has been an issue with the industry prior to the handful of securitizations that have taken place, and will continue whether or not securitization occurs. The industry has already invested an enormous amount of time and political effort to combat the problem. Both the National Association of Insurance Commissioners [4] and the National Conference of Insurance Legislators[5] have adopted model laws, versions of which have been adopted in most of the states, identifying and prohibiting STOLI. Those efforts will continue, appropriately targeting origination practices. The banning of securitization of life settlements will not add to the effectiveness of these efforts.

The numbers in the market also seem to undercut the Statement's argument. Conning Research & Consulting has reported approximately $31 billion outstanding of settled life insurance policies as of 2008.[6] Even assuming that a large portion of such policies were originated to standards that are now considered outdated, rendering such policies unacceptable for securitization, a recent report by the Aite Group, issued in January of this year, estimates that the life settlement market will transact approximately $13 billion in face value between 2010 and 2013, compared with $8 billion in 2009.[7]

If those numbers are compared with the small handful of securitizations closed to date, the expectations that those types of transactions will be slow in execution due to operational hurdles,[8] and the relative sizes involved (the recent AIG private securitization represented less than $2.5 billion in face value of policies it already held in its proprietary portfolio, dwarfing the first public securitization which represented only $70 million in notes), it would appear that the perceived exacerbation posed by securitization will take some time to be felt.

Finally, the Statement improperly analogizes the life settlement market with the mortgage lending market and predicts that promoters will utilize capital proceeds arising from securitization transactions to aggregate larger portfolios of life settlement contracts, execute additional securitizations and thus encourage intermediaries to produce yet more STOLI policies to meet the demand.

A crucial difference between the mortgage lending market and the life settlements market should be raised. Unlike the mortgage lending market, the life settlement market is trifurcated. It is not the issuers of life policies that securitize life settlement policies or loosen underwriting standards to generate product and should thus be required to maintain "skin in the game." The "originate to distribute" model is just not applicable. Rather, life settlement producers, who play the role of originators, merely act as intermediaries rather than principals, and often undertake the due diligence for third party funders that promote and ultimately securitize the policies. These life settlements providers have no ability to monitor the underwriting process of the insurance company underwriter, nor can they encourage STOLI by "loosening underwriting standards" to allow additional STOLI. In fact, strict state laws, vigilant due diligence and careful origination procedures at the provider level already screen such transactions.

Securitization Threatens Interests of Investors

The Statement's second argument is that securitization of life settlements threatens the interests of investors (i) by divorcing the interests of life settlement providers from the ultimate risks associated with the settled policies and (ii) because there is a lack of transparency for investors in the securitization process, again analogizing the securitization of these assets to that of mortgage loans.

Interests of Life Settlement Providers Are Divorced from the Ultimate Risks of the Settled Policies

As before, the first argument fails on threshold grounds. Even absent securitization, life settlement providers generally function, for a fee, as intermediaries between the initial seller of a settled policy and the ultimate purchaser of the policy and do not retain ultimate risk on the experience of the policy. The provider does, however, make representations and warranties in the agreement with its ultimate purchaser, but only to support its own due diligence and operations. The Statement comments that the ultimate risk to life settlement investors is longevity risk, that is, that the insured will live longer than expected, and that that if the insured lives "too long," the investment may not pay out. This is clearly the principal risk in life settlements, one to which investors are subject, and one that providers have *never* assumed. Securitization does not alter that risk allocation.

To the same point, the Statement notes that rating agencies advise that there is no standard method and no common set of assumptions used by life settlement providers (sic) to predict the life expectancies of insureds, and that if there are no restrictions on the pooling and securitization of life settlement policies, there is little incentive for life settlement providers (again sic) to "get it right in terms of medical underwriting and respect for insurable interest requirements." It is correct, of course, that there is not yet consensus as to life expectancy assumptions and methodology and medical underwriting techniques. Life expectancy estimates entail multiple assumptions, techniques and procedures applied by practitioners with differing backgrounds and training. A LISA subgroup has finalized a Best Practices effort for life expectancy providers to attempt to bring uniformity to the reports of such providers. The final step of the effort consisted of an actuarial table, and an accompanying report, based upon data provided by providers. This will create a benchmark for providers who will adjust to it in accordance with how they develop their own actual-to-expected life ratios. The Best Practices effort is designed, according to the LISA group, to make available to investors "meaningful and comparable information on the accuracy of [life expectancy] providers."[9]

To reiterate, the uncertainty as to life expectancy already exists, again, absent securitization, for investors in life settlements. But, to be clear, it is not the providers that provide such reports but independent specialist firms that do so. It is also the case that providers already have an incentive to assure insurable interest, as they are typically required to provide a representation to that effect. It should further be noted that there is a growing interest in developing a new capital market in longevity risk. Longevity swaps, where investors assume the risk that insureds live longer than expected, are becoming more acceptable. For example, at the beginning of February, a group of banks and insurers in the UK organized the Life and Longevity Markets Association to promote a liquid longevity market.

Finally, the Statement asserts that unlike the residential mortgage markets where securitization provides additional capital to lenders for consumer lending, there is no capacity issue for the resale of existing life insurance policies. But commentators have noted that although life insurance is one of the remaining liquid assets available to consumers who are suffering from decreased values in their housing and capital market assets, secondary market sales of their life insurance policies are not as high as expected just because of the lack of capital in the life settlement market and the consequent depressed prices. Other factors contributing to the increased pool of available policies for settlement include (i) the increased number of people living to an older age; (ii) the decrease in defined benefit retirement benefits; and (iii) an increased awareness regarding the possibility of life settlements. Securitization capital would serve to allow such sellers to realize a greater return on their policies.

Securitization Investors Suffer from a Lack of Transparency

A standard complaint that arises in securitization transactions is that investors cannot undertake their own due diligence on the underlying assets, because the assets are too numerous (as in credit card transactions), because of privacy reasons (as in life settlements), or because the investors themselves are too numerous. A number of reporting requirements have been imposed by the Securities Exchange Commission (SEC) to assure that sufficient disclosure is made to investors, at least for publicly registered instruments, to provide additional transparency and facilitate risk assessment.[10]

The SEC has undertaken specific initiatives with respect to the rights of investors in securitized life settlements. On April 28, 2009, Chairman Mary Shapiro sent a letter to Chairman Herbert Kohl of the Senate Special Committee on Aging confirming the applicability of federal securities laws to any life settlement transaction that was a securities transaction in terms of disclosure, suitability requirements and anti-fraud protections. Subsequently, Chairman Shapiro announced the establishment of a Life Settlements Task Force to review emerging issues in the field of life settlements and to advise the Commission as to whether market practices and regulatory oversight could be improved. Among the issues identified were disclosures to investors that purchase securities backed by life settlements. The mandate noted that such securities are complex financial instruments and investors require information as to structure and risk issues.[11]

The ACLI Statement concedes that although personal medical information should be protected, there is information with which investors should be provided for purposes of risk evaluation, such as the age of each insured, life expectancy, the amount paid to the policy owner, future annual premium amounts, and so forth. Such concerns are already at issue with the purchase of policy portfolios absent securitization, and with prior securitization efforts such as in the LILACS and other life insurance securitization transactions. Techniques have been developed where protected identifying personal information is coded, a third party servicer maintains all files, or a securities intermediary is denominated as the nominal owner of all the policies. Such techniques are already available for securitization transactions as well in order to make available required investor information without breaching privacy constraints.

Securitization Serves No Consumer or Societal Needs

The Statement concludes that since there are arguments that securitizations of life settlements create problematic issues, as described above, and they do not provide any benefits to consumers or society, such transactions should be banned. But, as noted above, although the ACLI asserts that only service providers and intermediaries will benefit from securitization transactions, it is well established that such transactions bring into the marketplace new and economic sources of capital. As noted above, in light of the state of the financial markets, there is a greater supply of willing sellers of unwanted life policies chasing scarce capital. In this instance, the problems identified can better be addressed with other, more focused, tools. The fresh sources of funding at reasonable terms will allow greater opportunity for seniors with no-longer needed policies to monetize such assets at better rates than surrender.

Endnotes

1. Life Insurance Settlement Association Statement, February 5, 2010.
2. Institutional Life Markets Association Release, February 4, 2010.
3. Statement of Patrick McAdams, joint chairman of the European Life Settlement Association, February 11, 2010.
4. The National Association of Insurance Commissioners' Life Settlements Model Act, revised June 2007.
5. The National Conference of Insurance Legislators' Life Settlements Model Act, November 16, 2007.
6. Conning Research & Consulting, *Life Settlements, It's a Buyer's Market for Now*, 2009.
7. Aite Group, *Life Settlements: Technology and Service Providers*, January 27, 2010.
8. *Cf.* A.M. Best's rating methodology, *Life Settlement Securitization*, November 24, 2009, in which a number of reasons were identified, including: (i) the difficulty in assembling a portfolio that is adequate for statistically stable cash flows; (ii) assuring insurable interests requirements are met; (iii) high transactions costs; and (iv) lack of consistency in life expectancies and the continuing divergence from actual results.
9. Life Settlement Review, *Agreement Reached on Final Piece of LE Best Practices*, February 11, 2010.
10. Asset-Back Securities, Securities Act Release No. 33-8518; Exchange Act Release No. 34-50905, 70 Fed. Reg. 1506, 1508 Jan. 7, 2005.
11. The Task Force is about to finalize its examination, we have heard.

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The Offshore Reach of the U.S. Taxman: Phase Three[1]

First there was the UBS scandal. On February 18, 2009, UBS agreed to hand over $780 million in fines, penalties and fees, along with data on 285 U.S. clients, to defer prosecution for soliciting and arranging undisclosed accounts. The "John Doe" summons filed the next day led to a further August 19, 2009 settlement, under which UBS agreed to produce documents on another 4,450 UBS clients instead of the 52,000 the U.S. was said to have sought.[2]

Then came the Internal Revenue Service's (the "Service's" or IRS's) special Offshore Voluntary Disclosure Initiative, from March 23 to October 15, 2009. Some 14,700 taxpayers accepted the Service's offer to tell all about the prior six years' worth of undeclared foreign accounts and to pay back taxes, interest and penalties, in return for probable avoidance of jail and penalty limitations.

Phase Three is about to unfold. After more than a year of hearings, deliberations and legislative proposals, Congress unveiled the Foreign Account Tax Compliance Act (FATCA) on October 27, 2009.[3] FATCA was simultaneously hailed by the White House, the Treasury Secretary and the IRS Commissioner. On March 18, 2010, in revised form, it was signed into law as Hiring Incentives to Restore Employment (HIRE) Act Title V, Subtitle A (the "Act").[4]

The main target of all three actions is the U.S. taxpayer who secretes assets and income offshore. At the same time, the U.S. is after non-U.S. facilitators. That is plain in the UBS case. It became clear with respect to the Offshore Voluntary Disclosure Initiative, as IRS officials publicized their voluminous data haul on foreign entities and advisers and assured the bar they were exploiting it. In the Act, non-U.S. entities take center stage, even though the objective is, again, to ferret out U.S. taxpayers' offshore investments.

The Act impacts non-U.S. entities with passive U.S. investments for their own or customer accounts. Unless such entities yield up information on direct or indirect U.S. interest-holders, a 30 percent tax will generally apply to certain receipts of U.S.-source income and to gains from disposition of assets that do or could produce such income, whether or not it would otherwise be subject to U.S. tax. Credits and refunds will be limited.

The Act regime differs for "foreign financial institutions" and for "non-financial foreign entities." Requirements go beyond U.S. reporting and withholding currently imposed on either, and confront foreign entities with new choices. These choices must be made and new systems for coping must be in place by 2013, when the Act becomes effective.

Foreign Financial Institutions (FFIs)

The general rule for FFIs is that each shall enter an information reporting and withholding agreement (a "1471(b) agreement") with the U.S. Treasury Department ("Treasury") regarding certain U.S. clients. Variations and alternatives are possible, creating options. Coverage is broader than under the current "qualified intermediary" ("QI") withholding regime for non-U.S. financial institutions. It has expanded to more and more broadly defined financial institutions, U.S. accounts and payments. More information is required, and both verification and the treatment of foreign non-disclosure barriers have altered.

Covered institutions: non-QIs, investment funds and members of affiliated groups

Pre-Act, only QIs had to enter agreements with Treasury.[5] QIs are usually non-U.S. banks or clearinghouses or non-U.S. branches or offices of U.S. banks or clearinghouses, which have entered agreements to facilitate withholding of U.S. tax on payments of certain U.S.-source income. FFIs are subject to U.S. withholding requirements even if they do not enter QI agreements,[6] but without such agreements enforcement is difficult.

The Act requires 1471(b) agreements of all FFIs that receive covered U.S.-source income—non-QIs as well as QIs. A newly expansive definition of the term "financial institution" imposes the same mandate on non-U.S. entities engaged mainly in investing, reinvesting or trading in securities, partnership interests, commodities or interests therein. A non-U.S. hedge fund or private equity fund is therefore an FFI, required to enter a 1471(b) agreement.

Where an FFI is a member of a group of entities related through 50 percent control (an "expanded affiliated group"), the Act requires all FFI group members to enter 1471(b) agreements if one does. Thus, unless all FFI group members enter agreements, all are barred, and therefore exposed to the 30 percent withholding tax.[7] Legislative history provides an out for groups with non-participating FFIs: such FFIs may assure Treasury they have no U.S. accounts and follow any other procedures Treasury specifies.[8]

Covered accounts: non-U.S. entities with U.S. owners

A QI agreement requires a non-U.S. financial institution to request, from each beneficial owner of an account, certification of its status as U.S. or non-U.S. and as an individual or a particular type of entity. A QI must request certification from certain indirect, as well as direct, owners—persons whose accounts are held by agents or by "flow through" entities such as partnerships or grantor trusts. There is no look-through, however, to a U.S. shareholder or beneficiary of a foreign corporation or non-grantor trust, because the entity is treated as the beneficial owner of an account in its name.

Under a 1471(b) agreement, "substantial" U.S. owners of such entities must be identified. A substantial U.S. owner of a foreign corporation is a U.S. citizen, resident or U.S. entity (a "specified United States person") with at least 10 percent of the equity. A substantial U.S. owner of a foreign non-grantor trust is a specified U.S. person with at least 10 percent of the beneficial interests in the trust. A substantial U.S. owner of an investment vehicle is a specified U.S. person with *any* interest in it.[9]

The investment fund case highlights another difference between QI and 1471(b) agreements. QI agreements cover deposit and custodial accounts. A "financial account" subject to a 1471(b) agreement also includes any debt or equity interest not regularly traded on an established securities market.

Reportable information: more financial data, more often

A non-tax-exempt U.S. owner of a foreign account covered by a QI agreement is reported to IRS or to an upstream payor under a QI agreement only in connection with the receipt of reportable U.S.-source income. The report reveals the U.S. owner's identity and the amount and type of income paid.

Under a 1471(b) agreement, the U.S. owner of an "account" in an FFI (including an interest in an investment fund) will be reported annually, regardless of whether any U.S.-source income was paid into the account. Reportable data will include the account balance, account value, and generally gross receipts and withdrawals, along with any additional information that may be requested. Receipt of non-U.S. as well as U.S.-source income will be revealed.

Income subject to withholding: dividend equivalents and other innovations

By reporting individual US account holders, QIs help to enforce the backup withholding tax, currently 28 percent, levied on U.S. citizens and residents when they fail to provide payors with social security numbers or to certify they are not subject to the tax (usually on a Form W-9), or when IRS notifies a payor that the tax applies. The focus of the QI program, however, is the 30 percent (or lower treaty rate) tax on certain payments to non-U.S. individuals and corporations. This tax, withheld under Internal Revenue Code Chapter 3, covers passive U.S.-source income such as dividends, interest, rents and royalties, with exceptions for items such as "portfolio interest."[10]

The Act will levy a different 30 percent withholding tax, under new Chapter 4 of the Internal Revenue Code, on payments of more U.S.-source income than before, as a sanction for failure to cooperate with the Act's demands for information on U.S. account holders. New Act categories of "withholdable income" include "dividend equivalent payments," i.e., payments contingent on or determined by reference to dividends on stock underlying certain notional principal contracts;[11] interest on bank accounts; and "portfolio interest."[12] Gain on proceeds from disposition of property that produces or could produce U.S.-source interest or dividends is also taxable under the Act.[13]

Withholdable payments and payments derived from withholdable payments (collectively, "pass-through payments") will be subject to Chapter 4 tax to the extent they are destined for a "nonparticipating" FFI (one that does not enter a 1471(b) agreement or an alternative arrangement) or for an account belonging to a nonparticipating FFI or a "recalcitrant" account holder (one who does not comply with requests for identifying information or for a waiver of foreign law provisions that could prevent disclosure). A pass-through payment to an FFI that has elected to be "withheld upon," i.e., to shift the task of withholding to an upstream withholding agent or payor, will also be subject to the new tax to the extent the payment is allocable to accounts for non-participating FFIs or recalcitrant holders. Overlap between tax levied under this and the other two withholding regimes will not always be offset by credits, which along with refunds will be subject to constraints.

Verification: beyond KYC?

QI agreements are available only to non-U.S. financial institutions and clearinghouses in jurisdictions whose "know your customer" (KYC) anti-money-laundering rules meet U.S. requirements. A QI must agree to comply with the KYC rules of its jurisdiction, including its due diligence procedures.

The local KYC compliance rule is backstopped by another feature of a QI agreement. A QI agrees it may rely on information provided by account holders unless it knows or has reason to know the information is unreliable or incorrect. This provision means information gathered for local KYC purposes must match the information a customer submits for U.S. withholding purposes, or the QI will have reason to know it cannot rely on the customer's assertions.

The Act requires an FFI entrant into a 1471(b) agreement to comply with Treasury verification and due diligence rules for U.S.-account identification. Those rules have yet to be written. The statute does not recite the rule for reliance on customer-supplied information that governs QI agreements, though it may yet appear in regulations.[14]

Congress also expects that an FFI and other members of its expanded affiliated group will comply with any KYC, anti-money-laundering and anti-corruption rules to which they are subject and that Treasury may use such rules to craft its own requirements.[15] However, because FFIs may be located outside one of the 59 jurisdictions whose KYC rules the IRS approves for QI purposes, Act rules may need to vary by jurisdiction or set minimum standards for all.

Non-U.S. legal barriers to disclosure: a tougher stance

A QI must agree to certain procedures if prohibited by law (including contract) from disclosing a non-exempt U.S. account holder's name, address, taxpayer identification number or reportable payments received. For accounts opened after 2000, it must request either authority to disclose such information or to exclude from the account assets that generate or could generate reportable income, or a mandate to transmit a Form W-9 completed by the account holder. Prompt action must follow any such mandate or grant of authority. Although the rules do not spell out a QI's duty if a non-exempt U.S. account holder fails to cooperate, they require action when an account is "discovered" after 2000 to be held by such a person. Within 60 days, either a Form W-9 must be obtained, and in some cases provided to withholding agents, or assets that generate or could generate reportable payments must be sold. Backup withholding must apply immediately and continue until a valid Form W-9 is received.[16]

The Act reflects a harsher stance. An FFI must try to obtain a waiver of any foreign law that would prevent reporting of account information, provided a waiver would remove the obstacle to disclosure. If a waiver is not obtained within a reasonable period of time, the account must be closed. The statute does not specify what an FFI must do if the foreign impediment to disclosure cannot be effectively waived or the account closed under local law. It does provide, however, that a 1471(b) agreement may be terminated for noncompliance.

Choices

Entry into a 1471(b) agreement generally requires an FFI to withhold tax from covered payments that pass directly or indirectly to a non-participating FFI or recalcitrant account-holders. However, an FFI can elect to shift withholding responsibility upstream.[17]

Information collection and reporting is another matter. Legislative history clarifies that withholding on a recalcitrant account holder or a new account is not a substitute for collecting or reporting the required information. In fact, reasonable attempts to collect information and minimum levels of reporting may be required under an FFI's agreement.[18] Equivalents are possible, but narrowly confined. An FFI may agree to report payments of compensation and passive income the same way a U.S. financial institution would report payments to accounts held by U.S. citizens.[19] Or, if Treasury determines reporting under the Act would duplicate other required reporting, it may waive the obligation.

Aside from equivalents, there are only three ways for an FFI to avoid Act reporting, consistent with avoiding its withholding tax. The first is to have no U.S. "accounts," comply with Treasury procedures to insure there are none, and follow Treasury instructions on accounts for other FFIs. An FFI that goes this route will be deemed to satisfy Section 1471(b) requirements.[20] The second alternative is outside FFI control: membership in a class of institutions (such as widely held collective investment vehicles) whose participation Treasury considers unnecessary for Act purposes. The third alternative—shed U.S. investments—does not appear in the statute.

Non-Financial Foreign Entities (NFFEs)

A "withholdable payment" to an NFFE may also trigger 30 percent Chapter 4 withholding if the payee NFFE or another NFFE beneficially owns the payment. An NFFE, however, need not enter an agreement with Treasury to avoid the tax. Instead, either the payee or the beneficial owner must give the withholding agent the name, address, and taxpayer identification number of each "substantial" U.S. owner of the beneficial owner or certify that there are none. The submission will be effective as long as the withholding agent neither knows nor has reason to know the information is incorrect and reports it to Treasury as required.

Despite its simplicity, the information submission required to avoid Chapter 4 withholding goes beyond the data required to reduce or eliminate Chapter 3 withholding pursuant to a treaty. Under Chapter 3, because a foreign corporation or non-grantor trust is the beneficial owner of any payment made to it, the entity need only establish its own character, not the character or identities of its shareholders or beneficiaries.

