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New York International Chapter News

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Message from the Chair


Michael W. Galligan

2009 has been a year of "firsts" for our International Section: the inauguration of our Announce List-Serve in early March; the organization of our first day-long CLE event, "Fundamentals of International Practice" on April 30; the organization of our first major Chapter Meeting in India, in June; our first meeting with the CLE Directors of New York's major international law firms in August to discuss future CLE projects; a breakthrough CLE program in September on Latin American private equity in which we were able to offer free CLE credit to our Section's attendees while offering a paid-for web conference option through NYSBA's CLE office, and much, much more.

At the September 15 meeting of the Executive Committee, we approved three "Long-Term Missions" for the Section: Custodian of New York Law as an International Standard, Guardian of the New York Convention on the Recognition and Enforcement of Arbitral Awards and the Arbitral process, and Monitor of International Law Developments at the United Nations. You can read more about these Missions in the Chapter News section of this Newsletter. In addition, we approved Guidelines for Committee Chairs and Chapter Chairs, which synthesize debate and discussion going back to our 2006 EC Retreat (Chapter Chairs) and 2007 EC Retreat (Committee Chairs). We also approved the establishment of a new Section Committee on International Contract and Commercial Law, which we hope will play a very significant role in implementing the first of the "Three Missions." At our October 26 Executive Committee Meeting, we adopted a proposal by First Vice

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Chair Andre Jaglom and Secretary Andrew Otis to establish a new senior officer position of Chief Information Officer, with the purpose of coordinating the Section's utilization of the various technologies at our disposal for facilitating communication among our Committees, our Chapters and our members in general.

Our Annual Seasonal Meeting in Singapore continued our storied tradition of exceptional annual fall overseas conferences but it also counted as the first meeting at which we have had such an extended opportunity to engage representatives of the highest level of government in our host jurisdiction in discussions about their record and their philosophy in implementing the rule of law. More details on this meeting are contained in this edition of the *Chapter News*.

I am proud to say that this year we have had the benefit of programs and meetings in New York City sponsored by our Committees on the Americas, as well as our Committees on International Arbitration, Banking and Securities Law, Customs Law, Corporate Counsel, Environmental Law, Human Rights, Investment Law, Insurance and Reinsurance Law, Real Property Law, and Women's Human Rights. Many more Committees organized panels at the Annual Seasonal Meeting in Singapore and for the International Practice Institute that had been planned for last May. We also welcomed to our ranks new chapters in Canada (Ottawa and Montreal), China (Hong Kong-Guangzhou-Shenzhen and Shanghai), Czech Republic, Dubai, Korea, Malaysia, Singapore and Ukraine and appointed new leadership for our Russian and Swedish Chapters, among others. And we set in motion a process that we hope will soon lead to new chapters in Africa as well.

As the year drew to a close, for the first time ever we met with the Marketing Directors of New York International Law Firms (to explore ways in which we can make membership in our Section more attractive and more useful for young and not-so-young leaders in the New York international legal community) and launched our online membership directory on our website at www.nysbaintl.org.

The broad contours of major events for 2010 can already be discerned: Annual Meeting Programs on international arbitration and dispute resolution on January 27 and 28, 2010; Section participation in the Annual Meeting of the Barra Mexicana in Mexico City on March 18 to 20; the second major Chapter Meeting of our India Chapter from March 27 to 28 in Mumbai; what we hope will be a strong presence and participation in the ABA Spring Meeting in New York City from April 14 to 18; the first major Chapter Conference of our Canada Chapters (Ottawa and Montreal) on cross-border litigation from June 10 to 11 in Ottawa; our first jointly sponsored conference with Union Internationale des Avocats on Cross-border Investment from September 10 to 11 in New York City, and next year's Annual Seasonal Meeting in Sydney, Australia from October 27 to 31. I would be remiss in this Report if I did not mention our outreach to the important international bar groups with whom we are working to publicize our mutual efforts and find ways to work together: ABA International, the New York City Bar Association and the International Sections of our sister State Bar Associations (approximately 22 in all). We are looking forward to an exciting 2010 under the leadership of Steven Krane.

Let me take this opportunity to thank all the Meeting and Conference Chairs, Committee and Chapter Chairs, the Senior Officers, the Vice-Presidents for Chapters and for Committees, our several very active former Chairs, Executive Committee members, the Editors of the *New York International Law Review*, the *International Law Practicum* and the *New York International Chapter News*, all our members who supported us in so many different ways and of course our hard-working staff members in Albany for all the work that has made this year of dynamic growth and new vistas possible.

Let us all keep in mind that the purpose of all this activity and effort is to support and strengthen the practice of law in every relevant field and division of transnational legal practice and to support the rule of law throughout the world. In this column earlier this year I remarked on how we were pursuing two seemingly contradictory but profoundly complementary ends: deepening the intensity of the Section's work in New York while extending the Section's outreach throughout the world. I think we have seen in this brief period how well moving along these two trajectories can inspire and move us. I hope amidst all of this activity and new energy, we will keep in mind and be sustained by the deeper purposes and significance of our Section, on which I spoke at greater length at the opening of our India Chapter Meeting last June: to support and strengthen international civil society as well as to promote adherence to international law at the level of interstate relations and to build up the global system of international human rights.

A blessed, peaceful and constructive 2010 to all!

Michael W. Galligan

Note from the Editor

Dunniela Kaufman

Following up on the excitement expressed by our Chair in underlining how far our Section has come this year, I want to echo from my own personal experience in putting together this edition of the *Chapter News* his sentiment. I have been involved in putting this publication together for almost five years now and never before have we had the depth of participation that we have had in response to our most recent call for articles.

In that regard, I am very pleased to bring to you what I consider to be an edition of the *Chapter News* that is a true reflection of all our Section has to offer; substantive articles on legal/legislative issues in differing jurisdictions, insight into the investment climates in places as diverse as Brazil, Israel and Mauritius, articles on matters of international concern, such as the African Human Rights Commission and the 44th session of the Convention to Eliminate All Forms of Discrimination against Women, as well as updates on the activities of our Section, certain committees and our members.

Although we have seen a significant increase in our Section's activities, which I hope is aptly reflected herein, I would be remiss not to remind you that our Section, similar to this newsletter, can only give to its members that which they put in. As the Editor of the *Chapter News*, I hope that your fellow members' efforts move you to participate. As always, I welcome your articles and announcements, and also welcome any thoughts that you may have on how we can improve the Newsletter to better serve our membership.

Dunniela Kaufman
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Legal and Investment Updates from Various Member Countries

Foreign Investments in Brazil

I. Introduction

In this article we will first explain the general rules and guidelines applicable to all foreign investments made in Brazil, and then we will detail certain limitations and conditions for investment in specific sectors of the economy.

3:1 General Guidelines

There are three main regulatory entities in charge of governing foreign investments in Brazil: the National Monetary Council ("Council"), the Central Bank of Brazil ("Central Bank") and the Brazilian Security and Exchange Commission ("Commission").

The first two entities establish rules and oversee foreign investments from a foreign exchange control perspective and registration thereof, and the latter monitors foreign investor activities on the Brazilian capital markets.

The main role of the Council is to: (i) establish general Brazilian guidelines for monetary, exchange and credit policies; (ii) govern the incorporation, operation and supervision of financial institutions authorized to operate in Brazil; and (iii) to establish the general rules regarding the registration of foreign investments.

The Central Bank is part of the National Financial System. The 1988 Federal Constitution established the following role for the Central Bank, among others:

(i) exclusivity in the issuance of money;

(ii) control over foreign exchange markets;

(iii) execution of foreign exchange operations on behalf of public sector enterprises and the National Treasury;

(iv) execution of the rules established by the Council; and

(v) receipt of reserve requirements and voluntary deposits by commercial banks.

The actions of the Central Bank are performed pursuant to the rules established by the Council. The Central Bank is responsible for enforcing the rules issued by the Council and it also issues regulations detailing those rules and indicating how they should be complied with.

Additionally, the Central Bank performs an important function related to monitoring transactions carried out by Brazilian financial institutions in connection with foreign investments, including those associated with the entry of investments into the country and their repatriation, as well as the remittance of profits and other revenues.

Among other activities, the Central Bank also audits financial institutions and foreign capital registrations. Whenever a problem is detected, the Central Bank commences administrative proceedings to determine the responsibility for the problems and may impose penalties both on the foreign investors and/or the local invested companies. The decisions issued by the Central Bank in administrative proceedings may be appealed to the National Financial System Council of Appeals ("CRSFN").

II. Foreign Direct Investment (Equity/Capital Stock)

3:2 Liberty to Invest and Divest; Amount and Term of the Investment

Foreign capital in Brazil is treated quite liberally and few areas are subject to restrictions. Legislation makes no distinction between domestic and foreign companies, the basic principle being that juridical treatment must be granted to foreign and domestic capital under the exact same terms.

Investments in the economic sectors that are not subject to conditions or restrictions may be freely made and are not subject to any prior approval, license or authorization from authorities. Hence, there is freedom to invest in those sectors.

There is also freedom to totally or partially repatriate the invested capital whenever the investor deems fit, as well as to remit abroad profits obtained in Brazil. Once the invested capital is registered, no authorization or permit from the authorities is necessary for repatriation or profit remittance. Please note that capital gains are subject to taxation generally at the rate of 15%.

There are no maximum or minimum limits on the investment amount and there is no different treatment based on the origin of the investment. Activities that require a certain minimum capital and net worth (such as those of financial institutions) have the same requirements for both domestic and international investments.

There are also no maximum or minimum terms for the investment. Effectively, investments may be made on one day and repatriated on the next day or remain in the country for decades.

Foreign investors are free to use any of the available company forms that can be used by local investors and

there is no restriction to foreign access on capital markets. The rules are the same both for local and international entities.

In the event of serious balance of payment deficits, the Central Bank may limit profit remittances and prohibit remittances as capital repatriation for a limited period of time. This limitation, however, has never been applied, even during Brazil's most difficult balance of payments problems.

3:3 Registration of Investments

Brazil has adopted a system of registering all foreign capital invested in the country. Registration takes place through the Central Bank. However, it is to be noted that some investments in specific areas are made through certain mechanisms whereby other governmental agencies are involved in the registration.

Applicable law defines foreign capital as follows:

> The goods, machinery and equipment entering Brazil with no initial foreign exchange outlay and are to be utilized in the production of goods and services, as well as the financial or monetary resources introduced into the country for investment in economic activities, are to be considered foreign capital, with the condition that, in both cases, they pertain to individuals or legal entities resident, domiciled or with head offices abroad.[1]

The definition encompasses goods, machinery and equipment as well as financial or monetary funds. Actually, the word "goods" [*bens*] under Brazilian law is very broad and includes everything that may be acquired by an individual or legal entities such as energy, intellectual rights, equipment and funds, to name a few.

In order to be considered as "foreign capital," the goods must: (i) be utilized for economic purposes (production of goods and/or services); and (ii) belong to individuals or legal entities resident, domiciled or with head offices abroad.

Consequently, goods or funds that enter the country, but are not destined for the production of goods and/or services, are not considered "foreign capital" and cannot be registered. However, a certain good may be considered foreign capital even though it is not inherently destined to produce goods and/or services. For example, a leisure boat destined to be rented by a local company controlled by foreign capital is a good destined to produce a certain service, and the capital of the company can and must be registered as foreign investment.

Also, a foreign investment will be "nationalized" and the foreign capital registration will be cancelled if title thereto is transferred to an individual or legal entity resident, domiciled or with head office in Brazil.

As mentioned above, the Central Bank is the governmental agency responsible for: (i) managing the day-to-day control over foreign capital flow in and out of Brazil (equity capital and loans under any form); (ii) setting forth the administrative rules and regulations for registering investments, based on the rules laid down by the Council; and (iii) monitoring foreign currency remittances.

When monitoring and registering foreign investments, the Central Bank does not have the authority to evaluate the quality of any given foreign investment, whether such an investment is in the interest of the national economy or its effect on the economy. This means that the Central Bank cannot decide whether or not a certain investment is to be registered or accepted. If the investor complies with the applicable rules, the investment will be registered and the investor will be entitled to the applicable rights and must comply with the related obligations.

Please note that, as explained below, in the case of investments in financial institutions, the Central Bank will evaluate whether a new investment in the financial area is of interest to the domestic economy.

3:4 Characteristics of Registration

Registration of foreign investments shall be made within thirty (30) days of its entry into the country and it is not subject to the payment of any fees or prerequisites.

The registration of profit reinvestments shall be carried out within the same period, as from the date on which the respective accounting record is approved by the competent company body.

According to article 5 of Central Bank Ruling (Circular) 2,997/00, the registration of foreign capital shall take place in the foreign currency that was effectively remitted to Brazil.

In the case of reinvestment of profits, they shall be registered simultaneously in the domestic currency and in that of the country to which the profits could have been remitted. In order to determine the amount in foreign currency, the profits are converted at the average exchange rate in force during the period in which the reinvestment in fact took place.

Should the foreign invested capital be represented by physical assets, such as a machine, the registration shall be made at their value in the country of origin or, when sufficient proof of this value is absent, at the values registered in the accounting records of the company receiving the capital or according to the evaluation criterion which shall be determined in the appropriate regulations.

3:5 Registering the Investment

In the past, the Central Bank required the submission of various documents to register investments. Registra-

tion was evidenced by a physical document issued by the Central Bank and called the "Certificate of Registration." Presentation of the Certificate of Registration was required for the invested company to remit profits from Brazil and to repatriate capital. In July of 2000, the time lag for issuance of the Certificate of Registration for foreign direct investment capital transferred into Brazil was anywhere from a year-and-a-half to two years after a registration request was filed with the branch office in São Paulo.

Fortunately, the system has undergone major changes. Presently the company receiving the investment or its representatives may register it electronically, through a computer system managed by the Central Bank called SISBACEN. Under the new system, registrations can be made in one day, provided that the company possesses the required documents.

There is no need to submit any document to the Central Bank to register the investment. However, during a 5-year term from the date of registration, the invested company may be required to submit the related documents for the Central Bank to review at any time.

3:6 Failure to Register

If an investment is not registered, the investor would be unable to repatriate the investment and to remit profits out of Brazil.

Additionally, the Central Bank is entitled to charge a fine for failure to register to a Brazilian entity that receives foreign investment. This fine is established by Council Resolution 2883/01 and the amount of the fine may reach up to R$ 50,000.00.

In the past there were situations where a foreign investor was the holder of the Brazilian subsidiary's shares, but, for some reason, the payment made for the acquisition of these shares was not viewed by the Central Bank as entitled to foreign capital registration. The portion of the shares that was not registered by the Central Bank is called "tainted capital."

Historically, the reasons behind "tainted capital" were, among others, the following:

(a) conversion of debts registered at the Central Bank with discount;

(b) reinvestments of profits related to the portion of the capital stock originally not registered by the Central Bank;

(c) changes in the criteria adopted in the past by the Central Bank in connection with the net value of the shares and not their market value for purposes of registration; and

(d) corporate reorganizations involving non-registered portions of the capital (spinoff, mergers, etc.).

In light of these facts, there used to be many cases where the foreign investor acquired shares or quotas of a given Brazilian entity, but was not entitled to have the quotas or shares registered with the Central Bank either in foreign or domestic currency. As a consequence, the failure to register this portion of the shares held by the foreign investor used to result in the inability of the Brazilian entity to remit abroad the results of the invested capital attributable to those shares, such as profits and dividends, interest on equity, repatriation out of a capital reduction or the proceeds of a sale of the shares. This situation caused may problems for foreign investors.

However, in 2006, the government enacted Law 11.371/06, which created the possibility of foreign investors facing the situation stated above, to have their shares duly registered with the Central Bank in Brazilian currency. The conditions required to allow registration are as follows: (i) the amount related to the tainted portion of the capital stock must be booked by the Brazilian entity as paid in; (ii) this amount must have been booked according to the accounting regulation by December 31, 2004; and (iii) Brazilian tax legislation must have been complied with.

According to Law 11.371/06, every Brazilian entity holding a portion of tainted capital for any reason had to register the portion of non-registered capital by following specific procedures made available by the Central Bank on SISBACEN. This registration is actually an obligation of the Brazilian entity, subject to penalties if the registration does not take place.

The deadline for registering "tainted" capital booked up to December 31, 2006 was June 30, 2007. From that date on, if any "tainted" capital is generated in the future, the Brazilian entity must register it in Brazilian currency with the Central Bank during the next calendar year.

After the registration is concluded, the portion of the capital that was considered "tainted" will be added to the total number of quotas/shares held by the foreign investor, and the amount will be denominated only in Brazilian currency (Reais). There will not be any parity in foreign currency.

The lack of a corresponding amount in foreign currency for a determined portion of the registered capital has no impact on remittances of funds abroad to the foreign investor, such as profits, dividends, resources available due to capital reduction, interest on equity, sale of the investment, and so on. The procedure described above will guarantee that the total amount intended to be sent abroad in the future can be freely sent.

The only relevant consequence is that the acquisition cost for these quotas/shares will be denominated in Brazilian currency with no parity in foreign currency. Therefore, if, in the future, the foreign participation is sold by the foreign investor to any third party, the acquisition

cost for purposes of calculating the capital gain will have a positive or negative impact, depending on the exchange variation. The cost of the investment is relevant to determine the existence of capital gain, which is subject to taxation.

3:7 Repatriation of Capital

As mentioned above, as long as the foreign capital is duly registered with the Central Bank, it may be freely repatriated to the foreign investor. Aside from the situations mentioned in the item above (lack of registration), the only other situation where the foreign investor might be prevented from receiving back its invested capital is the booking of losses by the Brazilian subsidiary.

Repatriation of the investment within the amount stated in the foreign capital registration may be made free of any tax or authorization. In principle, any excess over the registered amount will be treated as a capital gain, subject to a 15% withholding tax (this rate is increased to 25% in the case of investors residing in tax havens) and prior (and discretionary) approval of the Central Bank.

In accordance with Central Bank practices, whenever full or partial repatriation of capital is sought upon the sale of an investment, the book value of the foreign investment (based on the financial statements of the company which received the investment) will be compared against the amount registered in foreign currency. If the book value is lower than the registered foreign investment, the remittance abroad of any amount exceeding the book value may be understood by the Central Bank as a capital gain, and, as such, subject to tax.

3:8 Restrictions on Foreign Ownership of Companies

While a foreign investor may have unrestricted access to almost all areas of the Brazilian economy, according to the Brazilian Federal Constitution participation of foreign capital in the following activities is prohibited:

(i) development of activities involving nuclear energy. The Brazilian federal government has the monopoly of exploring, exploiting, processing, industrializing and selling radioactive minerals and their by-products. This restriction applies both to Brazilian and foreign private investment (Federal Constitution, Article 21, item XXIII);

(ii) health services. The Federal Constitution establishes that direct or indirect access of foreign capital to health services is prohibited, unless authorized by law (Federal Constitution, Article 199, Paragraph 3). A law authorizing this type of participation has not yet been issued, save for services related to family planning. Law 9263/96 contemplates the participation of foreign capital in these activities (Article 7).

(iii) businesses located on international borders;

(iv) post office services. These services can only be rendered by the federal government, and the restriction applies both to Brazilian and foreign private investment (Federal Constitution, Article 21, item X). The delivery of documents and objects that are not defined as correspondence is allowed.

In addition, there are still some restrictions to foreign capital investment in the following areas:

1. Ownership and management of newspapers, magazines, radio and television stations and other periodicals. According to an amendment to the Brazilian Constitution, at least 70% of the total capital and of the voting capital of newspapers, magazines and other periodicals must belong directly or indirectly to a Brazilian resident. Therefore, foreign investment is limited to 30% of the total and voting capital of these entities (Federal Constitution, Article 222, Paragraph One).

2. Financial institutions.

   Financial institutions need formal authorization from the Brazilian government to receive foreign direct investment. In the event that this investment represents an increase of the foreign capital in the financial sector, a Presidential Decree or an international treaty is required.

   The rules for obtaining such authorization are set forth in National Monetary Council Resolution nº 3,040 of 2002 and Central Bank Ruling (*Circular*) nº 3,317 of 2006. According to these rules, there is a list of data, documents and procedures that an interested party must follow and present to the Central Bank in order to obtain the intended authorization.

3. Airlines with concessions for domestic flight routes. Foreign capital participation with voting rights is limited to 20% in these companies. (Law No. 7,565 dated November 19, 1986, Article 181, item II).

III. Investments in Capital Markets

In accordance with Council Resolution 2.689/00, any foreign investor, either an individual or legal entity, may invest in Brazilian financial and capital markets, using the same financial products available to Brazilian investors.

Foreign investments in Brazil's capital markets may be made by subscribing and purchasing interest in investment companies that are duly authorized and specifically established for this purpose. These investments may be made through three forms of funding: investment societies, investment funds and diversified portfolio of shares.

Another method for investing in the Brazilian stock market is through depositary receipts, which allow one to purchase abroad certificates of shares in Brazilian public capital companies. These securities are issued overseas when a foreign investor buys the shares of a Brazilian company and releases them for custody in a local bank, which then grants the depositing bank abroad the right to issue the corresponding depositary receipts in foreign currency.

Depending on the investment structure adopted by the investor, it may be necessary to appoint a representative in Brazil who will be responsible for providing the required registration with the Central Bank and the Commission. If the representative is an individual or a non-financial company, the investor must appoint a financial institution that will be jointly responsible for his or her obligations.

IV. Foreign Credit Transactions

Foreign credits are regulated by Council Resolution 2,770, dated August 30, 2000, and by Central Bank Circular 3,027, dated February 22, 2001.

Loans and leases of any type must also be registered with the Central Bank, as well as through SISBACEN. However, while foreign direct equity investments must be registered with the Central Bank within thirty (30) days after the inflow of funds or receipt of assets, the registration of foreign loans and leases must be made before the inflow of funds. The basic financial terms and conditions are submitted to the Central Bank through a computer data processing system known as "ROF," which stands for Registry of Financial Operations.

Whenever the basic terms and conditions of an envisaged transaction are presented to the Central Bank, it has the option to block the proposed credit transaction if the interest rate or some other condition is considered different from those of the market.

After disbursement is made, the information is also conveyed to the Central Bank and is registered in the same ROF system. This information permits the repayment of the credit transaction and the remittance of interest thereupon.

Currently, prepayments and extension of maturity dates of foreign credit transactions are allowed by the Central Bank. These adjustments must be reflected in the registration of the transaction, through SISBACEN. The necessary document for the registration of a foreign credit transaction is either a statement signed by the parties and/or a proper agreement.

The terms and conditions of a credit transaction may be freely amended by the parties at any time and these amendments must be reflected into the Central Bank registration accordingly, as to enable the respective outflow of funds upon maturity.

Finally, credit transactions entered into between foreign creditors and local borrowers with a term of shorter than thirty (30) days are subject to progressive taxation, so they may be less interesting.

3:9 Conversion of Foreign Credits into Direct Investment

In order to convert foreign credits into equity investments, the parties must execute a statement whereby they agree on the capitalization of the credits, stating the amount to be converted. Based on this document, the Brazilian debtor must register the capitalization of the credits with SISBACEN. Once this registration is concluded, the Brazilian debtor must request that a commercial bank provide for the execution of simultaneous (symbolic) foreign exchange agreements, which will represent an outflow of funds (as if the credits were being repaid to the creditor) and an inflow of funds (as if the foreign investor were sending funds to the Brazilian entity as paying in capital).

The next step following the execution of the symbolic foreign exchange agreements is to increase the capital stock of the Brazilian entity in the amount shown by the exchange agreements in the name of the foreign investor.

The final step is registration of the new foreign capital investment in the name of the foreign investor with the Central Bank.

V. Central Bank Census on Foreign Capital in Brazil

Every five years, the Central Bank conducts a foreign capital census. Through the census, the Central Bank obtains the figures related to foreign capital held by non-resident investors (legal entities and individuals). The last foreign capital census took place in 2006, based on the foreign capital existing on December 31, 2005.

Normally, companies required to submit information to the census are those located and headquartered in Brazil which, on a given date:

(i) have had corporate interest held directly or indirectly by non-residents of at least 10% of the voting shares or quotas, or 20% of the total capital stock;

(ii) owe debts to foreign residents, independent of the currency, and these debts have been registered with the Central Bank, and independent of these debts being in fact eligible for registration with the Central Bank, the principal outstanding balance of which was equal or superior to the equivalent of R$ 100,000.00 (approximately U.S. $41,000.00).

Failure to submit the required information by the required deadlines to the Central Bank, or the presentation of false, incomplete, or incorrect information, can result in fines.

VI. Foreign Exchange Market

Brazilian foreign exchange rules state that all foreign exchange transactions must be channeled through entities duly authorized by the Central Bank, such as commercial banks. Savings banks, credit, financing and investment societies, foreign exchange or securities and stocks brokerage societies, securities and stock dealing societies can only perform specific transactions related to foreign exchange. Tourism agencies can be authorized by the Central Bank to negotiate with limited amounts of foreign currencies in cash and/or traveler's checks.

Previously, there were two official exchange rate markets in Brazil (the commercial and floating rate markets), both of which were regulated and monitored by the Central Bank. The choice of one market or another was mandatory and depended on the nature of the remittance of funds to be made.

In March of 2005, the Central Bank unified the markets, extinguishing the differences between them and enacting more flexible exchange rules. Subsequently, remittances of funds in and out of Brazil must now flow through one single exchange market regardless of the nature of the payments.

Also pursuant to these more flexible rules, it is possible for any legal entity or individual to buy foreign currency without limitation to the amount of this purchase. However, there are some practical restrictions to the full observance of this concept. Additionally, foreign investments from Brazil are permitted, whether in the form of direct investments, loans repatriation or investments in the foreign financial and capital markets, without restriction to the repatriation of these funds to Brazil.

Foreign entities or non-resident individuals are allowed to open and maintain accounts denominated in Brazilian currency in authorized Brazilian banks. Accounts denominated in foreign currencies are permitted to residents and non-residents only in a few specific cases.

As mentioned above, from 2005 on, the Brazilian foreign exchange market has experienced several important changes, moving toward simplification and deregulation. Until 2005, transfers abroad were limited to transactions listed in specific Central Bank regulations. Assumptions of foreign obligations that could result in requests for an outflow of funds were subject to advance approval by the Central Bank, as were those transactions that were not clearly or expressly dealt by the exchange regulation. Furthermore, the regulation established that the procedures to be observed required specific documentation for each transaction.