There are only three ways an NFFE may escape Chapter 4 tax without identifying "substantial" U.S. owners. These parallel the alternatives for FFIs. One is, generally, to have and to certify that there are no such owners, directly or indirectly. The second, out of the NFFE's control, is to fall within an excepted category—as a publicly traded corporation, a member of an expanded affiliated group, a foreign government or government entity, a foreign central bank, an international organization or a certain U.S. possession entity. The third option is identical to the final one for an FFI: maintain no U.S. investments.

Conclusion

An FFI considering a QI agreement can look to a positive incentive: ability to conceal the identities of non-U.S. customers with U.S.-source income, in return for disclosing U.S. customers. Act incentives are negative; the only benefit is avoidance of the additional Chapter 4 withholding tax.

As Treasury has been at pains to point out, the Act's objective is to collect information, not tax, from non-U.S. entities. Initial proposals for stemming offshore tax evasion were considerably harsher. They included blacklisting an initial set of 34 jurisdictions[21] and forcing all FFIs to become QIs.[22] Pressure continues to implement other such strategies.[23] Nevertheless, the considerable burdens the Act imposes on FFIs and the very real prospect of "recalcitrant" foreign customers will likely give pause, especially, to smaller FFIs. NFFE managers may also hesitate to probe the backgrounds of their investors.

Some FFIs and NFFEs may be tempted to contemplate a fourth alternative: keep U.S. investments and investors, ignore the Act and hope to "fly below the radar." Lying low, however, is a high-risk option.[24] U.S. investors face newly enhanced penalties for not reporting their interests in non-U.S. entities, a "stick" that proved effective during the 2009 offshore voluntary compliance program. In addition, the legislation implies Treasury will publish a list of compliant FFIs. U.S. banks and other withholding agents will pay close attention to any such list; they themselves will be liable for any tax that should have been but was not withheld from a payment to either an FFI or an NFFE. IRS also pays rewards to whistleblowers (though not, so far, to data thieves) for information that yields significant tax revenues.[25]

The real decision for an FFI or NFFE, therefore, is whether U.S. investments (with or without U.S. clients and owners) still make sense. The answer may depend partly on compliance costs, which in turn depend on regulations only now in the works. Changes in FATCA from its original October 2009 form to HIRE Act Title V reflect bar and industry warnings about the need to avoid disinvestment and capital market disruption. Pressures for compliance burden mitigation have shifted now, from Congress to the IRS, with more public input on the way.[26] Stay tuned.

Endnotes

1. This article is partly drawn from a more detailed treatment of the same subject by the author. *Information or Else: the Offshore Focus*, Connecticut Lawyer, Vol. 20, No. 6 (February 2010), updated in Vol. 20, No. 8 (April 2010). The author has followed the development of U.S. money-laundering rules and their impact on withholding provisions and other tax matters for over eight years, in a regularly revised treatise chapter published in the United Kingdom.
2. Deferred Prosecution Agreement, *United States v. UBS AG,* Case No. 09-60033-CR-Cohn (S.D. Fla., released Feb. 18, 2009); Settlement Agreement, *United States v. UBS AG,* Case No. 09-00423-CIV-GOLD / MCALILEY (S.D. Fla., Aug. 19, 2009) (the "Settlement"). A Swiss court decision undercutting the basis for the Settlement threatened to derail it, but on March 31, 2010 Switzerland and the United States signed a protocol allowing the August 19 agreement to be applied from the date of its signature, pending parliamentary approval in June and possibly a referendum.
3. H.R. 3933 and S. 1934.
4. Pub. L. No. 111-147. Title V, Subtitle A, contains Act Sections 501-541. The focus of this article is Act Section 501, which adds Sections 1471-1473 to the Internal Revenue Code (IRC) in a new Chapter 4.
5. A model QI agreement appears in Rev. Proc. 2000-12, 2000-1 C.B. 387.
6. IRC § 1441.
7. This provision prevents groups from shifting U.S. customers or investments from members that enter 1471(b) agreements to ones that do not.
8. Joint Committee on Taxation, Technical Explanation of the Revenue Provisions Contained in Senate Amendment 3310, the "Hiring Incentives to Restore Employment Act," Under Consideration by the Senate (JCX-4-10), February 23, 2010 ("JCT Tech. Explan.") at 38.
9. Any U.S. interest in a foreign grantor trust is also treated as substantial, as is a 10 percent U.S. capital or profits interest in a foreign partnership.
10. The tax, levied under IRC Sections 871 and 881, applies to such income provided it is not "effectively connected" to a U.S. trade or business. The IRC Chapter 3 withholding provisions appear in Sections 1441 through 1446.
11. Act § 541(a).
12. However, interest on bearer bonds will no longer qualify as portfolio interest, exempt from withholding when paid to non-U.S. persons, under either Chapter 3 or Chapter 4. Hence, Chapter 4 tax on such interest may be eligible for credit against Chapter 3 tax on the same amount.
13. Such gains have been partly subject to backup withholding, but only in exceptional cases to Chapter 3 withholding.
14. The statute does recite a "know or reason to know" standard for the acceptability of information provided to a withholding agent under the NFFE regime, discussed below.
15. JCT Tech. Explan. at 38.
16. § 6.04(B) Rev. Proc. 2000-12.
17. A QI may do the same for payments to non-U.S. or U.S. accounts. The Act therefore allows QIs to handle withholding under the Act according to existing practice.
18. JCT Tech. Explan. at 38.
19. An FFI making this election will not be subject to the withholding requirement.
20. As noted earlier, this alternative also protects FFIs in expanded affiliated groups at least one of whose FFI members cannot (under local law) or will not agree to report U.S. accounts. *See supra* note 8 and accompanying text.
21. Stop Tax Haven Abuse Act, § 101(b) (blacklisting "offshore secrecy jurisdictions"). The bill was introduced in the 110th Congress by Senator Carl Levin as S. 681, on February 17, 2007 and in the 111th Congress, as S. 506, on March 2, 2009. Identical bills (HR 2136 and HR 1265) were introduced by Congressman Lloyd Doggett on May 3, 2007 and March 3, 2009, respectively.
22. Department of the Treasury, General Explanations of the Administration's Fiscal Year 2010 Revenue Proposals ("2010 Greenbook") at 43 (proposing to withhold 30 percent from payments of certain passive U.S.-source income to any NQI).
23. On May 11, 2010, Senator Carl Levin attached a proposed amendment to the Senate's financial regulatory reform bill (S. 3217, Section 1224) that would allow Treasury to sanction any foreign jurisdiction, any class of transactions involving a foreign jurisdiction or any foreign financial institution for impeding U.S. efforts to enforce tax law. In response, Treasury would be empowered to prohibit or place conditions on the opening or maintaining of U.S. correspondent or payable-through accounts and the authorization, approval or use of credit, debit or charge cards by U.S. institutions for or on behalf of a foreign bank. The proposed amendment, which appeared in both the 2007 and 2009 versions of the Stop Tax Haven Abuse Act, *supra* note 21, applies identical sanctions in cases of "primary money laundering concern." Although the Senate declined to include the Levin amendment in S. 3217 on May 20, Senator Levin may well seek another legislative vehicle for the proposal.
24. Risks would escalate sharply if the sanctions reproposed by Senator Levin are eventually enacted. *See supra* note 23.
25. The United States has not been above accepting data sold to Germany, however.
26. IRS and Treasury requested comments from the public regarding guidance on the Act in IRS Announcement 2010-22 (March 18, 2010). The response is well under way.

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The Newly Revised U.S. "Trade Adjustment Assistance" (TAA) Program Under the 2009 Amendments

Under the weight of the world financial crisis, it has been an inarguable fact that the U.S. economy slowed down and, along with it, the domestic employment rate. Thousands of U.S. workers have lost their jobs. Although inextricably tied to the global financial crisis, a lot of people blamed American engagement in globalization as the impetus for domestic production and jobs being shifted to low-labor-cost nations, such as China.

Although not known by many people, there is an effective domestic "safe-net" for those U.S. workers that are negatively affected by U.S. international trade policy—the Federal "Trade Adjustment Program."

The U.S. Trade Act of 1974 (19 U.S.C. § 2271 *et seq.*) established Trade Adjustment Assistance (TAA) to provide assistance to U.S. workers, firms, communities and farmers hurt by foreign trade. The Program has been in existence for about 36 years and has also been amended several times during this period. It provides both rapid and early assistance.

Under the TAA Program, U.S. workers, firms, communities and farmers may be eligible for a variety of TAA services and benefits if they were laid off as a result of increased imports (foreign trade) or if their companies shifted production out of the United States to certain foreign countries. The services and benefits available include, but are not limited to, job training, income support, job search and relocation allowances, a tax credit to help pay the costs of health insurance, and a wage subsidy to workers 50 years of age and older.

President Obama signed the Trade and Globalization Adjustment Assistance Act of 2009 on February 17, 2009. This new law was part of the American Recovery and Reinvestment Act of 2009 (the "Stimulus Bill"). The 2009 Act overhauls the TAA Program and expands TAA coverage to more U.S. workers and firms, while also improving workers' opportunities for training, health insurance coverage, and reemployment. The 2009 Amendments amend the provisions of the 2002 Act in several substantial ways.

This new legislation has significantly improved the Program. One significant change / improvement resulting from the Stimulus Bill is that it extends the Trade Adjustment Assistance benefits to workers in the service sector and public agencies (originally only workers in private production sector were eligible for the Program).

Another more important change / improvement is that the new legislation eliminates the prior requirement that "workers [be] laid off as a result of increased imports or a shift in production to a country that is party to a free trade agreement with the United States, or a country that is named as a beneficiary under the Andean Trade Preference Act, the African Growth and Opportunity Act or the Caribbean Basin Economic Recovery Act." In the criterion of "Group Eligibility Requirement," the 2009 Amendments extend the benefits to those workers whose firm has shifted production to any foreign country (before the amendment, it had been limited to those countries that have a trade agreement with the United States and those least-developing countries accepting international aid from the United States). This means those workers who are hurt by an emerging economy's exports and the outsourcing of service and production to an emerging country, and used to be ineligible for the benefits, are now able to file a Petition to seek benefits and services under the TAA Program.

The problems related to the limitations imposed by the previous criteria were evident in the case of China. As we all know, China is widely considered a "world factory." In recent years, the import of goods from China has significantly increased, resulting in the layoff of U.S. workers, bankruptcy of U.S. firms, and decreasing / weakening of U.S. communities / industries and farmers in competing businesses. Because China is neither a party to a free trade agreement with the United States nor a named country under any U.S. Trade Aid Act, affected U.S. workers, firms, communities and farmers were not eligible for any TAA Petition / benefits.

Nevertheless, under the new legal norm established by the Stimulus Bill, those U.S. workers, firms, communities and farmers that are affected by increased imports from, or shift in production to, China are now eligible for TAA benefits and services.

TAA assistance is a U.S. Program primarily administered by the U.S. Department of Labor—Employment and Training Administration—Office of Trade Adjustment Assistance, in consultation with the U.S. Department of Commerce and the U.S. Department of Agriculture, with no cost to the negatively affected U.S. commercial companies or public agencies at all.

In qualifying for benefits and assistance, the injured U.S. workers, firms, communities and farmers, or their representing counsel, need to file a Petition with the U.S. Department of Labor. Once the Petition is filed, the U.S. Department of Labor will determine whether a significant number or proportion of the workers of the firm have become totally or partially separated or are threatened to become totally or partially separated, and whether imports or a shift in production of services to a foreign country contributed importantly to these actual or threatened separations and to a decline in sales or in production of articles or supply of services. Workers in public agencies (such as the USCIS) may also qualify for assistance where an agency has acquired from a foreign country services like, or directly competitive with, the services the agency supplies. (For example, some U.S. public agencies outsource part of their services to China, India, or South Africa, which results in the layoff of some of their workers / officers in the agencies.)

The U.S. Department of Labor's decision on a TAA petition is subject to the judicial review of the U.S. Court of International Trade (a U.S. Constitution Article III Court—a trial court that specializes in and has exclusive and nationwide jurisdiction on cases involving international trade and customs issues). A decision of the U.S. Court of International Trade is appealable to the U.S. Court of Appeals for the Federal Circuit (a U.S. Constitution Article III court—an appeal court that has exclusive and nationwide jurisdiction to hear cases decided by the U.S. Court of International Trade).

Section 1856 of the 2009 Amendments contains the sense of U.S. Congress as it applies the TAA program: "The Secretaries of Labor, Commerce, and Agriculture should apply the provisions of [trade adjustment assistance program] with the utmost regard for the interests of workers, firms, communities, and farmers petitioning for benefits."

The TAA Program was created by U.S. Trade Act of 1974 and has been in existence since then to help U.S. workers, firms, communities and farmers affected by increased international trade. The U.S. Trade and Globalization Adjustment Assistance Act of 2009 further expands the benefits under this Program. It is a reasonable projection that with the further process of globalization and the involvement of the United States in the global economy, the needs for TAA benefits will also increase significantly and, correspondingly, more and more affected U.S. workers, firms, communities and farmers will file Petitions for TAA benefits.

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Legal and Investment Updates from Various Member Countries

The New Tax Shield Aimed at Repatriating Assets Held Abroad

In Italy, where contrasts, differences and tumultuous regulatory dynamics are par for the course; where political battles between the majority and opposition leaders never cease; among banners chiming "tax evaders and the mafia express their thanks"; bold negatively charged tags such as "State money laundering" "Amnesty" and "colossal State cash clean-up organized at bargain basement prices"; among those labeled "the shielders" and "the shielded," the odyssey known as "tax shield *ter*" is finally coming to a conclusion.

Eight years after the initial drafts of the law (legislative decree no. 350 / 2001, converted into law no. 409 / 2001 and legislative decree no. 12 / 2002, converted into law no. 73 / 2002), the 2009 edition of the tax shield is based virtually exclusively upon law decree no. 350 / 2001, which constitutes the primary provisions to which reference should be made with regard to the repatriation or regularization of financial assets or wealth from abroad. Therefore, from 15 September 2009 through 15 December 2009, it was possible to repatriate or regularize financial assets and wealth held illegally abroad.

Technically, the law which re-initiates the tax shield measure is set out in art. 13-*bis* (under the heading "provisions on the repatriation of financial assets and wealth held abroad") of the so-called "summer maneuver," legislative decree no. 78, of I July 2009, converted into law no. 102 of 4 August 2009, which entered into force on 5 August 2009, amended by law decree correcting the anti-crisis maneuver no. 103 / 2009, converted into law no. 141 of 3 October 2009 after having received the final "approval" from the Parliament and the President of the Republic.

Essentially, on the basis of art. 13-*bis*, an extraordinary tax is instituted, in the amount of 5% of the value of financial assets and wealth held illegally abroad (or, essentially, held abroad without the completion of the RW field in the income declaration, in breach of law-decree no. 167 of 28 June 1990, on tax monitoring), on assets that are repatriated to Italy from non-EU States, or regularized or repatriated since they are held in the States of the European Union or in a country that is party to the European Economic Area agreement which guarantees an "effective / actual" exchange of tax information for administrative purposes (at present, the SEE States which meet this requisite are Norway and Iceland).

Regularization and repatriation take place in accordance with the modalities set out in arts. 11, 13, 14, 15, 19, paragraphs 2 and 2-*bis*, and 20 paragraph 3 of law decree 350 / 2001 (converted into law no. 409 / 2001) and law decree no. 12 / 2002 (converted into law no. 73 / 2002).

The following assets fall under the notion of "*financial assets*," which is better explained under Circular Letter 45 / E issued by the Revenues Agency on 10 October 2009: shares and similar financial instruments, whether listed or unlisted, corporate shareholdings / stakes, debt instruments, fund units, and insurance policies which generate financial income, regardless of the residence of the issuer.

The following assets fall under the notion of "*wealth assets*": real estate and buildings located abroad, quotas / shares of in rem rights, timeshares, precious objects, yachts and works of art. Under the new provisions, the above-mentioned assets, if held in a member state of the European Union, may be:

a. regularized, through a "legal repatriation," by virtue of which the assets, wherever they are held, must be entrusted to an Italian intermediary;

b. repatriated to the Italian territory, or materially transferred to Italy and deposited with an Italian financial intermediary with which, as a rule, an administration and safe-keeping relationship or asset management relationship would be established.

Where, on the other hand, the assets are held in a non-EU state (such as Switzerland, Monte Carlo, San Marino) they may only be repatriated.

However, on the basis of clarifications provided by the Revenues Agency in the above-mentioned circular letter, the *regularization of assets held even in non-EU countries with which an effective exchange of information is in place in accordance with the recent standard ONU/OCSE* (by virtue of art. 56 of the EC treaty which prohibits any restriction on the movements of capital not only among member states but also between member states and non-EU states) must be deemed possible / feasible. Therefore, in addition to the EU member states and Norway and Iceland, regularization is allowed from all of the OCSE countries (Australia, Canada, South Korea, Japan, Mexico, New Zealand, United States and Turkey) which have not placed restrictions on the possibility of exchanging banking information.

In any case, with reference to both financial assets and wealth assets, in order to be eligible for the regularization or repatriation and, therefore, for access to the tax shield, the necessary condition that must be met is the occurrence of a breach of the tax monitoring provisions.

It should be specified in this regard that, while the concept of regularization, or legal repatriation, includes not only financial investments, but also non-financial assets (real estate assets, buildings, works of art, yachts), including assets held abroad in the name of fiduciary companies or held by the taxpayer through a third party, the possibility of repatriation (or, in other words, physical return to Italy) is limited exclusively to those financial assets and wealth assets which may be held through safe-keeping, deposit, administration or management by qualified intermediaries. Therefore, real estate assets may benefit from the shield, through legal repatriation, only if located in an EU or OCSE country.

The following persons are eligible for the shield: individuals, simple companies, non-commercial entities, including trusts and associations deemed similar to simple companies that are resident in Italy, which hold financial assets or wealth assets abroad since a date falling on or before 31 December 2008.

The above-mentioned circular dated 10 October clarified the concern that corporations may have been eligible for the shield. This circular resolved numerous interpretational doubts on this point without, however, changing the provisions that had already been approved. Indeed, there has been no extension of the shield to cover corporations, but only to foreign companies linked to an individual, such as trusts or fiduciary companies. Companies which may formulate a request for participation are *CFCs* (controller foreign companies), or foreign companies established in tax havens, which are controlled, either directly or indirectly, including through fiduciary companies or third parties, by persons who reside in Italy. If the above conditions are met, the income of the foreign subsidiary is taxed for transparency under the resident shareholder, in proportion to the stake held by the same. The circular provides that similar provisions are set out under art. 168 of the TUIR with reference to cases where the Italian residence holds a shareholding of nexus (*partecipazione di collegamento*) in the *CFC*. A nexus exists where the Italian shareholder holds a share of the earnings of the foreign company of at least 20%, or 10% if the company is listed. It is also specified that emersion transactions carried out by the *CFC* produce direct effects upon the Italian resident shareholders up to the amount of the assets repatriated or regularized.

The circular further clarifies that if the taxpayer eligible for the amnesty program is the *dominus* (owner or main shareholder) of a corporation, the repatriation or regularization may not be used to initiate tax audit proceedings against the same company, or in connection with the same.

A taxpayer who decides to participate in the amnesty program is also protected from the inversion of the burden of proof, pursuant to which he would otherwise have to show that the assets held abroad in breach of tax monitoring obligations were not generated through tax evasion.

In practice, in the event of a subsequent audit / control on the holding of assets abroad in breach of the reporting obligations set out under the "tax monitoring" provisions, the realization of emersion transactions allows the taxpayer to avoid the presumption introduced by art. 12 of the above-mentioned legislative decree 78 / 2009, pursuant to which investments and financial assets held in states or territories with a privileged tax regime (tax havens) are deemed to have been established using income subtracted from taxation in Italy.

Persons who choose to participate in the shield (pursuant to art. 13 of legislative decree 350 / 2001) must submit to financial intermediaries (such as, pursuant to art. 11 of legislative decree 350 / 2001, Italian banks, securities brokerage firms, asset management companies, fiduciary companies, stockbroker, Poste Italiane S.p.a, foreign banks or investment firms with a permanent establishment in Italy) a confidential declaration of emersion, granting a mandate to the designated intermediary to receive the assets originating abroad and at the same time paying the extraordinary tax.

The intermediaries, in turn, shall do the following (pursuant to arts. 13 and 14 of the above-mentioned decree):

a. countersign the confidential declarations presented by their customers, issue a copy of the declaration to the same, pay the amounts due in connection with the repatriation and regularization transactions by the deadline provided for the payment of the withholdings for the month of receipt of the confidential declaration;

b. indicate, in the annual declaration on tax substitution (*dichiarazione annuale del sostituto d'imposta)* (Form 770), the total amount of the repatriated assets, the amounts paid on behalf of customers, without specifying the names of those who submitted the declaration;

c. perform the recordings, for purposes of the tax monitoring provisions, of the repatriated amount as transfers from abroad pursuant to art. 1, paragraphs 1 and 2 of law decree 167 / 1990;

d. perform the recordings and reporting, for purposes of the tax monitoring provisions, of the financial assets kept abroad by the taxpayer and regularized, in accordance with art. 1, paragraphs 1, 2 and 3 of law decree 167 / 1990;

e. record the repatriation and regularization transactions, where data is requested in connection with the collection of evidence for pending criminal proceedings, and in connection with audits / checks aimed at preventing money laundering, in accordance with the anti-money-laundering provisions set out in legislative decree 231 / 2007.