In March of 2005, some changes were introduced to the foreign exchange regulation, softening and reducing the regulatory burden through the establishment of free negotiation between agents authorized to deal in the foreign exchange market and their clients. This reduction on the regulatory burden applied to any nature of transactions, with no limitation on amounts and with no requirement for Central Bank approval. In theory all foreign exchange transactions are permitted as long as the legal purpose is observed and the responsibilities defined in the appropriate documentation.

There is no restriction against receiving or sending foreign currency to and from other countries. These transfers may be made directly through an authorized bank without advance approval of the Central Bank. It falls to the bank to determine if the envisaged transaction can be performed or not.

In the case of exports and imports, Law No. 11,371/06 has simplified the procedures applicable to export receipts and import payments. According to this law, and further Council regulation based upon it, Brazilian exporters are allowed to maintain the totality (100%) of their export revenues in other countries. These revenues may be utilized for payment of the exporter's foreign obligations without advance authorization of the Central Bank. They may additionally be used to invest in any financial or capital product offered abroad. However, Law 11, 371/06 forbids the granting of loans with the proceeds of these export transactions.

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Endnote

1. Law no. 4,131, of September 3, 1962, as amended, art. 1 (Braz.).

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Brazilian Trade Remedies: Post-Economic Slowdown

In times of economic crisis, countries tend to protect themselves through the imposition of trade remedy measures such as anti-dumping, safeguards and countervailing measures. Brazil, as an important player in the international trade field, has adopted these tools, especially anti-dumping measures, to protect its domestic industry. Should we expect an opposite trend for the following the post-economic slowdown?

According to the WTO Report,[1] the number of new anti-dumping investigations increased by 27 per cent in 2008 compared to 2007. In the second half of 2008, Brazil was second in terms of anti-dumping measures, with 16 investigations initiated, behind only India.

To date, there are several ongoing investigations in Brazil, 26 of which concern anti-dumping and 2 investigations concerning safeguards. In 2009, the Brazilian Government initiated 9 anti-dumping and 1 safeguard

investigation. Exports from United States of America, the People's Republic of China, India, Bangladesh, Argentina, Austria, Taiwan, Indonesia, Thailand, Peru and Ecuador were all subjects of these investigations and the variety of products ranged from tires, footwear, polypropylene-PP, glass ampoules and bottles, polyethylene therephthalate, flexible magnets, barium carbonate, among other products. The safeguard investigations pertain to imports of dried coconuts and recorded optical media.

The use of anti-dumping measures by Brazilian domestic producers appears to occur because it includes a balance of both technical and political aspects, which generates less resistance from the target countries. In this sense, macro-economic factors may also be influencing the rise in new investigations.

It is possible to see a correlation between the frequent use of anti-dumping measures with the following factors: (i) it is an instrument allowed under WTO rules, provided that it meets certain requirements; (ii) it is private in nature, since a company or a group of companies are entitled to request the initiation of an investigation; and (iii) selectivity, since the investigation specifies the country and the product under investigation.

Exporters to the United States and European markets displaced by the effects of the current economic recession will seek other markets to minimize their losses. Important consumer markets like Brazil may be obvious targets for these trade flows, as the Brazilian economy is expected to grow in the forthcoming years. Likewise, the Brazilian currency valuation has also been contributing to an increase in imports of certain products. Given all of these factors, even in a post-economic slowdown, the initiation of anti-dumping measures (and other trade remedy measures) by several countries will likely continue, thus continuing to affect global trade.

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Endnote

1. See document WT/TPR/OV/W/1 at www.wto.org.

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One Step Forward for the Colombian Derivatives Market

Colombia has recently passed Law 1328 of 2009 ("Law 1328"), which, among others, generally provides for Early Termination and Close-out Netting in respect of OTC derivatives. Under the prior regime: (i) provisions giving rise to Early Termination upon insolvency-like proceedings of a Colombian counterparty were deemed to be unenforceable; and (ii) enforceability of Close-out Netting provisions under the ISDA Master Agreement would vary depending on whether or not the counterparty was subject to insolvency-like proceedings.

Today, such provisions would be enforceable even in the case of insolvency-like proceedings, if, at least, among others, one of the parties to the transaction is an entity subject to the supervision of the Superintendence of Finance or a so-called professional authorized foreign agent[1] under Colombian forex regulations.

Law 1328 also allows the Non-Defaulting Party to privately enforce guarantees received, to the extent that guarantees in cash or securities are liquidated at the prevailing market price and guarantees in assets other than cash or securities are liquidated at a fair market value. Posted collaterals will not be subject to claims, revocation, forfeiture, seizure, retention or other similar administrative or judicial measures. However, any pending amount after the collateral's liquidation will have to be claimed in the insolvency proceeding. The effectiveness of Law 1328 is subject to implementing legislation, most of which relates to certain registration requirements.

On the other hand, based on the ISDA Master Agreement, the Colombian Banking Association, with the advise of Brigard & Urrutia Abogados, has recently prepared and published a Local Master Agreement for OTC derivatives with the aim of providing the local industry with a model contract legally enforceable under Colombian law.

The Local Master Agreement reflects best practices in the local and international markets and contains certain elements recognized internationally that had not been implemented in Colombia until Law 1328 was issued. These include, Close-out Netting, Early Termination and, to a certain extent, some Cross Default Provisions. The Local Master Agreement was drafted based on the ISDA Master Agreement and the practical experience and recommendations from local industry participants, mainly a group of legal and financial officers and credit risk officers representing different financial entities, and Brigard & Urrutia Abogados.

The Local Master Agreement is organized in a fashion similar to the ISDA Master Agreement. It also contains some interpretation rules, representations and warrants, which have been drafted considering the counterparty's legal status (i.e., individuals, companies and entities subject to the supervision of the Superintendence of Finance). The Local Master Agreement contains a particularly detailed procedure in respect to settlement calculations, indemnities and compensation amounts in cases of Early Termination for Events of Default and Termination. To a certain point, Netting provisions allow parties to offset and combine accounts within negotiated transactions.

Recouponing, as well as collateral and guarantees, are also regulated and must be agreed upon and reviewed in the Schedule according to the counterparties' preferences. This is done on a case-by-case basis.

These recent developments are expected to greatly contribute to the advancement and sophistication of the Colombian derivatives and financial markets and mark an important step toward the standardization and enlargement of the local derivatives market at a global level.

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Endnote

1. A foreign entity will be deemed to be professional authorized foreign agent when it has entered into derivative transactions in the calendar year immediately preceding the date of the proposed transaction for a nominal amount exceeding one billion dollars of the United States of America (U.S. $1,000,000,000.00).

* * *

Israel: Country Report

Israel is a small country, about the size of Belgium or New Jersey. Located on the eastern shore of the Mediterranean Sea, Israel is at the crossroads of Europe, Asia and Africa, and maintains important political and economic ties with North America. Although located in the Middle East, Israel is culturally a European country with a democratically elected government and a legal system based on Anglo-American traditions.

According to Israel's Central Bureau of Statistics,[1] the country's population stood at 7.4 million at the end of 2008, eight-and-a-half times larger than on the eve of Independence in 1948, when the population was just over 800,000. During the past 60 years, 4.6 million births were recorded, and "Sabras," native-born Israelis, now constitute 66% of the Jewish population compared with 35% when the country was established.

The Israeli economy can be characterised as resilient, globally oriented and based heavily on foreign trade, especially in such high added-value areas as information technology, biotechnology and aviation. Total industrial exports, exclusive of diamonds and defense products, exceeded $37 billion in 2007, which is more than $5,000 per capita. Exports of services bring the total to more than $58 billion. Much of this export success is due to a national commitment to research and development: Israel spends about $1,100 per capita annually on civilian R&D, 20 percent more than the United States and 50 percent more than OECD countries. GDP per capita was about $24,000 in 2007, five percent higher than in 2005. Inflation, once a major issue, is now nonexistent. Israel's economy is larger than those of all its immediate neighbors combined and the number of its companies traded on NASDAQ ranks only behind the United States and Canada.

The Tel Aviv Stock Exchange ("TASE"), now in its eighth decade of trading, saw its TA-100 Index rise by 200 percent during 2003-2005, with an additional rise of 22 percent in 2006. A further rise of 37 percent in 2007 was offset in late 2008 by a 50 percent decline that paralleled sharp drops in markets around the world. TASE members, beyond local securities dealers, include Citibank, UBS, HSBC, Merrill Lynch and Deutsche Bank, to name a few.

The health of the Israeli economy is reflected in its ability to draw foreign investment: In 2006, inward direct investment reached $14.2 billion. Foreign investors are encouraged by reports such as the World Economic Forum's Global Competitiveness Index which ranked Israel in 23rd place overall worldwide, in sixth place for excellence of national research institutes, fifth place for patenting per capita, eighth place for access to venture capital and 14th place for access to equity finance for 2008 to 2009.

Many Israeli companies have become world leaders in their fields, including Check Point Software, Comverse Technology, Elbit Systems and Teva Pharmaceuticals. Technologies such as voice-over-Internet-protocol and instant messaging were developed in Israel.

A host of multinational technology firms have established R&D centers or manufacturing facilities in Israel. These include Intel, Google, Microsoft, Motorola, Toshiba and Sun Microsystems. Lucent, Cisco, Ericsson, Siemens, Hewlett-Packard and 3-Com also maintain a local presence via equity investments in Israeli companies.

Israel is integrated into the global economy, by way of free trade area agreements with the NAFTA countries [United States, Canada, Mexico], The European Union, EFTA—The European Free Trade Association, Jordan and Turkey. Israel also cooperates with Egypt and Jordan through Qualified Industrial Zone Agreements with the United States, giving co-produced goods preferential access to U.S. markets.

Banking

Israel maintains a modern computerized banking system. Most banks provide private banking services and maintain special centers for tourists and foreign investors. The five large Israeli banks have branches in Europe and the United States and representative offices in other countries. Israeli financial institutions have weathered the world financial crisis well. This is because they had little exposure to the "toxic" securities that caused the failure of many other banks. Moreover, Israeli banks have always been under close government supervision and

are required to set stringent conditions for mortgage approvals.

Taxation

The Israeli tax system is based on global taxation, which determines tax liability for an Israeli resident, whether the income is accrued or received in Israel or abroad. A "mini-reform," effective as of January 2006, deals with taxation of trusts, underlying companies, pre-rulings, participation exemptions, exemption for foreign residents from tax on capital gains from the sale of shares, establishment of real estate investment trusts in Israel, and more. The mini-reform also decreased the tax rates on individuals and companies on certain types of income, including a 20% or 25% rate on capital gains, interest and dividends.

Companies in Israel are generally subject to company tax on their profits at the rate of 26% on taxable income (to be reduced to 25% in 2010, 24% in 2011, 23% in 2012, 22% in 2013, 21% in 2014, 20% in 2015 and 18% in 2016 and further).

Distributed profits after company tax are subject to dividend withholding tax at rates of 20% or 25% (starting January 1, 2006 the rate is 20% for a shareholder who is not considered a "substantial shares holder"). These rates apply both to foreign individuals and foreign companies (if the tax treaty does not determine a lower rate). In the case of a non-resident individual, interest income is generally liable to withholding tax of 15% (if it is not or only partially linked to the consumer price index) or 20% unless reduced by a tax treaty. Lower tax rates and other benefits are applicable under Israel's investment incentive legislation.

Regarding personal taxation**,** Israel imposes progressive tax at rates of up to 46% (to be reduced to 45% in 2010 and 2011, 44% in 2012, 43% in 2013, 42% in 2014, 41% in 2015 and 39% in 2016 and further). An individual will be taxed in 2009 by the higher tax rate on the portion of his yearly income that exceeds 454,680 NIS (approximately U.S. $120,000 in October 2009). Credits, deductions and exemptions are given based on residency, sex, number of children, disabilities and more.

New immigrants are granted generous exemptions. They are granted for a period of up to 10 years on income from almost every source located outside of Israel, whether from business, passive or capital gain.

Foreign Residents

Foreign residents (including certain types of trusts) enjoy a range of fiscal benefits such as the law for encouragement of capital investment, exemptions for trusts, participation exemption and more, all aimed to attract foreign investors. Foreign residents, will, in principle, continue to enjoy a range of exemptions that cover income from passive investments in Israeli banks. Although foreign residents will be subject (as they are in most Western countries) to tax on capital gains derived from Israeli assets, they will be exempt from taxes on gains from the sale of publicly traded equities and the sale of securities of both publicly traded and privately held Israeli companies. Certain conditions on these exemptions existed until December 2008; since that time, almost every foreign resident has enjoyed these exemptions.

Other Taxes

Value added tax (VAT) is generally levied on transactions conducted in Israel, as well as on transactions relating to assets or activities in Israel on imports. The standard rate of VAT in Israel is currently 16.5%, but exports are generally zero-rated. Special provisions apply to financial institutions and non-profit bodies.

Israel has no inheritance or gift tax. However, on the subsequent sale by the recipient of an asset which is assessable for capital gains tax, the asset cost (net of depreciation where applicable) and acquisition date of the testator or donor are taken into account in the computation of tax liability.

Double Taxation Relief

Israel is a party to 44 double taxation treaties. The foreign investor who takes advantage of double taxation treaties can often withdraw profits earned in Israel under favorable tax treatment.

Taxation of Trusts

On January 1, 2006, the Taxation of Trusts Law came into effect in Israel. This law defines four types of trusts.

A. **Trust of Israeli Residents:** This trust is taxable on its worldwide income according to Israeli law and according to the tax rates applicable to individuals.

B. **Foreign Settlor Trust:** This type of trust makes Israel attractive to foreign residents. Whether or not the trust is irrevocable, a foreign settlor trust is considered a foreign resident. The assets held by the trustee are viewed as assets held by an individual foreign resident and the trust's income is viewed as the income of an individual foreign resident. If the trust profits are not derived from sources in Israel, they are not taxable in Israel and there are no reporting obligations in Israel.

C. **Foreign Resident Beneficiary Trust:** Such a trust may be established by an Israeli resident for a foreign resident beneficiary. In such a trust, assets and the income derived therefrom are taken out of the Israeli tax network.

D. Trust Established by Will: A trust established by a will of a testator who is an Israeli resident at the time of death will generally be taxed as a trust of Israeli resident or as a foreign resident beneficiary trust, depending on the residency of its beneficiaries.

E. Underlying Company: The Taxation and Trusts law provides for the establishment of an "underlying company" within Israel or abroad. The underlying company is used for the legal separation between the trustee's personal assets and the trust's assets. Before the new Taxation and Trusts Law was legislated, every Israeli trustee holding such a company would, through the "management and control" test, cause it to be regarded as an Israeli company resident in Israel and thereby subject to corporate tax and reporting requirements in Israel. Now the underlying company is regarded as a "pass through entity" and the management and control test is no longer relevant. The Israeli Tax Authority will "ignore" the company and treat the assets and the income derived therefrom as if they were held directly by the trustee.

Conclusion

Israel is a small country with a strong economy, a modern banking system, an educated population and laws aimed at attracting foreign investors. The best evidence of its economic strength is that during the current global financial crisis, not a single Israeli financial institution declared bankruptcy. The Israeli tax system has undergone a substantial overhaul in the past few years, including the taxation of trusts. The Taxation of Trusts Law is intended to close certain lacunae with respect to Israeli residents while maintaining Israel's policy of providing certain benefits to foreign residents. Further, the underlying company may be advantageous to certain foreign residents as an investment vehicle for income derived from sources outside Israel. Israel may be the right venue for certain foreign residents to form their financial planning center.

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Endnote

1. Sources for all data in this article are the Central Bureau of Statistics, The Israel Export & International Cooperation Institute, the Tel Aviv Stock Exchange or the CIA World Factbook.

* * *

Mauritius: Latest Developments

D. Naiken Gopalla

Mauritius is attractive to investors for many reasons, including its ease of doing business, state of art communication platform and its political stability among all African countries.

Mauritius is the only offshore financial services centre that is a member of all the major African regional organizations, such as the African Union, South African Development Community and the Common Market for Eastern and Southern Africa. It is also a signatory to more than 15 multilateral conventions relating to Africa.

Mauritius membership in these regional organizations, and major African conventions, makes Mauritius the best offshore financial service centre for establishing any Africa fund, especially in regard to treatment of the investment. World Bank ranking on Mauritius' business environment and economic performance is testimony to its competencies.

A. Tax Planning

Mauritius has a network of 32 double taxation treaties (DTA) which attract foreign investors and hedge funds investors. The DTAs are mainly useful for outbound and inbound investment across Asia and Africa.

The treaty allows an attractive form of tax planning that is not open to tax havens. It allows protection from capital gains taxation, from withholding taxes and from taxation on basis of permanent establishment.

It is worth noting that following the recent G-20 summit and the recent statement of U.S. authorities on the use of tax havens, Mauritius was not on the OECD Blacklist 2009 nor on the blacklist contained in the draft U.S. Stop Tax Haven Abuse Bill. This is partly due to Mauritius having rigid Anti-Money Laundering Laws in place, clearly defined exchange of information clauses in all its DTA, Memorandum of Understanding signed with worldwide financial regulators, and OECD and International Securities Commission's (IOSCO) principles being followed and clearly implemented in its offshore legislations.

B. Country-Specific Relationships

i) India

Despite criticism from lobbyists against the India-Mauritius DTA and unless both the Government of India and the Mauritian Government renegotiate the treaty, Mauritius is still the best jurisdiction for foreign direct investment in India. Notably, the Singapore-India "*limitation of benefits*" treaty is dependent on the fact that the Mauritius-India treaty is not renegotiated.

The recent *E*Trade* ruling, which involved a wholly owned Mauritian company subsidiary investing in India, has created some confusion among investors. In this regard, it is worth pointing out that although the ruling is binding on the applicant, it is not binding on third parties as it is not a final judgment of an Indian Court. The Mauritius-India Treaty has been tried and tested several times in court battles and the Indian Court has always handed down careful and detailed tax judgments in justifying the use of the Mauritius-India Treaty.

It is often said that Cyprus is a preferred debt route into India; however, prudent investors always consider other factors such as political stability of this region, cost of provision of directorship in Cyprus and whether or not the Cyprus-India treaty has been tried in any Court or whether the term "residence" is clearly defined therein.

On the other hand, Mauritius is also a magnet route for outward investment from India into the UK, Belgium and Switzerland through the use of the India-Mauritius and Mauritius-Luxembourg treaty. Currently, there is a growing interest from Indian investors in using a Mauritius entity to invest in UK start-up companies and in developing joint venture business or legal outsourcing centers.

ii) China

Mauritius shares a privileged relationship with China. This is due to strong historical, political and cultural ties, which have led to a sizeable population of qualified Mauritian Chinese business professionals as well as a coherent exchange of information between the two countries.

The China-Mauritius DTA and recent protocol is a useful tax planning tool for intermediate holding companies looking for advantageous capital gains and reduced tax on dividends. Subject to fulfilling some percentage ownership requirements, the DTA contains an attractive capital gains tax exemption clause. However, tax exemption will not apply if the Chinese company, whose shares are being disposed of, holds assets primarily of real estate or immoveable property in China.

On the outbound investment level, Chinese investors will use Mauritius' entities as a platform for investment into Africa mainly because of Mauritius' infrastructure, its political stability, communication system and, above all, its network of DTAs with leading African States.

iii) South Africa

Mauritius' next door neighbour, South Africa, is also well regarded in cross-border project financing and debt financing deals.

The recent Mauritius-South Africa DTA changes (2008-2009) are appealing to international banks that have a Mauritian Subsidiary or to a large foreign parent company that plans to use a Mauritius Global Business Company to provide debt financing to a South African company as the withholding tax on interest, subject to fulfilling the requirements, is nil. The DTA makes provision for capital gains tax exemption and lessens the burden on dividend withholding tax. A Mauritius Global Business limited life company investment holding vehicle is very attractive for UK investors investing in South Africa's pharmaceutical industry and health insurance.

C. Islamic Finance

During the first quarter of 2009, Mauritius welcomed the launch of new Islamic financial (*sharia-compliant)* products and noticed an expansion in its Islamic Banking sector. Islamic finance represents an attractive alternative to conventional financial products. Legislation and guidelines have been amended to adapt to these new products and Mauritius is already witnessing a growing interest from Middle Eastern investors and also notably from large European institutional investors.

D. Foreign Direct Investment in Mauritius

Besides being used as a tax planning route, Mauritius is also attracting foreign direct investment in its medical sector, cross-border logistics/transportation system, business process outsourcing, hedge funds management/accounting and administration and real estate development on breathtaking altitudes.

E. Legal Update

The Mauritius Attorney General's Office, in collaboration with the Mauritius Financial Services Commission, have been busy updating, amending and introducing new laws and regulations to adjust Mauritius' offshore laws to current international trends. For example;

i) **Securities Regulations on Global Funds**
After scoring excellent marks from the OECD and a favourable rating by the World Bank, and following the introduction of new securities regulations, the Mauritius route to set up fund structures (also known as collective investment schemes) has witnessed a sudden rise. The new securities regulations brought confidence among investors to use Mauritius for fund domiciliation. These regulations brought in new categories of funds aimed at expert and sophisticated investors and streamlined licensing and regulatory approval procedures.

ii) **Insolvency Law and Cross Border Insolvency**
The recent enactment of an Insolvency Act takes into consideration recommendations from international organizations and seeks to amend and consolidate the law relating to insolvency of companies, as well as providing for a more streamlined process on the distribution of assets. This new Act

is widely believed to have significantly improved the current insolvency regime in Mauritius and pertinent issues such as cross-border insolvency, the ladder of priorities, netting arrangements in financial contracts have been addressed.

iii) **International Arbitration Center for Africa**
Mauritius has been recommended by International Arbitration Bodies as a jurisdiction of choice for international arbitration across Africa. Recently enacted, the International Arbitration Act 2008 is modeled on the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law in 1985, and as amended by the UNCITRAL in 2006. The new Arbitration Act, together with a Mauritius hybrid legal system, represents a major breakthrough and offers features, solutions, and a framework to global businesses that is unique in the African region.

In times of uncertainty, investors will be cautious with their investment and in this climate, investing through a treaty-based jurisdiction will prove to be a safer destination.

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Arbitration "Alerts" from India
Three Important Court Decisions

A good arbitration agreement is one which minimizes complications when a dispute arises. The importance of a well-drafted arbitration clause, especially with regard to India, cannot be emphasized enough. Recent Indian judgments have reinforced the need for a precise comprehensive arbitration clause that, among other things, clearly specifies the laws applicable to the arbitration and the procedures for appointing arbitrators.

International Commercial Arbitration—Appointment of Arbitrator

The Supreme Court of India recently examined whether it had the power to appoint an arbitrator in a commercial dispute where the contract was not governed by Indian law but the Arbitration and Conciliation Act, 1996 (the "Arbitration Act") was not specifically excluded.[1] The Chief Justice of India ruled that unless the Arbitration Act is specifically excluded by agreement or by implication, the provisions of Part I of the Arbitration Act apply to international commercial arbitrations, even if the contract is governed by foreign law.[2]

In 2004, an Indian company, Citation Infowares Ltd. ("Citation"), entered into an agreement in India with a U.S. company, Equinox Corporation. This agreement was replaced by a new agreement in January 2007, which was also executed in India. Both agreements contained a dispute resolution clause, but the second agreement provided that the agreement.

> *shall be governed by and interpreted in accordance with the laws of California, USA and matters of dispute, if any, relating to this agreement or its subject matter shall be referred for arbitration to a mutually agreed arbitrator.*

Equinox did not appoint an arbitrator within the 30-day period as required, under Section 11(5) of the Arbitration Act, and Citation then petitioned the Supreme Court of India for the appointment of an arbitrator.

The Supreme Court of India observed that although the parties had chosen Californian law as the governing law, there was no agreement with respect to the law governing the procedure for appointment of an arbitrator or a choice of forum clause. The Supreme Court of India further observed that one of the parties was an Indian entity, and the obligations under the contract were to be fulfilled in India. In view of this, the Supreme Court of India did not find an implied exclusion of the Arbitration Act. Therefore, the Supreme Court of India went on to appoint an arbitrator in the matter. This judgment reaffirms that if parties in an international commercial transaction wish to exclude the provisions of the Arbitration Act, they should do so in express terms.

Jurisdiction of Indian Courts in International Commercial Arbitration

In another recent decision, *Max India Limited v. General Binding Corporation*, a Division Bench of the Delhi High Court rejected the appellant's plea to arbitrate pursuant to the Arbitration Act since the agreement between the parties provided that disputes are to be resolved by arbitration in Singapore, pursuant to the rules of the Singapore International Arbitration Centre ("SIAC") and for the Singapore courts to otherwise have jurisdiction.

More specifically, in this case an agreement was entered into in Delhi between General Binding Corporation ("General Binding"), a U.S. company, and Max India Limited ("Max") regarding the manufacture of synthetic films. A dispute arose between the parties and Max tried to prevent arbitration proceedings in Singapore and sought an injunction from the Delhi High Court. General Binding challenged the injunction on the grounds that the Delhi High Court had no jurisdiction in the matter. The Court decided in favor of General Binding and Max then filed an appeal with the Division Bench. The Division Bench found that the agreement provided for Singapore

as the governing law and stated that the Singapore courts would have jurisdiction over disputes arising out of the agreement. Further, the agreement specified that the arbitration would be conducted as per SIAC Rules in Singapore. In view of this, the Delhi High Court held that the arbitration clause evidently excluded the jurisdiction of Indian courts and therefore denied Max's appeal. The Delhi High Court relied on the Supreme Court of India's decision in *National Thermal Power Corporation* ((1992) 3 SCC 551) holding that in an international commercial arbitration agreement, the parties are at liberty to choose, expressly or by necessary implication, the proper or substantive law, as well as the applicable procedural law.

This decision clarifies that where all four elements (i.e., the law governing the contract, the rules governing the arbitration, the court's jurisdiction and the place of arbitration) are outside India and the parties' intention is unambiguous, this amounts to specific exclusion of the Indian courts' jurisdiction and the applicability of Part I of the Arbitration Act that provides for the procedural aspects of arbitration. The decision also confirms that it would be more appropriate for the party seeking relief to approach the court chosen by the parties in the contract instead of the Indian courts.