Once the information necessary for the repatriation or regularization transactions has been gathered, the intermediaries must guarantee to the persons participating in the amnesty program that they will remain anonymous, and in fact, under the above provisions not only is the data related to the emersion transactions carried out by the taxpayer not reported to the Tax Administration at the time of the transaction, but it is not even provided subsequently in the event of an audit. Indeed (as an exemption from art. 1 paragraph 3 of law decree 167/1990) intermediaries "*must not report to the tax administration, for purposes of tax checks/audits, data and information concerning the confidential declarations.*"

In order to further reinforce anonymity and therefore to encourage the taxpayer to perform the repatriation transaction, paragraph 3 of art. 13-*bis* (introduced by law 102/2009, of conversion of legislative decree 78/2009) provides that the repatriation or regularization may not in any case constitute an element that is usable against the taxpayer, in any administrative or court proceedings, whether on an autonomous or tangential basis. However, the "indulgent" nature of the provision is tempered by the amendment made by decree 103/2009 correcting paragraph 3 of the above-mentioned article, which has excluded from the application of such provision and therefore from the use of the shield, proceedings that are pending on the date of entry into force of the law converting this decree.

The final measure, as approved on the basis of the amendments introduced by the above-mentioned corrective decree, does not grant any "exoneration" to taxpayers who have already been reached by the courts, financial police (*guardia di finanza*), or tax inspections. However, through the approval of the Fleres amendment to the corrective decree, the scope of action of the shield has been extended to cover tax crimes covered by the amnesty program.

The initial version of the measure ensured coverage of only those cases of disloyal declaration or failure to submit a declaration, governed by arts. 4 and 5 of legislative decree no. 74/2000. The extra-large version of the shield, however, ensures that certain crimes will not be punished, such as the following:

a. fraudulent declaration using invoices or other documents or inexistent transactions (art. 2 of legislative decree no. 74/2000);

b. declaration altered fraudulently using other accounting maneuvers (art. 3 of legislative decree no. 74/2000);

c. concealment or destruction of accounting books (art. 10 of legislative decree no. 74/2000).

The umbrella also covers corporate crimes such as misrepresentation on financial statements, pursuant to arts. 2621 and 2622 of the Italian Civil Code, where such crimes have been committed in order to conceal fiscal crimes.

Finally, in connection with the twofold tax- anti-money-laundering shield, since art. 13-*bis* of the anti-crisis maneuver provides for, in connection with repatriation and regularization transactions, the applicability of art. 17 of legislative decree 350/2001, which, in turn, imposes applicability to the transactions indicated, of the anti-money-laundering provisions set out under legislative decree 143/1991, the technical staff of the Ministry of the Economy has been called upon to provide clarifications on the relationship between anti-money-laundering obligations and the tax shield, considering the taciturn nature of the provision. The same, in concert with the *Unità di Informazione Finanziaria* (UIF), confirmed the exemption, for professionals and intermediaries, only for crimes covered by the shield, from the obligation to report a suspect transaction to the Unità di Informazione Finanziaria, leaving in place the obligations to identify, register and report cases of tax crimes that are not eligible for the shield (such as, for example, false invoices or tax fraud) for which action must be taken pursuant to the provisions introduced by legislative decree 231/2007, implementing directive 2005/60/CE (concerning the prevention of the use of the financial system for purposes of laundering proceeds of criminal activities and the financing of terrorism), as well as directive 2006/70/CE (which sets out the implementing provisions).

At this point, regardless of whether the measure is referred to as a san "amnesty" or "exoneration," rather than legitimate amnesty program, the focus should be placed on the commencement of the procedures allowing for the "return to the country of capital abroad."

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"Class Action" in Italy

1. The Subjective Positions, the Parties, and Cases Covered by the New Discipline

On 1 January 2010, after a troubled legislative process, the so-called class action procedure came into force in Italy. This procedure, however, is very different from the one in the USA.

For the very first time in Italy a procedural instrument enables the enforcement of a plurality of individual rights through a single action. This represents a turning point from the previous rules that governed so-called collective actions in Italy, which, found in the Consumer Code, have as their focus the protection of consumers' rights, among which the most important to be mentioned are the right to health, safety and quality of products and services, as well as the right to correctness, transparency and fairness in contractual relations.

The previous regulation envisaged a central role for consumers' associations in the field of protection of "*collective interests of consumers and users*." The terms under which the recent reform amends the previous text are therefore twofold: first, it modifies the subject matter of the action, and second, it changes the subject empowered to act.

The innovation in the Italian legal system must therefore be defined very broadly.

In fact, collective and individual interests mentioned in Article 139 of the Consumer Code (Legislative Decree no. 206/2005) are not relevant anymore, but rather "*consumers' and users' individual homogeneous rights*." The main feature of the right object of protection appears to be homogeneity, namely, the identity between a number of rights, which rise to a collective relevance starting from an individual relevance. However, the new protection does not extend to any person or citizen in Italy. It is restricted to a particular category of people, that of consumers. Consumer is, by definition of letter a, paragraph 1, Article 3 of the Consumer Code, "*a natural person acting for purposes not related to the entrepreneurial, commercial, handcraft or professional activity carried out*," which is opposed to a "professional."

Precisely, the harmed (or damaged subject) is legitimated to act (individually or collectively) in Court, thus making a significant turn from the old rules, which entitled both consumers' and users' associations to the protection of their interests. The solution adopted by the legislature, however, is fully acceptable because it gives back to the right holder the role of sole legitimate claimant, in line with the general principles of law, and leaves a subordinate role to the associations representing consumers.

The legitimated defendants, therefore, include only private entrepreneurs (natural or juridical persons), independently from other professional requirements. However, what must be highlighted is that the new provisions keep the chance for associations and committees to take legal action to protect the collective interests of consumers and users (including direct actions to inhibit the professionals' prejudicial conduct), thus strongly limiting the practical innovative importance of the actions under Article 140-*bis* of the Consumer Code.

Other types of rights that the new provisions protect are those "*concerning the final consumers of a certain product against its producer, even regardless of a direct contractual relationship*" (letter b) and "*identical rights to from the damage resulting to the same consumers and users from unfair trade practices or anticompetitive conducts*" (letter c).

Despite the wording, which is not completely transparent, a reference may be found from the legislature, in the cases mentioned in letter b, to the damages caused by a defective product (in Articles 114 to 127 of the Consumer Code) to final consumers, even if that product is still in the test period or on approval with the consumer himself ("*regardless of a direct contractual relationship*"); this is the first moment from which, under Article 119 of the Consumer Code, the product is to be considered put into circulation, and thus "eligible" to infringe the rights of the final consumer. Clearly evident is the restriction implemented by the legislature in these particular cases, because the previous wording of Article 140-*bis* encompassed all cases of non-contractual tort.

The term referred to in letter c, however, faithfully recalls the text of the old Article 140-*bis* ("*illegitimate contractual acts, unfair trade practices or anti-competitive conducts*"), while those already indicated in letter b (i.e., defective products) must be excluded from the field of extra-contractual torts disciplined here.

The Consumer Code, under Article 20, defines an unfair trade practice "*if it is contrary to professional diligence and materially distorts or is likely to distort significantly the economic behaviour, with respect to the product, of the average consumer whom it reaches or to whom it is addressed, or the average member of a group when a commercial practice is directed to a particular group of consumers*": deceptive advertising is a clear example of unfair trade practice under Article 20 above.

The anticompetitive conduct is regulated and governed by the Law 287/1990 (so-called "*antitrust law*") and must be understood as any conduct performed by professional suppliers of goods and services likely to affect the functioning of the free market system. These acts may affect consumer rights in a more indirect way, since the rule is designed simply to regulate the behavior of professionals.

2. The Action's Features and Procedural Matters Regarding the Admissibility of the Claim

A class action is proposed before the Ordinary Court, which judges in joint composition, pursuant to paragraph 4 of the new Article 140-*bis* of the Consumer Code. The Ordinary Court also governs the territorial jurisdiction, according to the place where the legitimated defendant company has its head office.

The action is proposed through a writ of summons which must be served on the legitimate defendant and to the competent prosecutor's office (paragraph 5). The competent prosecutor's office has power to participate in the case, but only with reference to the judgment of admissibility. This stage is, actually, the first of the trial and the judge is primarily responsible for determining whether there is a character of identity of the rights that the claimants consider violated pursuant to paragraph 2.

This stage is very significant since it involves the awarding to the Court of an effective power to set the object of the case (so-called "*petitum*") and the legitimate claimant. Not by chance, in fact, the last provision of paragraph 6 grants the judge the power to issue a declaration of inadmissibility of the action if he deems the proponent's inability to "*adequately protect the class's interests*," with all the problems that a discretional evaluation of this nature involves.

And indeed, within the meaning of letter a, paragraph 9, the Court "*defines the characters of the individual rights object of trial, specifying the criteria according to which the subjects seeking to join are included in the class or must be deemed excluded from the action,*" awarding the judge a task of delimitation of the object and subject of the procedure.

The rule provides, therefore, a curious hybrid assessment field for the judge, which settles halfway between evaluations of procedure and matter of the case. This is an anomaly in respect of what the Italian legal system provides regarding inadmissibility, traditionally limited to procedural issues (and in this case, the examples could be numerous: i.e., if the defendant is not a company, if the homogeneous rights do not concern consumer relations, etc.).

The inadmissibility must also be declared for manifest groundlessness (see those cases in which the damage actually caused by the company's conduct is not recognizable, setting up what could be called a "punitive judgment") or when there is a conflict of interest, for example, when the judicial decision might have beneficial effects for some of those taking part in the class and prejudicial ones for others.

The judgment is given through order, appealable to the Court of Appeal within the final term of thirty days from its communication or notification. On the complaint, the Court of Appeal decides by order in council chamber, no more than forty days after the filing of the appeal. It must be noted that the proposition of the complaint on the admissibility / inadmissibility judgment does not suspend the proceeding before the Court.

The reasons, which permeate the rule referred to regarding the declaration of inadmissibility, have, however, the open purpose of limiting the number of cases, since through the order, "*the judge rules on the costs of litigation, even according to article 96 of the Civil Procedure Code, and on the most appropriate publicity to be made by the losing party at its own expenses.*" This obviously aims to discourage consumers or users from starting a clearly unfounded action, since the economic consequences would be extremely heavy for them, especially in the case of recklessness of the dispute, in which case the claimants would incur the aggravated liability under Article 96 of the Civil Procedure Code, resulting in damages and also in the possible request of payment of a sum determined "*aequo et bono*" by the Court.

It appears as though the legislators took into consideration the damage that companies, defendants in the class action, would encounter due to the negative publicity and damage of image that an unfounded action (for bad faith or gross negligence of the claimant) would inevitably entail.

An important content of the order with which the Court admits the action is the setting of terms and conditions for the "*most appropriate publicity, finalized to a timely participation of the class members.*" Even more important, as the performance of such publicity in the form and manner specified by the Court is also an admissibility condition for the claim.

Paragraph 11 provides that the same order declaring the admissibility of the action also fixes the course of the procedure. The law attempts to ensure the greatest possible speed and simplicity by allowing a very wide area of discretion of the decisions of the Court regarding a "*fair, efficient and prompt procedure management.*" The aim of the exercise of this discretion is to "*avoid undue repetitions or complications in presenting evidences or arguments*" and to enhance the management of the evidential part of the trial.

We cannot, therefore, fail to point out that the discipline of the procedure, such as that relating to the identification of the legitimate claimants, presents full of blanks and uncertain aspects, which certainly will lead to conflicting decisions on admissibility of actions between different courts in Italy. Only the creation of a substantial body of case law will help to better define the conditions and modalities for the carrying out of this type of action.

It does not seem, however, according to the author, that the proposed solution will have significant and decisive impact in the reduction of trial time in general, for which, it is believed, an effective enforcement of final terms would be needed and not an unlimited increase of discretion in setting conduct rules attributed to the body hearing the single cases.

3. Contents and Effects of the Judgment

Paragraph 12 of Article 140-*bis* of the Consumer Code provides that, if the claim is accepted, "*the court pronounces a judgment with which it liquidates, under Article 1226 of the Civil Code, the final amount owed to those who have joined the action or it sets the homogeneous criterion for the liquidation of such sums.*" Even in this case, the lawmakers have provided for vague rules, this time with respect to the amount determined in the judgment.

The judgment of the Court does not grant the claimants any right, but is limited to the ascertainment of the company's liability (thus constituting a mere declaratory judgment) and then later liquidates the sums or determines the liquidation criterion. It is therefore likely that, at the time of delivery, in the case of a sole liability judgment, each claimant does not know the amount due, but also a further individual process will be needed for the liquidation of the individual and specific due sum.

Here lies, in our view, the insufficiency of the scope of the new discipline. A ruling of this kind is obviously not suitable for enforcement against the company, nor is it an assessment judgment, which, in itself, would be sufficient to constitute a title for registration of mortgage claims.

The second possible content of the judgment is the sentence to pay damages and repayments, according to paragraph 1. Also, according to the combined provisions of paragraphs 1 and 12, the sentence may consist solely in the payment of a sum of money, excluding all other types of obligations. Explicitly, however, it is, unlike the previous one, enforceable under Article 474 of the Civil Procedure Code, since it becomes (see paragraph 12) enforceable after 180 days from its deposit.

The additional element that the Court may need to consider in the assessment of the liquidation is indicated in the actions proposed against companies which manage public services or public utilities: in the liquidation, "*the court takes into account what is granted in favor of harmed users and consumers in the relevant codes of services that may be issued*."

The most important anomaly, however, concerns the discipline of the effectiveness of the judgment, which is achieved only after 180 days from its issue, mentioned in paragraph 12, in striking contrast with the general principle under Article 282 of the Civil Procedure Code providing for the immediate enforceability of any judgment since the date of issue. Moreover, paragraph 12 continues by stating that "*the payments of the due sums during that period are exempt from all rights and increases, including the legal accessories accrued after the publication of the sentence*." The purpose of the rule is quite easy to spot: to protect the company from possible substantial economic losses as a result of any negative judgment and grant it a period of time to gather resources for the payment of the due sums. Another goal that has been pointed out is the setting-up of a system to encourage businesses to comply with the judgment of first instance, without appeal.

The favor for the losing company is also clearly seen from the provisions of paragraph 13, relating to provisional enforcement in appeal of the ruling of first instance, firmly integrating Article 283 of the Civil Procedure Code; the Court of Appeal, in fact, is likewise obliged to "*take into account the entity of the overall sum burdening the debtor, the number of creditors, and the related difficulty of reimbursement in case of acceptance of the claim*" to suspend all or part of the enforceability or execution of the judgment contested, with or without bail.

At the conclusion of this brief analysis, there are still many doubts regarding the real effectiveness of the protection granted by the Italian class action, as well as the complete constitutional legitimacy of the discipline, in reference to Article 24 of the Constitution, which states that all persons are entitled to bring cases before a court of law to protect their rights. If, from this latter point of view, the participation in this type of action is optional, without prejudice, pursuant to paragraph 14, to individual action of non-participants to the collective action, the possibility that the class action has a real diffusion remains very limited. Greater importance should be given, instead, to a legislative solution for the development of the effectiveness of individual actions in the direction of an effective achievement and protection of consumer rights.

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Little Brother Is Watching You…

Privacy experts have used George Orwell's Big Brother to warn us about surveillance: but isn't Little Brother, that is, our friend, our colleague, even a person who just observed us yesterday on the street, as dangerous to our privacy? Some Internet sites, both public and private, are dedicated to "tattling," whether it is denunciation of crimes, deviant behaviors, critiques, or whistleblowing. This article will examine how French law has addressed this threat to privacy.

Little Brother Is Tattling to the Government

In 2007, the police of Var county, in the Provence area of France, put in place a system allowing individuals to report illegal behavior by email. The site was later closed due to pressure from several police and judges' unions.

However, since 2008, individuals may still report illegal behavior online on a reporting site (*Internet Signalement*) managed by the French Minister of the Interior.[1] Certain activities, such as mere immoral behaviors and illegal acts perpetrated by a person we know, even if this person is using the Internet to harm us, may not be reported. Such complaints must still be made directly to the local police authorities. When making a permissible online report, the individual does not have to give his name; however, the site records the IP address of the computer from which the report is filed. In certain cases, the government has the right to obtain a warrant to learn the identity of the person using the identified IP address. IP addresses are then kept on file for two years.

Denouncing a crime to the authorities is one's civic duty, and is thus always legal. Pursuant to Article 434-1 of the French Penal Code (hereafter FPC), "*any person who, having knowledge of a felony the consequences of which it is still possible to prevent or limit, or the perpetrators of which are liable to commit new felonies that could be prevented, omits to inform the administrative or judicial authorities, is punished by three years' imprisonment and a fine of 45,000.*"[2]

When Tattling to the Government Is Malicious

Article 226-10 § 1 of the FPC defines malicious denunciation as "*a denunciation made by any means and directed against a specified person, of a fact that is liable to cause judicial, administrative or disciplinary sanctions and that the maker knows to be totally or partially false, where it is sent either to a judicial officer or to a judicial or administrative police officer, or to an authority with power to follow it up or to refer it to the competent authority, or to hierarchical superiors or to the employer of the person concerned.*"

In order for a denunciation to be malicious, it must be spontaneous,[3] and so the defendant must not have been obliged to denounce the facts to the authorities. For instance, pursuant to Article 40 of the French Criminal Procedure Code, every public servant learning about a crime while on duty must report it immediately to the District Attorney, and thus their denunciation of a fact would not be "spontaneous." In order to be malicious, the denunciation must also be inaccurate, either totally or partially.[4] Pursuant to Article 226-10 of the FPC, "*The falsity of the act denounced is conclusively established by a final decision of acquittal, or decision to drop the prosecution, which declares that the alleged facts are not established or that they are not attributable to the person denounced.*"

The FPC only criminalizes malicious denunciation made to an official authority. Online, this would only apply to the sites put in place by a public authority, such as *Internet Signalement*. Denunciation to a private authority has more gray areas.

Little Brother Is Tattling to His Employer

The Sarbanes-Oxley Act of 2002, applicable to American and foreign companies listing securities on U.S. exchanges, requires that companies adopt a code of ethics, and put in place a system allowing employees to report matters that they "reasonably believe" constitute a violation of SEC rules or of a federal law protecting shareholders (commonly referred to as "whistleblowing systems").

Establishing such whistleblowing systems has not been easy in France for both cultural and legal reasons. These systems involve at least some personal data processing, and must therefore comply with the 1978 French Data Protection Act.[5] In May 2005, the Commission Nationale d'Informatique et Libertés (CNIL), France's independent administrative authority on data protection, refused to authorize two whistleblowing systems. The CNIL later specified in guidelines that it "has no objection in principle to such schemes, provided the rights of individuals directly or indirectly incriminated through them are guaranteed with regard to personal data protection rules."[6]

In one of the cases not authorized by the CNIL, McDonald's wanted to put in place a system allowing French employees to alert the parent company by mail or fax, about their colleagues' behavior which they believed to be contrary to French law and to the McDonald's Code of Ethics. Anonymous reporting was permitted. The CNIL noted "that the possibility of setting up an anonymous whistleblowing system would only heighten the risk of false accusation,"[7] and that such a system was "disproportionate to the objectives pursued and the risks of slanderous accusations and stigmatization of employees subjected to an ethics alert." The CNIL had emphasized in the guidelines that anonymity raises the risk of slander, and rather than encouraging the anonymous use of systems, organizations should design them in such a way that employees would have to identify themselves when making an alert.[8]

In order to facilitate putting in place a whistleblowing procedure, the CNIL allowed companies to use a simplified procedure. Its December 8, 2005 deliberation put in place a "unique authorization" system. A company wishing to put in place a whistleblowing system merely needs to inform the CNIL of its commitment to comply with the unique authorization. The requirements for a unique authorization include not inciting the person using the whistleblowing system to do so anonymously, and to use such system only to report matters within the scope of the authorization, namely the areas of finance, accounting, banking and anti-bribery.

Based on these requirements, the Caen District Court in Normandy held in November 2009 that the whistleblowing put in place by a local company had to be closed, as its scope was overbroad. Employees were not only able to report conduct of colleagues that they thought breached the company's code of conduct, but also any other information about their colleagues, using an open "miscellaneous" field.

In a similar case, France's Supreme Court, the Cour de Cassation, held in December 2009 that the whistleblowing system put in place by Dassault Systèmes exceeded the scope of the unique authorization system, and therefore should have been submitted to the CNIL before being implemented. The message is clear: the Sarbanes-Oxley Act cannot serve as an opportunity to put in place an overall corporate "tattling" system.

Little Brother Is Tattling to Everybody

The mere avoidance of putting in place an overall tattling system is not enough to avoid trouble. We leave the corporate world and go back to school now. A French site, Note2be.com, freely accessible on the web, gave students the opportunity to grade their teachers, using six different fields (interesting, clear, available, just, respected and motivated). The results were then compiled to reach a final grade. There were no open fields allowing students to freely comment about the teacher, but there was an indirectly related discussion forum.