Incorporation of Arbitration Clause by Reference

Recently, the Supreme Court of India in the case of *MR Engineers and Contractors Pvt. Ltd. V. Som Datt Builders Ltd. (JT 2009 (9) SC 374)* was faced with the issue of whether an arbitration clause contained in a main contract can be incorporated by reference into a subcontract. In this case, the Supreme Court also discussed the applicability of the arbitration clause contained in the main contract to disputes arising in relation to the subcontract and laid down certain conditions for incorporation of the arbitration clause by reference.

The Public Works Department ("PWD") entered into a contract with Som Datt Builders Ltd. ("Som Datt") for improving certain highways. The main contract between PWD and Som Datt also included an arbitration clause. MR Engineers were the subcontractors of Som Datt and were assigned part of the job. The subcontract between Som Datt and MR Engineers was to be carried out as per the terms and conditions of the main contract. During the course of their work, MR Engineers carried out extra work on the instructions of PWD and asked Som Datt to make claim for payment from PWD. This claim, together with other claims of Som Datt against PWD, were referred to arbitration and the arbitrator made an award. MR Engineers maintained that the award passed in favor of Som Datt also covered the claims that MR Engineers had made through Som Datt. On these grounds, MR Engineers lodged a claim against Som Datt and as the claim was settled with PWD, MR Engineers sent a letter seeking reference of the disputes to arbitration.

MR Engineers filed an application under the Arbitration Act against Som Datt for failure to comply with the law. The application filed by MR Engineers was based on the general conditions forming part of the main contract between PWD and Som Datt, including the provisions for disputes to be referred to arbitration, which were incorporated into the subcontract between Som Datt and MR Engineers by reference, and that the subcontract was an agreement within the meaning of Section 7(5) of the Arbitration Act. However, the application was rejected on the grounds that the arbitration clause in the main contract was not incorporated by reference into the subcontract between Som Datt and MR Engineers. This decision was challenged before the Supreme Court of India.

The Supreme Court of India, based on the facts of the case, opined that there was no incorporation of the arbitration clause contained in the main contract into the subcontract between Som Datt and MR Engineers since the parties had never intended to incorporate it into the subcontract. The Court further held that the contract between PWD and Som Datt contained clauses specific to their deal and was wholly inappropriate and inapplicable in the context of a dispute between Som Datt and MR Engineers.

This decision lays down certain important principles with regard to the scope and intent of Section 7(5) of the Arbitration Act, requiring parties' conscious acceptance of an arbitration clause from another document as part of their contract before such arbitration clause can be read as part of the subsequent contract.

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Endnotes

1. Citation Infowares Ltd. v. Equinox Corporation 2009 (5) UJ 2066 (SC)].
2. Part I of the Arbitration Act provides for, among others things, the appointment of arbitrators.

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Italy Is Poised to Embrace Class Action Lawsuits

After a myriad of political debates and legislative amendments, it appears that Italy is finally ready to embrace its own version of class action lawsuits. The process began at the end of December 2007, when Law number 244/2007 introduced a specific statute (article 140-bis of Legislative Decree 206/2005, i.e., the Italian Consumer Code) providing for a form of class action on an opt-in basis.

The scope of the statute was limited. A collective action could be brought only in connection with (i) legal relationships arising out of standard form contracts, or as a result of (ii) torts (including securities and product liability cases), (iii) unlawful commercial practices, or (iv) anti-competitive behavior. Standing was limited to (i) consumer associations with a nationwide presence that were registered with the Ministry of Productive Activities, and (ii) any other consumer, investor group or association sufficiently representative of the collective interests as determined on a case-by-case basis by the court. These limitations were heavily debated in view of their lack of protection of all relevant parties' interests.

The entry into force of the statute has been stalled by subsequent amendments. However, on July 9, 2009, the Italian Parliament approved what appear to be the final amendments to the original version of the statute. As a result of the various amendments, these new rules are more in line with the U.S. class action model. In particular, the amended statute expanded standing to any member of a class of interested consumers. Therefore, the statute permits, however no longer requires, the use of a registered association. The amended statute also provides for collective action for damages arising from (i) contractual breaches, including breaches of standard form contracts, (ii) defective products, even in the absence of a direct contractual relationship, and (iii) unlawful commercial practices or anti-competitive behavior (article 140-bis, paragraph 2 of the Italian Consumer Code).

Another aspect of the Italian statute that is comparable to the U.S. regime is provided by paragraph 6 of article 140-bis of the Italian Consumer Code, whereby the court, in an initial hearing, decides on the admissibility of the class action. In fact, this provision resembles the certification process undertaken by the court pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure. As per the prerequisites for said admissibility, the judge will evaluate whether (i) the claim has a sufficient basis, (ii) there are no conflicts of interest among the plaintiffs, (iii) the terms under paragraph 2 of the statute are satisfied, and (iv) the claimant is able to adequately protect the interests of the class members. While there is some overlap between the regime provided by the Italian Consumer Code and the Federal Rules of Civil Procedure, the definition of conflicts of interest among plaintiffs under Italian law remains unclear. It still needs to be seen whether this prerequisite will hinder the admissibility of class action claims presented to the court.

In order to avoid frivolous claims, paragraph eight of article 140-bis provides that in the event of an inadmissible claim, the party who presented the claim shall be liable for all attorney and court fees. Subsequent case law will determine the extent of this precaution by the Italian legislature. Indeed, this provision could discourage individual consumers from filing class action claims.

The final aspect of the statute that has been heavily contested is its scope of applicability. Consumer protection groups attempted to lobby for its retroactive effect, thereby covering claims in connection with the collapses of Cirio, Parmalat, and Alitalia, which caused considerable financial damage to thousands of investors. The most recent draft bill submitted by the Italian Senate did include a retroactive effect clause, whereby the statute would apply to causes of action arising as of June 30, 2008. This clause was not approved by the Italian Parliament in the final version of the statute, hence the recourse to class actions will only apply to illicit conduct occurring after the date on which the law came into force, being January 1, 2010.

The entry into force of the statute represents an important step toward consumer and shareholder protection in Italy. Nevertheless, the aforementioned limitations could significantly impede its applicability, thereby providing for an ineffective measure for collective action under Italian law. The first cases brought will determine whether the prerequisites and possible sanctions established by the Italian legislature will render the law inadequate to protect consumers' rights and interests.

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The Italian Anti-Crisis Decree and Its Ramifications for Companies

Law decree no. 185 dated 29 November 2008 setting out "*Urgent measures in support of families, employment and business and aimed at redefining national strategies from an anti-crisis standpoint,*" approved on a definitive basis by the Italian Senate on 27 January, entered into force upon its publication in the *Gazzetta Ufficiale*, no. 22, on 28 January 2009.

In the current economic downturn, the anti-crisis measures implemented by the Council of Ministers, comprising a package worth almost Euro 5 billion, is aimed at providing support to families, protecting human capital and, from a broader perspective, promoting the Italian economy and the country's overall competitiveness.

The following constitute a few of the more noteworthy measures comprising the anti-crisis decree:

a) Art. 15, which envisages the possibility of allowing companies to reappraise real estate assets registered in their corporate books for the financial year ended 31 December 2007. In particular, paragraphs 16 and 23 of the above-mentioned article, which sets out tax provisions on the optional reappraisal

of real estate assets, provide that "*The parties indicated in art. 73, paragraph 1, letters a) and b) of the uniform income tax code, as well as general partnership, both limited and general partnerships, which do not adopt international accounting standards with regard to financial statement preparation, may, also as an exemption from art. 2426 of the Italian Civil Code and any other provision of law in force on such matter, reappraise real estate assets, excluding buildable areas and real estate assets the construction or exchange of which constitutes the company's corporate purpose, set out on the financial statement for the financial year ended 31 December 2007.*"

It should be noted that the reappraisal of assets is not permitted under the Italian Civil Code, which provides under art. 2426 that *long-term financial assets must be registered in the financial statement at cost of purchase or production.*

As an exemption from the above provisions, an adjustment in actual accounting values of real estate assets would be allowed, also allowing for recognition for tax purposes of higher values assigned to assets, through a reduced tax cost as compared with the taxes normally applicable.

The rationale underlying the above rule is that of "improving" civil law financial statements of companies without, however, neglecting tax repercussions.

Following the amendments introduced on the occasion of the conversion of decree 185/2008, the higher amount attributed to assets upon reappraisal may also be recognized for tax purposes (with regard to both income taxes and IRAP) starting from the fifth financial year following that in which the reappraisal was carried out, through the payment of a substitutive tax in lieu of IRPEF, IRES and IRAP.

The parties that may benefit from the reappraisal adjustments, as provided under paragraph 16 of art. 15, include joint stock companies (*società per azioni*), partnerships limited by shares (*società in accomandita per azioni*), limited liability companies (*società a responsabilità limitata*), cooperative companies (*società cooperative*), mutual insurance companies, public and private entities other than companies, trusts, collective name companies, and partnerships limited by shares.

The reappraisal concerns all of the instrumental and non-instrumental real estate assets, with the sole exclusion of buildable areas, which are set out on the company's financial statement for the financial year ended 31 December 2007. The reappraisal obligation concerns all of the real estate assets belonging to the same homogeneous category: in such regard, the decree breaks down real estate assets into two categories: amortizable and non-amortizable.

b) On the matter of tax controls over large companies, art. 27, paragraphs 9-15 of the anti-crisis decree provides for the activation by the Italian Revenue Agency (*l'Agenzia delle Entrate*) of substantial checks on the income declaration, on an early basis with respect to the deadline for the exercise of auditing actions: these checks will be carried out by the end of the year following that in which the income and VAT declarations are filed.

   For income tax declarations and VAT declarations of large companies, the Italian Revenues Agency activates substantial checks by the end of the year following the year of submission of the declarations (art. 27 paragraph 9).

   The large companies subject to such tax checks are those with declared revenues or turnover of at least three hundred million Euro.

   The criteria followed for the selection of companies to be audited are based upon the so-called "selection criteria," which include a specific risk analysis of the individual company, related to the industrial sector of the same. On the basis of the data in the possession of the tax database, the selection criteria may be based upon the degree of risk attributed to the individual company, its shareholders, its subsidiaries or transactions realized by the same, all of which is viewed in light of the tax history of the same with regard to checks or audits already notified.

c) The conversion of the anti-crisis decree will give rise to different changes for companies, also with regard to the reduction of administrative costs. Article 16 (paragraphs 12-bis and 12-undecies) acknowledges the possibility of keeping accounting books using electronic means. Paragraph 12-bis, in broadening the contents of art. 2215-bis of the Italian Civil Code, provides that "*books, repertories, writings and documentation required by law or regulation to be kept or required on the basis of the type or size of the company may be prepared and kept using electronic means.*" The obligations to keep, authenticate and number books, as well as the other duties imposed by law upon the company, are fulfilled through the time marking (every three months) and the digital business owner's signature (or that of another authorized person). The accounting documentation prepared and kept electronically will have the same evidentiary force as ordinary accounting books referred to under arts. 2709 and 2710 of the Italian Civil Code.

Companies will be obliged to have their own certified electronic mail address (PEC), which must be indicated in the application for registration in the companies' register.

Businesses established in corporate form are required to indicate their certified electronic mail address in the application for registration in the companies register or similar electronic mail address based upon technologies that certify data and transmission and reception times and the completeness of the contents of the same. Within three years from the date of entry into force of this law, all companies, already established in corporate form as of the date of entry into force, must notify the companies register of their certified electronic mail address. The registration of the certified electronic mail address and any changes to the same in the companies register are exempt from stamp duties and filing fees (art. 16 paragraph 6).

One further step toward simplification achieved by the cancellation from the list of corporate books of the obligation to keep a shareholders' ledger. One of the more noteworthy changes introduced by the anti-crisis decree is the abrogation of shareholders' ledgers for limited liability companies starting from 30 March 2009.

Article 16, paragraph 12-septies abrogated number 1 of the first paragraph of art. 2478 of the Italian Civil Code, which lists the shareholders' ledger among the mandatory corporate ledgers, which must set out the shareholders' names, the respective shareholding of each, the contributions made in respect of such shareholdings, as well as any changes in the shareholders.

The importance of such a ledger concerns the transfer of shareholdings since, under art. 2470 of the Italian Civil Code, *the transfer becomes valid and enforceable against the company upon registration in the shareholders' ledger.*

Upon registration in the shareholder's ledger, the transfer becomes valid and enforceable against the company and the purchase acquires corporate rights, including both administrative rights (participation and voting at shareholders' meetings, challenge of shareholders' decisions, and so forth) and economic rights (dividends, liquidation of his respective shareholding upon the company's dissolution).

Under the new provision, the moment in which the transfer of the corporate shareholdings becomes valid and enforceable is now the filing with the company's register of the deed of transfer of the share in the limited liability company and, therefore, its filing rather than its actual registration. In addition, the protocol registration will not allow persons retrieving a good-standing certificate to view the transfer of the shareholding, since such transaction will become visible only after registration and, therefore, following the completion of the related matter.

Moving on to art. 16, the obligation to submit the list of shareholdings and the other holders of rights over shareholdings on the occasion of balance sheets approval has been cancelled.

Finally, in consideration of the need to adapt to the new obligations, paragraph 12-undecies of the above-mentioned article sets out transitional provisions which state that "*The provisions of paragraphs 12-quater through 12-decies shall enter into force on the sixtieth day after the date of entry into force of the law converting this decree. By such deadline, the directors of limited liability companies must file a special declaration to supplement the data set out in the companies register with the data set out in the shareholders' ledger, which filing is exempt from all taxes and duties.*

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Three Strikes and You're…Disconnected: How France Is Trying to Prevent Illegal Downloading

This year, the French government tried to solve the problem of illegal downloading on the Internet, a problem that stands at the crossroads of both intellectual property and privacy laws. Although the debate took place in France, the tension it raised between two positive interests—protecting intellectual property rights while protecting the privacy of Internet users—is at the core of the worldwide debate.

In order to prevent illegal downloading of copyrighted materials, the French government presented in June 2008 the Internet and Creation bill, which then became known as the HADOPI bill, from the *Haute Autorité pour la Diffusion des Oeuvres et la Protection des droits sur Internet*,[1] an administrative authority created by the bill. The HADOPI would have had the power to shut down a user's Internet access if, after two warnings, the first being an e-mail and the second a registered letter, the user persisted in illegally downloading protected works. American journalists nicknamed the bill the three-strikes law, even though baseball is, unfortunately, an unknown sport in France. The United Kingdom seems to be taking a similar route: its currently discussed Digital Economy

Bill also advocates a three-strikes solution to illegal downloading.

Politically, the left side of France's *Assemblée Nationale* (the House of Representatives) and of the Senate were against the bill. On April 2009, socialist representatives even succeeded in temporarily preventing the vote into law of the bill by staging a dramatic last minute entrance into the *hémicycle*, the Assembly's meeting and voting area, suddenly outnumbering members of the UMP, France's leading party.

However, the story of the HADOPI bill is not a story where the left wing favors the protection of privacy, as a fundamental right, and the right wing favors the protection of intellectual property, as a monetary right. Artists known for their support to France's socialist party publicly championed the bill, among them the French chanteuse Juliette Greco. The bill was finally enacted into law on June 12, 2009, even though all representatives of the UMP party did not vote for it. A new bill, nicknamed, HADOPI 2, was proposed in June 2009 and finally adopted by the Parliament on September 15, 2009. However, only 55% of the representatives voted in favor of it.

The Minister of Culture, Christine Albanel, who had originally presented and defended the HADOPI bill, was replaced in June 2009 by Frédéric Mitterrand, nephew of the late President François Mitterrand. In his first speech in front of the *Assemblée Nationale* in July 2009,[2] he affirmed that, thanks to the guarantees provided by the High Authority, the protection of privacy would be assured; "the HADOPI bill protects the private correspondence from any incursion or monitoring." Minister Mitterrand then added further in his talk that "as a citizen and as Minister of Culture and Communication… I do not want pirates to drag in the gutter the 'atmosphere, atmosphere' of Arletty." Mr. Mitterrand was referring to what is probably the most famous movie quote in French cinema, from the 1938 Marcel Carné film, *Hôtel du Nord*. He spoke the often used French shorthand for the entire quote: "Atmosphère, atmosphere, est-ce que j'ai une gueule d'atmosphère?"

Privacy and intellectual property rights, protecting the artists' rights to live from their works, and protecting our privacy. Are these two values irreconcilable?

Why is the HADOPI bill a threat to privacy? Mr. Mitterrand talked about the protection of private correspondence. Is it really protected? The new article L.336-3 of the French Intellectual Property Code, as issued from article 11 of the June 12, 2009 law, states that "A person who has subscribed to Internet access to online public communication services is under a duty to ensure that said access is not used for reproducing, showing, making available or communicating to the public, works or property protected by copyright or a related right without the authorization of the copyright holders provided for in Books I and II when such authorization is required." But an earlier version of article L.336-3 had different wording, and it was the subscriber to Internet access to online public communication services "or electronic communications" who would have had the duty to ensure that no one is using his Internet access to violate copyrights.

Leaving the words "electronic communications" in the definition of article L.336-3 would have significantly enlarged the scope of the subscriber's responsibility, since it would have encompassed e-mails. Indeed "electronic communications" is defined by article L.32 of the French Posts and Telecommunications Code as the "emission, transmission or reception of signs, signals, messages, images or sounds, electromagnetically," and thus, encompasses e-mails and a host of other communications options. In a household, it is generally one person who subscribes to Internet access. If passed, the earlier version of the bill would have given the subscriber the duty to monitor e-mails of the entire household in order to check whether protected materials were not illegally sent or received, thus violating the secrecy of correspondence. But HADOPI 2 brought back the notion of "electronic communication" in its article 3 before it was deleted after parliamentary discussion.

Who has the right to shut down Internet access? According to the European Parliament, this right should be reserved to a court of law. On May 6, 2009, the European representatives voted to approve amendment 138/36 to the telecommunication package stating that suspending Internet connection because a user downloaded illegally protected material can only be authorized by a court and cannot be made at the sole initiative of an administrative authority.[3]

France's *Conseil Constitutionnel*, an institution created by the 1958 Constitution to check the constitutionality of bills before they are enacted,[4] has the same opinion. It declared unconstitutional the part of the HADOPI bill which provided that when the Internet subscriber had failed to comply with the duty defined in Article L. 336-3 within a year following proven receipt of the HADOPI recommendation, HADOPI could, after a full hearing of all parties, impose several penalties, including suspension of Internet access for two months to one year, during which the user would have had no right to contract with any ISP.[5]

The *Conseil Constitutionnel* argued that because the HADOPI bill would have given an administrative authority, rather than a court of law, power to impose penalties and to restrict or deny access to the Internet, this could lead to "restricting the right of any person to exercise his right to express himself and communicate freely, in particular from his own home. In these conditions, in view of the freedom guaranteed by Article 11 of the Declaration of 1789,[6] Parliament was not at liberty, irrespective of the

guarantees accompanying the imposition of penalties, to vest an administrative authority with such powers for the purpose of protecting holders of copyright and related rights."

However, the *Conseil Constitutionnel* did not follow the argument that this would have been contrary to the principle of separation of powers protected by the French Constitution, because this principle does not preclude "an administrative authority, acting within its powers as a public body, from exercising its power to impose penalties needed to enable it to carry out its tasks once the exercising of this power is accompanied by statutory measures designed to ensure the protection of constitutionally guaranteed rights and freedoms."

Nor did the *Conseil Constitutionnel* follow the argument that the bill "produces a patently unbalanced reconciliation between the protection of copyright and the right to privacy," because even if indeed, the HADOPI sworn agents collect personal data, nominative in nature, while performing their tasks, it would be done in compliance with the January 6, 1978 law, the seminal French Data Protection law, and "the sworn agents referred to in Article L 331-24 of the Intellectual Property Code are not vested with the power to monitor or intercept private exchanges or correspondence." As we saw, though, the first draft of the bill did try to add e-mails into the field of investigation covered by the High Authority.

The most important statement of this decision is that "in the current state of the means of communication and given the generalized development of public online communication services and the importance of the latter for the participation in democracy and the expression of ideas and opinions, [the freedom of speech right] implies freedom to access such services." According to the *Conseil Constitutionnel*, Internet access is a fundamental right.

Even though the three-strikes part of the bill was declared unconstitutional, almost immediately following this declaration, the government presented the HADOPI 2 bill, which also aims to shut down Internet access to users downloading protected material. Representatives requested on September 28, 2009 that the *Conseil Constitutionnel* review the bill before it is signed into law, and parts of the bill could be declared unconstitutional. Representatives are arguing that it is technically not possible to suspend Internet access under the same conditions throughout the entire French territory, and, in some areas, it will be technically difficult to maintain IP telephony at the same time Internet access is cut. Therefore, it is contrary to the principle of equality before the law to establish a criminal penalty to which the implementation will not be the same across the country and will depend on technical contingencies.

Several currently discussed bills in Europe include monitoring Internet activities in order to fight crime. We see that Great Britain is currently considering a three-strikes law. Another bill currently in discussion in France, the LOPPSI bill,[7] proposes to monitor Internet activities in cyber cafés by installing keylogging programs on their computers. The German Constitutional Court decided on February 27, 2008, that the use of such spying programs can only be authorized if there is a concrete menace over bodily integrity, life, freedom of persons, or if the fundamental interests of the nation have been affected. Germany's Bundestag voted in June 2009 a bill allowing content of Internet sites to be blocked to fight child pornography, inciting a protest and a petition.[8]

Internet access has been declared a fundamental right in France. Will other constitutional courts take the same stance? How will the rights of authors be effectively protected, and the fight against cyber-predators be efficient, while privacy rights of all Internet users are still preserved? Difficult questions, difficult answers; France does not seem to have found the winning balance yet. However, the French efforts, and trends we see elsewhere, warn of real privacy and access concerns as increasingly all communications and personal contacts are conducted through the Internet.

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Endnotes

1. High authority for the diffusion of works and protection of copyright on the Internet.
2. The complete transcript of the speech in available in French at http://www.assemblee-nationale.fr/13/cri/2008-2009-extra/20091025.asp#INTER_4, last visited September 14, 2009.
3. Press release available at http://www.europarl.europa.eu/news/expert/infopress_page/058-55086-124-05-19-909-20090505IPR55085-04-05-2009-2009-true/default_en.htm, last visited September 14, 2009.
4. It should be noted that the *Conseil Constitutionnel* is not France's Supreme Court. A general description of the institution is available in English at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/presentation/presentation.25739.html, last visited September 14, 2009.
5. Decision number 2009-580 DC, June 10, 2009, available in English, German, and Spanish at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/2009/decisions-par-date/2009/2009-580-dc/decision-n-2009-580-dc-du-10-juin-2009.42666.html, last visited September 14, 2009.
6. It is the 1789 French Declaration of Human Rights, which is at the same level as the Constitution under French law.
7. Loi d'Orientation et de Programmation pour la Performance de la Sécurité Intérieure, Orientation and Programming Law for Performance of Homeland Security.
8. https://epetitionen.bundestag.de/index.php?action=petition;sa=details;petition=3860, last visited September 14, 2009.

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Jurisdiction in Member States of the European Union and Arbitration: The End of the Arbitration Exception?

Background

On 21 April 2009, the European Commission (the Commission) adopted a Report[1] and a Green Paper[2] on the review of Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[3] (the "Brussels I Regulation"). The Brussels I Regulation contains a set of rules regulating the allocation of jurisdiction in international legal disputes of a civil or commercial nature involving natural or legal persons domiciled in a Member State of the European Union ("EU Member State"). It allocates jurisdiction to a particular EU Member State for a dispute to be heard, and governs the recognition and enforcement of foreign judgments among EU Member States. The Commission launched a broad consultation process amongst interested parties on how to improve the operation of the Brussels I Regulation and on how to achieve a truly free circulation of judgments in the European Union. The consultation period was opened from 21 April until 30 June 2009 and reviews were submitted by EU Member States, non-EU governments, civil societies, non-governmental organizations, academics, practitioners and other interested parties.

The End of the Arbitration Exception?

In the Green Paper, the Commission reconsiders whether arbitration should continue to fall outside the scope of the Brussels I Regulation (the "arbitration exception"), the rationale for the arbitration exception previously having been that the recognition and enforcement of arbitral agreements and awards is governed by the 1958 New York Convention[4] to which all EU Member States are members.[5] The proposal of the Commission's Green Paper is to delete the long-established arbitration exception from the Brussels I Regulation, so that court decisions rendered in arbitration matters can benefit from the simplified rules of recognition as set out in the Regulation.

This proposal was first raised in the 2006 *Heidelberg Report*,[6] a study led by a German group of academics, after the Commission had mandated it to lead a general analysis on the Brussels I Regulation. The Commission specifically envisages "*a (partial) deletion of the exclusion of arbitration from the scope of the [Brussels I] Regulation*" and recommends implementing a series of measures designed to "*ensure the smooth circulation of judgments in Europe and prevent parallel proceedings.*"[7]

The *West Tankers* Decision of the European Court of Justice

The Commission's reconsideration of the arbitration exception was partly influenced by the seminal *West Tankers* decision[8] of the European Court of Justice (the "ECJ"). The *West Tankers* case revealed the difficulties which parallel state court proceedings in breach of an arbitration agreement can create under the Brussels I Regulation. In the *West Tankers* case arbitration proceedings had been instituted in London. However, the respondent to the arbitration seized an Italian court in breach of the arbitration agreement with a so-called "torpedo action." Such actions carry their name because they are often brought in EU Member States where the judicial process is particularly slow, expensive, might favor the local litigant and due to these factors carries the high risk of successfully frustrating the arbitration proceedings.[9] As a countermeasure to the "torpedo action" the claimant to the arbitration obtained an anti-suit injunction in English courts. However, the ECJ in the *West Tankers* case decided that anti-suit injunctions restraining a person from commencing or continuing proceedings before the courts of another EU Member State on the ground that such proceedings would be contrary to an arbitration agreement are incompatible with the Brussels I Regulation.[10] The Brussels I Regulation states that every EU Member State court seized itself determines whether it has jurisdiction to resolve the dispute before it, and incidentally whether an arbitral tribunal on the other hand does not have jurisdiction. Therefore, other EU Member State courts are barred from interfering with this determination, even if this might take years and might effectively undermine the parties' agreement to arbitrate.

In light of the *West Tankers* decision the Commission acknowledged that the interaction between the Brussels 1 Regulation and arbitration raises potential difficulties.[11]

The Proposals of the Commission

The Commission has tabled several amendments to the Brussels I Regulation affecting the interaction of national courts and arbitral proceedings.

First, the Commission proposes to give priority to the courts of the EU Member State where the arbitration takes place (the "seat of the arbitration") to decide on the existence, validity and scope of an arbitration agreement. It thereby aims to achieve greater coordination between proceedings concerning the validity of an arbitration agreement. In order to achieve its first proposal, the Commission suggests to create a "*uniform conflict rule concerning the validity of arbitration agreements,*" thus avoiding the situation where an arbitration agreement is considered invalid in one EU Member State and valid in another.[12] The Commission aims to concentrate such proceedings in the courts of the seat of the arbitration, thereby reducing the possibility for "torpedo actions."

Second, as the seat of the arbitration will play an important role, the Commission proposes to introduce a uniform set of rules to determine the seat of arbitration. Such determination would take into account the agreement of the parties or a decision of the arbitral tribunal. If the seat cannot be defined on that basis, the Green Paper suggests connecting the seat of arbitration to the courts of the Member State which would have jurisdiction over the dispute under the rules of territorial jurisdiction as laid out in the Brussels I Regulation.[13]

Third, the Green Paper recommends bringing within the Brussels I Regulation's scope court proceedings in support of arbitration. The court of the state in which the arbitration has its seat will have exclusive jurisdiction to decide on measures in support of arbitration.[14]

Fourth, the Commission's last proposal is that arbitral awards which are enforceable under the New York Convention might benefit from "*a rule which would allow the refusal of enforcement of a judgment which is irreconcilable with that arbitral award*."[15] Such a rule would be in favor of arbitration. However, the Commission seems to remain cautious on this subject and alternatively suggests that a separate legal instrument could be developed to deal specifically with the question of recognition and enforcement of awards.

Comments on the Commission's Proposals

The proposed provisions have attracted criticism by the arbitration community.[16] Some commentators rely on the fact that most of the problems addressed are more theoretical than practical and that the appropriate step would be to leave the whole system untouched since arbitration has to be distinguished from litigation.[17] In other words, "*if it ain't broke, don't fix it*."[18]

However, in practice, the problem of parallel proceedings such as "torpedo actions" under the Brussels I Regulation needs to be addressed and solved. Therefore, the Commission is proposing a mechanism for allocating jurisdiction once parallel proceedings in connection with an arbitration agreement arise. One court in the EU Member States will have to have priority to decide the issue of the existence, validity or scope of the arbitration agreement. How this will be implemented is subject to further discussion. Some commentators stress the need to refine this mechanism by limiting it to the scenario of "torpedo actions."[19] Other commentators suggest instead to insert a provision permitting courts not to recognize judgments on the validity of arbitration agreements whenever the EU Member State being asked to recognize such judgment would take a different view of the same clause.[20] Some of the proposed provision might indeed need further reconsideration. It is, for example, questionable if the jurisdiction for measures in support of arbitration should be exclusively located at the seat of the arbitration. In practice, a party will often wish to seek such measures in the jurisdiction in which they will need to be enforced.

The Commission's proposal will therefore have to undergo further scrutiny. In this process, the Commission should pay particular attention to the numerous suggestions made by commentators with particular knowledge of arbitration proceedings.

Conclusion

The European Commissioner of Justice and Home Affairs, Ms. Karen Vandekerckhove, has announced that the European Commission is about to undertake a limited impact study on some of the ideas in the Green paper—including those on arbitration. She expects the Commission's final proposal to appear early next year.[21] Subsequently, it will be necessary to undertake a new assessment of the Commission's proposals which hopefully will have taken into account some of the justified criticisms raised during the consultation process.

That said, jurisdictions worldwide compete to attract arbitration and Europe has always been considered at the forefront of the promotion of arbitration. It remains to be seen whether implementing the Commission's proposals will greatly improve the interaction between local court proceedings and arbitration. However, even without the Commission's "fine-tuning" the attractiveness of popular arbitration venues within EU Member States will certainly not be diminished in the future.

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Endnotes

1. Commission Report on the Application of Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM (2009) 174 final (April 21, 2009).
2. Commission Green Paper on the Review of the Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM(2009) 175 final (April 21, 2009).
3. Commission Regulation 44/2001, on Jurisdiction and the Recognition and Enforcement of Judgments of Civil and Commercial Matters, 2001 O.J. (L 012) 1.
4. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 38.
5. *See supra* note 2, at 7.
6. PETER SCHLOSSER ET AL., BRUSSELS I REGULATION 44/2001 APPLICATION AND ENFORCEMENT IN THE. EU (2nd ed. 2008).
7. *See supra* note 2, at 8.
8. European Court of Justice, *Allianz SpA (formerly Riunione Adriatica di Sicurta SpA) v. West Tankers Inc* (ECJ Case C-185/07), Judgment of 10 February 2009.

9. Stutart Dutson & Mark Howarth, *After West Tankers –Rise of the "Foreign Torpedo"?*, 75 Arbitration 334 (2009).
10. *See supra* note 8, at ¶¶ 24-30.
11. *See supra* note 1, at 9.
12. *See supra* note 2, at 8.
13. Commission Regulation 44/2001, on Jurisdiction and the Recognition and Enforcement of Judgments of Civil and Commercial Matters, Art. 2, 2001 O.J. (L 012) 1,3.
14. *See supra* note 2, at 8.
15. *See supra* note 2, at 8.
16. A list of contributions and letters in response to the Green Paper are available at http://ec.europa.eu/justice_home/newskonsulting_publidnews_consulting_0002_en.htm (last visited, Sept. 10, 2009).
17. Letter from Ulrich Magnus & Peter Mankowski to the European Commission, available at http://ec.europa.eu/justice_homeinewsiconsulting_public/news_consulting_0002_en.htm (last visited, Sept. 10, 2009).
18. Ben Steinbrück & Martin Illmer, *Brussels I and Arbitration: Declaratory. Relief as an Antidote to Torpedo Actions under a Reformed Brussels I Regulation*, 4 SCHIEDSVZ [GERMAN ARB.J.] 189 (2009), who, however, make a number of well thought-out suggestions on how to improve the Commission's proposals.
19. *See supra* note 18, at 196.
20. David Samuels, *Other Options: How Else Could the EU Fix the West Tankers Problem?*, GLOBAL ARB. REV. (Aug. 5, 2009) (on file with author), http://www.globalarbitrationreview.com/news/article/18477/other-options-else-eu-fix-west-tankers-problem/.
21. David Samuels, *Special Edition: Roundtable on EU Green Paper*, GLOBAL ARB. REV. (Aug. 5, 2009) (on file with author), http://www.globalarbitrationreview.com/news/article/18479.

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European Data Protection Rules: A Challenge to U.S. Courts in Discovery

The European Union has adopted a Data Protection Directive (95/46/EC), which generally prohibits the processing and transfer of personal data, except under strict conditions, and for limited purposes. Individual European countries, interpreting and applying the Directive, have adopted statutes and regulations that may, in some cases, impose even more severe restrictions on information processing and transfer. And some countries (notably, France in its Penal Law No. 80-538) have adopted "blocking" statutes, which are specifically designed to protect their citizens from compelled discovery of information in court proceedings outside their borders.

As commerce becomes ever more global in scope, however, disputes increasingly involve parties in several different countries. When a U.S. court exercises jurisdiction over a European party (or a U.S. party that maintains some data in Europe) conflicts may result between U.S. civil discovery rules and European data protection rules.

In the recent case of "Christopher X," the Criminal Chamber of the French Supreme Court upheld the criminal conviction and fine of a French lawyer for violating the French blocking statute.[1] Yet, in the same case, in the United States, an American court rejected the French blocking statute as a basis to preclude discovery in a U.S. proceeding.[2] As these and several other recent cases illustrate, the conflict in rules is quite real.

Recently, groups in both the U.S. and Europe have undertaken efforts to reduce the potential conflicts between the two systems of law. In August 2008, the Sedona Conference, a U.S.-based think tank composed of lawyers, academics, service vendors, judges and others, through its Working Group 6, issued a "Framework for Analysis of Cross-Border Discovery Conflicts" (text available at www.thesedonaconference.org). The Sedona framework surveyed the law and practice in cross-border discovery, and offered a "way forward" to help guide U.S. courts out of the potential "Catch-22" conflict between U.S. and European rules. The Sedona framework essentially recommended a "balancing" of various factors, based on a test outlined in the Restatement (Third) of Foreign Relations § 442 (1987).

In February 2009, the Article 29 Data Protection Working Party, an independent European advisory body on data protection and privacy, created pursuant to the European Data Protection Directive, issued its Working Document (WP-158) on "Pre-trial Discovery for Cross Border Civil Litigation" (text available at www.ec.europa.eu/justice_home). Noting the Sedona Framework analysis, the Article 29 Working Party invited "dialogue" with parties and courts in other jurisdictions.

In June 2006, the Sedona Conference held a meeting in Barcelona, Spain, which focused on the existing Sedona Framework, and the views of the Article 29 Working Party. Members of the European Working Party attended the Barcelona meeting, and a lively exchange of views occurred. The Sedona Conference Working Group 6 resolved, at the end of the Barcelona meeting, to send a formal response to the Article 29 Working Party, in reply to its request for dialogue. That response is in the drafting process.

Most recently, on August 19, 2009, the French Data Protection Authority, Commission Nationale de L'Informatique et des Libertés ("CNIL"), issued its own Ruling (No. 2009-474) regarding the transfer of personal data in connection with legal proceedings (text available (in French) at www.legifrance.gov.fr). The CNIL called for the use of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (1972) (text available at www.travel.state.gov/law). The Hague Convention generally requires the use of "letters rogatory," formal requests (through diplomatic channels) from courts in one country to courts in another country, for the taking of evidence. The U.S. Supreme Court, in *Societe National Industrielle Aerospatiale v. U.S. District Court for the Southern District of Iowa*, 482 U.S. 522 (1987), however, held that the Hague Convention was, in U.S. proceedings, a supplementary method for obtaining information, which did not necessarily supplant ordinary rules of civil procedure.

The conflict between European data protection law and U.S. discovery rules may eventually be resolved by treaty, or other diplomatic efforts. The U.S. Department of Commerce, for example, has negotiated "Safe Harbor" standards with European authorities, which permit U.S. companies to obtain certainty as to the data protection rules they must follow when doing business in Europe. (See www.export.gov/safeharbor.) Similar standards could be developed for purposes of U.S. litigation. For now, however, dialogue between U.S. and European groups, such as the Sedona Conference and the Article 29 Working Party, may offer the best hope of improving understanding and developing "best practices" to manage the conflict.

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Endnotes

1. *In re Advocat "Christopher X"*, Cour de Cassation, Appeal No. 07-83228 (Dec. 12, 2007).
2. *Straus v. Credit Lyonnais, S.A.*, 242 F.R.D. 199 (E.D.N.Y. 2007).

* * *

Evolution in the Case Law Regarding Recognition of Foreign Judgments in France

In a decision dated January 29, 2009,[1] the French Supreme Court issued an important decision in the field of recognition of foreign judgments. The case involved a petition by the American receiver of Credit Bancorp seeking the recognition of a judgment rendered by a U.S. District Court inflicting a U.S. $13,107,200 civil fine on an individual found to be in contempt of court. The District judge had ordered a person referred to as Mr. X. to fully cooperate with the receiver and ruled that the order will be enforced by a civil fine of U.S. $100 to be levied for each day the order is violated, the amount to be doubled each day. Having found Mr. X to be in contempt of the order for many days, the judge set the fine at U.S. $13,107,200. Mr. X being an American living in France, the receiver sought to execute the judgment in France. The American judgment was recognized by the Court of Appeals of Chambery, and an appeal was filed with the Supreme Court. The arguments presented to the High Court were the following:

1. The U.S. judgment was not civil but penal in nature. The monetary amount was intended to be a sanction for conduct deemed to be in contempt of court and the judgment should therefore not be recognized as a civil judgment. The petitioner relied on article 3 of the French Civil Code which states in its first paragraph that police and security laws apply to all those residing in the territory of the Republic; the argument being that foreign police laws are not applicable in France. It was argued that Article 509 of the French Civil Procedure Code (CPC) only allows for recognition of foreign civil judgments, and that the Court of Appeals erred when it ruled that the foreign judgment in question was civil and not penal nature. It was further contended that in France, conduct constituting contempt of court is a crime punishable by the criminal code, and that as a result, the U.S. judgment could have only been considered as a penal measure inflicted by virtue of the local police powers. International comity, it was argued, does not require the courts of France to assist foreign courts in enforcing their local police powers.
2. The amount of the fine is so disproportionate to the gravity of the conduct sanctioned that the judgment violates Article 8 of the Declaration of Human and Civil Rights of 1789, and therefore French international public policy. Furthermore, it was argued that the disproportional nature of the fine violates the right to property pursuant to Article 1 of the 1st Additional Protocol to the European Convention of Human Rights and Fundamental Freedoms.

In rejecting these arguments and confirming the recognition of the U.S. judgment, the Supreme Court of France dealt yet another blow to the notion that foreign non-EU judgments will not be readily recognized in France. This decision engraves in stone a very liberal recognition policy that has been developed in recent French jurisprudence.[2] The underlying theory behind this jurisprudence is that the French judge will, subject to certain limited exceptions, adopt the point of view of the foreign court not only as to jurisdiction, but also as to the nature of the judgment. In other words, the French courts will no longer refuse recognition to foreign judgments implementing theories that are either not recognized under French law or are viewed differently. What matters is how the foreign court analysed the issue in question. So if the U.S. District Court judge considered the fine as imposing a civil obligation in a civil case, then it matters not that from a French point of view the judgment is penal in nature and involves the implementation of local police powers.

Another interesting aspect of this judgment is the fact that the Supreme Court did not summarily reject the human rights argument as it relates to the proportionality of the fine imposed. The Supreme Court concluded that to the extent that Mr. X. was suspected of embezzling U.S. $200 million, the amount of the fine was not so disproportional so as to the violate article 8 of the 1789 human rights declaration, which prohibits the infliction of punishment which is disproportional to the gravity of the crime committed, and Article 1 of the Additional Protocol to the European Convention of Human Rights, which prohibits the taking of property without due compensation. The

European Court of Human Rights has ruled that the Protocol applies to fines, and that a disproportional or an unlawfully imposed fine does violate the right to property. It is ironic that after refusing to view the judgment in question as anything more than a civil judgment, the Supreme Court went ahead and subjected it to a constitutional test that applies to criminal law.

The road to full recognition of U.S. judgments still contains certain hurdles. A judgment issued by the Court of Appeals of Poitiers in February 2009 echoes the almost ideological reticence of French judges to recognize theories that are foreign to the basic concepts of the civil law system.[3] In this case, an attempt was made to obtain the recognition in France of a California judgment containing *inter alia* a punitive damages component.

The Court of Appeals rejected the recognition of the judgment based on public policy, holding that: (1) punitive damages over and above compensatory damages violate Article 74 of the United Nations convention on contracts for the international sale of goods signed in Vienna on 11 April 1980; (2) punitive damages are contrary to the fundamental principles of French civil law which prohibits compensation that exceeds the actual damages; and (3) punitive damages violate Article 8 of the 1789 Declaration of Civil and Human Rights, in that they allow the beneficiary of the judgment to be unjustly enriched by operation of a penalty which is disproportional to the gravity of the conduct they are intended to punish. The use of the concept of unjust enrichment in conjunction with a constitutional concept intended to protect the citizen against excessive and disproportional punishment adds an interesting twist to the Court's reasoning. It is not certain that the aversion of French judges to the idea of punitive damages will resist the test of modern times and the global economy. One can see in the above decision of the Supreme Court that the concept of "penalty" in civil judgments did not create an insurmountable stumbling block. It seems that the real test is fairness and proportionality. It will not be surprising to see the recognition of punitive damages when the right case is brought before the high court.

In conclusion, France has become a jurisdiction where U.S. judgments are more readily recognized. France is also a jurisdiction where attachment orders can readily be obtained on the basis of a foreign judgment. It will be interesting to see how far the French Supreme Court will take this liberal recognition policy.

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Endnotes

1. This decision is available on the website Legifrance at the following address: http://www.legifrance.gouv.fr/under reference 07-11279.
2. The recent cases have distinguished the conservative doctrine set forth in the landmark Case "Munzer" of the French Supreme Court dated 7 January 1964, JCP 1964, II, 13590, available on the above-mentioned website Legifrance; see Case "Prieur" of the French Supreme Court dated 23 May 2006, JDI 2006, p.1377, also available on the website Legifrance under reference 04-12777; Case "Cornelissen" of the French Supreme Court dated 20 February 2007 available on the website Legifrance under reference 05-14082 ; Case "Banque de développement local" of the French Supreme Court dated 22 May 2007, JDI 2007, p. 956, also available on the website Legifrance under reference 04-716.
3. Court of Appeals of Poitiers, 26 February 2009, available on the website Legifrance at the following address: http://www.legifrance.gouv.fr/.

* * *.

Wrongful Termination in Canada: U.S. Employers with Canada-Related Activities Could Be in for an Unpleasant Surprise

The United States and Canada enjoy perhaps the closest economic, cultural, and political ties of any other neighboring countries and share the largest and most comprehensive trading relationship in the world. Bilateral trade between Canada and the U.S. in 2008 was more than $596 billion, with over $1.6 billion worth of goods crossing the border every single day. With such close ties between the two countries, it is not surprising that many U.S. businesses maintain close connections with Canada.

However, although the U.S. and Canada share much in common, their legal systems are often dramatically different. A primary example of this is the difference between the U.S. and Canada in rights afforded to employees terminated without cause. As explained below, U.S. businesses with Canadian employees or with significant Canada-related activities could find themselves subject to Canadian employment laws, which could lead to surprising results.

The At-Will Employment Doctrine Does Not Apply in Canada

Unlike in the U.S. where employees are generally regarded as "at will," meaning an employee can be terminated without notice for no cause, in Canada employees are regarded as having an implied contract for employment. As part of the implied contract, an employee terminated without cause is always entitled to a period of notice or payment of wages in lieu of notice. If an employer fails to provide adequate notice, the terminated employee is entitled to assert a claim for wrongful termination and recover compensatory damages.

How much notice is required can depend on many factors. Legislation in Canada typically provides for minimum notice periods. For instance, the Ontario *Employment Standards Act* provides that employees in Ontario must receive at least one week of notice for every year of service,

capped at eight weeks. However, in most instances, under the common law, employees will be entitled to a substantially longer notice period.

To determine the length of notice due under the common law, courts take into account the character of the employment, length of service, the age of the employee and the availability of other employment, in light of the experience, training and qualifications of the employee. No single factor is dispositive. Rather, courts take into account the factors as a whole and assess the overall circumstances of the employee.

For instance in *Honda Canada, Inc. v. Keays*, 2008 SCC 39, the Supreme Court of Canada held that an employee who worked at Honda's plant as a data processor was entitled to 15-months' notice of termination on the basis that he was one of the first employees hired at the plant, he had spent his entire adult working life at the plant, and he had no formal education and an incapacitating illness, which substantially reduced his chances of re-employment. In other words, as a result of being a long-time employee and because he would have a difficult time finding a new job, Keays was entitled to a substantial period of severance.

Similarly, in *Minott v. O'Shanter Development Co. Ltd.*, 1999 CanLII 3686 (ON C.A.), a maintenance worker who had been employed with the defendant company for 11 years was granted 13-months' notice. The court took into account the fact that the plaintiff was 43 when he was fired, he had little formal education and limited skills, and that because of a recession few jobs were available at the time of his dismissal. Therefore, because of his length of service and the difficulty he faced in finding a new job, the plaintiff was entitled to a substantial period of severance. Likewise, in *Dunlop v. B.C. Hydro & Power Authority*, 1988 CanLII 3217 (BC C.A.), a 61-year-old engineer who had worked for the defendant for 10 years was granted 20-months' notice, which also appeared to be based on the plaintiff's length of service and the difficulty he would have in finding new employment.

U.S. Businesses Can Be Sued in Canada, Even When They Have Few or No Contacts

Unlike the Due Process analysis familiar to U.S. litigants, which generally provides that defendants cannot be sued in a foreign jurisdiction unless the defendant has purposely established contacts with the jurisdiction, courts in Canada apply an entirely different set of rules when determining whether to assert jurisdiction over a foreign defendant. In *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, the Supreme Court of Canada established that Canadian courts are entitled to assert jurisdiction over a foreign defendant as long as there is a "real and substantial connection" between the forum and the matter in dispute. Although the term "real and substantial connection" has not been exactly defined, courts seem to have settled on a broad approach that balances the interests of plaintiffs and defendants, including factors such as:

- **The connection between the forum and the plaintiff's claim.**
  Canadian courts will afford injured plaintiffs generous access to domestic courts to recover their damages.
- **The connection between the forum and the defendant.**
  Courts in Canada have long held that, because damage is an essential element of any tort, if the damages complained of occurred in the forum, the tort is deemed to have been committed in the forum, regardless of whether the actual tortious conduct occurred somewhere else.
- **Unfairness to the defendant in assuming jurisdiction.**
  Courts take into account the nature of the activities engaged in by the defendant to determine whether there was a foreseeable risk of harm to parties in other jurisdictions, which would make haling the defendant into a foreign court less unfair.
- **Unfairness to the plaintiff in not assuming jurisdiction.**
  Canadian courts have become much more protective of a domestic plaintiff's right to sue in a domestic forum. As such, convenience and fairness to the plaintiff are important factors in determining whether to assert jurisdiction over a foreign defendant.

The balancing approach taken by Canadian courts favors asserting jurisdiction over foreign defendants, as long as the plaintiff can demonstrate a strong connection to the forum and the inconvenience to the plaintiff in litigating in a foreign jurisdiction outweighs any inconvenience to the defendant in litigating in the Canadian jurisdiction.

For instance, in *Stanway v. Wyeth Canada, Inc.*, 2008 BCSC 847 (June 27, 2008), a resident of British Columbia sued Wyeth Canada and two of its U.S.-based subsidiaries, as well as several related companies based in Canada, for alleged personal injuries relating to the plaintiff's use of the drug Premarin. The U.S. defendants did not maintain any offices or facilities in British Columbia, did not engage in any business in British Columbia, did not market Premarin or place it in the Canadian market, and did not test, market, label, distribute, promote or sell any of the products in question. Nevertheless, the court held that it would be far more inconvenient to force the plaintiff to file a separate lawsuit in the U.S. than it would be for the U.S. defendants to litigate in British Columbia. Therefore, despite the fact the U.S. defendants had no contacts with British Columbia and did not purposefully engage in any conduct in British Columbia, the court assumed jurisdic-

tion over the U.S. defendants based on the convenience to the plaintiff in maintaining the entirety of her claim in British Columbia.

Similarly, in *Lalany v. Muir*, 2007 CanLII 50280 (ON S.C.) (Nov. 7, 2007), an Ontario resident was involved in a car accident in Michigan with a Michigan resident. The Michigan defendant had no connection whatsoever to Ontario, other than the fact she was involved in a car accident in Michigan with a resident of Ontario. The court held, however, that, because all the other parties were Ontario residents and the rest of the case was clearly rooted in Ontario, the claim against the Michigan defendant had a "real and substantial connection" to Ontario. As such, even though the Michigan defendant had no connection to Ontario and trying the case in Ontario would be a great inconvenience to her, the court held it had personal jurisdiction over the Michigan defendant.

U.S. Businesses Could Be Subject to Suit for Wrongful Termination in Canada Even If They Have Few Contacts to the Forum

In light of the plaintiff-oriented approach Canadian courts take in determining whether to assert personal jurisdiction over a defendant and given that the right to notice of termination is regarded as a fundamental right of all employees, it should not be surprising that Canadian courts are often willing to assert personal jurisdiction over foreign employers when Canadian employees bring wrongful termination claims. For instance, in *Hilton v. K & S Services Inc.*, 2009 ONCA 603, the plaintiff lived in Ontario but worked for a Michigan company, where he commuted back and forth between Michigan and Ontario. The plaintiff claimed he was wrongfully discharged and sued for damages in Ontario. The defendant argued that it is a resident of Michigan and does not maintain any contacts with Ontario and therefore not subject to the jurisdiction of the court. However, the court held that, because the plaintiff's salary was paid in Canadian dollars, the plaintiff's wages were subject to Canadian federal and provincial income tax and other deductions and were paid through a Canadian bank, he received health benefits from a Canadian insurance company, and had a Canadian Blackberry, Ontario had a "real and substantial connection" to the dispute. In addition, the court also held that Ontario was the proper forum for the dispute because, if the case were tried in Michigan, the plaintiff would have no right to sue for damages for wrongful termination.

Similarly, in *Hodnett v. Taylor Manufacturing Indus. Inc.*, 2002 CanLII 49503 (ON S.C.), the plaintiff was employed in Ontario by an Ontario company and then accepted a transfer to Georgia to work for a related company located in Georgia. The plaintiff worked in Georgia for over five years until he was terminated without cause. The plaintiff then filed suit in Ontario for wrongful termination, claiming that under Ontario common law he was entitled to notice of termination. The defendant argued that, as a Georgia corporation with no operations in Ontario, it was not subject to the jurisdiction of the Ontario court. The court disagreed and held that, because the plaintiff was lured to Georgia from Ontario and the defendant has a sister company in Ontario, it would not be "inherently unfair" for the case to be tried in Ontario. In addition, because Georgia is an "at-will" state, the plaintiff would suffer a great disadvantage if the court declined jurisdiction. The court therefore determined Ontario had a "real and substantial connection" to the dispute and held it had personal jurisdiction over the defendant.

Conclusion

Resisting personal jurisdiction in Canada can be an uphill battle, particularly when the plaintiff can make out at least a colorable argument that without the protection of a Canadian court the plaintiff would be effectively prohibited from asserting its rights. Given that every U.S. jurisdiction regards employees as "at will," employees will always be able to make the argument that, if forced to sue in the U.S., they will be effectively denied the right to seek any recovery when terminated without notice.