Some comments were far from amiable, and the teachers were identified by their real names. Several teachers and teachers' unions sued the owner of the site claiming in the first instance that the use of their names, place of work, and the topic they taught was an invasion of their privacy. The Paris District Court, ruling in emergency, determined that the mere use of this public information was not an invasion of privacy.[9]

However, the Court agreed that this information is personal data, and, as such, is protected by the Data Protection Act pursuant to Article 6 of the Act that states the data can only be obtained for specified, explicit and legitimate purposes and must then be processed in a manner compatible with these purposes. Data was collected on the site to allow the grading of teachers. Pursuant to Article 7 of the Data Protection Act, the data subject must consent to the data processing, unless such processing pursues a legitimate interest not contrary to the interest of the data subject. The teachers had not consented to the use of the data, so the Court had to decide whether such unauthorized use was legitimate.

The Court held that the fact that there were only six fields was a "partial approach that can legitimately cause trouble, because it can lead to a biased assessment, either overly favorable or overly adverse." Curiously, the Court went on to blame the site owner for failing to moderate the open forum before publishing any comments, as this lack of moderation could then lead to polemics. The Court concluded that the teachers have the right to object to their data being associated with a system presenting such a high risk of imbalance between the legitimate freedom of students' expression online, and the use of a teacher's personal data. The Court ordered the site to stop using the teacher's personal data, and to moderate the forum prior to the publication of each comment.

The Court's argument was far from convincing, especially as no teachers claimed defamation, yet the Paris Court of Appeals confirmed in June 2008 the District Court injunction. This Court went even further and ordered the site to close its forum. It also ordered it to stop allowing online grading of teachers, noting that anyone could give a teacher a grade, regardless whether one had been a particular teacher's student. That lack of control led to a heightened risk of data inadequacy, which in turn leads to "illicit trouble."

When Tattling Online Is a Defamation

Defamation is a crime under French Law, not a tortuous conduct. Since the enactment of the June 21, 2004 French Law on Confidence in the Digital Economy (LCDE), online publishing is regulated by the seminal July 29, 1881 Freedom of Press Law (the Press Law). Its Article 29 defines defamation as "*an act prejudicial to the honor or reputation of the person or the corps to whom the act is attributed.*" The law presumes the intent of the crime.

In order to protect freedom of the press, the Press Law sets many obstacles for the plaintiff before he can bring his case to the courts, among them a rather complicated procedure and a statute of limitations of only three months.[10] Three months probably was enough time in the 19th century for a person to discover she had been slandered in the press, and it should also be enough time in an online publishing environment, as people are becoming more and more aware that they should search their names on the Internet on a regular basis.

Nevertheless, in November 2008 the French Senate adopted a bill proposing to lengthen the statute of limitations to a year for Internet defamation.[11] The then-President of the Paris Bar, Mr. Charrière-Bournazel, during a Senate hearing on his concerns, expressed that the length of diffusion of a message published on the Internet "has [no] other limitation than the one assigned by the issuer. It becomes potentially infinite." The bill has not been passed by the National Assembly (France's lower Chamber), and is currently stalled.

Online Right of Reply

Article 6-IV of the LCDE provides to any person named or designated in a public communication a right of reply, which must be sent to the editor, or if the person publishing the site is anonymous, to the ISP which must send it immediately to the editor. The plaintiff has three months from the day the message was available to the public to take advantage of the right of reply. Pursuant to Article 4 of the October 24, 2007 Conseil d'État decree taken in application of Article 6-IV, the reply message must be made available to the public by the editor in conditions similar to those of the original message in question, presented as resulting from the exercise of the right of reply, and following the message in question if it is still available to the public. Article 1 of the decree states that users cannot take advantage of this right to reply if they are able, because of the nature of the online communication service, to make direct comment in reply.[12] However, having an open forum on the site is not enough, according to the Paris District Court, which ruled in the first case requiring a court to interpret Article 1 of the decree. The defendant, a consumer protection site which had published critical reports on the plaintiffs' business practices, argued that having an open forum on its website where plaintiffs could reply was enough. But the Court disagreed with the argument, distinguishing between whether the text at issue is published "in the heart of the editorial site" or is "a simple message on the discussion forum." In the latter case, having a discussion forum is enough, whereas in former case, one can benefit from the online right of reply.[13]

Defamation as a Tort, Not a Crime?

Could defamation no longer be a crime in France in the near future? A report published in 2008 on the Minister of Justice's site proposed that defamation should no longer be a crime, but a mere tort, "except for defamation of a discriminatory nature," and that every French trial court should have a civil "pole" dedicated to "defamation and insult." [14] Suing someone for defamation would become easier, and thus more and more plaintiffs may be tempted to go to court.

Enacting such law would have a chilling effect on Internet speech, without preventing Little Brother to tattle. What then should be done? Should prior restraint be advocated for forums and blog postings? The regulation of tattling with such a heavy hand would be a remedy worse than the disease, letting Big Brother take over freedom of speech while attempting to control Little Brother tattling tots.

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Anyone Looking for Reasons to Move to Israel?

While some people do not really need a reason to move to Israel, others may be interested in certain recent tax amendments that make immigration more attractive.

In 2003, the tax system in Israel was revised from a territorial system to one of worldwide global taxation and Israeli residents are now taxed based on their worldwide income. As a result of the overhaul to the tax system, the taxation of trusts law came into force in the year 2006 and the deadline for its implementation for the years 2006-2008 was December 31, 2009.

For its 60th birthday, Israel passed a law amending its Income Tax Ordinance (the "Amendment") which provides great tax benefits to those who immigrate to Israel and to expatriate Israelis who return to reside in Israel. The purpose of the Amendment is to encourage individuals to change their jurisdiction of residence to Israel, which would enhance Israel's economy and population.

A. Definitions

The Amendment relates to three classes of residents:

1. New immigrants: those who become residents of Israel for the first time.
2. Returning residents: also referred to as "regular" returning residents (as opposed to long-term returning residents discussed below), includes individuals who have resided abroad for a period of at least six consecutive years. The six-year period relates to those who emigrated from Israel after January 1, 2009. For those who emigrated from Israel before December 31, 2008, they will be considered returning residents after a period of three years abroad.
3. Long-term returning residents are those individuals who return to reside in Israel after they resided abroad for a period of at least ten consecutive years.

Irrespective of these definitions, a regulation has been promulgated that permits individuals who have returned to reside in Israel during the years 2007, 2008 or 2009 to be considered a long-term returning resident, if their residence abroad was at least five consecutive years, rather than ten years.

B. The Benefits

1. New Immigrants and Long-Term Returning Residents

a. Exemption on All Foreign-Source Income

The Amendment provides an exemption to new immigrants and long-term returning residents from the payment of taxes on all forms of income, active or passive, earned or derived from sources outside of Israel for a period of ten years. This includes passive income, earned income and capital gains. The great advantage is that there is no requirement that the asset from which the income is derived be purchased prior to the change of residency of the relevant individual, as was required prior to the enactment of the Amendment. The exemption applies for the ten-year period, even if the assets are purchased after the individuals change their residency to Israel.

b. Management and Control of Foreign Corporations

The Israeli Tax Ordinance provides that a corporation is regarded as an Israeli resident if it is incorporated in Israel or if the management and control of the corporation is conducted from Israel. A new immigrant who owns and manages a foreign corporation with business activities abroad may expose the foreign corporation to Israeli taxation simply due to the change of residency of the owner of the company to Israel. Pursuant to the Amendment, a foreign company will not be considered an Israeli resident solely due to the fact that its owner and manager have moved to Israel. This enables the company to conduct its business activities abroad without subjecting the income derived from such activities to taxes in Israel.

c. An Accommodation Year

A new immigrant or a long-term returning resident may be entitled to a one year period in which they will not be considered a resident of Israel for the purpose of its tax laws. This enables individuals to get settled and decide whether they wish to change their jurisdiction of residency to Israel. In order to enforce this benefit, certain procedures and formalities must be followed with various offices of the Israeli Government.

2. "Regular" Returning Residents

The benefits to "regular" returning residents are with respect to assets purchased by such residents during their residency abroad.

These benefits include the following:

a. Passive income derived from said assets (again, those purchased while a resident of another country) are exempt from taxes in Israel for a five-year period.

b. Interest and dividend income derived from "preferred securities" are exempt from taxes in Israel for a period of five years. The definition of "preferred securities" is those securities which are traded on foreign exchanges and which were purchased while the individual resided abroad.

c. Capital gains from the same assets discussed above are exempt from taxes in Israel for a period of ten years as long as there is no right via the asset, whether directly or indirectly, to assets located in Israel.

C. Definition of Foreign Resident

An important issue for expatriate Israelis returning to reside in Israel to consider is the actual termination of their residency in Israel upon their departure to reside abroad.

The definition of a foreign resident under the Israeli Tax Ordinance is as follows:

1. For a corporation, as mentioned previously, a foreign corporation remains as such and will not be considered an Israeli resident solely due to the fact that the management and control of the corporation is conducted in Israel as a result of a new immigrant or long-term returning resident moving to reside in Israel. This will be the case for a ten-year period from the date the shareholder and director moved to Israel.

2. For an individual—an individual will be considered a foreign resident from the date of departure from Israel if:

   a. Within a two-year period the individual spent 183 days per year abroad; and

   b. During the following two years, the individual's center of life is abroad.

   Here the issue of residency becomes quite complicated due to the center of life test under the Tax Ordinance, which is the test for tax residency in Israel. While there are legal presumptions associated with residency, such as the number of days spent in Israel, these are presumptions. The ultimate test for residency is the center of life test which is very fact specific and includes many variables that require consideration. The center of one's life is the place in which the individual has the most substantial ties. Some of the facts reviewed include the residency of family members, such as a spouse and children, the ownership of real property, economic ties, the participation in charitable organizations, and other similar facts.

D. Reporting Obligations

New immigrants and long-term returning residents are not required to file tax reports with the Israeli Tax Authority with respect to their foreign income or assets during the ten-year tax exemption period. This relates to both annual tax returns and declarations of assets.

E. Conclusion

The tax issues associated with immigrants and expatriate Israelis returning to Israel can become quite complex. It is very important for new immigrants to seek legal advice prior to their arrival and, in the case of Israelis who change their residency to another country, also upon their departure to ensure that they sever their ties with Israel and are no longer considered Israeli residents for tax purposes.

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Maturation of Chinese Anti-Monopoly Law

Introduction

The People's Republic of China (China) adopted its first broad-sweeping anti-monopoly statute on August 30, 2007. This statute took effect on August 1, 2008.[1] China's National People's Congress wrote the law to prevent monopolistic behavior among corporations operating within China and those engaging in mergers and acquisitions in the country, including those mergers and acquisitions that take place abroad but involve stakes in Chinese companies.[2] The Ministry of Commerce (MOFCOM) was placed in charge of merger control.[3] Two examples of how MOFCOM has implemented the law can be seen in the merger of InBev N.V./S.A. and Anheuser-Busch Companies, Inc., and Coca-Cola Company's attempted acquisition of China Huiyuan Juice Group. The development of China's anti-monopoly Law (AML) was a reaction to these transactions. They shaped the law's growth and tested its limits.

Anheuser-Busch InBev

MOFCOM published its first decision under the AML on November 18, 2008, determining that the merger of Anheuser-Busch Companies, Inc. (Anheuser-Busch) and InBev N.V./S.A. (InBev) was conditionally acceptable.[4] Anheuser-Busch, an American company, had a 27% share in Tsingtao Beer, a Chinese company, and InBev, a Belgian company, had a 28.56% share in China's Zhujiang Brewery group.[5] MOFCOM permitted the merger on condition that the new company, Anheuser-Busch InBev N.V./S.A. (AB InBev), did not increase its shares in either company or buy shares in either of the other two biggest Chinese beer companies, CR Snow and Beijing Yanjing Brewery, without MOFCOM's approval. The stated purpose of these regulations was "to maintain a competitive environment" in light of the magnitude of the merger.[6] The deal reached between the two companies was for $52 billion, creating the largest beer maker in the world.[7] As long as AB InBev did not undermine the competitiveness of the Chinese companies, China permitted the merger under the AML. Subsequently, AB InBev sold 19.9% of its stake in Tsingtao Beer in an effort to reduce debt incurred from the merger.[8] This is evidence of AB InBev's apparent lack of interest in overtaking Tsingtao Beer, which seems to have been a primary concern of MOFCOM.[9]

Coca-Cola Company/China Huiyuan Juice Group Limited

On March 18, 2009, MOFCOM denied Coca-Cola Company's (Coca-Cola) attempt to acquire China Huiyuan Juice Group (Huiyuan), citing that the acquisition did not satisfy AML regulations.[10] Huiyuan is China's leading pure juice brand, and Coca-Cola bid $2.4 billion to acquire the company.[11] MOFCOM's primary concerns involved the fairness of the merger to Chinese businesses and citizens: "If the acquisition of Huiyuan went into effect, Coca-Cola is very likely to take a dominating position in the domestic market and the consumers may have to accept the high price fixed by the company as they don't have more choices."[12]

MOFCOM did not outright deny Coca-Cola's acquisition attempt; it made several requests for modification of Coca-Cola's anti-trust application so as not to disturb market competition. However, Coca-Cola failed to satisfy MOFCOM's conditions.[13] This was the first denial under the new AML law.[14] It comes as no surprise that the first time China exercised its ability to prohibit an acquisition or merger occurred when a non-Chinese company attempted to acquire a Chinese company; China wrote the law to avoid mergers and acquisitions that would lead to Chinese companies being unable to participate in their own domestic markets. MOFCOM's spokesman explained why MOFCOM deemed the decision fair, as it based it on the law as written, and it corresponded with common anti-monopoly practices in other countries.[15]

Conclusion

The Anti-Monopoly Bureau of MOFCOM released two documents on November 27, 2009, *Measures on the Notification of Concentrations of Business Operators* and *Measures on the Review of Concentrations of Business Operators*. These publications detail MOFCOM's practices and incorporate public suggestions, such as notification and investigation policies and answering questions about revenue.[16] These two documents exemplify China's interest in regularly analyzing the law and encouraging its growth each time it is used. They also exemplify China's willingness to engage in further analysis of the efficacy of its new laws each time they are exercised. Events such as the successful creation of AB InBev and the attempted acquisition of Huiyuan by Coca-Cola are necessary for the maturation of Chinese anti-monopoly law and will likely encourage companies to invest in China in the future.

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Arbitration Law in India

The Indian arbitral system was governed by the Code of Civil Procedure from 1908 until the Arbitration Act of 1940 came into force. This Act was later replaced by the Arbitration and Conciliation Act 1996 (the "Act"), which consolidated and amended the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards. It also defined the law relating to conciliation. The Arbitration and Conciliation Act 1996 is largely based on the model law of the United Nations Commission for International Trade Law (UNCITRAL).

The Act sets out the law however the arbitration proceeding is governed by the agreement signed between the parties to the agreement. The Indian courts have a very limited role; however, the Act does provide some statutory authority for court involvement. For example, Section 11 of the Act deals with the appointment of an arbitrator by the court when the other party fails to appoint the arbitrator pursuant to the terms of the arbitration agreement.

Another example is set out in Section 9 of the Act which allows any party to the arbitration to approach the High Court to seek urgent and interim relief, even though the arbitration proceeding has not started.

Section 34 of the Act provides for an application to the Court for setting aside an award. The grounds are very limited and generally courts in India do not interfere with an award passed by an arbitrator unless there is a gross error of fact and law.

Part II of the Act deals with the enforcement of a foreign award in India. A foreign award is an arbitral award on differences between persons arising out of a legal relationship, whether contractual or not, considered as commercial under the law in force in India. Any foreign award which would be enforceable under the Act is treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defense, set-off or otherwise in any legal proceeding in India.

The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court:

a) The original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;

b) The original agreement for arbitration or a duly certified copy.

The enforcement of a foreign award may be refused by the court on the following grounds:

a) The agreement for arbitration is not valid under the law to which parties have subjected or agreed to it or under the law of the country where the award was made.

b) The party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or the arbitral proceedings.

c) The award deals with a difference not contemplated by the terms of submission to arbitration.

d) The composition of the arbitral authority or arbitral procedure was not in accordance with the agreement of the parties.

e) The award has not yet become binding on the parties under the law of which the award was made.

f) The subject matter of the difference is not capable of settlement by arbitration under the law of India.

g) The enforcement of the award would be contrary to the public policy of India.

Where the court is satisfied that the foreign award is enforceable, the award shall be deemed to be a decree of that court. The arbitration award passed by the arbitrator can be enforced through the court like an order passed by the judgment of the court. Thus, although an arbitration is a private process, in India, as in most countries, there is a role to be played by the courts. This is firmly established by the Act.

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Pre-Salt: A New Legal Framework for the Oil Industry in Brazil

Within the last three years, Brazilian society has been involved in a major debate pertaining to the current legal framework of the oil and gas industry in light of the recent findings of large amounts of oil and natural gas off the Brazilian coast. These findings made by the state-owned oil giant, Petrobras, at the end of 2006, lie under an extensive salt layer extending 500 (five hundred) miles across the central-southern seashore (the "Pre-Salt" area).

Based on the current findings and technical studies, these oil and natural gas reservoirs present huge potential for new findings, with the expectation of being one of the world's largest oil reservoirs ever. In addition to the sheer volume, the quality of the oil, considered a light crude oil with high commercial value, and the fact that the reserves found so far indicate that the exploitative risks are considerably low, have motivated the Government to rethink the Brazilian oil regime, which has promoted a debate in society.

Following the finding, the Government, through the Ministry of Mines and Energy, commenced an evaluation of possible changes to the legislation in place. It created an Inter-Ministerial Commission to propose alternatives for the development of the Pre-Salt exploitation. The idea behind such an approach was to adapt the legislation to the new paradigm in the exploitation of oil and gas, and to increase the Government stake in future entrepreneurships, while ensuring that the contracts in progress are fully respected. As a result of this intense government activity, four legislative bills were presented by the Federal Executive Branch to the Brazilian Lower House in September 2009.

The intended main pillar of the new oil and gas legal regime is the LB nº 5938/09, which aims to regulate the exploitation and production of oil, gas and other hydrocarbon fluids under the regime of production-sharing in the Pre-Salt and other strategic areas. This proposed bill also introduces amendments to the former Brazilian Oil Legislation[1] to ensure consistency with the new proposals.

The current model of contracts available for the exploitation of oil and gas, according to the Brazilian Federal Constitution and Brazilian Oil Legislation, was one of the major reasons that the Government felt reform was needed. This model concession agreement was initially designed for a system where exploitation risks were considerably high. Under this model, the grantee carries on the exploitation and production activities under its own account and pays the Federal Union a subscription bonus, royalties, and special participations, while maintaining ownership of all hydrocarbons produced.

In contrast, evaluations of the Pre-Salt reservoirs suggest an area with considerably low risks of exploitation, which is one of the main reasons considered by the Government to propose a new model of contracts, based on the sharing of the production. Under this regime, in case of commercial findings the contracted party would be reimbursed all costs incurred in the exploitative activity through profits of production. The profit from exceeding oil and gas produced would be shared between the Federal Union and the contracted. The contracted party maintains the risks of the exploitation and development activity.

The proposed bill also reflects the Government's will to strengthen the economic and financial power of Petrobras. According to the new project presented, Petrobras shall be the operator[2] for all the oil blocks contracted by the Federal Union under the regime of production-sharing. Accordingly, Petrobras shall participate in the consortiums to be formed with, at least, 30 percent equity.

In this respect, the bill sets forth that the Federal Union, through the Ministry of Mines and Energy, may execute production-sharing agreements either directly with Petrobras or through a public bidding procedure, under the modality of auction. Moreover, the bill also provides that Petrobras may be contracted directly to perform exploratory studies for the assessment of the energetic potential of the Pre-Salt and other strategic areas. Finally, another aspect introduced in the legislation is that Petrobras is entitled to participate in public biddings, which could extend its minimum participation in the consortiums.

Similarly, LB nº 5941 also aims to strengthen Petrobras' power to the extent it authorizes the Federal Union to assign to Petrobras the research and extraction activities of oil, gas and other hydrocarbons of the Pre-Salt area not previously granted to third parties, dismissing the requirement of public bidding, subject to a payment which may be effective through government bonds. The model to be followed under these circumstances is total risk assumption by Petrobras with ultimate ownership of the total volumes of oil and gas produced. Hence, an exception to the production-sharing model. The authorization provided by this bill shall be valid for a 12-month period from the publication of the law.

Finally, it is important to note that LB nº 5941 also authorizes the Federal Union to subscribe shares from Petrobras, paying for such shares with public bonds. Capitalizing Petrobras to assure its financial needs in the exploitation of the Pre-Salt areas was another major concern of the Government.

With respect to the public bidding required in cases where Petrobras is not directly contracted by the Federal Union, the new regulatory regime also provides for some additional mandatory elements, such as minimum local content, which shall be observed by bidders, and the value of the subscription bonus. Moreover, the criterion for awarding an agreement to a bidder, under the proposed regime, is the highest offer of exceeding oil to the Federal Union. Foreign companies participating in public biddings will also be required to incorporate a local company, under the Brazilian laws, in case they are awarded a contract.

It is also of interest to note that the former regulatory regime did not regulate the commerce of oil, gas and other hydrocarbons fluids, which is precisely what is regulated by the proposed bill. In this regard, the newly created national oil company shall be allowed to contract Petrobras without a proper public tender process, as a commercial agent for the oil, gas and other hydrocarbon fluids produced and owned by the Federal Union. The revenue that arises out of such commercialization shall be deposited in a to-be-created Social Fund, with special purposes, as detailed below.

The bill also states that a public company will be created for the purpose of governing the production-sharing agreements and the agreements for the marketing of the hydrocarbon fluids, owned by the Federal Union. In this regard, LB nº 5939/09 authorizes the Executive Branch to create a public company. This new public company will be formed by common shares, all of which will be owned by the Federal Union, and will represent the latter's interests in the consortiums to be created.