Therefore, U.S. businesses that employ Canadians or that otherwise engage in Canada-related activities could find themselves haled into court in Canada to answer a claim for wrongful termination, where they could be subject to a substantial claim for damages amounting to a year's worth of salary or more, plus interest and attorney's fees. For employers used to operating in an "at-will" environment, this could come as a very unpleasant surprise. To avoid this outcome, U.S. employers should take steps to make clear their employment relationships are governed by U.S. law, either through formal employment contracts, employee handbooks, or similar methods. Otherwise, unexpectedly becoming subject to Canadian courts could be an unwelcome experience.

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Ethnicity and the Politics of Power in Post-Conflict Rwanda

What must be remembered and acknowledged before we can move forward to create a future together, whether individually or collectively?
—Carrie J. Menkel-Meadow

Rwanda is attempting to unify a community that has suffered ethnic conflict and tragic violence under the banner of "We are all Rwandans." The country is working toward a future, hoping to leave behind the horrors of the

1994 Genocide through unification. However, this unification comes at a price: the suppression of ethnic identities, which is inherent in the individual and collective Rwanda. The suppression of ethnic differences in the imposition of one history in post-genocide Rwanda prevents reconciliation.

Reconciliation is a "rebuilding of relation—both individually and collectively."[1] Reconciliation is a "complex process[,] the end result of which is to allow people in conflict 'to arrive at a pacified society where free and equal individuals acknowledge each other and are capable of facing up to a history of violent acts, and above all, are able to surmount that history.'"[2] Ethnic identification with a certain group, whether it be Tutsi, Hutu, or Twa, pervades within the hearts of all Rwandans; thus, it is part of the shared Rwandan history and necessary in reconciliation.[3]

However, the Rwandan government's attempt to unify the nation by emphasizing *banyarwanda*, or a shared common language, ancestral history, and land[4] also simultaneously represses the discussion of different ethnic identities. The result is not the development of a new age of Rwanda with all Rwandans crying, "We are all Rwandans." Instead, Rwandans must cloak their ethnic identities in public. While the Rwanda government believes that this singular history is necessary for national unity and reconciliation, the repression of ethnic differences is ultimately harmful to sustainable peace and meaningful reconciliation.[5]

By instituting one "official truth," the government is repressing subgroups[6] and "creating new dynamics of social exclusion in the present."[7] The repression of contrary versions of history is a new form of exclusion, and will eventually manifest itself in resentment and rebellion against a repressive regime. In addition, the imposition of this one history on the nation serves to impede critical thinking and independent analysis,[8] skills that many believe "allowed the genocidal ideology to take such strong hold in so many parts of the country."[9]

Rather than denying ethnic divisions, Rwanda must address the political actors which manipulated the ethnic divisions in the pursuit of power. In order to move forward, Rwanda must find a way to avoid a historical abuse of power that results in "winner-take-all politics, liquidation of opponents, and (more recently) mobilization of ethnic factions that proved so destructive in the past."[10] As much as ethnicity plays a role in conflict, so do power and class play key roles.[11] Political actors abused their power regardless of ethnicity.[12] For example, just as there are examples of Hutus being dispossessed of their cattle, so there is record of Tutsis being dispossessed.[13] Another example is while the general understanding is that Tutsi were the ones who generally held positions of power and prestige, there were examples of influential Hutu who the royal court sought as allies.[14] If Rwanda is to move past the Genocide and toward reconciling the nation, the identities of ethnic groups cannot be denied and the ethnic tensions which existed between the Hutu and the Tutsi must be recognized as well as the discussion of manipulation of those differences by political actors hungry for power.

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Endnotes

1. Marion Hodgkin, *Reconciliation in Rwanda: Education, History and the State*, Journal of International Affairs, Fall/Winter 2006, vol. 60, no. 1, 199, 207.
2. Marie Beatrice Umetesi, *Is Reconciliation Between Hutus and Tutsis Possible?*, Journal of International Affairs, Fall/Winter 2006, vol. 60, no.1, 157, 164.
3. Barbara Cassin, *Politics of Memory on Treatment of Hate*, The Public, Vol.8 (2001), 3, 9, 19. "Reconciliaton and pardoning, forgiveness, are presented as closely allied through full disclosure."
4. Ervin Staub, *Notes on Cultures of Violence, Cultures of Caring and Peace, and the Fulfillment of Basic Human Needs*, Political Psychology, Vol. 24, No. 1 (Mar., 2003), pp. 1-21, page 14.
5. Marion Hodgkin, *Reconciliation in Rwanda: Education, History and the State*, Journal of International Affairs, Fall/Winter 2006, vol. 60, no. 1, 199, 207. *Id.*
6. Marion Hodgkin, *Reconciliation in Rwanda: Education, History and the State*, Journal of International Affairs, Fall/Winter 2006, vol. 60, no. 1, 199, 207. 204-5.
7. Marion Hodgkin, *Reconciliation in Rwanda: Education, History and the State*, Journal of International Affairs, Fall/Winter 2006, vol. 60, no. 1, 199, 207. At 205.
8. Marion Hodgkin, *Reconciliation in Rwanda: Education, History and the State*, Journal of International Affairs, Fall/Winter 2006, vol. 60, no. 1, 199, 207.
9. Marion Hodgkin, *Reconciliation in Rwanda: Education, History and the State*, Journal of International Affairs, Fall/Winter 2006, vol. 60, no. 1, 199, 207.
10. Catherine Newbury, *Ethnicity and the Politics of History in Rwanda, in* Genocide, Collective Violence, and Popular Memory: The Politics of Remembrance in the Twentieth Century 67, 78-79 (David E. Lorey and William H. Beezley, eds., 2002). At 78-9.
11. Catherine Newbury, *Ethnicity and the Politics of History in Rwanda, in* Genocide, Collective Violence, and Popular Memory: The Politics of Remembrance in the Twentieth Century 67, 79 (David E. Lorey and William H. Beezley, eds., 2002). At 78-9. 79.
12. Catherine Newbury, *Ethnicity and the Politics of History in Rwanda, in* Genocide, Collective Violence, and Popular Memory: The Politics of Remembrance in the Twentieth Century 67, 70 (David E. Lorey and William H. Beezley, eds., 2002).
13. Catherine Newbury, *Ethnicity and the Politics of History in Rwanda, in* Genocide, Collective Violence, and Popular Memory: The Politics of Remembrance in the Twentieth Century 67, 70 (David E. Lorey and William H. Beezley, eds., 2002).
14. Catherine Newbury, *Ethnicity and the Politics of History in Rwanda, in* Genocide, Collective Violence, and Popular Memory: The Politics of Remembrance in the Twentieth Century 67, 70 (David E. Lorey and William H. Beezley, eds., 2002).

Of International Interest

Information—The New Trade War?

At the end of September, the film director Roman Polanski boarded a plane from France to Switzerland where he was to receive a lifetime achievement award at the Zurich Film Festival. This excursion turned out to be anything but happy as he was arrested on landing in connection with a U.S. warrant for his arrest issued in 1978. Was this just a one-off or is this just the latest sign of a trend?

Concern was immediately expressed in Europe not for the seriousness of Polanski's crimes, but for the way in which he was arrested in Switzerland, a country where he had reportedly lived for much of the last 15 years. The Swiss Association of Directors called the arrest "a grotesque judicial farce and a monstrous cultural scandal." The case shows the increasing concern in Europe about the perceived increasing encroachment of the U.S. authorities onto European soil, a trend felt more acutely for corporations in the last few years. Reacting to this concern, regulators in Europe are finding time to seek to limit perceived U.S. intrusion into Europe, notably with the increasing extra-territorial reach of the U.S. authorities and the perceived sprawl of e-discovery to European soil. In general, in all of these areas, Europeans see the U.S. as wanting too much information. Litigation techniques, like wide discovery and litigation holds, are simply too rich for the European palate. Many European jurisdictions, especially those with a civil law background, find discovery alien and are taking steps to limit its effects in Europe. At the same time, the U.S. authorities have been anxious to regulate U.S. corporations (and others doing business with the U.S.) in all of their activities around the world. Corporations on both sides of the Atlantic and their lawyers are likely to get caught in this perfect storm. The NYSBA survey of the pressures on corporate counsel in Fall 2008 showed this as one of the big compliance issues of the day.[1]

The end of 2008 had seen a telling example with the announcement of the conclusion of the SEC investigation into allegations of bribery at the German company Siemens. The U.S. investigation and Siemens' internal investigation of its business practices began in November 2006 when raids by German prosecutors prompted Siemens to talk to the U.S. authorities about potential violations of U.S. anti-bribery laws. The U.S. authorities indicated that the internal investigation was of "unprecedented scope." Reports suggest that over 300 lawyers, accountants, and support staff spent 1.5 million billable hours on the internal investigation alone. As well as collecting and sharing vast amounts of documentation with the U.S. authorities, Siemens agreed to pay $800 million in fines. Siemens' fines in a related settlement with the authorities in Germany stand at €596 million, bringing the total cost to date of resolving the corruption-related charges to around $1.6 billion.[2]

February 2009 saw a further illustration of the trend as shares in the Swiss bank UBS fell to an all-time low when they were forced by U.S. tax authorities to pay a $780 million fine and disclose the identity of around 300 of their U.S. clients. Separate civil proceedings were issued in Miami seeking disclosure of details of the business done by between 45 and 60 Swiss-based bankers who allegedly had travelled to the U.S. around 3,800 times with encrypted laptops.[3] The U.S. authorities suggested that 52,000 U.S. based customers could be involved. In Switzerland, this was headline news with calls for the resignation of the then UBS Chairman who is himself a lawyer. The stakes were raised after the Swiss government got involved with a settlement being negotiated in August between the U.S. and Swiss authorities, with UBS agreeing to provide details on around 4,450 accounts.[4]

These incidents come amid European developments to try and curb "le fishing expedition" in Europe. The French authorities have looked to legislate against French documents being used in foreign proceedings since 1968. In 2008, the French Supreme Court upheld the criminal conviction of a French lawyer for violating a Penal Law which provides that:

> *Subject to international treaties or agreements and laws and regulations in force, it is forbidden for any person to request, seek or communicate in writing, orally or in any other form, documents or information of an economic, commercial, industrial, financial nature leading to the constitution of evidence with a view to foreign judicial or administrative procedures or in the context of such procedures.*

The lawyer was fined €10,000.[5] In January of 2008, the French data protection authority, CNIL, said it would look again at measures to stop the reach of U.S. authorities and courts into France. CNIL's language has at times shown a frustration with what they perceive as the "U.S. way" of doing things. The leader of CNIL, Alex Türk reacted firstly to post-9/11 legislation touching French soil:

> *The virtue of the climate metaphor resides in its ability to reflect the unpredictability of current events, their abruptness and brutality at times, as well as their precarious serenity. Gusts of western winds, firstly, blowing from the US Administration determined to impose an extraterritorial effect to its homeland security laws.*[6]

CNIL then set up a committee led by CNIL Commissioner and Judge at the Cour de Cassation Bernard Peyrat to look at discovery in civil proceedings particular. In June last year Judge Peyrat described the issue as one which "*involves substantial challenges linked to both an "economic war" and a "war between legal cultures."*[7] Significantly, Mr. Türk said that he would use his chairmanship of the Article 29 working party (known as WP29, a pan-EU body looking at data protection issues) to put his campaign on the agenda for all of Europe.[8]

It is clear at the same time that the U.S. authorities have been more willing than ever to reach outside of the U.S. in their investigations. In 2008, the SEC made 550 requests to their foreign equivalents for assistance in their investigations including asking for telephone and e-mail logs.[9] U.S. authorities also helped train their foreign counterparts in their investigatory techniques. Many U.S. corporations in particular find themselves caught by this apparent conflict. They can ignore their own authorities and face sanctions at home, or they can comply with requests to export information from Europe, override the rights of European employees or third parties and face criminal sanction in Europe. In areas like internal investigations there is the added complication of aggressive subjects who will try and enforce their privacy rights to suspend, compromise or limit an investigation against them.

In February, Mr. Türk also led WP29 into action, publishing its opinion dealing only with the civil litigation aspects of the problem.[10] The WP29 opinion is still "an initial consideration" and interested parties can comment on it. WP29 itself is a representative rather than a law-making body although its opinions are often followed by regulators in the EU and in other countries in Europe (for example Switzerland). Many will feel that, like similar WP29 pronouncements on SOX helplines, the report is better at specifying the problems than proposing any solutions. WP29 reaffirmed its position that compliance with U.S. law is not in itself enough to override the data protection rights of individuals. It supported the French position that procedures are in place to help with foreign disclosure, notably provisions of the Hague Conventions, and recommended that American courts consider requiring litigants to use the procedures of the Hague Conventions if available and build in sufficient time in the litigation schedule for them to do so. It is interesting to note that the UBS settlement calls for the U.S. authorities to follow a similar process.

In both civil and regulatory cases, the data protection implications are many and varied. When conducting an internal investigation, for example, those involved must only use data which has been obtained "fairly and lawfully." In many cases this will include the corporation concerned having the consent of employees to collect their data and the investigation will need to be proportionate to the wrong. For example, the "borrowing" of pens from meeting rooms is unlikely to justify a wholesale trawl of every employee's e-mail. WP29 said that in civil proceedings litigants must limit the discovery of personal data to that which is objectively relevant to the issues being litigated. Care will need to be taken to avoid the use of sensitive data. Sensitive data is a term of art in privacy legislation. Its definition can vary across Europe, but restrictions on the use of sensitive data will make investigations involving issues like sexual liaisons, trade union membership, health and suspicion of prior misdemeanours harder to run in Europe. Investigators or data collectors need always be mindful of the fact that they may have to answer to employees, former employees and third parties for what they have done with their data and who they have shared it with. Broad document-freezing policies or litigation hold orders are also likely to cause issues. The WP29 opinion says: *[Data] Controllers in the European Union have no legal ground to store personal data at random for an unlimited period of time because of the possibility of litigation in the United States…."*[11]

In addition to data protection legislation, other laws could come into play including legislation aimed at preventing hacking and preserving the secrecy of communications. Often this category of law carries heavier criminal sanctions than data protection legislation. Some countries, like Greece, impose criminal sanctions for such a breach. In addition, improperly collected evidence could be inadmissible in any subsequent proceedings.[12]

In the U.S., a whole industry has built itself up around e-discovery and internal investigations. However, their experience and knowledge of the issues in Europe varies. If outside providers are used, proper due diligence will need to be done into their experience of assisting with investigations in Europe and their ability to do work in the relevant European country to avoid issues around transferring data to the U.S. This will include assessing the vendor's own compliance, the qualifications of its staff and their technical ability. For example, does the provider have the facility to partition data, secure it and set specific access rights tailored to individuals who need to see the data? Due diligence is also likely to include questions on their understanding of the standard BS 10008:2008 published in November last year. This standard deals with the evidential weight and legal admissibility of electronic information. It seeks to lay down a process for managing the authenticity, integrity and availability of electronic evidence. This due diligence must be done before data collection starts and compliance should be regularly audited throughout the process.

It is clear that these issues will come under increased focus this year as the pressure on regulators to regulate increases, and ever more U.S. litigation touches on Europe. Some lawyers in Europe have pushed for increased e-discovery in Europe; however, this is not universally welcomed. Lawyers practising litigation which touches Europe would be wise to work out a procedure now with

their clients for responding to the need to collect personal data for any purpose. Issues they will need to address include:

1. the need to limit the scope of investigations/ discovery;
2. the need to keep investigations in-country where possible;
3. restricting circulation—corporations need to get out of the habit of unintelligently copying people in "for information only" especially where those people are in a different jurisdiction. In discovery, consideration should be also given to applying to the U.S. courts for a protective order. With investigations and regulatory enquiries, consideration should be given to seeking to agree the scope of an investigation and steps like anonymization of data with regulators;
4. arrangements in each relevant jurisdiction with outside counsel who could direct an investigation;
5. managing employee expectations before an incident. This could include sending a reminder to employees that their e-mails could be read where legally permitted;
6. doing due diligence on suppliers; and
7. checking data protection registrations. In most countries in Europe corporations need to file for a state permit to process data. These registrations may need to be amended to refer unambiguously to processing of personal data for litigation and investigation purposes.

The need for law firms to know the local culture in those countries where data is collected, as well as local law, will be ever more important. Data collection procedures will have to be tailored to suit each occasion to try to ensure both compliance with local law and the expectations of the U.S. court or regulator. Litigation teams will need to include data privacy specialists in all aspects of the investigation and may even need to include independent counsel to lay down ground rules on behalf of those being investigated.

It is clear that in the next 12 months, neither the perceived wider spread of the U.S. legal system, nor the opposition to that spread in Europe, will decrease. If Judge Peyrat is correct when he speaks of a war between legal cultures, then we can be sure that the battle has only just begun.

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Endnotes

1. The survey in the run up to the NYSBA International Section conference in Stockholm in September 2008 used online voting by 77 NYSBA corporate counsel members. For an article on the survey and comments from in-house counsel see www.tinyurl.com/jpa009.
2. There is more information on the scope of the Siemens investigation here: http://www.tinyurl.com/cpqe5s" \n _blank.
3. *United States of America v. UBS AG*, United States District Court for the Southern District of Florida, Miami Division, Civil No. 09-20423.
4. For details of the settlement see the UBS announcement at http://www.ubs.com/1/e/media_overview/media_global/releases.html?newsId=170330.
5. WP 158 (Working Document 1/2009 on pre-trial discovery for cross border civil litigation), page 5.
6. See CNIL 2007 highlights here: http://www.cnil.fr/index.php?id=4.
7. CNIL bulletin 03/06/08.
8. There is more explanation of the French position, including an interview with Marc Lempérière, a French lawyer with experience in these cases, in the Brighttalk webcast from February 12, 2009, "Investigations & Discovery—Why US strategies don't work in Europe" here: www.tinyurl.com/jpa007.
9. SEC figures from Corporate Secretary December 2008 page 9 quoting SEC Chairman Christopher Cox.
10. WP 158 (Working Document 1/2009 on pre-trial discovery for cross border civil litigation).
11. WP 158 (Working Document 1/2009 on pre-trial discovery for cross border civil litigation), page 7.
12. See generally "Managing Risk: Technology and Communications" by Jonathan Armstrong, Mark Rhys-Jones and Daniel Dresner, published by LexisNexis, pages 36-45—www.tinyurl.com/jpa001.

* * *

The African Court of Human and Peoples' Rights

The African Court of Human and Peoples' Rights (ACtHPR), established on January 1, 2004, a product of the Organization of African Unity (OAU), now known as the African Union (AU), is the newest of the three regional human rights judicial bodies.[1] The other two courts are the European Court of Human Rights (ECtHR),[2] seated in Strasbourg, France, and established as a part-time court in 1959 and operating full time since 1998, and the Inter-American Court of Human Rights (IACtHR),[3] effective in 1979 and seated in San José, Costa Rica. The ECtHR is a creation of the Council of Europe and the IACtHR of the Organization of American States (OAS).

The Statute of the ACtHPR has yet to be promulgated and ratified so the Court is non-functioning at this time, even though eleven judges have been elected to the Court located in Arusha, Tanzania. There are two proposed features of the Court, which differ significantly from the other two regional human rights courts and indeed any other international judicial body.

The OAU/AU

The Organization of African Unity (OAU),[4] currently known as the African Union (AU), was established on May 25, 1963, in Addis Ababa, Ethiopia. The Charter of the OAU was signed initially by 32 African states and subsequently joined by 21 more.[5] The main aim was, and is, to promote unity and solidarity among African States, coordinate and intensify efforts for a better life for all its people, to defend sovereignty, promote territorial integrity and to eradicate colonialism in Africa. Due regard was given in the OAU Charter to the Charter of the United Nations and its Universal Declaration of Human Rights.

Membership of the OAU/AU comprises 53 of the 54 countries of Africa, with only the Kingdom of Morocco not a member, having withdrawn in 1985 following the admittance of the disputed state of Western Sahara.[6]

The OAU/AU has three major governing bodies: (i) the Assembly of the Heads of State and Governments, (ii) the Council of Ministers (the "Council"), and (iii) the General Secretariat.[7] The Assembly, consisting of a representative of each member nation, meets once a year to consider recommendations from the Council, made up of the Foreign Minister or a designate from each state. The Council determines the annual budget of the Union. The General Secretariat, situated in Addis Ababa, Ethiopia, is headed by the Secretary General who is elected to a four-year term by the Assembly. It is the administrative arm of the OAU/AU.

The OAU/AU created the African Charter on Human and Peoples' Rights in 1981 and the Protocol to the African Charter in 1998 with the African Court of Human and Peoples' Rights finally constituted in 2004, as will hereafter be discussed.

International Courts Classification

What follows is taken from the recent book, *The International Judge*,[8] written by Daniel Terris, Cesare P.R. Romano, and Leigh Swigart, with an introduction by our newest Supreme Court Justice, Sonia Sotomayor, then a Judge on the Second Circuit Court of Appeals. It will be interesting to see if her interest in international courts will find its way into her opinions.

International courts can be classified in four ways:

1. The classical state-only court, such as the International Court of Justice (ICJ) (World Court),[9] a civil court and an organ of the United Nations, situated in The Hague, in which only states may appear; the International Tribunal for the Law of the Sea (ITLOS); and the World Trade Organization Appellate Body (WTOAB);

2. The human rights courts, such as the three regionals, the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR), and the African Court of Human and Peoples' Rights (ACtHPR);

3. The courts of regional economic and/or integration agreements, such as the European Court of Justice (ECJ), which is situated in Luxembourg, and resolves mainly economic disputes among the 27-member states of the European Union (EU); European Free Trade Area Court of Justice (EFTA); and the Caribbean Court of Justice (CCJ); and

4. The international criminal courts such as the International Criminal Court (ICC),[10] a product but independent of, the United Nations, situated in The Hague, which is presently trying Thomas Lubanga Dyilo, a former rebel leader from the Democratic Republic of the Congo, whose forces are accused of ethnic massacres, murder, torture, rape and forcibly conscripting child soldiers; the International Criminal Tribunal for the Former Yugoslavia (ICTY), which trial of Slobodan Milosevic, the former Yugoslavian present, ended prematurely because of his death; the International Criminal Trubunal for Rwanda (ICTR); the Special Court for Sierra Leone (SCSL), which has been trying Charles Taylor, former president of Liberia, for war crimes and crimes against humanity (but using the facilities of the ICC at The Hague for security reasons); Extraordinary Chambers in the Courts of Cambodia; and the Special Panels for Serious Crimes in East Timor. Except for the ICC, which is a permanent court, most of the criminal courts are ad hoc, have a limited lifespan and have jurisdiction limited to a specific period and geographical region.[11] When a court has a mix of national and international judges and prosecutors working together it is often called a "mixed" or "hybrid" court such as the tribunals for Cambodia and Sierra Leone.

The ACtHPR Judges

As noted, the African Court of Human and Peoples' Rights is a regional human rights court. When it begins functioning, it will be ruling on the compliance by African Union member states with the Charter on Human and Peoples' Rights, adopted by the OAU June 27, 1981, which did not enter into force until October 21, 1986.[12]

The Charter, because it could not achieve consensus, omitted the creation of a court, and instead created an African Commission on Human and Peoples' Rights (ACHPR) presently situated in The Gambia.[13] Article 62 requires member states to submit every two years to the Commission a report on the legislative or other measures taken, with a view to giving effect to the rights and freedoms recognized and guaranteed by the Charter.[14] It hopefully will have more teeth in it when the Court is up and running if it is given sufficient powers as an enforce-

ment arm, because the Commission really has no enforcement and compliance control mechanism. Unfortunately, the Protocol establishing the Court, while requiring parties to a decision to comply with any Court judgment, makes enforcement of a judgment effectively voluntary.[15]

The definitive document establishing the Court is the Protocol to the African Charter, adopted by the OAU June 9, 1998.[16] Eventually, the necessary fifteen African countries ratified the Protocol and the Court was finally constituted in 2004. The Court is temporarily based in Arusha, Tanzania, which is also the seat of the International Criminal Tribunal for Rwanda. The Court is thus intended to be an organ of the AU and to complement the Commission on Human and Peoples' Rights.[17] The Court is comprised of eleven judges elected by member states of the AU, with only states party to the Protocol proposing candidates and no more than one national of any state sitting on the Court.[18] The judges were elected by the AU Assembly in January 2006[19] and have renewable alternating six-year terms. Article 14(3) of the Protocol requires "the Assembly shall ensure that there is adequate gender representation." Judges serve on a part-time basis except for the President of the Court who serves full time [Articles 15 (4) and 21 (2)]. Judgments require a majority vote.

Comparison With ECtHR and IACtHR

The ACtHPR is different from the ECtHR and the Inter-American Court of Human Rights (IACtHR), and indeed, from other judicial bodies, international or domestic. This is because the 1998 Protocol to the African Charter provides that actions may be brought before the ACtHPR on the basis of a violation of any instrument, including international human rights treaties.[20] The only condition is that the state party to be charged must have ratified the instrument in question.

In addition, the Court, when making decisions, may rely on any law relevant to human rights in addition to the African Charter, with the proviso that the instrument relied on has been ratified by the state party in question.[21]

As noted by the Project on International Courts and Tribunals:[22]

> In other words, the ACHPR[23] could become the judicial arm of a panoply of human rights agreements concluded under the aegis of the United Nations (e.g., the International Covenant on Civil and Political Rights, the Convention on the Elimination of all Forms of Discrimination against Women, or the Convention on the Rights of the Child) or of any other relevant legal instrument codifying human rights (e.g., the various conventions of humanitarian law, those adopted by the International Labour Organization, and even several environmental treaties). Very few of those agreements contain judicial mechanisms of ensuring their implementation, and therefore, at least potentially, several African states could end up with a dispute settlement and implementation control system stronger and with more bite than the one ordinarily provided for by those treaties for the rest of the world.

That, and what follows, could only possibly occur, of course, if the Statute of the Court, not yet promulgated or thus effective, has built into it a comprehensive enforcement mechanism to ensure compliance.

Pursuant to the Protocol to the ACtHPR, unlike the other regional human rights bodies or any other judicial body, advisory opinions may be asked for not only by member states and OAU/AU organs, but by any individual or African NGO (with observer status) recognized by the OAU/AU.[24] This is again qualified by the requirement that the member state involved has made a declaration accepting the jurisdiction of the Court to hear the type of case involved. Individuals may also bring contentious cases if the declaration has been made.[25] The issue is, how likely is it that African states will recognize the competence of the Court to hear individual or NGO petitions?

In summary, because neither the Statute of the Court nor the Rules of Procedure of the Court have been prepared, or if prepared, made available, and thus not ratified, it is undetermined how much teeth the Court will really have to enforce its judgments and opinions when it becomes a functioning judicial body.

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Endnotes

1. For website of the Court http://www.aict-ctia.org/courts_conti/achpr/achpr_home.html. *See also* http://www.aict-ctia.org. For an excellent summary, written by Scott Lyons, of the history of the Court see The American Society of International Law ASIL Insights—Volume 10, Issue 24 at http://www.asil.org/insights060919.cfm as of 9/4/09. *See also* the PICT summary at n. 20 infra and discussion n. 8.
2. *See* http://www.ECtHR.coe.int/ECtHR *and also* R.L. Gottsfield, *The European Court of Human Rights: Influencing the Way in Which Human Rights Obligations Are Understood Around the World*, New York International Chapter News Future Publication.
3. *See* http://www.corteidh.or.cr/index.cfm?CDIF=7406&CFTOKEN=57210983 *and also* R.L. Gottsfield, *Human Rights Protection in the Americas: The IACtHR*, New York International Chapter News Future Publication.
4. www.africa-union.org
5. For a concise history of the OAU/AU see http://www.diplomacy.edu/africancharter/organ_hist.asp as of 9/4/09.

6. For members of the OAU/AU see http://www.diplomacy.edu/africanchater/organ_memb.asp as of 9/4/09.
7. *Supra* n. 5.
8. *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases*, Brandeis University Press/ University Press of New England, 2007, at 6-7. Brandeis University houses the Brandeis Institute for International Judges which many international judges have attended, and the International Center for Ethics, Justice, and Public Life. http://www.brandeis.edu.ethics/international___justice/biij.html. Dr. Terris is the director of the Center. Dr. Swigart is the director of programs for the Center and oversees the Institute. Professor Romano, Loyola Law School Los Angeles, is the founding father of the Project on International Courts and Tribunals (PICT). The Project has established a new website dedicated to international courts and tribunals operating solely in Africa. www.aict-ctia.org.
9. *See* R.L. Gottsfield, *The International Court of Justice (World Court): A 60th Birthday*, New York International Chapter News, Vol. 11, No. 1 (Spring 2006) at 8.
10. *See* R.L. Gottsfield, *Human Rights Icon: The International Criminal Court*, New York International Chapter News, Vol. 13, No. 1 (Summer 2008) at 11.
11. *The International Judge*, *supra* n. 8 at 8.
12. PICT *infra* n. 20 at 1.
13. *See* "African Charter," at http://www.achpr.org/english/_info/charter_en.html. Sometimes called the "Banjul Charter," this agreement was adopted in 1981, but did not enter into force until October 21, 1986. Article 30 *et seq*. of the Charter established the Commission. For the Commission see http://www.achpr.org/english/_info/mandate_en.html. For Rules of Procedure for the Commission: http://www.achpr.org/english/_info/rules_en.html or http://www.hrcr.org/docs/African_Commission/afrcommrules2.html as of 9/8/09. Lawyers and rights activists have called on the Commission to move its headquarters out of The Gambia after President Yaya Jammeh threatened human rights defenders on national television and said he would kill anyone collaborating with them.
14. Rights and freedoms set forth at Articles 1-29 of Charter.
15. Lyons, *supra* n. 1.
16. *Id.* Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights http://www.achpr.org/english/_info/court_en.html or http://www.africancourtcoalition.org/content_files/files/ACJHR_Protocol.pdf.
17. Lyons, *supra* n. 1. The ACtHPR is not to be confused with the African Court of Justice, which was to address inter-state conflicts. The African Court of Justice has never entered into force but there is a draft process for merging the two courts. *Id.*
18. *Id.*
19. A list of judges and profiles can be found at http://www.pict.pcti.org/courts/ACHPR_judg_bio.html.
20. Article 3 of Protocol. See discussion Lyons, *supra* n. 1 and also the summary, as of 9/4/2009, provided by the Project on International Courts and Tribunals (PICT) at http://www.pict-pcti.org/courts/ACHPR.html.
21. Article 7 of Protocol.
22. See n. 8 *supra* for PICT and the summary at n. 20 *supra*.
23. Referred to as ACtHR in this article to avoid confusion with the African Commission on Human and Peoples' Rights ("ACHPR").
24. Articles 4, 5 (3) and 34 (6) of Protocol.
25. Articles 5 (3) and 34 (6) of Protocol.

* * *

CEDAW Committee: 2009 N.Y. Summer Session

The 44th session of the Convention to Eliminate All Forms of Discrimination against Women (CEDAW) Committee was held from 20 July to 7 August at the N.Y. Headquarters of the United Nations. CEDAW has been recognized as the international bill of human rights for women and girls. It 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 female genital mutilation and cutting as well as early marriage.

This session is particularly noteworthy because, in addition to examining certain country reports, the CEDAW Committee considered issuing two new General Recommendations. One of the important proposed General Recommendations concerned the issue of older women, who are often neglected by societies. The other significant proposed General Recommendation relates to the economic consequences of dissolution of marriage by divorce or death, and the negative impact upon women and their children.

The CEDAW Committee held two open sessions in order to elicit information about the proposed General Recommendations. UN entities, NGOs, and other actors from civil society delivered interventions which were overwhelmingly in support of both themes.

Specific issues that were discussed regarding older women related to armed conflict and the inability to flee persecution, statelessness, difficulty in making asylum claims, lack of access to health care, lack of social support benefits and networks, violence, and the negative impact of the economic crisis upon women.

Denise Scotto, Esq., provided a written statement noting the specialized area of *elder law* in many developed countries including the U.S., explaining its significance and the concept of *elder abuse,* particularly as it concerns women.

The discussion concerning the economic consequences of dissolution of marriage by divorce or death generated participation primarily by those involved in the legal field because, as it is well known, in most societies, marriage is regarded as a contract. Issues which arouse included: registration of marriage; the right of women to initiate divorce; religious and customary law and practices; polygamy; marital support; child custody; distribution

of assets and the right of women to manage property and widowhood.

Denise Scotto, Esq. with support from Jill Laurie Goodman, provided a written statement on this critical area of concern and delivered an oral intervention at the session. Some of the key points that were mentioned related to equality before the law; the legal process; legal aid; increasing the number of women in the legal and judicial professions, and conducting gender sensitivity training.

The CEDAW Committee working groups will continue to analyze the issues and expect to produce preliminary drafts of the proposed General Recommendations early 2010.

Denise Scotto
International Federation of Women Lawyers &
International Federation of Women in Legal Careers
UN Representative
Former Social Affairs Officer UN Department of Economic & Social Affairs

* * *

International Estate Planning for U.S. Citizens

An extensive article of mine, "International Estate Planning for U.S. Citizens: An Integrated Approach," has appeared in the October, 2009 issue of the U.S. estate planning periodical, *Estate Planning*, a publication of Thomson Reuters.

The article urges that an estate plan for a U.S. citizen with extensive foreign property holdings should aspire to have only one U.S. global Will or testamentary instrument to govern the disposition of the client's worldwide property rather than separate Wills for each foreign jurisdiction in which the client may own property. By organizing the non-U.S. property in a U.S. limited liability company or similar entity, the U.S. citizen client can effectively convert non-U.S. property into U.S. property for estate planning purposes so that the U.S. global Will can govern the worldwide property without the need to have recourse to foreign probate and/or succession proceedings and without the need to apply foreign law rules regarding choice of law, inheritance, community property, debtor-creditor rights, and succession taxes. This can be critical to the successful implementation of an international estate plan because foreign property and tax rules often vary substantially from U.S. rules and therefore can upset and even destroy what would ordinarily be a U.S. tax-efficient estate plan.

The article draws in part on an extensive survey of estate planning experts in 37 countries outside the United States. It concludes that, in 19 of the surveyed countries (with a few exceptions for real estate), the transfer of foreign property to a U.S. LLC should immunize the foreign property from the application of local rules that often require a testator to leave a percentage of the testator's property directly to children or a spouse, forbid transfers in trust, expose the heirs to unlimited liability to a decedent's creditors claims and incur local succession and other taxes for which there is no adequate U.S. tax credit or offset. That number increases by at least another eight countries when the U.S. citizen acquires the foreign property through a U.S. LLC at the inception rather than acquiring the property individually and transferring the property later to a U.S. holding entity.

The article also underscores the importance of acquiring foreign property through a U.S. holding entity in the first instance by discussing the local income and gains tax consequences of transferring foreign property that was initially acquired in the name of a U.S. individual to a U.S. holding entity. Most countries in the world effectively treat a U.S. LLC for tax purposes as a corporation rather than as a pass-through entity, with the consequence that the U.S. client could trigger income or gains taxes for which there would be no offsetting U.S. income or capital gains tax credit because the transfer would not be a taxable event for U.S. tax purposes. Acquiring the property through a U.S. LLC or other entity in the first instance would avoid this potential "mismatch" of U.S. and non-U.S. tax concepts. The article explores strategies for dealing with such "mismatches" in situations where the property has already been acquired immediately. It also explains the general tax consequences when a U.S. LLC is taxed on current income as a separate taxpayer in foreign jurisdictions but is disregarded for U.S. tax purposes.

The article discusses a number of supplemental strategies to be used when holding foreign property through a U.S. LLC may not, in itself, be a complete protection from the application of foreign law rules that would compromise a typical U.S. tax-efficient estate plan. These strategies include lifetime as well as post-death renunciations, inheritance agreements among U.S. clients and their heirs, and also conditional bequests and "in terrorem" clauses that would disadvantage or disinherit an heir who tries to pursue succession rights in a foreign country that contravened a U.S. estate plan. The article concludes with advice as to how to proceed if the holding entity strategy for any reason cannot be implemented: "any acquisition of U.S. property and any execution of a non-U.S. will must always invite review of the U.S. will as well as revision and re-execution of the U.S. estate planning documents after the non-U.S. transactions are complete."

The text of the full article may be found on the Thomson Reuters tax database, "Checkpoint," on the publication page of the website of Phillips Nizer LLP or by e-mailing me at mgalligan@phillipsnizer.com.

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Chapter News

New York State Bar Association
International Section
India Chapter

First All India Conference

Oberoi Hotel, New Delhi, India—June 4-6, 2009

Opening Remarks of James P. Duffy, III

Former Chair, International Section

As we begin our New Delhi Chapter's first conference, it is only fitting to take a few minutes and reflect on the great common heritage that New York and India share through their use of the common law which we both acquired from our respective past links with England.

As you probably know, New York was one of the original thirteen States of the United States of America. However, before becoming part of the United States, New York was an English colony until 1776, when these thirteen English colonies declared their independence from England.

Even though New York and its twelve sister States wanted to be free of certain oppressive aspects of English rule, and fought a long and hard war with England to do so, New York did not want to be free of many aspects of English culture, heritage, and tradition. Among the things New York wanted to retain was the English language and the English system of common law. While I am not as knowledgeable of the history of India, this may be similar to what happened in India, which also chose to maintain English as a working language and to keep English common law as the foundation of its legal system when India became independent from England.

Thus, it is not surprising that lawyers from India and New York would seek to enrich their common legal heritage by working more closely together and by sharing more fully their knowledge and understanding of the elements the common law legal system adapted from the English. As a New York lawyer, I am most pleased to be here this week to meet and discuss important issues with my colleagues from India. I very much want to learn from my Indian colleagues about their version of common law. I am also pleased to be able to have a few minutes to share with you some insights into New York's version of common law.

Obviously, India and New York have each put their own mark on the common law system they received from the English, but both systems still have their foundation in *stare decisis,* the primary guiding principle of common law. Simply put, unlike civil law which is code driven, common law seeks to assure that, if two different groups of litigants go into court with the same facts, both groups will leave court with the same result—something that is not always assured in civil law. Although this is a simple concept, it is what makes the common law legal system we both share so vibrant.

For well more than two centuries, New York has been a leading center of finance, commerce, and industry. For example, the New York Stock Exchange, one of the world's leading stock exchanges, was founded in 1792, when 24 New York City stockbrokers and merchants signed the Buttonwood Agreement. In colonial days New York was also a major port, and the metropolitan New York area remains so today. While New York City is not the largest city in the world and probably never was, New York City was always a large city with an enormous concentration of highly skilled business and professional people who often had to rely on the legal system of New York to adjudicate the disputes and differences that inevitably occur in all aspects of commercial life. Because of this, New York's version of common law, aided by those of its sister States and the federal government of the United States of America, has remained at the forefront of legal thinking as it relates to business, finance, and commerce.

As a consequence, New York law is highly evolved, well understood, and is widely practiced by a large number of lawyers who are generally perceived as being highly skilled and competent. Perhaps, most important, is that New York law is administered by courts that are generally perceived as dispensing justice according to the highest standards. Like India, New York is firmly committed to the Rule of Law.

Thus, it is no surprise that New York law has achieved a certain prominence in important transactions, including international transactions. While there is no hard evidence I know of to support these statements, it is widely understood that about ninety percent of the world's most important transactions are conducted in the English language and that ninety percent of those English language transactions are subject to New York law as the governing law, with English law governing most of the rest. Whether you accept these anecdotal figures or not, there can be no serious dispute that New York law governs a large percentage of the world's business transactions.

Because of the role New York law plays in international finance, business, and commerce, it is understandable that New York attorneys have a strong interest and concern in seeing that New York law is not only properly understood around the world but is also practiced cor-

rectly whenever it is chosen to govern a transaction. Put another way, the improper application of New York law tends to destroy its integrity and its utility as a reference legal system. Thus, if the parties to a transaction elect to have the transaction governed by New York law, they should also make sure that they get proper New York legal advice. If they do not, they may not achieve the benefits they seek. Instead, they may experience some rather disastrous consequences as would usually be the case if any body of law were incorrectly applied to the question at hand.

Also, it is important to know when New York law is the same as or different from another version of common law, because there may be times when New York law may not be the most appropriate law and some other law might serve better. There may also be times when a particular version of civil law is preferable to common law. As lawyers, we all know that there can be majority views and minority views on many important subjects. Sometimes, even within a majority or minority view, there are further differentiations. While these differences may seem subtle on occasion, the outcome can be most surprising if they are disregarded. Thus, it is important to know whether New York law is appropriate or not in any particular circumstances.

We are very fortunate that we have a number of outstanding speakers at this conference who are well able to explore the nuances of both New York law and Indian law and help us understand the similarities and the differences of these two important bodies of law. More important, our panelists will help us appreciate the richness and depth of both New York law and Indian law. This will undoubtedly facilitate better understanding and cooperation between New York lawyers and Indian lawyers as India becomes increasingly more involved in the world economy.

Thank you for your attention, and I hope you find this to be an interesting and enjoyable conference at which you will meet many interesting people, many of whom will become your friends.

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Address of Michael W. Galligan

NYSBA International Section Chair

First Meeting of NYSBA International India Chapter

New Delhi, June 5, 2009

Dear Distinguished Colleagues and Ladies and Gentlemen:

If you take the time to access the website of the International Section of the New York State Bar Association, "NYSBA International," you will read that the Section "is dedicated to the promotion of the international practice of law in all phases of international life—whether commercially or for the common good—and to the promotion of the rule of law throughout the world." This morning, at the inception of this historic first meeting of the NYSBA International India Chapter, I would like to consider and discuss with you the meaning of these major goals of our organization.

I. Strengthening International Civil Society by Promoting the Rule of Private as Well as Public International Law

Many of us no doubt were first drawn to an interest in international law by issues that are commonly said to involve "public international law," such as building peaceful relations between states based on the fundamental principles embodied in the Charter of the United Nation—respect for the territorial integrity of nation states, non-aggression, respect and promotion of the civil, political, social and economic rights of every individual and cooperation among states in order to build the conditions for human dignity and prosperity throughout the world. Now, in those parts of the world where states do not claim to occupy every part of economic and social life but support the flourishing of an autonomous civil society, there developed in the years after World War II an exponential increase in travel, communication, sharing of information, cross-border financial investment, commercial transactions and corporate affiliations among private persons, families and business entities, under many different circumstances and in a wide variety of forms, what I think can best be called "international civil society," of which this meeting is a splendid reflection and example. The scope of this mass of transnational activity became almost universal when the major countries built on the premises of state socialism and one party rule either adopted many of the tenets of "liberal democracy" or at least switched to an emphasis on market forces in the planning and development of their economies.

This proliferation of transnational contact and commerce has created the field of what can rightly be called "private international law"—not just in the more restricted sense of conflicts or choice of law as that term is often used by our colleagues from continental Europe—but in a much more comprehensive and dynamic sense. This includes (1) seeing the various countries of the world as they develop their own law related to the increasing internationalization of all aspects of life as laboratories of legal invention and experimentation from which all of our respective countries can learn and benefit (2) building a network of agreements between countries that seek to rationalize and harmonize the legal traditions of the state parties in areas of commercial and personal law so as to encourage and not inhibit transnational private activity, and (3) where desirable and convenient, to establish transnational structures that coordinate and regulate specific areas of international commerce—for example, in the areas of trade, environment and even immigration. In truth, as you can see, the old distinction between public international law and private international law is itself breaking down as the diplomatic resources of states are more and more dedicated to issues outside the province of public international law in the traditional sense and are dedicated to the promotion and facilitation of the activity of international civil society.

The International Section of the New York State Bar Association stands firmly rooted and has its reason for existence in the vitality and broad reach of international civil society. It is committed to the development and strengthening of an interrelated set of legal principles, structures and policies that support each level and type of international civil relationship, transaction and project—from the exalted world of complex international financings and corporate acquisitions to the lowly efforts of a crew member of an ocean cargo ship or a migrant worker to access a bank account in a port of call or temporary place of work, even to the more intimate sphere where lovers from different countries attempt to formalize their relationships in marriage or similar forms of personal union. This, of course, does not mean that NYSBA International has forgotten the still very critical issues that need to be addressed to strengthen of the rule of law at the level of the formal relations of states and to promote a worldwide system to protect international human rights—for these issues and needs still undergird the whole international system, including that of international civil society.

II. The Structure and Strategic Objectives of NYSBA International

To see how NYSBA International in general—and the India Chapter in particular—can contribute to these objectives, let me explain a little about the structure and strategic activities of the Section.

The Section has five major organizational components: (1) substantive law and regional law committees, (2) national chapters, (3) conference steering committees, (4) the Executive Committee, and (5) the Section's web-based membership communities.

1. **Law and Regional Committees.** The Section has over thirty committees each devoted to a substantive area of private or public international law or to the legal issues of special relevance to a region of the world. Every member of the Section, whether living in New York or anywhere else in the world, can serve as a m ember of as many committees he pleases. Each Committee should generally has two co-chairs and a steering committee.

2. **National Chapters**. The Section endeavors to have a chapter in every county and in countries like India, to have co-chairs from every important city of that country. Membership in a chapter is intended primarily for Section members residing in that country, but there is nothing to prevent Section members residing in New York or other countries from joining one or more particular chapters.

3. **Program Committees**. The organization of a major Conference—such as the four-day "Annual Seasonal" Conference that will take place in Singapore in the last week of October this year and our major continuing legal education conferences in New York—such as "Fundamentals of International Practice" and "International Practice Institutes"—require the leadership of a steering committee organized well in advance of the event. Membership in these committees draws from our worldwide membership.

4. **Executive Committee**. The Executive Committee is the steering committee for the entire Section. Its members include all chairs of the substantive law and regional committees, the national chapters and the program committees as well as the Section officers.

5. **The Web Communities**. I cannot underestimate the importance of the web communities because these are the means, made possible by the revolution in international communications over the past couple of decades, by which every member of the Section can have a voice and be aware of all the opportunities the Section offers. The Section Listserve, while not organized at this time as an interactive site, is still the way in which the Section's leadership can "scan" the Section membership for volunteers, ideas and important news. For example, without the ability to reach out so quickly to our members on the Section Listserve for volunteers to join this meeting in India, we might never had sufficient participants from outside India to enable this first meeting of the India Chapter to go forward. Every Committee and Chapter can have its own Listserve, organized through NYSBA headquarters. In addition, there are also over 300 members who are part of an interactive web-based community through Linked-In.

We are also expecting momentarily the installation of a web-based membership directory that will enable Section members to identify and communicate with fellow members in specific countries and cities and a web-based project using the new "Google Knolls" technology that will enable eventually all Section members to share with each other articles and studies that they have authored in all the areas of international practice and law with which the Section is concerned.[1]

Now let me turn to what I world call the strategic activities of the Section:

1. **Education**: While the core principles of the law we learned years and even decades ago have not changed, the application of these principles is open to new challenges every day to a plethora of issues that were not even thought of just a little while ago. Moreover, especially in international practice, no legal counsel can be an "island" in his or her area of specialty. Every Committee and Chapter is encouraged to organize events that will deepen the legal knowledge of our members and also broaden their international horizons and perspectives. These programs can include lunchtime or breakfast events with a single speaker to more formal programs approximating a half day or even a one or two day conference like this meeting of the India Chapter, possibly in association with other committees, chapters and even other bar associations.

2. **Networking**: Members of NYSBA International want not only to learn about and understand international practice but to help create the relationships and transactions that make much up international practice and also assist each other in the legal work that must be accomplished to make transnational relationships and transactions succeed. Committees and chapters can organize receptions and other social, events—in conjunction with educational events or not as they see best. The Annual Seasonal Conference is a also a splendid opportunity for this type of interaction. Perhaps, in the long run, our web-based communications portals will provide methods of interaction that we have not yet even thought of at this time.

3. **Development of Law**: NYSBA International seeks to shape law and assist in the development of the international legal systems that make international practice possible. This includes reform and change in the law of (1) New York, the home jurisdiction of the Section, (2) the federal law of the United States, (3) the relevant federal and local law of its "chapter countries," (4) the law of treaties affecting private international law as well as public law, including but not exclusively those developed through the Hague Conference on Private International Law, UNCITRAL and UNIDROIT. NYSBA International, for example, was influential in changes to the rules of New York law about the granting of judgments in foreign currency. NYSBA International has been actively involved, through its Committee on International Estates and Trusts, in efforts to secure support of U.S. ratification of the Hague Convention on the Recognition of Trusts. Projects that are now under consideration include (1) study of the Model UNCITRAL Arbitration Statute as a model for a reform of the U.S. Federal Arbitration Act, (2) study of the advisability of a possible treaty concerning the protection of intellectual property assets in national bankruptcy proceedings, (3) study of legal instruments that simplify the procedures for executing against property serving as security for registered obligations in countries that do not necessarily have jurisdiction over the financial obligation so being secured, (4) reform of New York and other state law provisions dealing with cross-border distributions of estate assets to heirs in civil law countries, and (5) procedures for the appointment of non-U.S. persons to be guardians of orphaned children in New York and other states.

4. **Reform of Rules Affecting the Ability to Practice Law**: International practice does not always fall neatly within national and state rules about the authorization to practice law, the limits of competence to render legal opinions and the ability to appear in courts outside the jurisdiction where a lawyer is normally admitted to practice law. NYSBA International is in the process of considering how best to institute a new version of a New York State Bar Association Committee on Cross-Border Practice that recently worked on these issues for several years.

5. **Promoting the Rule of Law**. Despite well-conceded weaknesses and being the subject of criticism of from many quarters in the world, the United Nations, which is headquartered in New York City, represents the most comprehensive worldwide organization devoted to the promotion of peace and the welfare of peoples. The United Nations is the home of the International Law Commission and UNCITRAL, which has been the sponsor of a number of important treaties that affect the private practice of international commercial and financial law as well as the resolution of private legal disputes. NYSBA International is investigating the possibility of the New York State Bar Association attaining NGO status at the United Nations, the better to have a voice in and to better understand the newest developments that affect the rule of law domestically and internationally at the United Nations and its member organizations.

III. India's Dedication to the Rule of Law

Dear colleagues, it is especially appropriate that we meet here in New Delhi, in India, to discuss the involvement of our new India Chapter in the work of NYSBA International. In 1959, the International Commission of Jurists met here and issued the "Declaration of Delhi" on the rule of law. In that declaration, the Commission said that it reaffirmed the principles that an "independent judiciary and legal profession are essential to the maintenance of the Rule of Law and to the proper administra-

tion of justice." The Commission also went on to declare that "the Rule of Law is a dynamic concept for the expansion and fulfillment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which the legitimate aspirations of men and women may be realized."

No one can read the story of the meetings of the Constituent Assembly that met here in New Delhi and drafted the Constitution of India from 1946 to 1949 without being convinced that dedication to the ideal of the rule of law runs very deep in the modern history of this country, even if the great pluralism of religions, ethnic groups, languages, political philosophies, historical and modern class and caste distinctions have posed major challenges to its implementation in the every day life of the nation. Your Constitution reflects the priority of the rights of the individual over group or class or community affiliations and a recognition of the key role of the judiciary in the development of the civic and political life of the nation. The increasingly important role assigned to private markets and international investment here also reflects a growing integration of the peoples of India into what I have been calling international civil society.

This history and these developments makes us all the more eager to have the benefit of your ideas, your insights, and your contributions to the development of fair and workable legal systems that facilitate the types of international communications and exchanges in all walks of life—commercial and non-commercial—that make up international civil society. We in New York are, of course, very proud of what we believe is the deep commitment and passion for the rule of law that lies behind the history of our state and our country, even as we are aware that we too have certainly not mastered all the challenges that the varieties of prejudice, discrimination and class distinctions that are part of our history—so much shorter than your history—have posed and even though our own U.S. Supreme Court—just like the Supreme Court of India—has perhaps not yet said the "last" word about the proper role of the judiciary in our own constitutional system.

Nonetheless our pride, which you may detect in certain comments you may hear during this meeting about the strengths and attributes of "New York law" or even "United States law" by no way means that we cannot benefit, learn from and even be corrected by the insights and the contributions of the bar of India and the bars of the other many countries in which NYSBA International has chapters. In this respect, I hope you will allow me to apply to our experiment in attempting to build a truly international bar association with its roots in New York State the words a certain lawyer, first admitted to the Inner Temple of London and later a legal practitioner in South Africa before returning to India, the country of his family's origins, once said in regard to his own love of India:

> My patriotism is not an exclusive thing. It is all-embracing and I should reject that patriotism which sought to mount upon the distress of the exploitation of other nationalities. The conception of my patriotism is nothing if not always, in every case, without exception, consistent with the broadest good of humanity at large.