In this respect, the corporate structure proposed for the exploitation of the Pre-Salt area is the consortium, which will be formed by Petrobras and the new national oil company in the case of direct contracting of Petrobras, and also by the awarded tender(s) in case of contracts to be granted under public biddings, whereby Petrobras shall be named the operator of the agreement. Moreover, an Operational Committee composed of representatives of all the public and private companies involved shall be created to manage the consortium.

As mentioned above, the last pillar of the new regime proposed by the Government concerns the creation of a Social Fund. This Social Fund, linked to the Federal Presidency, has been created with the purpose of serving as a regular source of financing for social projects. As provided in the bill, LB nº 5940/09, these projects include fighting of starvation, the development of education, culture, science and technology and sustainability of the environment.

With respect to the most discussed issue regarding the new regime, royalty distribution, the Government had first opted for maintaining the provisions of the regime in progress, leaving the heavy discussions to the Congress. As expected, an enormous amount of amendments were presented by congressmen representing states currently enjoying the benefits from royalty distribution and states pushing for a larger stake of royalties.

As a result of the enduring discussions promoted in the Brazilian society concerning this topic, more than 700 (seven hundred) amendments were presented to the legislative bills since they reached the Lower House, in the beginning of September. At this moment, the four bills have been approved by the Lower House–LB nº 5939/09, and they are under discussion at the Upper House, where new amendments may be presented. In the event that the Upper House proposes amendments, such amendments will need to return to the Lower House for approval before the final sanction of the President.

Despite the Government's optimism, there are several controversial legal issues being raised concerning the proposed regime. Just to mention a few, the mandatory participation of Petrobras on all oil concessions as operator and with a minimum interest, the direct contracting of Petrobras to perform exploratory studies for assessment of the reservoirs' potential, and the assignment of the activities of research and extraction of oil, gas and other hydrocarbons, irrespective of public biddings.

Another issue which has promoted certain debate is the capitalization of Petrobras by the Federal Union, which may dilute the current stakeholders. Finally, the fact that the Brazilian Constitution does not permit the exploitation of hydrocarbons under the model of production-sharing agreements, and the assurance of our *Magna Carta* that the grantees shall have ownership of the products obtained during the extraction process, are also controversial issues being discussed.

Although the bills presented to the Congress are running under a regime of urgency, which implies a maximum of 45 days for the projects to be voted, due to the controversial issues raised and, taking into account the election year in Brazil, the timeline remains relatively uncertain.

Endnotes

1. Law nº 9.478/97.
2. Responsible for the conduct and execution, directly or indirectly, of all the activities of exploitation, assessment, development, production and termination of the exploiting and production premises.

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Brazil Is Ready to Retaliate Against the U.S. and May Implement the First Cross-Retaliation Effectively Adopted in International Trade Recent History

Brazil has already set the necessary legal and trade foundations to implement Brazil's retaliation rights against the United States of America (U.S.) as authorized by the World Trade Organization (WTO) at the end of 2009 in relation to the cotton dispute.[1]

The Brazilian Ministry of Development, Industry and Foreign Trade (MDIC) on March 8, 2010 published a list containing 102 products originating from the U.S. that would be subject to a surcharge on import duty rates (the Camex Resolution). On February 11, a law was enacted by the President authorizing cross-retaliation in intellectual property rights (IPRs) and the service sector against countries that had not complied with WTO obligations. On March 15, 2010, the Brazilian government specified the rights that could be affected in the cross-retaliation against the U.S. and submitted to public hearing.

Retaliation in goods

The list of goods included in the Camex Resolution includes products from a broad range or sectors. For example, certain cosmetics had their import duties doubled, from 18% to 36%. In addition, despite the fact that imports of fabrics and textile products are not so significant when compared to other countries, the duty on these products has been increased to 100%. The list also includes several consumer goods such as certain foods, cars, boats and toiletries.

The Camex Resolution that published the list of goods subject to retaliation would be in effect 30 days from March 8 but was already postponed twice, now with effect only from June 21. This establishes a very short deadline for negotiations to take place. The Resolution also states that other measures may be adopted.

Brazil has announced that it is prepared to retaliate against the U.S. to the equivalent of U.S. $830 million worth of trade. Out of this total amount, Brazil would sanction U.S. $560 million originating in goods from the list. Subsequently, if retaliation reaches this threshold, Brazil would trigger the cross-retaliation for the remaining U.S. $270 million, which may be applied by suspending certain obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

Cross-retaliation may be in IPRs

The recently approved legislation, which enables cross-retaliation, comprises several measures: (i) suspension and limitation of IPRs; (ii) modification of rules and procedures that assure IPRs protection; (iii) temporary prohibition of royalty remittances; and (iv) surtax to remuneration of IP owners.

The law sets forth alternative methods to apply these measures such as: (i) postponing or subtracting the protection periods of IPRs; (ii) licensing or establishing non-commercial public use, without the title holder's authorization; (iii) suspending the exclusive right of the titleholder to block the commercialization of goods that encompass patent rights; (iv) increasing the values owed to organizations or entities of the Public Administration for IPRs registration, to obtain it or in its maintenance; and (v) creating new obligations for registration to obtain and maintain IPRs.

The specific legislation, which targets the cross-retaliation against the U.S., sets out some sectors, such as the pharmaceutical industry, agriculture products and process, author's rights, the software industry, music industry and movies industry, that could be affected by these sanctioned measures.

Interested parties had 20 days from March 15 to comment on the law.

Cross-retaliation as the last alternative to implement a WTO decision

According to WTO rules, if the respondent fails to implement the recommendation and ruling of the Dispute Settlement Body (DSB) within a reasonable period of time, as agreed to by the parties or through an arbitration procedure, parties will try to set a mutually acceptable compensation. It should be noted that compensation is voluntary. If no satisfactory compensation is agreed, the complaining party may seek an authorization from the DSB to suspend the application of concessions or other obligations to the respondent, as follows:

(i) Complaining party should first seek, as a general principle, to suspend concessions or other obligations with respect to the same sector.

(ii) If the complaining party considers that this is not practicable or effective, it should seek to suspend concessions or obligations in other sectors which are governed by the same WTO agreement that governs the disputed item. In this case, the cotton sector.

(iii) As the last alternative, if the complaining party considers that the last is not practicable or effective, it may suspend concessions or other obligations under another WTO agreement. This option is known as cross-retaliation.

Cross-retaliation in recent international trade history

Under the WTO framework, cross-retaliation has been authorized twice before. First, in the dispute between Ecuador and the European Communities involving bananas, and second, in the dispute between Antigua and Barbuda against the U.S. involving gambling. However, those retaliations were never implemented by the complaining countries.

One of the main reasons cross-retaliation was not undertaken is that developed WTO members, who in these cases are the respondents, are not likely to be harmed by the suspension of concessions in goods or services when executed by a developing or least-developed country. It may be observed that the trade impact that arises from a dispute between a developed country and a developing or least-developed country is generally not significant enough to compel the developed country to comply with a decision. This is a consequence of the unbalanced nature of trade relations and the differences in economic status. On the other hand, the developing country may be harmed since consequences could be brought to its own consumers through an increase in prices or even a decrease in supply of products or services. While this situation has historically been the norm, developing countries like Brazil, China and India have powerful economies and consequently may have material impact in developed countries if they decide to impose restrictions on market access (i.e., goods).

Suspension of concessions on intellectual property rights could be a valuable tool to induce compliance by developed countries, since by restricting or suspending these rights, a country may cause economic damage, regardless of its level of development, to a developed country, usually without making its consumers suffer from higher prices.

Next steps

While statements from governments and the private sector indicate that Brazil and the U.S. are trying to find an amicable resolution to this matter, the law that published the list of goods subject to the retaliation sets out a very short deadline for these negotiations to take place.[2] Also, some actions were already conducted by the U.S., as there were some proposals of elimination of agricultural subsidies and also the opening of a public hearing by the Department of Agriculture regarding the facilitation of beef exports from Brazil.

Regarding the retaliation in IPRs, the Brazilian government shall wait for public comments prior to issuing a definitive law toward cross-retaliation.

Endnotes

1. WTO—United States—Subsidies on Upland Cotton—DS267.
2. Please note that during the time lapse between submission of this article and publication, the CAMEX ministers approved the terms of a Framework Agreement for the solution of the WTO cotton case. As a result, retaliation has been suspended, while the Agreement is in force.

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New Disclosure Rules for Brazilian Issuers of Securities

After the 2008 economic crisis, regulation emerged as one of the main tools used to address the turmoil in the international financial sector. In Brazil, the crisis affected the markets to a lesser extent when compared to larger and more developed economies, yet the resulting regulatory agenda did lead to some improvements in Brazilian securities regulation. Particularly, on December 7, 2009, the Brazilian Securities and Exchange Commission (*Comissão de Valores Mobiliários*—CVM) released CVM Regulation n. 480 (the "Regulation"), providing for a consolidated set of new rules for registration, delisting, and disclosure-related rules applicable to publicly traded corporations (*companhias abertas)*, which includes securitization companies and other issuers of securities.[1]

This article summarizes the main objectives of the Regulation, namely: (i) the creation of two categories of securities issuers (A and B), with different regulatory regimes applicable thereto; (ii) the adaptation of Brazilian disclosure standards for the shelf-registration system, which replaces the Annual Information Form (*Formulário de Informações Anuai*—IAN) with the Reference Form (*Formulário de Referência*); (iii) new rules to define a foreign issuer permitted to have Brazilian Depositary Receipts ("*BDRs*") offered and traded in Brazil; and (iv) a new status of issuer—the issuer with high market exposure, or *"EGEM"* (*emissor com grande exposição ao mercado*)—designed to provide a fast-track structure for public offerings, similar to the concept applied in the U.S. to the WKSIs (well-known seasoned issuers).

Issuers included in Category A are authorized to issue and offer equity- and non-equity-related securities, while Category B's authorization includes only non-equity securities. Accordingly, the former are subject to softened requirements, when compared to the latter. The creation of two categories meets the demand of Brazilian issuers for a discounted regulatory regime for issuers with no or only non-equity securities admitted to trading in Brazil.

The Regulation is very innovative when it comes to the Reference Form, inspired by what the International Organization of Securities Commissions—IOSCO—calls the shelf-registration system.

According to this registration system, all information concerning the issuer is brought together in a single document that the IOSCO calls a "shelf document"[2]—and the CVM designates as the Reference Form—to be filed with the competent governmental authority,[3] and regularly updated, usually once a year. When performing a public distribution of securities, the issuer is then required to prepare only one additional document, relatively short, in comparison to the former "prospectus," which IOSCO calls an "offering note." The CVM designates the supplement, which describes the specificities of the securities and the offering, and incorporates by reference information contained in the issuer's shelf document.

On the investor's side, the combination of the Reference Form and the offering note aims to provide the investor with all information needed to make an investment decision, either as a result of a public offering, or on a regular basis, through the Reference Form. The Reference Form must be updated yearly, or partially upon the occurrence of an offering or other material event, as set forth in the Regulation. On the issuer's side, this combination grants issuers the flexibility to enjoy market windows and raise capital more quickly.

Additionally, the Reference Form improves the conditions for investors to evaluate the issuers by raising the quality of information[4] and imposing a regular update requirement. Since the volume of trading in the secondary markets far exceeds the volume of securities issued in new offerings, investors have a need for issuers' updated and complete information to help them price the securities correctly. The shelf document provides a way for issuers to satisfy that demand for information, reducing the cost, both in time and resources, of preparing a prospectus, while simultaneously creating a permanent and reliable source of current information about issuers. Also, the shelf-registration system will prepare the investor to deal with the Reference Form, and refer to it when necessary, enabling market participants to look for information on a particular issue, and compare specific data among issuers.

Another import change in the Regulation is the definition of foreign issuer for BDR-related purposes. Previously, the only requirement was that the headquarters of the issuer was located outside Brazil. This simple requirement allowed Brazilian-based companies to set up holding companies elsewhere and avoid certain local rules. According to the new Regulation, an issuer shall not be characterized as a foreign issuer if (i) its headquarters is located in Brazil, or (ii) 50% or more of its assets are located in Brazil. However, no transitional rule was established regarding those companies that already issued BDRs and have them traded in Brazil; therefore, these companies will remain classified as foreign issuers, even for future offerings.

Finally, the Regulation also creates a new status—the EGEM[5]—which will have priority and shorter time frames in CVM's analysis when applying for an offering's registration. An amendment to public offering rules is expected to occur shortly to provide for the details on the regime applicable to the EGEMs.

Other important changes were implemented by the Regulation, including the reduction from forty-five to thirty days for quarter financials to be disclosed and delivered to the CVM. This new regulatory environment, together with the conversion of Brazilian accounting standards to IFRS rules, will certainly enhance Brazil's capital markets and facilitate deeper internationalization of the same.

Endnotes

1. Except for investment funds and companies beneficiary of tax incentives, which are subject to specific rules.

2. *See* http://www.iosco.org/library/pubdocs/pdf/IOSCOPD118.pdf *and* http://www.iosco.org/library/pubdocs/pdf/IOSCOPD317.pdf for further information.

3. The Reference Form shall be also posted in the issuer's website, when the issuers are classified as category "A."

4. For example, the Reference Form must include: (i) consolidated statements and other financial information; (ii) MD&A, including operating results, liquidity and capital resources, trend information and off-balance sheet arrangements, and critical accounting estimates; (iii) material-related party transactions; (iv) management's compensation disclosure; (v) corporate governance disclosure; (vi) disclosure related to market risk-sensitive instruments; (vii) security ownership in the issuer, and related stockholder matters; (viii) risk factors; and (ix) business activities and policies.

5. Requirements for a company to be considered an EGEM: (i) shares listed for at least three years; (ii) timely and due compliance with securities regulations obligations in the past year; and (iii) free float market capitalization worth over R$5 billion.

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Labor Claims and Liens on Real Estate in Brazil

Thomas Friedman, in his recent book *The World Is Flat*, draws this conclusion as individuals living in the four corners of the planet have the power to collaborate and compete globally. Understanding the complex nuances of a foreign legal environment is vital to this concept. Classed as a new emerging property market, Brazil, with its economy stable and far stronger than ever, has been attracting foreign investors such as individuals, commercial buyers, corporations and developers to its real estate market. Annual GDP growth in Brazil rose to 4.7% on average during 2004-08. Public debt as a percentage of GDP has been shrinking for five years. The adoption of conservative credit policies, the expansion in investments from international companies and the increase in profitability of major Brazilian companies have boosted the economic climate of the country, bringing with it a positive effect on investments. "The investment environment is probably the best in 20 years," said Geoffrey David Cleaver, visiting New York last February. He runs a $500 million private equity infrastructure fund at the Sao Paulo unit of Santander, a Spanish-based bank. Due to this, Brazil is building more credibility in the international marketplace.

Real estate is considered an excellent investment vehicle for people of all ranges of wealth. A foreigner can freely buy, sell, rent and use real estate in Brazil. To be considered a valid owner of real estate in Brazil, the property has to be registered in the buyer's name at the Real Estate Registry, located in the jurisdiction of the property. Due diligence requires an extensive verification of title, including checking for third-party or government debts associated with the property. In Brazil, one must be extremely careful about debts, which are not always predictable and may turn out to be a lien on the property later. This problem can even arise from debts owed by past owners of the property. A property can end up with a lien against it if an employee of the seller obtains a judgment against the seller's company for unpaid wages, labor benefits and/or social tax contribution and the company has no assets left to pay that debt, either because the company is insolvent or is shut down. However, if the current personal owners' assets have been exhausted, Brazilian Labor Courts also hold that any officer in charge during the period that the labor was rendered is jointly and severally liable. Hence, purchasing property in Brazil demands careful due diligence that includes checking the probability of future liens on the property. It is of note that individual owners can also be held personally liable in a wide range of areas such as environmental, consumer and antitrust issues, but in this article we are going to concentrate on the labor claims only.

One typical problem that illustrates how a past owner's labor debts can affect title is a plaintiff-worker struggling unsuccessfully to enforce his judgment for many years. The company he/she used to work for no longer exists. No assets can be found belonging to the people/corporations who logically would be liable. The Labor Court can order the satisfaction of a judgment from the following classes of assets: 1. any private personal assets of any current owners; 2. any private personal assets of owners in charge during the period that worker rendered the service; 3. any private personal assets of any of the owners; it does not matter if the partner had no power of management to bind the company and the ownership was minimal; 4. any assets from companies that are/were subsidiaries of the employer.

The problem is not as acute when purchasing a personal residence as Constitutional Law protects a family residence, so an owner cannot lose the residence where the family lives. Tribunals can protect good-faith buyers as long as that asset was not sold during the process of litigation with the purpose of the sale being to prevent the creditor from satisfying his judgment. That course of action would be considered fraudulent. As indicated, when a company has no assets to pay its debts, courts reach the assets of all the owners and even ex-owners to satisfy labor claims. For Brazilian Labor Courts, it is irrelevant if an owner/partner had only minimum participation and/or no power of management. Nor does it matter if it is a Limited Liability Company or a Limited Partnership. All shareholders/partners are jointly and severally liable for judgments of employee wages, benefits and rights. Of course, if one of the owners has to pay more than his fair share of a judgment he can always sue his co-partners/

owners for reimbursement in the civil courts. However, in any case the burden of proof is with the property owner.

Article 2, paragraph 2, of the Brazilian Labor Code (CLT) says that all companies belonging to the same group are liable for labor obligations. The concept here is when two or more companies are under the same control, direction or administration, even though distinct, all will be liable. So, all subsidiaries are jointly and severally liable. Articles 10 and 448 of the CLT reinforces the concept that changes in a corporate structure do not affect labor rights. Also, all contractors and their subcontractors are jointly and severally liable for the full payment of salaries and other labor rights on any project. As is evident, the CLT is very aggressive when it comes to enforcing labor obligations. As these obligations can be enforced through a lien on a property, one has to be very diligent when purchasing property in Brazil.

Cushman & Wakefield reported that in 2007 Brazil ranked 11th as a destination for foreign investments in real estate, with approximately U.S. $14 billion, 143% more than in 2006. Americans, Europeans and Arabs are investing in commercial and residential buildings, low-income housing and shopping centers. Many people from European countries like Spain, Portugal, Germany, Great Britain and the Nordic countries buy second homes in Brazil. Henrique Meirelles, the president of the Central Bank, said that this year Brazil will receive U.S. $45 billion in direct investment. In 2009, the city of Sao Paulo by itself registered the selling of 35,832 units. Thomas Friedman also said that work and business are done where they can be made in the most efficient manner. Due diligence with legal assistance and insurance are required when buying property in Brazil. If these are done carefully, these investments can bear fruit.

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The Constitutional Implications of International Treaties

The Constitutional framework that a country establishes to enter into and implement international treaties is an important issue that requires knowledge and objectivity because it deals with legal instruments that link a country to the world. This framework establishes the rules of the game between sovereign states, determines the rights and duties of states and, in short, regulates a country’s affairs with the world community in many areas. Due to the increasing relevance of international obligations on domestic affairs, it is imperative that national rules, which establish principles and procedures relative to the foregoing, should be precise. However, the Constitution of Ecuador, in effect since October 20, 2008, incurs in manifest impreciseness. It is hoped that the texts, being what they are, will not create conflict of rules and confusion in the ratification and application of international instruments, which, given their importance, cannot be circumvented.

1. Who Ratifies the Treaties? Ecuador is a signatory of the Vienna Convention on the Law of Treaties. The provisions of the Vienna Convention are binding on Ecuador and the implementation thereof cannot be left to the discretion of local rules or the Government. According to Article 2:b of the Convention, “ratification,” “acceptance,” “approval” and “accession,” “mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty.”

The decision of a state to undertake obligations under a treaty must be unequivocal. There can be no doubt with regard to the expression of its will, or to the competence of the state agency on which it is devolved. The matter is so important that under Article 46 of the Vienna Convention, a problem of competence between local agencies with regard to the execution of an international instrument may render said instrument invalid.

Unfortunately, the Ecuadorian Constitution creates confusion regarding the competence to ratify, approve or accept a treaty. Article 120, n° 8 of the Constitution states that the National Assembly (Congress) has authority to "approve or disapprove international treaties in the relevant cases." However, without making any exceptions thereto, Article 147, n° 10 establishes that the President of the Republic is empowered to "enter into and ratify international treaties." Furthermore, in the chapter on international instruments, Article 418 provides that "the execution or ratification of treaties and other international instruments resides with the President of the Republic." Article 438 sets forth that the Constitutional Court shall render a prior decision on the constitutionality of "international treaties, before the ratification thereof by the National Assembly." As is evident, the document is not clear with respect to who ratifies or approves international instruments: the National Assembly or the President?

The Constitution makes no mention of, or exception to, the treaties that are to be approved only by the legislature. Furthermore, Article 419 states that certain instruments (relative to the territory, boundaries or natural heritage, involving the enactment of laws, etc.) require "approval" by the National Assembly prior to ratification by the President. It would appear that every treaty is to be ratified by the Chief Executive; in such an assumption, what about the rules of Articles 120, n° 8 and 438, which attribute ratifying authority to the legislature? If this issue is not clarified, other countries will not know when the expression of the will of the Ecuadorian state is valid and this confusion can bring serious consequences.