Of course, I refer to the words of none other than Mohandas G. Gandhi, the Mahatma, and with these words I am also happy to thank you for your attention this morning and for the extraordinary hospitality and generosity of the Indian lawyers and law firms who have made this extraordinary meeting possible.

Thank you, again!

Endnote

1. In all these efforts, we are also supported by the principal publications of our Section, the *New York International Law Review,* the *International Law Practicum* and the *New York International Chapter News.*

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Section News

Mission Statement

Please find reprinted below the e-mail that our Section Chair, Michael Galligan, sent out to our membership outlining the long-term missions for the Section, which were adopted by the Executive Committee in September of 2009.

Dear Members of NYSBA International Section,

This may be my most important message of the year to you!

The purpose of this e-mail is to share with you the news that our Executive Committee, at its meeting on September 15 last, adopted for the Section the following "long-term missions":

1. Custodian of New York Law as an International Standard.
2. Guardian of the New York Convention on the Enforcement and Recognition of Arbitral Awards and the international arbitration process.
3. Monitor of International Law Development in the United Nations System.

Below is the description of each mission that was adopted by the EC. Please keep in mind that these missions by no means exclude many others present and future but we hope these particular missions will help to define some of the areas of activity and focus that define the distinctive identity of the International Section of the New York State Bar Association and its unique contributions to the international legal community and for all those who, for whatever reason, are concerned about the rule of law throughout the world.

Here are some of the first steps we envisage to begin to implement these missions:

1. Custodian of New York Law: The EC, at the September 15 meeting also approved the formation of a new Committee of International Contract and Commercial Law. We will soon be sending out an invitation for leaders and members and organizing a first meeting to take place in November or early December, once the Singapore Conference is concluded. While many of our Committees can contribute to this mission, we expect the new Committee to have a special focus related to this mission.
2. Guardian of the New York Convention: Our Committee on International Arbitration will have a very special role with regard to this mission. The January 27, 2010 Annual Meeting Program will be devoted to this topic and NYSBA's new Dispute Resolution Section will have additional relevant programming on January 28. I would like to see us set up a clearing house for information about case law and legislative developments in the countries where we have chapters. Ideally, each Chapter will have a "reporter" on developments in its jurisdiction.
3. Monitor of UN Legal Developments: Our Committee on the United Nations will play a leading role but, because of the many forums in which international rule-making activity is taking place, many other of our Committees should be involved as well. We are planning on a joint meeting of the leadership of our UN Committee, NYSBA leaders and Section officers, the leadership of the United Nations Association of New York and other interested parties, probably in early December, to move forward on this front. We had had a generous offer from Denise Scott, co-chair of our Committee on International Women's Rights, to assist with a possible application for NGO status.

Please spread the word about these "three missions" to your colleagues and friends. I hope these missions will inspire many of you to become more active in the Section and also to help you identify colleagues for whom the adoption of these missions would be an important reason to become members of NYSBA International. In pursuing these three missions, we welcome the participation and cooperation of other New York international bar associations, including, but not limited to, the international committees of the New York City Bar Association, the New York County Bar Association, the Federal Bar Council, AFLA, ASIL, the international sections of our sister U.S. state bar associations, IBA, UIA, and the bar associations of the many countries and jurisdictions in which we have chapters.

Here are descriptions of the three missions adopted by the Executive Committee:

THREE LONG-TERM MISSIONS OF NYSBA INTERNATIONAL

1. **"Custodian" of New York Law as an International Standard**. It is said that more international transactions are governed by New York law than the law of any other jurisdiction in the world. While New York can be proud of the reception that its law has received throughout the world, this fact carries a corresponding responsibility to work to make New York law as strong, flexible and useful as possible for purposes of structuring cross-border business and personal transactions. The

process here should be reciprocal and not competitive. There is after all no copyright on New York law; other jurisdictions can incorporate New York legal concepts or provisions that they deem meritorious. At the same time, New York must learn about and be willing to adopt meritorious provisions of laws that other jurisdictions have adopted or recommended.

2. **"Guardian" of the New York Convention on the Enforcement and Recognition of Arbitral Awards and the international arbitral process.** The United Nations Convention on the Enforcement and Recognition of Arbitral Awards was negotiated, drafted and signed in New York City and hence it is better known as the "New York Convention." The New York Convention is the key to what has made international arbitration such a force in private and even public international law because, with it, has come substantial assurance about the enforceability of arbitral awards through national courts even where the courts have not rendered the awards whose enforcement is sought. With the help of our chapters throughout the world, we should be able to maintain up to date information about the implementation of the New York Convention globally. We should also take a lead in discussions and proposals about updating the Federal arbitration act, other national arbitration statutes, and the arbitral process itself.

3. **"Monitor" of International Law Development at the United Nations.** The United Nations is headquartered in New York as well as is the Secretariat of the International Law Commission. It is important that the international bar be knowledgeable about and involved in the process of law formation and treaty development that occurs through the United Nations and its agencies, such as UNCITRAL and UNIDROIT. For this purpose the Section should take the lead in assuring that NYSBA, or at least the International Section, has NGO status at the United Nations (as the ABA and the NYCBA already have) and, once achieved, plays an active role in the UN discussions and debates on matters of importance to NYSBA International members and their varied practices and civic concerns.

Approved by the NYSBA International Executive Committee

September 15, 2009

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Singapore

Please find reprinted below the e-mail that our Section Chair, Michael Galligan, sent out to our membership following his return from the Singapore meeting. In addition, as enclosed in his e-mail, we are also providing you both his, and Minister for Law, K. Shanmugam's opening addresses.

Dear Section Members:

I have just returned from our Annual Seasonal Meeting in Singapore. The meeting was, by all accounts, an outstanding success.

1. The Meeting was, I believe, our most successful conference from a regional perspective in the twenty-plus year history of these Meetings—with the possible exception of our Latin American Meetings. Countries from Southeast Asia and the Pacific region represented among the speakers and participants included representatives of China, India, Australia, Indonesia, Malaysia, Vietnam, Japan, Thailand, Taiwan, Philippines, in addition to Singapore. The "lion's share" of credit for this tremendous representation goes to Program Co-Chair Eduardo Ramos-Gomez who worked untiringly over the past two years to identify chapter chairs for many of the Asian jurisdictions in which we had never had chapters before. We also owe a tremendous debt of gratitude to Program Co-Chair Glenn Fox for the work he accomplished in supervising and coordinating the organizations of over 30 programs that were featured at the meeting. I want to thank not only Eduardo, Meng Meng Wong and Glenn for their leadership of this Conference but for all those members who organized the wide array of panels and plenary sessions that made the meeting such a substantial and educational occasion. I must also thank the leadership of Singapore Management University and the National University of Singapore for their tremendous tangible, intellectual and cultural support for the Conference, as well as the tremendous support and hard work of our NYSBA staff in Albany.

2. The Supreme Court of Singapore and the Singapore Ministry of Law provided substantial logistical and personal support for the Conference, for which we are very mindful and grateful. Never before, I believe, have we had such an extensive participation of officials at the highest level of government in our meetings as we had in Singapore—and on such a significant and even controversial topic—the interpretation and application of the rule of law. The Chief Justice of the Supreme Court of Singapore, Chan Sek Keong, as our Keynote Speaker on October 27, addressed us in some de-

tail on Singapore's approach to the rule of law. He was preceded by Singapore's Minister of Law and Second House Minister, K. Shanmugam, who first addressed the Meeting at the Opening Ceremony on October 26. Minister Shanmugam addressed us again at the Rule of Law Plenary on October 28 and then responded to questions and took part in the discussion on Singapore's approach to rule of law issues immediately following his address. We were also addressed by Foreign Affairs Permanent Secretary B. Kausikan, Ambassador-at-Large Tommy Koh and Attorney General Woon Cheong Ming Walter. This outstanding participation of government leaders was surely a sign of the respect the leadership of Singapore has for Program Co-Chair Meng Meng Wong and for Eduardo Ramos-Gomez, as well as an indication of the importance they attached to our Meeting. I should note that Ambassador Koh challenged us to ensure that the United States properly fulfills its role as the leader in the effort to establish the rule of international law on a global basis and to show by its actions that it considers itself bound by the principles of international law—this is something to which our Section should always be attentive.

3. Great social events, at our Annual Meetings, are important occasions for establishing new ties, both personal and professional, between the members of the Section and leading attorneys of our host country. The highlight of the social events at the 2009 Meeting was the gala dinner at the National University of Singapore (Lee Kuan Yew School of Public Policy). The gala commenced with a performance of a ballet that expressed the ideals of hope and peace. It ended with a musical meditation played by the orchestra assembled for the ballet and the dinner. Other events included cocktail/dinner events at Singapore Management University ("SMU") on October 26 and the Maxwell Chambers Arbitration Center on October 28 and, last but not least, an "al fresco" dinner on the evening of October 27 at which we were treated to a performance by students at SMU of a traditional dragon dance. Eduardo Ramos-Gomez's expert hand and creativity could be seen in all of these events. I want to thank not only Eduardo, Meng Meng and Glenn for their incomparable leadership of this Conference but for all those members who organized the wide array of panels and plenary sessions that made the meeting such a substantial and educational occasion.

I enclose here for your interest the texts of the Opening Addresses of Minister Shanmugam and myself on Monday evening, October 26. We will be posting on the NYSBA International Section website additional materials related to the October 28 Rule of Law Panel. At the Opening Ceremony, representatives of the NYSBA and SMU also signed a Memorandum of Understanding regarding future collaboration between the SMU Law School and NYSBA International. We hope this Agreement will help ensure a lasting connection and partnership of our Section with our colleagues in Singapore. The National University of Singapore has just initiated a Center for International Law and we hope we can explore avenues of cooperation there as well.

Thank you to all those who traveled to Singapore for this extraordinary event! Now that those of you who did not travel to Singapore know how much you missed…. Steve Krane (Chair-Elect), David Russell and Richard Gelski (Australian Chapter Co-Chairs), Andrew Otis (Secretary and Sydney Program Co-Chair) and I all look forward to seeing all of you at the 2010 Annual Seasonal Meeting in Sydney!

Michael

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ADDRESS OF MICHAEL W. GALLIGAN
CHAIR, NYSBA INTERNATIONAL SECTION

AT THE OPENING SESSION OF THE
ANNUAL SEASONAL MEETING IN SINGAPORE ON OCTOBER 26, 2009

Honorable the Chief Justice Chan Sek Keong, Minister K. Shanmugam, President Hunter, President Getnick, President Krishnamani, Dean Furmston, Distinguished Members of the Bar of Singapore and of the State of New York, Distinguished Guests, Ladies and Gentlemen:

Two states aside the greatest waterways of the world;

Two cities boasting the finest harbors in the world;

Two centers of entrepreneurial energy admired the world over;

Two giants of global finance, banking and commerce;

Two jurisdictions that trace their legal systems to the fundamental maxims and procedures of the common law;

Two peoples whose forbears each came from lands thousand of miles away, driven by famine, economic dislocation and political disjunction…

Ladies and Gentlemen, these two jurisdictions, New York and Singapore, located at opposite ends of the earth, almost at the antipodes of the globe, now come together in this Lion City, in the persons of the leaders of their professions, academies and courts of law, for this extraordinary Meeting, planned for and anticipated for almost three years, now finally realized notwithstanding last year's global economic shock and major political change in the United States and elsewhere.

Sitting (l-r): Prof. Michael Furmston, Dean, SMU School of Law; Prof. Howard Hunter, President, SMU; Mr. Michael Getnick, NYSBA President; and Mr. Michael Galligan, NYSBA International Section Chair.
Standing (l-r): Practice Assistant Professor Rathna Nathan, Associate Dean, SMU School of Law; Mr. Eduardo Ramos-Gomez, Managing Partner, Duane Morris Singapore LLP; Mr. K. Shanmugam, Minister for Law and Second Minister for Home Affairs; and The Honourable the Chief Justice Chan Sek Keong, Supreme Court of Singapore.

It is my great privilege and pleasure, as the Chair of the International Section of the New York State Bar Association, to welcome the leaders, members, colleagues and friends of our Section to Singapore, pointing out with special mention the Charge d'Affaires of the United States of America in Singapore, Daniel Shields; the President of the New York State Bar Association, Mr. Michael Getnick; and the Chairs of the Steering Committees for this Conference, Ambassador Eduardo Ramos-Gomez [Duane Morris] and Mr. Meng Meng Wong [Wong Partnership] of Singapore and Mr. Glenn Fox [Alston & Bird] of New York City.

It is equally my great privilege and pleasure to welcome the leaders, members, colleagues and friends of the Singapore bar to this convocation of attorneys and law counselors from the State—and, yes, that also means the City—of New York. It is a very special honor to acknowledge the presence and participation of the Honorable Chief Justice of Singapore, Mr. Chan Sek Keong; Minister of Law of the Republic of Singapore, Mr. K. Shanmugam; Ambassador-at-Large and former Chair of the historic United Nations Convention on the Law of the Sea, Tommy Koh; and the many other distinguished representatives of the government, the courts, and the professional legal societies of Singapore. It is my special honor to acknowledge the presence tonight of the leadership of the Singapore Management University, including the University President, Howard Hunter, and the Dean of the School of Law, Michael Furmston, and to thank them and all their colleagues for their hospitality this evening in hosting this Opening Ceremony and Cocktail Reception, for the extraordinary support they have given to developing the content of our Program by helping us identify speakers and panelists, and for so many other gestures of assistance and support. Let me also take this opportunity to thank the Honorable Chief Justice of Singapore and his staff for hosting the sessions that we will enjoy tomorrow morning at the Courthouse of the Supreme Court. And let me thank you, Minister Shanmugam and your staff at the Ministry of Law for the making possible the hospitality of Maxwell Chambers International Arbitration Center for the events on Wednesday afternoon and evening and your personal participation in the Plenary Session on the Meaning and Advancement of the Rule of Law.

Let me say at the outset that we view this Meeting

- not just as an educational conference—although we hope learning and insight will abound throughout our sessions;
- not just a networking opportunity, although we hope many constructive and profitable connections will begin here;
- not just an opportunity to see and observe lands and peoples far from our respective homes, although we hope the signal beauty of Singapore and the warmth and humanity of our delegations will be enjoyed by all; but an opportunity to build long-lasting relationships of dialogue, cooperation and constructive engagement between the lawyers, scholars, legislators and leaders of our two jurisdictions.

To that end, we have all been delighted that the highest court of New York State, our Court of Appeals, has given its sanction to the eligibility of graduates of the Joint Masters of Law program of the National University of Singapore and New York University to stand for admission to the bar of the State of New York, subject to reasonable conditions proposed by the Universities to meet certain concerns of the Court of Appeals.

Let me also express my great satisfaction that this opening ceremony of our Meeting will conclude with the signing of a Memorandum of Understanding between the New York State Bar Association, through its International Section, and the Singapore Management University, through its Law School, in which the two parties endeavor to work together to support their mutual purposes and efforts through communication, cooperation and scholarship.

As you know, the theme of our Meeting is: "New York and New Asia: A Partnership for the 21st Century." Let this Meeting indeed be the beginning of a partnership for the 21st Century between the legal communities of New York and the New Asia that is Singapore!

Dear Colleagues from Singapore:

I would like to share with you a few facts about the New York State Bar Association and its International Section. The Association is the organization of lawyers admitted to the bar in the State of New York and lawyers throughout the world admitted to the bars of jurisdictions outside New York who want to have a relationship with the legal communities and institutions of New York. We have over 75,000 members, of whom approximately 71,600 live in the United States and approximately 3,500 live outside the United States.

Membership is not compelled by any rule of court. Although for over a century and a quarter, we have borne the proud name of our state, we are not an organ of any government authority nor are we supervised by any state agency. As stated in the Brief History and Purpose of our Association that you can find on the Association's website [www.nysba.org],

> The Association's objectives, originally stated in its constitution adopted in 1877, are the same today. They are to cultivate the science of jurisprudence, promote reform in the law, facilitate the administration of justice, and elevate the standards of integrity, honor, professional skill and courtesy in the legal profession. As a link between the state and the individual lawyer, as a force for constructive change and as a chief exponent of the rights and liberties of the public, the New York State Bar Association stands proud and capable, ready to serve.

I am sure that President Getnick will be telling you more about the work of the Association as a whole during his remarks at the Singapore Supreme Court tomorrow morning.

The International Section of the New York State Bar Association has almost 2,200 members, with a majority of our members residing in the United States but a very substantial portion of the members living outside the United States as members also. As stated on our webpage [www.nysbaintl.org], "The International Section of the New York State Bar Association is dedicated to the international practice of law on all planes of international life—whether commercially or for the public good—and the support of the rule of law throughout the world."

The International Section ("NYSBA International") accomplishes these goals through two main axes: First, a system of over thirty committees dedicated to almost every area of law practice in its cross-border or transnational aspect as well as regional committees and committees dedicated to international public law, international organizations and human rights—and, second, a network of chapters in over fifty jurisdictions throughout the world. As we discussed at the First All-India Meeting of our India Chapter in New Delhi last June, NYSBA International stands firmly rooted—and even has its reason for existence—in the vitality and broad reach of what I call "international civil society," while at the same time being firmly committed to the strengthening of the rule of law between states (as well as within states) and to the support of a worldwide system to protect international human rights.

Dear Colleagues from New York:

I was first privileged to visit Singapore over thirty years ago. My purpose was to visit a gentleman who was a scholar, a linguist and a priest—Carlo von Melckebeke, appointed the Catholic Church's representative to the Chinese Diaspora—he hailed from Belgium but in a lifetime of service in China up to and even for awhile after the 1949 Revolution he came to deeply interiorize in his soul and even in his appearance the culture of China and the sense of spiritual, familial, and cultural solidarity for which the cultures of the Confucian tradition are so well known. After my visit, I wrote of how, during a fifteen minute taxi ride on the way to Nassim Road, I passed by "a sweeping alternation of gardens, parks, high rise apartment complexes and rows of small store-front shops."

I remember walking downtown from Nassim Road along Orchard Street to the downtown area. Orchard Road was not as full of people or as built up then but I was impressed by the sense that everyone seemed to be able to have basic housing, basic life needs, and basic safety. If it could even be said at that time that Singapore was a part of what we used to call the Third World, this was no ordinary Third World City!

I was also particularly impressed by the commitment to maintaining religious harmony and concord, promoted among other means by the observance of public holidays on the more important religious festivals of each of Singapore's main religious traditions.

Today, ladies and gentlemen, there are fewer small store-front shops and many more impressive skyscrapers in Singapore than thirty years ago. Everyone knows about the reputation Singapore has gained as a thriving modern port, a world-class manufacturing center and as a financial and commercial hub not just for Southeast Asia but for the world itself. It continuously receives the highest levels of praise for its success in fighting corruption, in maintaining one of the best educated and highly trained workforces in the world, in consistently and thoughtfully applying objective legal norms in matters of commerce,

business, and finance, and for maintaining a strong sense of personal security, prosperity and comfort among its citizens. During this Conference we will have an opportunity to see at first hand the institutions Singapore has built to enlarge and enhance its role as a legal as well as economic center, including the modern chambers of its Supreme Court and the state-of-the-art facilities in its newly established Center for International Arbitration. Most of all we shall have the opportunity during our sessions to engage the leaders of Singapore's legal profession in debate, dialogue and friendship.

And now to everyone:

There is more to Singapore than all these factors and achievements, which are perhaps familiar to many of us. Singapore came to its independence and its fast-paced maturity in an area of the world and against a background of culture that is Asian rather than European, primarily Confucian rather than Judeo-Christian, and during a period of resurgent nationalism, revolution, and Cold War politics and competition. You can read a riveting account of that story in the memoir of Singapore's founding Prime Minister, Lee Kuan Yew, *The Singapore Story*.

Singapore is sometimes associated with the idea that "Asian" or "Confucian" values differ from "Western" values and that therefore it is difficult to speak of universal norms or criteria for the relationships between citizens and their governments, the role of the individual in the formation of governments and the allocation of power and duties among the institutions of government. There is sometimes a feeling that the United States or Europe is too quick to want to impose on non-Western countries the "liberal" political values that arose in the aftermath of the American and French Revolutions.

To that point, I want to simply make three brief comments:

First, almost all the major religious/philosophical/cultural traditions have articulated a basic principle about human relationships that puts inter-personal reciprocity at the core of the moral system: For example, from the Western traditions, Hillel's formulation from the Talmud, "Do not do to another what is hateful to you—all the rest is commentary;" and Jesus' formulation as reported in the Gospel of Luke, "Do unto others what you want them to do to you." From the East, we have, among others, the formulation of Confucius as reported in the Analects, "Never impose on other what you would not impose on yourself" and the formulation of the epic Mahabharata, "Never do to another that which you would consider injurious to yourself: this in brief is the rule of dharma." There is attributed to the Prophet Mohamed a saying from one of his last sermons that is in the same vein.

I do not mean to suggest tonight that the whole system of what we refer to as international human rights can be deduced from these formulations. But everything about government, the social order, even international relations themselves comes down, in the final analysis, to how human beings relate to other human beings. Therefore, I do mean to say that any radical relativism in the discussion of global norms is very hard to sustain in the light of this constant theme of human reciprocity that runs across the broad spectrum of Western and Eastern traditions.

Second, I believe our various religious/philosophical traditions all recognize that the most basic values of empathy, fellow-feeling, compassion and charity do not simply happen in the abstract but are strongest when first experienced and sustained in the relationships of parent to child, brother to sister, the young to the old and the old to the young, spouse to spouse, beloved to beloved. "Filial piety and fraternal duty—surely they are the roots of humaneness," we read in the Analects. In words attributed to Martin Luther, "The family is the school of love." However the institutions that may embody or celebrate these relationships may be developed or formulated, the experience in the West and East does not in the end greatly differ in this respect.

Third, the modern concern with global human rights, the rule of law and a strong role for the individual in the life of the state and the world community is grounded in an event of the last century whose dark shadow none of us can totally escape—the calamity we know as the Second World War. Singapore directly experienced the ravages of occupation and oppression during the War that New York fortunately never did and whose magnitude can hardly be imagined. Estimates of the numbers of young men from Singapore who were summarily executed in the wake of the Dalforce defense and other acts of resistance, according to the Minister Mentor, range from 50,000 to 100,000: keep in mind that the whole population at the time was under one million.

The Minister Mentor himself describes how he narrowly escaped being one of those interned and killed.

The Universal Declaration of Human Rights—in addition to the establishment of the United Nations itself—represents one of the legal monuments that the generation that survived the War established—not just to expiate the dead but to establish principles that could serve as a deterrent from a recurrence of global war and holocaust. It may be true that Western voices were more prominent than Eastern voices in the formulation of the Universal Declaration. But that, I submit, does not gainsay the validity of what the authors of the Universal Declaration were trying to achieve. The ideologies that supported and inspired the states that launched the aggression that started

the war often appealed to values not only of nation and class but, however cynically, very effectively at least for a time, to values of community, solidarity and family.

There were not enough individuals who could or would say "no."

The political institutions at the time in the countries that succumbed to totalitarian rule were not strong enough to provide a mechanism to deflect the rush towards collectivism and absolutism.

I submit that the Declaration sanctions freedom of the press, freedom of assembly, freedom of association, and the right to participate in government primarily to support and encourage the assumption by individual citizens of a responsibility for their governments, for the good of their societies, for the promotion of peace and justice, to work for change when change is needed. For the work of our New York State Bar Association and its International Section—especially for the work we do educating the public as well as lawyers about the law, constructively criticizing government at the state and also federal levels, proposing and lobbying for reform of the law—the freedoms I just mentioned are indispensable.

Ladies and Gentlemen, We hope that our Association and its International Section can be a model as to how these rights can be exercised honorably, responsibly, constructively—in a way that is fully consistent with the aspirations of Asian as well as Western peoples. We hope we can help, in some small way, to develop what the Minister Mentor himself has described as "that culture of accommodation and tolerance which makes a minority accept the majority's right to have its way until the next election, and wait patiently and peacefully for its turn to become the government by persuading more voters to support its views" (*From Third World to Firs*t, p. 549). We hope that there shall come a time when these rights are better understood and more fully integrated into legal culture throughout the world. We hope that, in good time, in part through interchange and dialogue at events like this Meeting, the contrasts between "Asian" and "Western" or even "Confucian" and "liberal," at least in the area of civil law and constitutional law, will be more and more a matter of degree or emphasis rather than a matter of essential distinction or substantial difference.

* * *

[At the conclusion of his Address, Mr. Galligan introduced Minister Shanmugam to give his Welcome Address, highlighting the Minister's career before his entrance into government as a litigation partner at the Singapore law firm of Allen & Gledhill and the support of his Ministry for the Meeting.]

Speech by Minister for Law K. Shanmugam at the Opening Cocktail Reception of the Seasonal Meeting of the NYSBA International Section

26 October 2009 Posted in Speech

The Honourable Chief Justice Chan Sek Keong,

The Honourable Justice Chao Hick Tin, Judge of Appeal,

Mr. Michael Getnick, President, New York State Bar Association,

Mr. Michael Galligan, President of the International Section of the New York State Bar Association,

Professor Howard Hunter, President, SMU,

Mr. Michael Hwang, President, Law Society of Singapore

Professor Michael Furmston, Dean of the SMU School of Law

Distinguished Guests

Ladies and Gentlemen

Good evening.

I. Introduction

The theme of your conference is "New York and New Asia. A Partnership for the 21st Century." Singapore is a good place to be in, thinking about such a partnership. It will give you a gentle introduction to the intricacies of Asia. And we are part of the new, vibrant Asia, freed from the taboos, the superstitions and unworkable political and economic ideologies of the past

In that context, I will speak to you about:

(1) Singapore;

(2) our relationship with the U.S., and

(3) what we, small as we are, could mean to you, as you seek to forge a partnership with Asia.

II. Singapore / US

A. Singapore

First, Singapore: If you look at the world map, Singapore's position is striking; it is at the nodal point between the two great Asian giants, India and China. We are at the strategic point, in one of the most strategic waterways of the world. Much of the trade between the West, the Middle East, Africa on the one hand and the East Asian giants, China, Korea and Japan, passes through the Straits of Malacca—including a quarter of the world's oil shipments.