2. Treaties Are Subject to the Constitution. Article 417 of the Constitution states that "international treaties ratified by Ecuador shall be subject to what is established in the Constitution." A literal interpretation implies that: (i) instruments ratified in the past which implies retroactivity and any ratified in the future, must conform to the Constitution; (ii) eventually any clause of a treaty in force may be contrary to the Constitution, in which case the international instrument would fall into a strange "situation of unconstitutionality," and pose a substantial problem for International Law. If such a situation were to arise, Ecuador could undermine the value of its commitment by an interpretation or amendment of the Constitution.

This runs counter to the Vienna Convention, which is binding on Ecuador. Article 27 of the Convention reads: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." The concept of "internal law," or national law, certainly includes the constitutions of the signatory states. This provision of the Vienna Convention is based on the fact that in the international world, the concept of sovereignty does not operate as a "supremacy" or final power within the territory. Outside national borders, there are no superior powers, political supremacies, or internal rules that supersede treaties. On the contrary, "independence" operates internationally and from it stems the juridical personality of states and their capacity to bind themselves to others, under equal conditions. In the exercise of its will, an independent state creates, concurrent with other states through treaties and conventions, an autonomous international body of laws that cannot be revoked by the mere decision of any state and cannot be subject to the changing notions of the internal laws of each state.

3. The Effects. If the idea is to impose, no matter what, the principle that the Constitution shall prevail over international instruments without any further considerations, other than human rights instruments, Ecuador will have to "denunciate" treaties that do not comply with its provisions. This would mean putting aside the body of international laws that conflict with its Constitution and opting for purely nationalistic policies. This will necessarily result in a review of Ecuador's participation in the Vienna Convention. It appears as though the authors of Ecuador's constitutional project have confused concepts central to Constitutional Law, such as "sovereignty," "supremacy" and "independence," with the role of the Constitution with respect to the Law on Treaties.

The situation in Ecuador exemplifies that the increasing advance of economic globalization inherently affects the legal systems of the states.

The underlying question is: In today's world do the internal constitutional laws of each state prevail over the legal rules and commitments deriving from international instruments? If the old concept of absolute sovereignty were to triumph, International Law could not survive and the world would return to a sort of "state of nature," in which force would triumph over the reason of legal rules.

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Section News

Words of Fernando Peláez-Pier, President of the International Bar Association, Upon Receipt of the Section's 2010 Award of Distinction in International Law and Affairs at the Annual General Meeting

Dear Colleagues and Ladies and Gentlemen:

I would like to thank deeply the New York State Bar Association's International Section for conferring this award upon me. The list of previous recipients reads like a "Who's Who" of internationally acclaimed figures and I feel extremely humbled and honoured to be associated with such impressive company. Thank you very much.

Bearing in mind the nature of this award and the fact that you are all international lawyers, I found myself wondering what exactly it means to be an international practitioner. What is an international lawyer? I tried to come up with a precise definition but I came to the conclusion that, as a profession, we are a little like the proverbial elephant—a bit difficult to define but you know one when you see one!

Being an international lawyer covers a multitude of talents: government lawyers engaged in treaty negotiations, in-house counsel for multi-national companies, advocates before international courts and tribunals—all would be seen as international lawyers. In a similar way, university lecturers in public, and indeed, private international law, legally qualified consultants engaged in legal sector capacity building, might, with justification, operate under the banner of "international lawyers." And, of course, we have lawyers engaged in various forms of cross-border advisory, transactional and / or litigious private practice who would also qualify for this same international distinction.

Yet, there is still arguably no single, "one-size-fits-all," uniform that distinguishes an international practitioner from his or her purely domestic counterpart. Some may be dual or even multi-qualified, and some may not. An Atlanta lawyer whose client base includes overseas clients whom he regularly advises on Georgia law, but who never leaves the state, might regard himself as an international lawyer just as does his New York colleague who is handling multi-jurisdictional commercial transactions and is constantly conducting negotiations in London, Paris, or Sao Paulo.

Yet fundamentally, as I am sure you will acknowledge, this analysis misses the point. For exactly what we *do* is, in many respects, not the issue. What is important is what we *are*, what we stand for, what values we bring to our specific daily practice.

And in this regard, lawyers like us, who find ourselves, whether deliberately or by chance, with an international dimension to our work (whatever precisely that work might be), have an opportunity not afforded to everyone. We have the chance to reach out, beyond the narrow confines of our state or country, and gain an understanding of the ways of others. Yes, to learn about the *laws and customs* of other jurisdictions, certainly—but in addition, and as importantly (if not more so), to learn about other aspects of life which are different from our own—whether social, cultural, political, or religious. In doing so, we become multicultural international practitioners.

We have an opportunity to learn about laws and regulations applicable in a good number of jurisdictions around the world, whether they refer to finance, bankruptcy or arbitration. However, we also have an obligation to impart to others values which we hold dear, and to articulate exactly why we hold them so dear.

This international outreach has always been important and has been a constant element in the history of mankind. Yet, questionably, it has never been more important, nor more in evidence, than now.

Since the end of the Second World War nations have increasingly come together, in an attempt to deal with recognised regional and global threats to our own very existence.

The United Nations and the international human rights movement were born out of the mass destruction resulting from the Second World War. We still face many of those threats today. We have terrorism and organised crime which know no borders; we have autocratic regimes in different regions of the world that violate constantly the fundamental pillars of the rule of law—independence of the judiciary and the right of lawyers to practice without any interference—and human and civil rights; and we are still in the throes of an international financial meltdown which has ripped across the world like a tsunami and left lives shattered from New York to Beijing and from London to Lagos.

Of course, the efforts of nations to counter these threats have been more successful in some occasions than others and I'll say more about that in a minute.

Not only has international outreach been more in evidence in our most recent history but in some ways it has never been easier; in other ways never harder.

Never easier because never before have so many of the world's population, of all ages, been able to travel extensively throughout the globe, whether on business or for pleasure.

Never easier because our systems of communication are now instantaneous and available to the great mass of the world's population. It is extraordinary to think that it was only less than 100 years ago that the first trans-continental telephone call was made. It was in this very city in 1915 that Alexander Graham Bell spoke to Mr. Watson in San Francisco and was clearly heard on the Pacific coast. What would Mr. Bell think of the Internet, Twitter, You Tube, iPods, and all the varied mobile phone technology that we have today?

This communications revolution has certainly brought its own challenges but who can doubt that it has brought great benefits as well? We are aware of the business advantages that these developments have brought to our practices. Nowadays, no matter where in the world we are, due to this communications revolution we can plug into our office as if we were actually in our office. An example of this is what happened a couple of weeks ago. A priest in the city of London held a service in his church which was a modern version of a traditional back-to-work ceremony called Plow Monday, in which villagers gathered to bless a symbolic farming implement dragged to the church's door—the tools of the trade. Because his church was, as the priest freely acknowledged, nowhere near a field in London, he ended up blessing a multitude of BlackBerries held up by his city congregation!

Yet in global terms the impact is far wider than the benefits to our offices. No longer can an autocratic regime be confident that it can illegally circumvent democratic processes, engage in ethnic cleansing, torture or otherwise repress its people behind a veil of secrecy. Despite protestations to the contrary by the authorities within Iran we have witnessed, over the last few months, countless examples of the civil unrest in that country brought to our television screens by the mobile phones of hundreds of individual citizens.

Only a couple of weeks ago the UN Special Rapporteur on Extra-Judicial Killings, Philip Alston, announced that the mobile phone footage supposedly showing Sri Lankan soldiers executing prisoners was authentic. He called upon the Sri Lankan government to hold an independent inquiry into possible war crimes committed by both sides of the conflict. Whether this will happen, of course, remains to be seen, but nevertheless the fact remains, the impermeability of state borders is not as it once was.

And we have increasingly seen "grassroots" movements develop through the coming together of like-minded individuals, often far removed from each other geographically, yet each connected by the simple means of the Internet.

Developments in communication have also revolutionised education. Law firms, Bars, universities and continuing education providers have better access to remote audiences than ever before, using webcast or other Internet based technology.

As I said before, however, whilst in many respects international outreach has become easier, in other ways it has become so much more difficult.

In many areas of life the stakes have become higher, the web of international relationships has become more difficult and, despite increasing opportunities for developing mutual understanding, that primordial motivator, fear, is too often still a factor.

For all the grand gestures from world leaders we still have a tendency to be driven more by narrow domestic, not to say parochial, interests than by the needs of the planet and its population at large. When you bring together politicians and government officials from 100-plus countries with different levels of development, their peoples speaking different languages, having different faiths, customs, legal and cultural traditions, and motivated by different fears, it is hardly surprising that the results are sometimes disappointing. Look at Copenhagen.

And it is not just political leaders who are influenced by these factors. Anyone who has been involved in discussions with domestic bar associations regarding issues such as practice and establishment rights for foreign law firms will have seen similar factors at work on both sides of the argument.

In the business environment, also, we have in the last few years been reduced almost to the status of spectators as we have watched the world's financial system unravel before our eyes. We have witnessed the wholesale creation of forms of toxic investments which no one really seemed to understand; and we now fully appreciate, if we did not before, the "global" in the word "globalization."

The sheer scale of financial institutions, and the web-like matrix which they weave across the world, has made us realise that, yes, the world is indeed a small place, yes, internationalization can bring massive dividends, but that, nevertheless, we must walk carefully. We must be mindful of the consequences and not simply engaged in some hell-bent pursuit of unsustainable, unjustifiable or unrealistic profit—whether corporate profits or individual profits in the form of unrestricted salaries, bonuses and pensions.

Nevertheless, challenging though it may sometimes be, the opportunities for us to engage in international outreach are many and we, in this room, are especially privileged to work in an environment where the international dimension is so much at the centre of what we do.

Yet with that privilege comes responsibility. Many of you, I know, are involved in large cross-border transactional work. You play your part in wealth creation and do so to great effect. Not only wealth creation directly for yourselves and your families through the fees you earn but also indirectly for others through your facilitation of commerce with its knock-on effects on the economy, job creation and so on—job creation not only in the U.S. but in the foreign jurisdictions touched by the transactions with which you are involved.

How very necessary your work is! How valuable it has been shown to be in the dreadful vacuum created as the commercial downturn took hold!

Yet as we go about wealth creation we must remember also our responsibilities as lawyers to play as direct a part as possible in the promotion of human rights and the rule of law—in your own jurisdiction, of course—but also elsewhere in the world.

We sit in this room and speak freely. In many parts of the world people cannot do that. We have confidence that we will not walk out of this room and be arbitrarily detained, and that if we are detained we have appropriate fair trial guarantees. In many parts of the world people do *not* have that confidence. The women in this room know that there are systems in place to ensure that they will not be discriminated against because of their sex. As we know, in many parts of the world, women have *no* recourse to such protection.

I urge you all, therefore, to continue to do all you can to support human rights and rule of law initiatives wherever you can make a meaningful contribution—through the activities of your own Association, as well as with and through the International Bar Association, in particular its extremely pro-active Human Rights Institute.

I know that this is part of your vision because I have read the words from your Section Chair, Michael Galligan, which appears on your website and which I could not have said better:

> Just as the depth of the roots of the great maple trees that grace the broad landscape of this State supports the wide expanse of their branches, we aim to intensify and expand our activities and profile in this state in order to also support the vigor of our outreach to South as well as East Asia, Eastern as well as Northern Europe, Africa as well as Latin America and the Middle East.

We are talking the same language. Like most things in life, international outreach can bring harmony or discord; it can preserve and promote rights or destroy them; it can make peace or it can bring war. We don't need to define the expression "international lawyer." We know what we are about. In addition to rendering our professional services in our day-to-day practice in our respective countries or in any part of the world, we are here to serve and to promote human rights and the rule of law and I salute the efforts of each and every one of you in your attempts, individually and through your Association, to do just that, and why not? Let's work together, not just in establishing a strategic alliance for the benefit of our members but also in our efforts to support the rule of law and human rights around the world!!

Chapter News

Opening Remarks of James P. Duffy, III Co-Chair

Second All India Conference of the India Chapter International Section of the New York State Bar Association
Taj Lands End Hotel, March 25-27, 2010

In my opening remarks for the First All India Conference of the India Chapter of the International Section of the New York State Bar Association that was held in New Delhi in June 2009, I discussed the reasons why the Section and the Association thought it was important to open a dialogue with the Indian Bar and why the Chapter had undertaken this important work.

By any measure, the New Delhi conference was a huge success and the Chapter facilitated important discussions with our Indian colleagues. Among other things we learned, both sides came to understand that what we shared in common was much larger and more significant than what we did differently. I must say that this was not a surprise to me. In my more than four decades of international activities, I have rarely found that the differences among people are greater than those things they have in common. Usually, the most difficult task is establishing the dialogue necessary to establish the common ground.

Now that we have done that in New Delhi, and now that both sides have come to realize how much common ground we share together, it is both necessary and fitting to take the next step. That is why the Chapter has chosen as the theme of this meeting "Building Bridges Between the United States and India." This theme made me think about what it means to build a bridge.

In addition to my law degrees, I happen to have two engineering degrees. So, I can look at the process of building a bridge from several perspectives. In analyzing what makes a good bridge, I thought about the old saying that no chain is stronger than its weakest link, and I saw that this had some application to a bridge as well. No bridge is stronger than the structures that support it at each end. Looking at the ends of our bridge, we have the Indian Bar on one side and the New York Bar on the other. These are, indeed, two very strong and worthy supports. So, we have beginnings of the most important structures needed to make an excellent bridge.

Our task now is to connect these two support structures with a sturdy pathway so that we can easily travel between our two supports and create appropriate exchanges of knowledge, information, and lasting relationships for the betterment of our respective bars and the good of the clients we serve.

This then led me to consider what building materials we have to create this path. Happily, they are many, and like the supports, they too are strong. First, we both have inherited our legal system from the British, and we are both very solidly grounded common law lawyers. While we have the same core to our legal system, we have each experimented with enhancements to this core, and we have much we can share with each other and learn from each other once our bridge is built. I should also add that the Committee on Legal Education and Admission to the Bar has, at my request, recently agreed to study and report and recommend on whether Indian law degrees should be included among those foreign law degrees that qualify the holder to sit for the New York Bar Examination. It is still early days on this study, but we hope to have some positive news to report before long.

Another thing we have inherited from the British is the English language. This is the second important building material for our pathway. We can easily communicate with one another with minimal translation problems. While it is true that American English is not the same as Indian English and neither is it the same as British English, we can communicate effectively using our English language facility.

Our third building material is our mutual adherence to and respect for democracy. The United States is one of the early modern democracies, and India is the world's largest democracy. So, we both understand an important aspect of how we chose to govern ourselves, and we do so using common principles.

Another important building material is our mutual dedication to the Rule of Law, and our belief that the Rule of Law is supreme. This is another common value that we share and that helps each of us shape how we and our legal systems approach solutions to problems and needs.

While I could continue to list other building materials for our bridge, in the interests of time, I will mention only one more, and that is the economic standing of India and the United States. Both countries are very large important world economies. The United States has held this status for many years now, and India will soon be the world's third largest economy. One day, it will no doubt surpass the United States in terms of aggregate size. This will undoubtedly be what makes our bridge so important.

If you accept my premise that we can and should build an outstanding bridge, what can we do with this bridge? What are some of the things the United States can learn from India and vice versa?

One thing the United States needs to learn from India is more about its long and deep history and culture because this will clearly enhance the opportunities for two of the world's largest economies to work more closely together in the future as India takes its rightful place on the world stage. The United States, and New York in particular, has much it can offer to India in terms of how international business is done and how law and lawyers can facilitate that process.

With this, I want to welcome you to this conference. We have tried to put together a variety of interesting panels on important topics that will help us start the process of building our bridge. The India Chapter will continue this process by sponsoring additional meetings of this type in the next several years, and further down the road, the Section will hold a larger conference in India as well.

In closing, I would like to add a very personal note. In working with Kaviraj Singh on the New Delhi conference last year and this conference, I have come to appreciate his outstanding qualities as a lawyer and as a person. More important, we have developed a great mutual respect and a deep and lasting friendship. I hope that all of us from New York will be able to say similar things about the people we meet here at this conference and at future conferences as New York lawyers and Indian lawyers take advantage of the bridge we are starting to build here today.

Thank you, and enjoy the conference, and I look forward to making more lasting relationships with our Indian colleagues.

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Address of Michael W. Galligan

Immediate Past Chair of NYSBA International Section at the Opening of the Second Annual Meeting of the NYSBA International India Chapter in Mumbai, India, on March 26, 2010

Dear Colleagues and Friends:

How full of meaning it is for us to be gathered here today in this city of Mumbai for the second annual meeting of the India Chapter of the International Section of the New York State Bar Association:

- a city so emblematic of India's modern history as a nation;
- great commercial, industrial and cultural center of the nation;
- home to the great founding figures of the Indian nation and the Indian Constitution, Mahatma Gandhi, B.R. Ambedkar, Pandit Nehru;
- fulcrum in the great movement for national independence and in the founding elections and debates about the organization of the nation after independence;
- and, now, in the wake of the awful attack of November 28, 2008, an important symbol and witness in the struggle to protect democratic, humanitarian and liberal values against terrorism and repression!

Ladies and gentlemen, I am particularly pleased to be able to address the opening session of this 2010 India Meeting of the New York State Bar Association International Law Section ("NYSBA International"), now as Immediate Past Chair of NYSBA International, just ten months after I had the honor and privilege of addressing the Opening Session of the first India Chapter Meeting in New Delhi last June as Chair of the Section. I am very, very proud not only that the first India Chapter meeting took place during my chairmanship year but that the plans for this second meeting in Mumbai also began to be made last June and continued to be developed throughout out the year.

Steven Krane (of blessed memory), Chair of NYSBA International this year, has asked me to convey to you his deep regret that, due to unexpected developments in New York last week, he had to cancel the plans he made months ago to be here with us in Mumbai. On behalf of Steven and myself, I want to extend my special thanks and appreciation to the indefatigable and visionary chair of the India Chapter, Kaviraj Singh, and the tireless and unshakable New York Steering Committee Chair, James P. Duffy, III, for their dedication, perseverance, and organizational ingenuity in organizing the program for this year's Meeting, which is even more ambitious and wide-ranging than the program for last year's Meeting.

Let me also extend generous words of welcome to Stephen Younger, the President-Elect of the entire New York State Bar Association, who begins his tenure as Association President in just two months and who has been gracious to help open this second India Chapter Meeting just as he helped open last year's inaugural Meeting. We all look forward to his leadership of the entire New York State Bar Association later this year and next year and also extend our thanks to Michael Getnick, current President of the New York State Bar Association, and the entire NYSBA staff, for their support of this Meeting.

The Leading Role of the India Chapter in NYSBA International

Let no one underestimate the importance of the collaboration and affiliation that this India Chapter represents for NYSBA International and indeed the entire New York State Bar Association! India, at least measured by population, is the largest country in the world that follows the common law tradition. The United States, by that same token, is the second largest common law jurisdiction. English, of course, is the principal language of the United States including New York. While India is a country of many different languages whose official use is regulated by the Constitution of India itself, English is the official language of the Supreme Court of India and occupies a key place in the administrative departments of the Union government as well as in many High Courts and state administrative bodies. Last summer, I was asked to review for a client a set of court filings from a state deep in central India: if you just changed the names of the court and the place names involved in the underlying dispute, the papers could have just as well been a set of papers filed in a county court in upstate New York or a state court in the U.S. Midwest.

The only surprise here is not that we have begun to establish this official, organized bridge between the lawyers of India and the lawyers of New York and the wider United States but that it has taken so long!

Let me assure you that the establishment of this India Chapter—and the boldness of the Meeting that it undertook last year to mark its inception and the even greater ambition that characterizes this Meeting—is having an unmistakable influence on the development and growth of other chapters of NYSBA International. In a couple of months, our Canada chapters will be having their first extended Canada Chapters Meeting in Ottawa, for which your Meeting last year was clearly a model and catalyst. After our Meeting last year, our chapter in Beijing organized a series of events in connection with two of the leading international arbitration institutions of China that very much complemented our Meeting here. Plans are now under way for a European Chapters Meeting next year—and similar ideas are now being talked about for Brazil, Russia and even Israel. May I mention that all of this is without prejudice to our major Annual NYSBA International Seasonal Meeting, which takes place in Sydney this year at the end of October and to which you are all invited, and significant events in New York City itself, such as the joint meeting of NYSBA International and the Union Internationale des Avocats on the theme of International Investment Law that will take place this coming September 13-14, and, even sooner, the "Fundamentals of International Practice" program co-sponsored by NYSBA International and the International Section of the American Bar Association this coming April 13.

The Three Long-Standing Missions of NYSBA International

On September 15 of last year, NYSBA International's Executive Committee adopted for the Section three long-standing missions for the organization: (1) Custodian of New York Law as an International Standard, (2) Guardian of the New York Convention on the Enforcement and Recognition of Foreign Arbitral Awards and the international arbitration process in general, and (3) Monitor of Developments in the Law at the United Nations. Permit me to comment briefly on each of these missions and their relationship to India.

A. Custodian of Law on an International Standard

Our Steering Committee Chair, James P. Duffy, reminded us in New Delhi last year that English is said to be the language of an overwhelming majority of international legal transactions and New York law is said to be the chosen law for a very significant number—if not a substantial majority—of these same transactions. Our Section wants to ensure that New York law continues to be as clear, well-stated, reasonable, and effective a body of contract, commercial and fiduciary law as it can be. The point here is not to compete with the laws of other jurisdictions but, in concert with our members from chapters such as the India Chapter, to do what we need to do to make sure that New York law is a model for the conduct of privately ordered commercial, fiduciary and personal transactions across borders and across legal traditions. To that end we want to learn from your law and we hope that you will learn from our law—and, in this process, that both New York and Indian law will not only advance in practical usefulness and conceptual sophistication but come to be an even more useful instrument of practical and meaningful justice in the many areas of life where it must be applied.

May I take this occasion to salute the approval by the Lok Sabha of legislation providing for the establishment of commercial divisions in the High Courts of India and special procedural rules designed to make the resolution of commercial disputes involving sums of fifty million rupees and above more speedy and efficient. Our own experience in New York with the establishment of special commercial courts has been very satisfactory indeed and we will be very interested to study the procedures you have designed to expedite the disposition of cases and to learn from your experience in implementing these procedures.

B. Guardian of the New York Convention on International Arbitration

As for the New York International Arbitration Convention, we want NYSBA International to become a clearinghouse of information about the implementation of the Convention from all the jurisdictions in which NYSBA International has chapters. The Section should also become a clearing-house for our members of information about major developments in our chapter jurisdictions about our respective arbitration laws and their effect on international arbitration, such as, in the case of India, the somewhat surprising decision of the Supreme Court last November in the *Radhkrishnan* case that excludes claims of fraud from the competence of arbitrators. We hope that this information will also enable NYSBA International to make practical and meaningful suggestions and proposals for improving the efficacy of the international arbitral process not only in New York and the United States itself but throughout the world. Your Supreme Court, in the recent *Dolphin Drilling* case, called attention to the tendency of arbitration to become very expensive and time-consuming: Working together, let us try to find practical ways to make the arbitral process more efficient from both a time and cost perspective in India and in New York!

C. Monitoring of Legal Developments at the United Nations

As for legal developments at the United Nations, the Section has officially recommended to the leadership of the Association that the Association become a non-government observer both at the Economic and Social Council of the United Nations and the United Nations Department of Public Information. The Executive Committee of our Association will take this matter up on April 9 at a meeting at which Stephen Younger, Steven Krane (of blessed memory) and I will be present and we are very hopeful for a favorable outcome. We very much want to be able to contribute to the development of international agreements in UNCITRAL and other law-making and law-proposing bodies of the United Nations in the areas that make up "private international law" (in the expanded sense that I discussed in my remarks last year) as well as the more public levels of international law, including laws of the rights of women and all those who are dispossessed or disenfranchised. We also want to assist in the legislative implementation of treaty obligations that our countries have ratified—something that is very important in the United States and whose importance for India was recently underscored by the recent decision of the High Court of this city in the *Karan Dileep* case, to the effect that, for India, obligations under international agreements such as the GATT are not self-executing and require express incorporation in domestic legislation to be effective for domestic purposes.

Moving Forward After the *Lawyers Collective* Decision

Ladies and Gentlemen, I am sure you will agree that it is difficult to mention the High Court of this great city in a meeting in 2010 of the India Chapter of the International Section of the New York State Bar Association without bringing to mind the High Court's recent decision in the *Lawyers Collective* case. As you know, in a carefully reasoned opinion, the Court invalidated the permission given by the Reserve Bank of India to two New York law firms and one UK firm to open "liaison" offices in India under the 1973 Foreign Exchange Regulation Act.

In mentioning this case, let me first reiterate that NYSBA International does not have an agenda or a mission regarding the ways in which New York lawyers or New York law firms organize their interaction with lawyers from other jurisdictions or how they organize the international aspects of their firms. We are a professional body, not a trade organization. We want to foster a spirit of dialogue and collaboration among all lawyers, whether licensed in New York or not, for whom engagement with the lawyers of New York and with each other is important. Thus, the following comments should be taken strictly as expressions of my own personal reactions to the case and the issues it raises:

1. **The Decision**. While I have not read the underlying briefs, my impression is that the Court carefully described and summarized the main contentions of the parties. The decision seems to me to hang on two hinges: The first hinge is the Affidavit submitted by one of the non-Indian firms that its "liaison" activities included giving advice about "international standards and customary practice" relating to clients' transactions, which the Court not unreasonably interpreted as giving legal advice (#41). The second hinge is the provision of Section 29 of the 1961 Advocates Act to the effect that "there shall…be only one class of persons entitled to practice the profession of law, namely advocates" who must be admitted to the practice of law by the appropriate Indian Bar Council (#46). The decision, taken on its own terms, appears to represent a reasonable, if not the only possible, construction of the statute. But, the Court, to my mind, made it clear that it was not ruling on the underlying policy issues when it not only urged but actually directed the Central government "to take appropriate decision" about the issue of foreign law firms practicing law in India "as expeditiously as possible" (#59).

2. **Formalizing the Role of the Foreign Legal Consultant**. In New York, we have found it very helpful to separate the issue of foreign lawyers giving advice about the law of their own jurisdictions and the issue of foreign lawyers giving advice about New York law. In New York, a foreign lawyer may be licensed by the New York authorities to practice the law of that lawyer's country in New York. Obtaining this license authorizes the foreign lawyer to carry the title of Foreign Legal Consultant and to work in New York for either a domestic or a foreign law firm. In order to give advice about New York law, on the other hand, a foreign lawyer must still be admitted to practice in New York. May I suggest that implementing a similar regime in India might be a good way to begin to deal with the issue posed by the High Court because it would enable foreign lawyers to be able to more conveniently and easily advise Indian clients about non-Indian law issues in India and also interact more directly and personally with the client's Indian lawyers on the relevant issues and problems. At the same time, India would be able to continue to maintain the standards it thinks appropriate for someone to be able to give legal advice on matters of India's own law and, of course, to represent clients before the courts of India.

3. **Future Discussion**. Let us admit that it can be challenging to balance the need to preserve the rigor and high standards typical of the legal profession with the competitive nature of the market for legal services. As the High Court pointed out, lawyers have duties to clients, the Courts and the public (#32). To paraphrase the title of Max Weber's famous essay on "Science as a Vocation," law in a certain sense *is* a vocation with the fiduciary and even moral obligations that that hallowed term connotes. On the other hand, when a country like India is eager to attract the investment of foreign financial and human capital, making it easier for clients within and without India to obtain the legal services they need in India to make these investments may also make it easier to encourage the underlying capital commitments that seem so indispensable to India's long-term employment,

productivity and wealth formation. Let me assure you that determining how to balance the need to preserve the integrity of the legal profession with the exigencies that call for a more "open" market in legal services is an issue with which New York, just like India, continues to grapple. As with the other matters I discussed above, the working out of innovative solutions for these issues is a process from which we, of New York and of India, working together, can gain much.

Let me conclude these remarks, ladies and gentlemen, by thanking once again all the members of our India Chapter for having the vision and the openness of mind to join my colleagues from New York in our effort to create a global network of attorneys dedicated to the advancement of our profession and of the rule of law throughout the world.

On the occasion of the notable visit in 1961 of India's first Prime Minister, Jawaharial Nehru, to the late President John F. Kennedy and Mrs. Kennedy, Prime Minister Nehru observed that, for the people of India, "peace is a passion—not only a passion but something which all our logic and mind drives us to as essential for our growth." One of the images that is most associated with promoting peace is the building of bridges, the theme of our meeting. Let us fulfill the passion of peace of which Prime Minister Nehru spoke so eloquently almost fifty years ago by forging strong and enduring links of dialogue and collaboration between the legal communities of India and New York and among all our colleagues in the service of the law throughout the world.

Success to our meeting!

* * *

Opening of the Indian Legal Market

Summary of Comments Made by Som Mandal, Managing Partner of Fox Mandal Little, at the Mumbai Conference Pertaining to the Opening of the Indian Legal Market to Foreign Lawyers. This Summary Was Provided by Conference Organizer and India Chapter Chair Kaviraj Singh of Trustman & Co.

1. Building of trust between the two countries, i.e., India and U.S. He also said that with U.S. signing the nuclear treaty with India, it will obviously develop a great amount of trust that has been built politically and this trust should reflect in other areas, including business.
2. The opening of the Indian Legal Services is important for India. The opening of the legal sector will not only help international law firms to open offices in India but also help international investors in India to rely upon their services in India. The opening of legal services will also help young lawyers in India work in international law firms and learn new areas of practice, which ultimately will be beneficial to Indian law firms as well.
3. Indian law graduates have been recruited by a large number of international law firms, especially in the UK, since it is easy for Indian law students to qualify for practice in the UK by taking QLTT exams. The suggestion was made that Indian law students also be allowed to sit for state bar exams without further studies in the U.S., which should help Indian law students get into U.S. law firms in the U.S.

* * *

Report of the Inter-American Committee Regarding NYSBA Participation in the XII Congreso Nacional de Abogados of the Barra Mexicana, Colegio de Abogados

A delegation from the New York State Bar Association recently attended the XII Congreso Nacional de Abogados of the Barra Mexicana, Colegio de Abogados. Stephen P. Younger, then President-Elect of the New York State Bar Association was invited to attend the meeting and participate in the roundtable session on bars and legal faculties, the themes of which were cross-border practice and legal education. Alyssa Grikscheit, Co-Chair of the Inter-American Committee, coordinated participation and was a roundtable speaker on cross-border practice. Professor Melinda Molina of St. John's University Law School was an additional speaker on legal education. Juan Carlos Partida, Co-Chair of the Mexican Chapter, was also involved in coordinating high-level meetings between the various bar leaders.

The meeting took place on March 18-20 in Veracruz, Mexico. The theme of the meeting was "Mexican Law 200 Years After Independence." On Friday, March 19, the NYSBA delegation met with the key bar leaders of the Barra Mexicana as well as Carolyn Lamm, the current President of the ABA. The Barra Mexicana was appreciative of the participation of the ABA and NYSBA. For many years they have attended bar meetings (mostly of the ABA) in the U.S., but have not had reciprocal attendance in recent years, although there was an Executive Committee delegation some years ago. The Barra Mexicana leaders expressed a wish to formalize links with the ABA and NYSBA to institutionalize communication. Carolyn Lamm indicated that there was currently a level of formal communication and annual meetings with Canadian bar leaders, and this was discussed as a potential model for future cooperation and communication. Participants in this discussion included Carlos Loperena Ruiz, President of the Barra Mexicana; Hector Herrera, Chair of the meeting, as well as past and future presidents of the Barra Mexicana, the coordinator of the International Law session and others.

The four-hour roundtable discussion of bar and law faculty leaders took place on Saturday, March 20 from 9-1, with Stephen Younger, Alyssa Grikscheit and Melinda Molina all actively participating. It had been stressed to us that this roundtable would be conducted exclusively in Spanish; however, out of courtesy, the session was ultimately conducted in a mixture of both English and Spanish, a first in the organization's history as we learned later at the closing ceremony. This roundtable covered a variety of issues regarding bar association cooperation, ethics, billing rates, legal formation and other issues of legal education and cross-border practice. The participants were particularly keen on asking Stephen Younger questions regarding bar associations and ethics. Alyssa Grikscheit presented on cross-border issues, which were actively discussed. Professor Molina's remarks on her research on Latinas in the law sparked a very emotional discussion on the role of male and female attorneys in Mexico.

Barra Mexicana President Carlos Loperena and NYSBA President Stephen Younger

The conference wrapped up with a very interesting speech by Dr. Salvador Cardenas, Director of History at the Supreme Court, followed by closing remarks from the Chief Justice of the Mexican Supreme Court on access to justice. The President of the Barra Mexicana and the Chief Justice both mentioned NYSBA's participation and Stephen Younger by name in their remarks.

The closing dinner was hosted by the Governor of the State of Veracruz, and again NYSBA and Stephen Younger were thanked by name. In an email exchange after the meeting with Carlos Loperena Ruiz, President of the Barra Mexicana, he indicated that the international aspect of the program was the "jewel of the crown."

Overall, the NYSBA participation in the Barra Mexicana annual meeting was a success and I would recommend that NYSBA continue to stay in communication with the Barra Mexicana. We discovered several Mexican lawyers interested in working with our Mexican Chapter Chairs to become more involved in NYSBA. Some of the participants also expressed interest in attending the Regional Meeting in Panama in 2011 to further solidify ties between our organizations, while learning from each other and building relationships.

Program Host Laura Rodriguez and NYSBA President Stephen Younger

Alyssa A. Grikscheit
Co-Chair, Inter-American Committee

* * *

NYSBA International Section Held Successful London Meeting

The New York State Bar Association London Chapter held a successful litigation roundtable in London on Tuesday 16 March. Attendees from the Bar, the solicitors' profession, regulators and corporate counsel met at Duane Morris' office in London to discuss a number of pressing current issues in litigation. The roundtable was led by Jonathan Cohen and chaired by Jonathan Armstrong, both partners at Duane Morris in London.

There was a lively debate among the participants and the issues discussed included:

1. The expense of litigation. Jonathan Cohen outlined the recent UK review on litigation funding and how that had drawn on developments in the U.S. and Canada. Corporate counsel participating at the roundtable were particularly concerned about the costs of litigation, with one general counsel saying that the costs were almost prohibitive.
2. The group was concerned about the long arm reach of the U.S. In particular, executives of UK companies were concerned about the possibility of extradition to the U.S. Perhaps surprisingly one of the regulators present also expressed concern at the volume of requests for cooperation they receive from the U.S. and the burden that this creates for the regulator.

3. Issues around bankruptcy law and the perceived softness of the UK insolvency regime leading to insolvency tourism from Germany and the U.S.
4. There was particular concern about the costs of D&O liability especially with the pull of U.S. securities litigation.
5. There was concern about the legalities for the gathering of evidence. This was particularly exacerbated in the international context with issues like internal investigations and the ability of litigants to seize computer evidence.

The event also featured contributions from NYSBA co-chairs from Poland and Ireland and a NYSBA member from France also joined in to offer different perspectives from around Europe.

The event was sponsored by First Advantage Litigation Consulting (www.fadvlit.com) who also shared their experiences of being involved in some of the major internal investigations in Europe.

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* * *

The Germany Chapter of the International Section, in Cooperation with the American Chamber of Commerce in Germany, Presents Expert Briefing

The Germany Chapter of the International Section, in cooperation with the American Chamber of Commerce in Germany, recently presented an Expert Briefing on banking regulation and the global financial crisis. Titled "The Way Forward: Emerging From the Crisis Into a New Regulatory Environment," the briefing focused on regulation in the European Union, Germany and the United States.

The distinguished panel consisted of Otto Heinz, Principal Legal Counsel, European Central Bank; Michael Fischer, Director of Strategy and Issue Management, SoFFin (Germany's Financial Market Stabilization Fund); Andreas Steck of Linklaters LLP; and Patrick Kenadjian of Davis Polk & Wardwell LLP. Rudolf Cölle and Mark Devlin, Co-Chairs of the Germany Chapter in Frankfurt, moderated the Briefing. Linklaters LLP kindly made its conference center available as a venue for the event.

Dr. Heinz described the measures the ECB has taken in the crisis, especially in terms of providing emergency liquidity lines to threatened financial institutions. He explained the ECB's standards and requirements as well as its strategic goals, which differ in important ways from those of the various national regulators. Dr. Fischer described the parallel efforts of the SoFFin, discussing in detail SoFFin's sub-agency "bad bank" model, which rescues banks while leaving their shareholders exposed to the banks' pre-rescue losses. Andreas Steck discussed emerging developments in German and EU regulation, including stiffened risk capital requirements, efforts to reduce the pro-cyclicality of reserve formation, and areas in which oversight will (and will not) be increasingly harmonized at the EU level. Finally, Patrick Kenadjian provided a "hot off the presses" description of Senator Dodd's draft Restoring American Financial Stability Act. In a presentation that was as entertaining as it was informative, Mr. Kenadjian outlined Sen. Dodd's proposals, among other things explaining how the law would change the role of the Fed and discussing the prospects of the Volcker Rule.

The event was well attended by participants from the worlds of law, finance and industry, and a conference line was provided for NYSBA members dialing in from outside Frankfurt. The panelists and participants continued the discussions in an informal atmosphere at the reception that followed the Briefing.

Mark Devlin
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Linklaters LLP, Frankfurt

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Swedish Chapter Holds Mini-Seminar on the FCPA

April 26, 2010, the Swedish Chapter of NYSBA International Section held a mini-seminar on the FCPA and its extraterritorial dimension and influence on the fight against corruption in Europe and elsewhere. The seminar was moderated by Carl-Olof Bouveng and Peter Utterström, Co-Chairs of the Swedish Chapter. The speakers—attending by phone—were Oliver Armas, Chadbourne & Parke, New York, and Jonathan Armstrong, Duane Morris, London. Attending in person were Gunnar Bjorkenor, General Counsel ABB Sweden, Regional Counsel Northern Europe; Corene Crossin, Control Risk, London; Ulf Lindén, Senior Legal Counsel, and Manfred Maier, Compliance Manager, GE Healthcare, Uppsala. Some fifteen attendants were participating by phone or in person.

* * *

Understanding CEDAW's Role in Advancing Women's Rights Globally

On March 30, 2010, the International Women's Rights Committee together with the New York University School of Law sponsored an evening program relating to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Despite the rain, the event gathered over 50 attendees who came to learn about the Convention, hear success stories and understand implications for U.S. ratification.

In her introductory remarks, Shannon McNulty discussed the mission of the International Women's Rights Committee and thanked all actors from within the NYU Law community for their support and assistance. Ms. McNulty explained how establishing the committee filled a gap within the NYSBA International Section and how issues of women's inequality globally were gaining attention. She then turned the program over to Jayne Huckerby, from NYU Law, to moderate.

Gaynel Curry from the New York UN Office of the High Commissioner for Human Rights described how CEDAW, with 186 signatories, is one of the most popularly recognized of the international treaties. It is recognized as the international bill of human rights for women and girls. CEDAW aims to end all forms of discrimination against women and girls in every sphere and to guarantee them their civil, political, economic, social and cultural rights. The Convention and General Recommendations also protect women and girls from various forms of violence including harmful traditional practices such as early marriage and female genital mutilation and cutting.

Karen Stefiszyn from UNIFEM, the UN Development Fund for Women, elaborated upon the meaning of the Convention by providing concrete examples of ways CEDAW had made a positive impact regarding law reform and policy formation. In 2007 the new Constitution of Thailand enshrined equality of women and men; in Morocco a new Family Code was adopted; in the Philippines a new General Equality Law was adopted; in Cameroon traditional leaders abolished harmful traditional practices toward women and widows; in Colombia access to abortion was discussed and considered, a milestone in the country; and in Kenya training of judges concerning CEDAW gave rise to a women's right to inherit land, something that had been prohibited by customary law.

Ms. Stefiszyn remarked that CEDAW challenges continue, most notably through States Parties enacting reservations to various provisions of the Convention, usually concerning the area of marriage and family. She further detailed the lack of enforcement of treaty obligations and the concluding comments issued by the CEDAW Committee of experts.

Janet Benshoof, President of the Global Justice Center and U.S. speaker, gave a thought-provoking presentation about the implications of CEDAW ratification generally and with respect to the U.S. specifically. She related how U.S. CEDAW ratification is a test case for President Obama. U.S. CEDAW ratification would provide the U.S. with the opportunity to implement an international human rights treaty rather than use human rights discourse as a public relations campaign.

Continuing to discuss U.S. CEDAW ratification, Ms. Benshoof explained that CEDAW is radically incompatible with the U.S. Constitution's 14th Amendment, which only prohibits facial discriminatory laws, not laws that in substance discriminate against women (for example, by applying laws relating to pregnancy). CEDAW ratification would change American laws in various ways if fully implemented. There would be a broad definition of equality requiring a standard of strict scrutiny; abortion laws would be analyzed by the strict scrutiny standard as opposed to a rational basis test; the government would have an affirmative obligation to implement laws protecting women; and a redefinition of U.S. foreign policy, including the policy banning international humanitarian organizations receiving government funding from discussing abortion.

The panel presentation was followed by a lively debate, which largely focused on whether US ratification of CEDAW would be worthwhile if ratification were accompanied by certain reservations, such as denying that CEDAW has any effect on laws relating to abortion. Ms. Curry and Ms. Stefiszyn emphasized the importance of ratification, notwithstanding significant reservations. They pointed out that ratification would at least open a dialogue regarding women's rights issues and that reservations may subsequently be withdrawn, as has happened in other countries. Ms. Benshoof, on the other hand, expressed her strong opposition to US ratification if that ratification were conditioned on significant reservations because it would have a deleterious effect on the interpretation and implementation of CEDAW in other countries.

The question and answer session also involved discussion about U.S. ratification and implementation of human rights treaties generally, and the frequent disconnect between the U.S. Constitution, which is characterized by negative prohibitions on the federal government, and treaty provisions that require the government to take affirmative action. Likewise, treaties may require remedial action that may be prohibited by the Supreme Court's interpretation of the 14th Amendment.

Denise Scotto concluded the program by highlighting key points from the evening's discussion. She urged those interested in learning more to gain information from the websites of organizations relating to participating speakers and encouraged those with a keen interest in the legal field to support the work of the CEDAW Committee of experts.

Please contact Denise Scotto or Shannon McNulty to learn about joining the International Women's Rights Committee.

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Member News

NGO Participation in the Universal Periodic Review and the UN Human Rights Council

Submitted by Denise Scotto, Esq., International Federation of Women Lawyers and International Federation of Women in Legal Careers UN Representative; Former Social Affairs Officer, UN Department of Economic and Social Affairs

On March 11, 2010, Denise Scotto, Esq., organized and moderated a high-level panel, "NGO Participation in the Universal Periodic Review and the UN Human Rights Council," during the 54th session of the UN Commission on the Status of Women at New York headquarters. The event was co-sponsored by the New York Office of the High Commissioner for Human Rights. Speakers included: the Director and staff of the New York Office of the High Commissioner for Human Rights; Global Advocacy Director of Human Rights Watch, and Founding Director of the Center for Women's Global Leadership.

The United Nations Human Rights Council was established in March 2006 by Resolution of the General Assembly. The Human Rights Council (HRC) is an intergovernmental body composed of 47 Member States which serves to promote and strengthen human rights around the world. To date, 13 sessions have been held, with the most recent one concluding March 26, 2010. A variety of issues were discussed. For some sessions, issues were set to the agenda in advance of sessions, but emergency sessions were also held on an ad hoc basis when crises emerged.

With its foundation reaching back to the long-standing Commission on Human Rights, the HRC retained some of the Commission's features while also creating new ones. The HRC continues to be headquartered in Geneva and maintains the pre-existing liaison and field offices. The Special Procedures, which include the Special Rapportuers, continue to exercise their mandate although there is concern that some of the mandates may be discontinued and not renewed when their terms expire.

Another element of the Commission, which has remained in the method of work of the HRC, is NGO participation. The participation and active engagement of NGOs, academics and other sectors of civil society are vital to the work of advancing human rights globally. NGOs in particular have been instrumental in bringing situations of human rights abuses to the attention of the Special Rapportuers, formerly the Commission and currently the Council. The work and role of NGOs are what the panel focused on.

The Universal Periodic Review (UPR) is a critical new feature of the HRC. The UPR aims to assess, review and examine the human rights situation of all the UN's 192 Member States. The first cycle of the UPR started in 2008 and is continuing until 2012, when all Member States will have submitted to the process.

As speakers from the Office of the High Commissioner for Human Rights (OHCHR) explained, Member States are required to provide a written report not to exceed 20 pages. Governments are encouraged to include input from civil society. The OHCHR then prepares a compilation report, which is no longer than 10 pages, gathering information from many sources including the treaty monitoring bodies, the Special Rapportuers, and amongst others. NGOs may also provide reports to the OHCHR, which may be posted on the OHCHR website. After all documents are submitted the Member State appears before the Council. Subsequently, a dialogue is held with government representatives presenting their report and other Member States representatives ask questions. After this dialogue period, an outcome report is then issued and adopted.

As Peggy Hicks, the representative from Human Rights Watch, remarked, this peer review process can carry more weight against a Member State than that of an NGO making the same complaint. She observed how some governments, in advance of the appearance before the HRC, had begun to remove reservations to treaties or were amending legal provisions to show good faith and political will.

Both the speaker from Human Rights Watch and the speaker from the Center for Women's Global Leadership discussed the importance of NGO participation in formulating government reports, preparing their own NGO report and in following up to implement recommendations from the outcome report issued by the HRC upon conclusion of the UPR process.

Noteworthy is the recommendation for NGOs to employ a strategic approach in highlighting a maximum of three or four issues for the HRC to examine. Preparation time begins a year in advance of a Member State reporting to the HRC so that this strategic approach can be formulated. Five months before the scheduled appearance date, NGOs could begin engaging with the government of the Member State up for review to see if there is any traction on issues of concern. Three months before appearance date, lobbying efforts to members of the HRC who will conduct the peer review could begin. It should be noted that NGOs are not permitted to ask questions during the dialogue period and therefore a strategic approach that includes lobbying representatives of those governments who will ask questions of the country under review is critical.

Since this event was held at the time of the UN Commission on the Status of Women, an issue that came to the light was the lack of information in URP reporting about human rights situations relating specifically to women. As speakers commented, many governments hide behind culture or religion to restrict the fundamental freedoms of human rights of women and girls. They have enacted reservations to many international treaties on this basis and have not implemented previously agreed-upon commitments to advance gender equality and women's empowerment. The OHCHR encouraged all advocates to include reporting on situations that affect women and girls in the UPR process.

Charlotte Bunch, representing the Centre for Women's Global Leadership, explained the importance of gains made during past years by NGO advocates in bringing issues relating to gender before the CHR. She informed some attendees that the U.S. is scheduled to submit to the UPR process later this year and hoped that NGOs and women's rights advocates would participate in formulating the U.S. country report.

The UPR process, while fairly new, has the potential to become a powerful tool which could serve to implement obligations of Member States in advancing human rights globally.

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Book Review: *Cross Border Litigation: Interjurisdictional Practice and Procedure*, by Kenneth C. MacDonald (Canada Law Book 2009)

By David Franklin Ad E.

Kenneth C. MacDonald's latest work, *Cross Border Litigation: Interjurisdictional Practice and Procedure* (Canada Law Book 2009) (hereinafter the "Book"), is a remarkable "practical handbook" that thoroughly analyzes cross border litigation, not only between the United States and Canada but also between other countries.

As his introduction states, "cross border litigation entails layers of complexity," which MacDonald successfully unravels in a very methodical analysis of various issues that confront lawyers practicing international private commercial law, varying from choice of jurisdiction, applicable law, obtaining evidence abroad, and various legal recourses including enforcement of judgments.

The Book describes itself as a "very general overview"; however, in this reviewer's opinion it is most comprehensive, a long-needed tome in international and civil commercial litigation both substantial and procedural.

Chapter One deals with strategic considerations of selection forum, particularly where the dispute might have several concurrent jurisdictions, i.e., "forum shopping." Furthermore, also covered are the availability of discovery, trial by jury, damages and enforcement of judgments, and minimum requirements of the chosen Court. Forum selection clauses, their recognition and validity and challenges to the jurisdiction are thoroughly discussed. This chapter also deals with the defense of *forum non conveniens*, and its test for application. It concludes with a pragmatic step-by-step analysis of where the case ought to be litigated.

Chapter Two continues with the strategy and procedure of avoiding, having a court hear the case, either by parallel proceedings or by motions for stay and anti-suit injunctions.

Chapter Three deals with an often ignored topic, the proper service of legal proceedings upon a foreign defendant, as improper service could lead to non-recognition of the resulting judgment. Compliance both domestically and with the jurisdiction of destination are discussed with emphasis on various Canadian provincial law requirements. The Hague Service Convention is reviewed with a useful table listing the countries with which Canada has a treaty, either as a party to the Convention or by bilateral treaties. The laws of Australia, Brazil, India and several other important countries that are not bound by a treaty are also discussed.

Chapter Four reviews the fundamental principles of *lex fori* and *lex causae*. There is summary review of the UN Vienna Convention. Chapter Five focuses on six methods of pleading and proving foreign law. Chapter Six concerns obtaining evidence from foreign jurisdictions with special attention given to the U.S. Federal Code. Chapter Seven deals with responding to requests for evidence from foreign jurisdictions.

Chapter Eight covers pre-judgment remedies such as Anton Pillar, Norwich orders, Mareva injunctions and extra-territorial injunctions, including a survey of U.S. practice. The last chapter deals with the enforcement and recognition of foreign judgments. Such a review entails the requirements for enforcement, defenses, reciprocal arrangements, international arbitration awards, and concludes with a survey of laws regarding enforcement in eleven foreign jurisdictions including the United States, China, EU, India and Russia.

The Book has appendix guidelines applicable to court-to-court communications in cross-border cases, and the Hague Conference on Service.

The Book concentrates admittedly on cross-border aspects of the common law with limited coverage of Quebec law; however, there are many Quebec court cases that are referred to.

The Book is titled a "handbook," which might give the impression of a summary treatment of the topic, but indeed it is a thorough and comprehensive one. The Book is of great assistance to those practicing international litigation. It is timely, comprehensive, relevant and highly annotated—and therefore highly recommended.

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(Continued from page 1)

entity of any association or firm in the biennial spring meeting of the ABA International Section: We pioneered a full-day CLE presentation on the "Fundamentals of International Practice" at the opening day on April 13, attended by over 150 delegates; we were the exclusive sponsor of the Welcoming Reception on the evening of April 13, attended by close to 300 delegates and visitors; our Committee on International Real Estate Transactions co-hosted William Zeckendorf at a briefing on cross-border real estate investment on the last morning of the meeting; and many of our members served as steering committee members and program speakers. On the closing evening, NYSBA President-Elect Stephen P. Younger and I had the privilege of addressing a farewell dinner for the India delegation at the meeting, organized by our own Sanjay Chaubey.

NYSBA International's offerings of briefings and programs organized by our Committee here in New York have grown in size and variety: topics of programs, so far in 2010, have included international lending and Sharia law; international arbitration and sovereign wealth funds; international micro-financing; and Russia and international law.

We have also begun to put into place the building blocks for the implementation of our three Long-Term Missions:

First Mission: Custodian of New York Law as an International Standard. Our new Committee on International Contract and Commercial Law had its first meeting on April 19 and has begun to set the stage for several projects, including the production of a treatise for publication by the NYSBA on "New York Law in International Law," web-based quarterly briefings on noteworthy New York cases applying New York law to international transactions and cross-border legal disputes, and soliciting our chapters to help us better understand the interaction of New York law and the law of New York's sister jurisdictions. The Committee is exploring and seeking to engage the resources and assistance of the Institute for Commercial Arbitration Law of Pace University Law School and other New York State law schools devoted to the promotion and diffusion of international law in all its dimensions.

Second Mission: Guardian of the New York Convention on International Arbitration. Efforts to establish a network of Chapter reporters on cases interpreting and applying the Convention are under way, under the guidance of Section members Chryssa Valletta and David Miller. We hope to see the first round of reports later this year or early next year in the *New York International Chapter News*. At the same time, we are exploring the possibility of whether the Section should undertake an initiative to advocate for adoption by New York State of the Model UNCITRAL International Arbitration Statute (augmented by provisions to deal with discovery and other similar evidentiary procedures) for international arbitrations governed by New York law.

Third Mission: Monitor of International Law Developments at the United Nations. At the December 2009 meeting of the NYSBA Executive Committee, the Committee adopted a resolution and reconsideration that the NYSBA apply to be qualified as a Non-Governmental Observer before the Economic and Social Council and the Department of Public Information at the United Nations. On April 9, 2010, Steven Krane (of blessed memory) and I had the honor of presenting this recommendation to the Executive Committee of the NYSBA. The NYSBA Executive Committee unanimously endorsed NYSBA International's recommendation. Denise Scotto, co-chair of our International Women's Rights Committee, has now been in contact with Kathy Baxter, NYSBA's General Counsel, and the preparation of the NYSBA's application is under way.

II. NYSBA International's Global Outreach. Our global outreach efforts have proceeded on an equally active basis. After a year of effort to identify promising candidates to establish new chapters in Africa, we have formally approved the establishment of chapters in over ten countries in Northern and Subsaharan Africa and founding chapter chairs are now serving in Algeria, Botswana, Cameroon, Nigeria and Tunisia.

In the meantime, an increasing number of our chapters are actively organizing programs and events. The second annual meeting of the India Chapter took place at the end of March. Over 200 attorneys attended two extraordinary days of the highest quality programming as well as networking lunches and dinners (my report on the meeting, which appeared on the AnnounceListServe, is also re-published elsewhere in this issue). The London Chapter held a roundtable on international litigation (Jonathan Armstrong's report of the conclusions of the meeting is separately presented in this issue). The German Chapter (Frankfurt branch) held a program on international financial reform; the Swedish Chapter held a program on FCPA compliance; and the Argentine Chapter was co-sponsor of a day-long program on international environmental law in Buenos Aires.

As the pace of business picks up in the later summer/early fall, NYSBA International will co-chair and sponsor, with our friends at the Union Internationale de Avocats, a day-and-a-half program at the Yale Club on September 13 and 14 on the law of international investments. At the same time, registration will be open for the Annual Fall Meeting of NYSBA International for October 25-28 in Sydney, Australia, with the theme of "Navigating the Currents of International Law."

(continued on page 53)

A Message from the Past Chair

(Continued from page 52)

I want to render a special word of thanks to Steven Krane (of blessed memory), who assumed the leadership of the Section on January 27 of this year. Steve gave invaluable support to our UN-related mission and other key initiatives throughout his all-too-short tenure as Chair. Faced with very pressing and unexpected needs of his clients, Steve generously stepped aside as Chair on April 19 to allow Carl-Olof Bouveng to assume the role of NYSBA International Chair. We are very grateful to Carl and his firm (Advokatfirman Lindahl in Stockholm) for agreeing that Carl should assume the position of Section Chair earlier than anticipated. Carl is our first Chair to rise to this position from the ranks of the Chapter Chairs. I can attest that he has gotten off to a very active and dynamic start. I hope you will all follow me (through our dedication of time, energy and resources) to make Carl's year as Chair "one for the history books."

Michael W. Galligan, May 4, 2010

New International Section Members

Bhagwan Dass Ahuja
N. Alexander Aizenstadt
Nathaniel E. Akyeampong
Nora Musaed Alharoun
Abbas Ali Khan
Douglas Francis Allen
Ayman T. Almoayed
John C. Alsina
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A Message from the Chair

(Continued from page 1)

as an International Standard; (ii) “Guardian” of the New York Convention on the Enforcement and Recognition of Arbitral Awards; and (iii) “Monitor” of International Law Developments at the United Nations.

The network of lawyers in our foreign Chapters is a unique feature of the Section. A large number of new Chapters have been established in the past years. Most recently we approved a number of new Chapters and Chapter Chairs in Africa, Canada and Europe. In connection with our Singapore meeting last year, we formed new Chapters in Asia. There are more Chapters to come, and more projects to further involve and energize the Chapters. The Chapters are a key factor in making the Section “truly international.” Without an extensive involvement by the Chapters, the Section would lose much of its international nature.

The international practice of law requires an extensive dialogue among lawyers from various countries, cultures and religions. The Section maintains this dialogue in several ways, including everything from the informal daily contact with the Chapters to programs and events organized by Committees and Chapters. There is also the overseas Seasonal Meeting, which is organized in close co-operation with the local bar and its members. At the latest Seasonal Meeting, our Section members had an opportunity to discuss human rights and constitutional issues with the Singapore Minister of Law. I believe all of us walked away with a far better understanding of the background to the legal system in Singapore, and the Minister also got the opportunity to obtain a better understanding of the views offered by our members.

The work of our Section is important for international lawyers practicing in New York, as well as for lawyers practicing elsewhere. We should be proud that most lawyers around the globe recognize New York law as one of the leading laws to govern international transactions. At the same time we are aware that there are other laws and legal systems of importance, and as international practitioners we are in our daily practice trying to establish how these different legal systems operate in relation to each other. All laws and legal systems are interdependent on each other in international business and trade and in all other international relationships. In this context, our mission of being “Custodian of New York law” also includes that New York law shall serve its purpose in an international context, in relation to other legal systems, and for all parties irrespective of where they reside, do business or hold property.

I would like to stress the importance of our activities in New York. Our Section is one of the most active sections within the NYSBA and the number of activities has increased in the past years. We have Committees covering a wide range of areas which offer extensive programs as well as “brown bag” luncheons. Many Committees have been active for a long time while others are becoming increasingly active. A high level of activity, and general member activity, is fundamental to the Section and to making the Section attractive to prospective members. To give a perspective from abroad, I can also confirm that the Chapters and their members welcome contacts with the Committees and we can therefore do even more to find synergies between Chapters and Committees. I welcome all of you who would like to further develop any Committee in an area of your interest to contact me or any of the other senior officers.

As part of our ambition to build networks, we are holding a number of programs in co-operation with other bar associations. In April we held our program “Fundamentals of International Practice” together with the ABA Section of International Law. In September, we are planning a program on international investments with the UIA Union International des Avocats. We are also in discussions with the leadership of the International Bar Association about future cooperation.

This year our Seasonal Meeting takes place in Sydney. It will be a great opportunity to learn about the legal system not only in Australia but in the greater region and to discuss the latest developments in international law. We will be hosted by our Australian colleagues and be joined by lawyers from all continents.

To travel across the globe to meet lawyers with a different background may be one of the best ways to increase our understanding and knowledge. However, we also use modern technology for efficient communication and distribution of information, and we can do even more in this area. The activities of our Committees and Chapters can be made more widely available through webcast and webinars and we will increase our use of these tools in the future. The flow of information can sometimes become overwhelming and we need to continuously review our use of various means of communication, such as e-mail, our web page and our discussion group on LinkedIn. We have established the position of Chief Information Officer for this purpose.

Finally, relating to distribution of information, I would like to encourage everybody to contribute to our publications, including the *New York International Law Review*, the *International Law Practicum* and the *New York International Chapter News*. You can find information about this and much else on our website at www.nysba.org.

I look forward to a year in close cooperation with all of you. A year goes fast and we shall not lose any time, so please let me know as soon as you have any thoughts or ideas, and together with our Chair-Elect Drew Jaglom and the other officers, I will do my best to take the Section to the next level.

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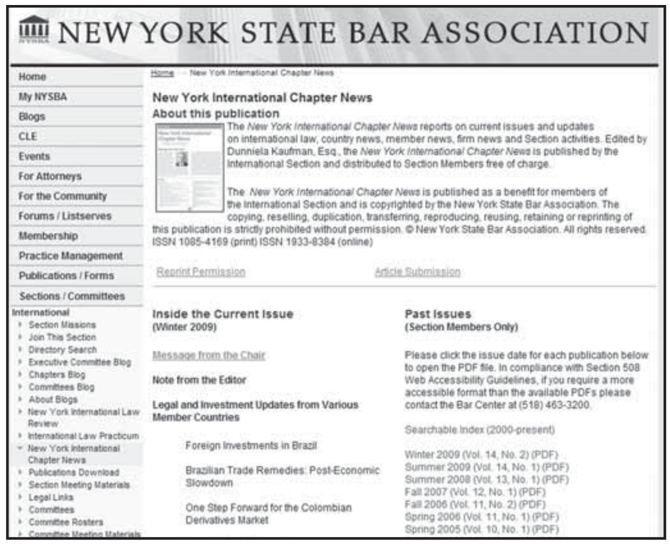

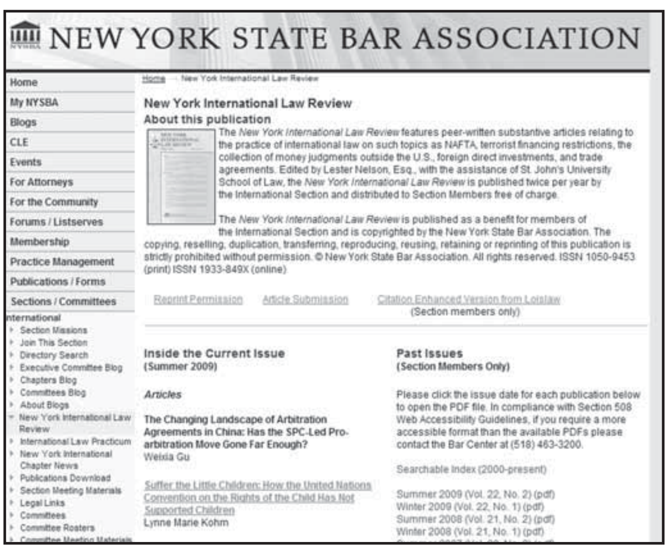

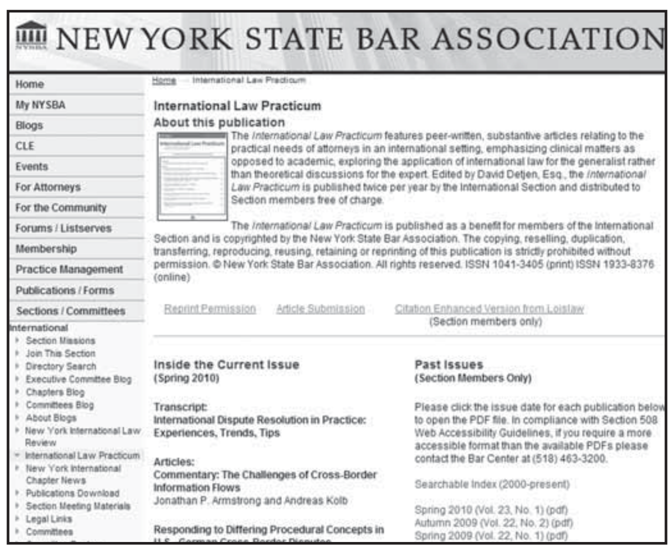

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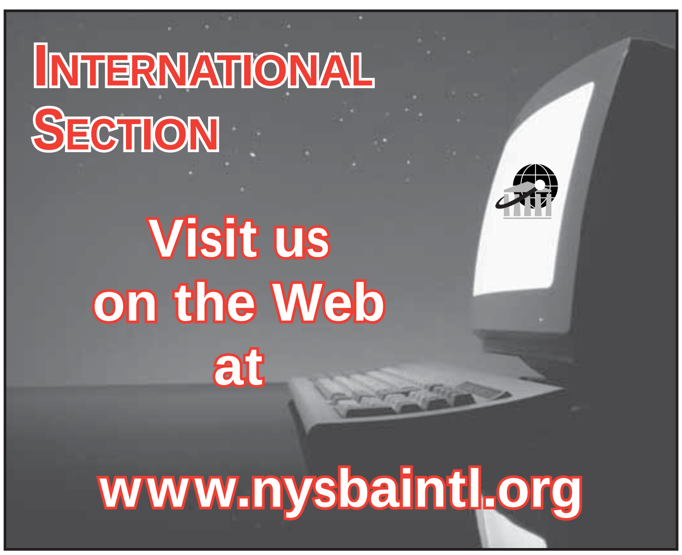

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