We are also at the economic heart of South East Asia, a region of 580 million people, who are hardworking and talented. It is a region rich in resources, and bursting with energy. The potential is enormous, and is now being realised—the region has been largely freed from the shackles of unworkable political and economic ideologies, which had kept it back.

(l-r): Prof. Michael Furmston; Prof. Rathna Nathan; Mr. Michael Getnick; Mr. Eduardo Ramos-Gomez; Prof. Howard Hunter; Mr. K. Shanmugam; The Honourable Chief Justice Chan Sek Keong; and Mr. Michael Galligan.

We in Singapore believe that we are well placed to ride on this wave of regional economic progress. For 50 years, we have consciously gone about implementing rational economic and social policies, at a time when such policies were not fashionable—like openness to foreign investment, clear laws protecting such investment and recognising that wealth is better created through open competition rather than closed protectionism. We have thus become a leading financial, manufacturing, trading and services centre in the region.

Our open policy towards talent and capital, sound financial system, strong adherence to Rule of Law, ease of communications, excellent infrastructure, all make this place attractive to both businesses as well as High Net Worth Individuals.

B. Relationship with the U.S.

Let me now touch on our relationship with the U.S. The relationship the U.S. has had, and continues to have with many countries in Asia, is multifaceted. And parts of that relationship have been befuddled by the parties not understanding each other.

Americans are very direct, and speak a language which is fact based and logical. Sometimes, that language has not taken account of local nuances, and the tides of nationalism and anti-colonialism. Sometimes it mistook nationalism for something more sinister and anti-American. Asians in some countries, on the other hand, viewed Americans as little more than neo-colonialists, replacing the British, the French and the Dutch.

In contrast to this, Singapore has had a quite excellent relationship with the U.S. The relationship has been largely free of misunderstandings. I say largely. I will touch on a couple of aspects which have been mildly contentious, later.

Our excellent relationship has resulted in many deep ties, including strong economic and strategic ties. It is also worth noting the impact of American soft power on Singaporeans. I will touch briefly on these aspects.

(i) Economic Linkages

There are thousands of Americans with their families, working and living in Singapore. Several major American institutions, including several leading Financial Institutions have significant presence in Singapore. Singapore and the U.S. have a Free Trade Agreement, which came into force in 2004.

Twenty out of 97 foreign law firms present in Singapore are American. Two American law firms have recently been given Licences that allow them to practise Singapore law.

American companies have very large investments in Singapore. In the last two years, two American companies alone committed about U.S. $8 billion in two projects, in addition to various other American investments.

Despite our small size, Singapore is the U.S.' 15th largest trading partner, and in 2008, our total trade volumes amounted to over U.S. $60b.

(ii) Strategic Linkage

Let me now touch on the strategic ties. Singapore believes that the U.S. has an important role to play in this region. We see a sustained U.S. presence as an important stabilising influence in the Asia-Pacific region.

Our sentiments have been backed by our concrete actions. America used to have a large base in Subic Bay in the Philippines. That Base was closed in 1992 because America and the Philippines could not agree on what the U.S. would pay the Philippines. Some sectors of the Filipino society were also against the Base.

The U.S. faced the prospect of being turfed out of this region. That would have been a serious setback to America's strategic interests, and also not good for the region.

So we stepped in. We are not big enough to offer a Base. But we allowed U.S. ships and aircraft to use Singapore's facilities.

The offer was based on a clear-minded analysis of our national interests. It was not influenced by emotion or rhetoric.

The signing of an Agreement between the two Governments in 2005 marked a new milestone in U.S.-Singapore relations. We formalised our long standing and wide ranging bilateral defence and security cooperation.

Thus today, we stand as a trusted and reliable friend of the U.S. In terms of recent international security operations, we have made contributions to Afghanistan and the Gulf of Aden, where we work closely with the U.S. and other coalition partners. Given our size, our contribution can only be modest. We also regularly hold bilateral military exercises with the U.S. and multilateral exercises with the U.S. and other regional armed forces.

As I say this I will also emphasise that a small city state like Singapore must, in its own interests, have deep and strong linkages with as many countries as possible. Thus in addition to the U.S., we also have excellent deep and strong, relationships with various other countries, big and small, including our near neighbours as well as the Asian giants, China and India.

(iii) Soft Power

Next let me touch on American soft power in Singapore. Singaporeans of my generation and younger have been brought up on American TV and culture. It is the country we know most about.

Our universities have close linkages to the top universities in the U.S., including partnerships and collaborations with the Duke University, MIT and Wharton (amongst others). Chicago University's Booth School is here as well.

Singapore has a practice of selecting the most promising High School students and sending them overseas on education scholarships. Between 2000 and 2007, about 2,000 students were sent abroad on scholarships. Ninety percent of them went to the UK or the U.S. Increasingly the trend is to favour American universities. When they come back they take on top roles in the Public Sector. In addition to those who go on public scholarships, many others go independently to further their education in the U.S.

An illustration would be our Cabinet. Ten out of our 21 Ministers have had some education in the U.S., in top schools. This would also be reflective of the upper echelons of our Civil Service—the decision makers.

This education, in our formative years, has made many of us admirers of many aspects of American society.

III. The Economic Potential of Partnership

Now let me touch on the economic potential of these linkages.

Over the foreseeable future, the opportunities in this region are going to multiply. The economic rise of China and India is inexorable. Much has been said about them. I don't need to repeat the details. It is enough to say that China is a 4.4 trillion dollar economy that will grow at between 8 to 10 percent per annum. India is a 1.2 trillion dollar economy that will grow at between 6 to 8 percent, with the potential to grow even faster. They also have an almost inexhaustible supply of top quality human capital. Important centres in both countries (including both capitals and the major financial centres of Mumbai, Hong Kong and Shanghai) are within 6 hours of flight from Singapore. Indonesia, whose capital is 1½ hours away, has had several years of relative stability and growth and seems set to continue on that path. It is expected to grow by 4 percent in 2009 and is projecting 5 percent growth in 2010. It has over 4 billion barrels of proven oil reserves and 98 trillion cubic feet of proven gas reserves, making it the tenth largest holder of such reserves in the world and the largest in the Asia Pacific Region.

According to one study, Asia Pacific wealth is expected to hit U.S. $13.5 trillion, and Asia's share of global GDP is expected to hit 30 percent by 2018.

Yesterday, there were declarations from the ASEAN Summit. Leaders from China, Japan, Korea, Australia, New Zealand and India also attended the Summit.

A number of Free Trade models have received endorsement. By 1 January 2010 (i.e., in two months), tariffs on more than 87 percent of intra-ASEAN imports are slated to be removed, on a dual track basis, with some countries moving faster than others.

The leaders also accepted a report on the feasibility of a proposed East Asia Free Trade Area, comprising the 10 ASEAN countries as well as China, Japan and Korea.

A separate report on a Comprehensive Economic Partnership between those 13 countries and India, Australia and NZ is also being studied.

The 16 countries will have a market of 3.1 billion people and a current GDP of U.S. $19 trillion, one-third of the global GDP.

There are also plans to enhance road and rail connectivity between China and this region. A high level task force has been set up to develop a master plan and infrastructure development fund.

These are plans. But they are plans to which the top leaders have committed themselves publicly. There will be many hurdles along the way in seeking to implement these plans. But it is undeniable that this region understands the need for free trade, better infrastructure and is moving in the right direction.

There is much that American companies and firms can do to take part in this region's growing development and prosperity.

Singapore is a natural place for Americans to consider, to locate, and take part in this progress. Why? Because we are a stable democracy with the following attributes:

A. Government

(1) We have a rational Government that is fundamentally pro-market. No expropriations, no unfair taxation, no U-Turn on policies. On the World Bank Governance Index, we get 100 for Government Effectiveness and 99.5 for Regulatory Quality. We are also ranked as the 3rd least corrupt country in the world. Government policies are formulated for the long term and clearly articulated. The Government is not held hostage to interest groups. The Government moves quickly, decisively and efficiently.

(2) In 2007, FDI (stock) in Singapore amounted to U.S. $331 billion, including over U.S. $36 billion from the U.S. Our FDI inflows in 2007 and 2008 were U.S. $35 billion and U.S. $21 billion respectively. We are an open economy. IMD ranked Singapore as the 3rd most competitive economy in the world in 2009.

(3) Our GDP per capita at PPP is U.S. $51,500. Total GDP is U.S. $182 billion.

(4) Our estimated stock of private wealth is about 700 billion USD.

(5) That excludes Government Reserves. The Government generally runs budget surpluses.

B. Legal Framework

(6) Our legal framework is ranked among the top in the world by both the WEF and IMD.

You can get a case heard in the High Court within eight to 10 months, if the lawyers move quickly. Appeals are disposed off within another five to six months. Our Court system is recognised as effective, fair and one which men of commerce can trust.

We have also taken steps to make Singapore a leading international arbitration centre. In 2008, ICC ranked Singapore as one of top five locations in the world for arbitration. The Singapore International Arbitration Centre (SIAC) is gaining wide acceptance internationally. This March, an international blue-ribbon Board (with nine members from seven different countries including two Americans) was appointed to helm the SIAC. The SIAC deals with many cases. Any lawyer from anywhere in the world can appear in the arbitration hearing in Singapore, and the parties are free to appoint whom they choose as Arbitrators. The judicial philosophy is to not intervene in arbitration.

C. Livable City

We also have low taxes. The top bracket for personal income tax is 20 percent and for corporate income tax only 18 percent. These rates are amongst the lowest in the world. Many tax incentives are also available. Quality of life here is excellent. Mercer's 2009 Report ranks us top in the world for City Infrastructure and 26th overall. The Mori Report, based on a comprehensive survey, places us 5th in the world, after NY, London, Paris and Tokyo. The survey is based on the economy, R&D, cultural interaction, liveability, ecology, natural environment and accessibility. Singapore is a great place to bring up a family, with excellent schools, parks and recreation. And you get great access to nature within one to two hours of flight.

Our Internet connectivity is high. Household Broadband penetration is at 115 percent. Singapore ranks among the top three connected cities in the world.

IV. Some of the Differences in Perceptions About Singapore

Let me, in this context, touch on a couple of points made about human rights by Mr. Galligan and how we feature in a separate ideology—the Asian value system of human rights. If you look at Singapore in 1959 when we became a (self-governing) state and in 1965 when we were kicked out of the Federation and became independent, you will see a city that was poor, in the third-world, with no natural resources, surrounded by Malaysia in the north, which had just kicked us out, and Indonesia in the south. What can you do to survive as a city, many people warned us.

9/11 is a tragedy but it was never an existential threat for the U.S. For us, when World War II ended, the communists declared war on us. That involved thousands of highly trained armed young men and women who were ideologically motivated, financed by communist countries. As many of you would recall, in the 1950s and 60s, there was a time when people thought that a large part of the world could be swept through with Communism. We were at the frontlines. And the British had to deal with that. They put in the predecessor to the Internal Security Act. We inherited it and added to it. There was paranoia, as you can understand, because of the existential threats. The communist threat, the threat of being kicked out of the Federation and the fact that our unemployment was high. A large part of our economy was dependent on the British bases here. You can imagine the economic challenges. We needed to move the population from a third-world mindset, with most of the population being people who came here as immigrants with no idea of nationalism, and bringing them forward into the 20th century and developing economically while ensuring security and stability. Those were huge challenges. I invite the audience to think about this point. Name a country that became independent in the 1950s, post-colonial, post-Second World War, name me one country that has done better, better than Singapore, despite the challenges.

And when you talk about human rights, if you take stability for granted, if you take education, healthcare for granted, if you take economic progress for granted, as the

U.S. had taken all these for granted in the 20th century because all the bases for development had been set.

If you take your own security for granted, then you start thinking forward about the finer aspects of human rights. But first you must secure the base and make sure that the country is safe to move along. That was the part that most countries were involved in, in the third world, post-Second World War, and unfortunately, most of them did not succeed well in that.

Our success is that we took the institutions that the British gave us and we built upon them. We have a judiciary that is stronger today and more respected. It is a truly great institution that is ranked highly internationally. If you look at the institutions, whether it is civil service or the judiciary, or any other in Singapore, all these are free of corruption and they are efficient. None of this happens by an accident. None of this can take place with an absent Rule of Law. None of this can take place by controlling people's minds. We have 115 percent connectivity and you walk out there and you can get 5,500 international journals, it's hard to talk about controlling people's minds. But that is the perception that you might get of Singapore if you have only read certain American newspapers, without having been here.

I know some of you had a long flight, many of you, and I had meant to skip this part. But I am going to talk to you a little bit about our approach to the press.

If you read about Singapore in some American newspapers, you may not get the picture of prosperous modern city state, with strong adherence to the Rule of Law. Instead if you didn't know Singapore and only read these journals, you may believe that we are a repressive state that controls the people's thoughts (as if that is possible in a modern, successful, wired and internationally connected city like Singapore), and that we unfairly target the press.

Our approach on press reporting is simple: The press can criticise us, our policies. We do not seek to proscribe that. But we demand the right of response, to be published in the journal that published the original article. We do not accept that they can decide whether to publish our response. That irks the press no end. If the press cross the line from attacking our policies and make allegations of fact against someone—that that person is corrupt or if they make some other personal factual attack is made—then there will be a libel suit—and the factual accusation must be proven. If allegation is proven, the Plaintiff will lose the case and pay legal costs. Otherwise the accuser pays damages and legal costs.

Likewise in the political arena. We have no problems with tough debate, criticism of policies. But we believe that such debate should avoid untrue and scurrilous personal attacks. Personal reputation is no less valuable than personal property. Public discourse does not have to descend into the gutter.

If untrue statements are made that a person is corrupt or that he lied, or that he tried to help my family or friends, there will be a suit. Let the accuser prove it. But if it is said that someone is stupid or that policies make no sense and the policies are attacked vigorously, then you can't sue. There is public prerogative to comment on policies. In response it will be sensible to defend the policies and ignore the attacks on intellect.

Over the years this has resulted in the Government and Ministers having several tussles with newspapers—the *Wall Street Journal, Far Eastern Economic Review* and so on. The press is not used to this anywhere else in the world. And of course it will be no surprise—they don't like it one bit. So every lawsuit is met with the same reaction—we are out to silence the press. That feeling has been pervasive and has, in my view, coloured the general reporting on Singapore. When I was in private practice, I have dealt with some libel cases. I have looked at some of the articles, which were the subject of a lawsuit: it would have been perfectly possible to have been deeply critical of government policies (often the central thrust of the articles) without the addition of totally unnecessary remarks on some form of corruption.

How objective is the criticism of Singapore in relation to press freedom? I took some trouble to go through with you how we rank on various economic, governance and quality of life indices. Is it possible to have a modern, successful, open economy if the people are not empowered and educated? I will share with you something that struck me as quite absurd and divorced from reality: there is an organization called Reporters Without Borders. It comes out with a ranking of countries on press freedom. In 2008 they ranked us 144 out of 173 countries, somewhere below Ethiopia, Sudan, Kazahkstan, Venezuela, Guinea, Haiti, and so on.

Today's *International Herald Tribune* had a story on Guinea. The headlines were "Ousting Guinea's brutal junta." The first paragraph read as follows:

> *One month ago over 150 people were gunned down by soldiers in the West Africa country of Guinea. Women were raped on the streets, and opposition leaders were locked up. This was the response of a brutal military junta to a group of brave citizens who dared to hold a peaceful pro-democracy rally.*

We are apparently below Guinea on press freedom.

This year, we have behaved better—so we moved up to Rank 133. Below Kenya (which saw riots following a disputed election), and Congo (which continues to struggle with the aftermath of an armed conflict that has

claimed more than 5m lives), Venezuela, and so on. But we are ranked above North Korea and Eritrea.

If you look at a different ranking, the Freedom House rankings for 2009, we are ranked below Haiti, Colombia, Kenya, Moldova, Guinea, Pakistan and so on. We are 151 out of 195. We are ranked together with Iraq.

Prof. Michael Furmston; Mr. Eduardo Ramos-Gomez; Prof. Howard Hunter; Mr. Michael Getnick; and Mr. Michael Galligan.

These are all countries which are trying to progress. My point is not that we are in any way inherently superior to them—the question is whether a truly objective assessment will give us such a ranking. Our approach has therefore to been to ignore the criticisms which make no sense—and we continue to do better. The people of Singapore also know better. Sixty-five percent voted for the Government at the last General Elections. And the investors who put in billions every year know better as well. They do not have to come here. We do not have any natural resources. Our main selling point is that there will be good value added when they invest here, their investments will be protected, and that we are a stable democracy.

These issues are fundamental to the relationship between the two countries. The relationship is based on more solid footing.

Conclusion

Try and experience Singapore yourself. Talk to our lawyers. Talk to our professionals. You are likely to go away convinced that:

(1) on the whole we do many things right, even though you may not agree with everything we do; and

(2) if you are thinking of doing business with Asia, this is a place to seriously consider.

Let me end by saying this. Last Friday 23 October, Moody's continued with its triple A sovereign rating for Singapore. I think what it said about Singapore is worth reflecting on:

> *Singapore's ratings are based on our assessment of its very high economic resilience and robust government finances,…*
>
> *Its economic resilience is derived from its high per-capita income, strong human capital base, flexible labor and product markets, and highly effective policy, regulatory and market institutions and mechanisms. These structural and institutional features have supported the city state's very high level of economic resiliency and have enrolled it to withstand the global economic crisis, not withstanding its large degree of economic openness…*
>
> *The rating reflects appropriate policy responses to the global economic crisis, and which—alongside a strong financial position—are allowing the country to weather the downturn with relative ease. The government's countercyclical policies are being implemented with relatively less stress on its underlying credit fundamentals than many other triple A rated countries. The countercyclical policies and evolving medium term economic strategies should position Singapore to effectively exploit regional and global growth opportunities.…*
>
> *The risk of sudden, adverse shifts in regional or domestic political stability is low, and the banking system is reasonably positioned to cope with prolonged global financial volatility or weakness in domestic demand.…*
>
> *Singaporean authorities are striving to fortify the economy's medium term competitiveness within the context of ensuring social inclusiveness, maintaining a high degree of institutional effectiveness and credibility.…*
>
> *Meanwhile, Singapore's corporate and banking sectors are well managed, have avoided deep distress, and pose low contingent fiscal risks. The Singaporean Government's large net external creditor position and its relatively low susceptibility to financial, economic or political shocks underpin its very high "financial robustness.…*

When Asia grows rapidly, as we have no doubt it will, it is going to need services: Legal, Accounting, Financial, Lifestyle and many other services. We are placed well to be one of the leading cities to provide these services, in addition to our developing strengths in R&D and high-value manufacturing.

We hope you will take part in the immense wealth that is going to be created in this region and partner us in the Asian growth story.

Let me end by congratulating SMU Law School on the signing of the MOU with the NYSBA and in the deepening of their ties.

Thank you.

Committee News

International Women's Rights Committee Raises Awareness of Abuse of Women's Human Rights

The gender-based violence and discrimination faced by women around the world is perhaps the greatest legal and moral challenge of our time. Violations of women's basic human rights are often flagrant and unapologetic, resulting from laws that explicitly discriminate against women, as well as a failure to enforce laws that would otherwise protect them. To give just a few examples:

- In Saudi Arabia, the pervasive violation of women's basic rights has been described as a form of "gender apartheid." The Saudi government enforces sex segregation in the workplace, prohibits women from driving, and requires a woman to obtain the permission of a male "guardian" to work, study, travel, or visit her doctor.
- In India, a woman is burned to death in a "bride burning" every two hours either to punish her for an unsatisfactory dowry or so that her husband can remarry.
- In Afghanistan, girls walking to school have had acid thrown in their faces to disfigure them as a punishment for seeking an education. Such acid attacks have become a common weapon in the region against women and girls who attempt to assert their independence.

As lawyers, we often take pride in our role in protecting individual rights. Today, that role requires that we take action to prevent the rampant human rights violations that are being perpetrated against women and girls. Last year, the International Women's Rights Committee (IWRC) was created to ensure not only that the legal community is aware of the widespread abuse of women's rights, but also that it has a means to take steps to support and protect those rights.

On October 25, 2009, IWRC co-sponsored a "Conference on Women's Rights and Leadership in Iraq" held in New York City. The conference examined post-war threats to women's safety and independence in Iraq, the important role of women in the newly formed government, and the integration of international human rights standards into Iraqi law. Speakers included the Iraqi Permanent Representative to the United Nations, a spokesperson from the U.S. Department of Defense, as well as a number experts from the private and non-profit sectors. Carole Basri, a member of IWRC and Co-Chair of the Committee on International Corporate Compliance, was a key organizer of the program. Ms. Basri became involved with the cause of Iraqi women's rights when she traveled to Iraq to provide advice on anti-corruption measures. IWRC Co-Chair Shannon McNulty gave opening remarks, pointing out the grave threats faced by Iraqi women and emphasizing the importance of protecting women's rights in the process of building a fair and democratic Iraqi state.

This past spring IWRC organized a reception in connection with a number of women visiting New York for the 53rd Session of the United Nations Conference on the Status of Women. The reception provided an opportunity for New York lawyers to meet women's rights advocates from around the world and to learn about the work these advocates are doing in their home countries. The event was hosted by the law firm of Curtis, Mallet-Prevost, Colt & Mosle. IWRC hopes to make the reception an annual event.

IWRC is currently in the process of organizing an event that will recognize the 30th Anniversary of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The program will assess the progress that has been made under CEDAW over the past 30 years, the obstacles that stand in the way of further progress, and the work that is currently under way to effect the goals of the Convention.

Given the pervasive and egregious nature of women's rights violations, the task before IWRC is nothing less than daunting. Therefore, anyone interested in this issue is strongly encouraged to join the Committee. To join, please contact either Shannon McNulty (shannonmcnulty@hotmail.com) or Denise Scotto (dscotto@gmail.com).

* * *

International Section Establishes a Chapter in Ottawa, Canada

The International Section recently established a new chapter in Ottawa, the capital city of Canada. With more than 1.1 million residents, Ottawa is Canada's fourth largest metropolitan area. As the nation's capital, one of Ottawa's primary employers is the Canadian federal government. However, Ottawa also has a vibrant hi-tech industry and is often referred to as "Silicon Valley North." Ottawa has a highly educated population, where over half the population has at least a university degree, and it has the highest per capita concentration of engineers, scientists, and residents with Ph.D.s in Canada.

Ottawa is also a popular tourist destination. It is located in the scenic Ottawa Valley and boasts famous landmarks such as Parliament Hill and the Rideau Canal, as well as a wealth of national museums, memorials, heritage structures, and interesting architecture. Directly across the Ottawa River stands Gatineau, Quebec, which is well known for its parks, rolling hills, skiing, and other Memoutdoor recreational activities.

Ottawa is less than an hour's drive from New York State, and given that it is the nation's capital and one of Canada's largest cities, Ottawa is an ideal location to establish a Chapter of the New York State Bar Association International Section. A large proportion of businesses in the Ottawa area have connections to New York State, and therefore there is a great deal of interest among members of the bar in the Ottawa area in meeting lawyers in New York and learning about New York practice.

With that in mind, as Chair of the Ottawa Chapter, my objective is to help bring members of the local bar together with Section members for networking opportunities and to exchange information about their practices. In addition, we are in the initial planning stages of a major conference on cross-border legal issues to be held here in Ottawa in the spring of next year. Any Section members who have an interest in coming to Ottawa to establish contacts with local lawyers should feel free to contact me directly to discuss potential opportunities in greater detail.

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Member News

Protection of Journalists in Situations of Armed Conflict—Enhancing Legal Protection under International Law

Dr. Hong Tang is a practicing attorney focusing on international law and policy, and a member of the New York State Bar's International Chapter. Dr. Tang recently obtained his *Scientiae Juridicae Doctor* (SJD) degree, and is planning to publish his SJD doctoral dissertation entitled *Protection of Journalists in Situations of Armed Conflict—Enhancing Legal Protection under International Law*.

Dr. Tang would like to thank Mr. Hansjoerg Strohmeyer, Mr. Manuel Bessler, Mr. Simon Bagshaw, Ms. Christina Bennett, Mr. Stephen O'Malley, Ms. Lilian Sangale, Ms. Shalni Tamdji and many others at the United Nations Office for the Coordination of Humanitarian Affairs.

Table of Contents: Chapter I. Legal Status and Special Circumstance of Journalists in Armed Conflict under International Law; Chapter II. International Rule of Law and Current Rules on the Protection of Journalists in Armed Conflict; Chapter III. Proposing a Future Convention on the Protection of Journalists in Areas of Armed Conflict; Chapter IV. U.N.'s Legal Role & Function and its Peacekeeping-Mandate Obligations on the Protection of Civilians and Journalists in Armed Conflict; Chapter V. The Culture of Protection and the Common Ground & Mutual Understanding on the Protection of Civilians and Journalists.

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Request for Contributions

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

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

www.nysba.org/IntlChapterNews

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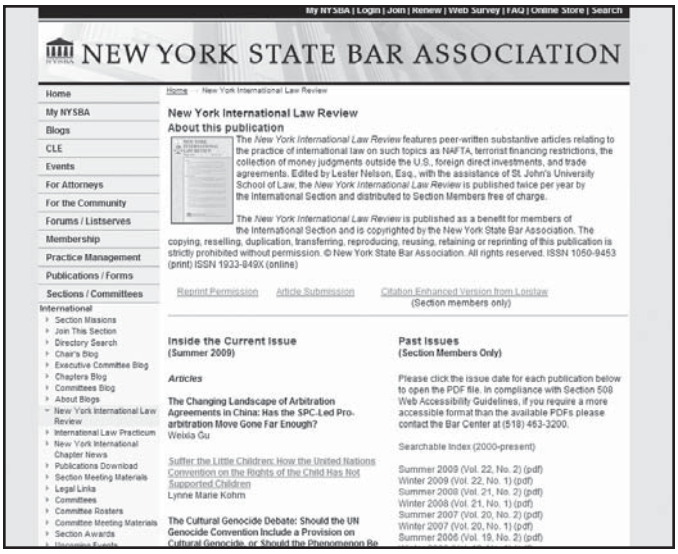

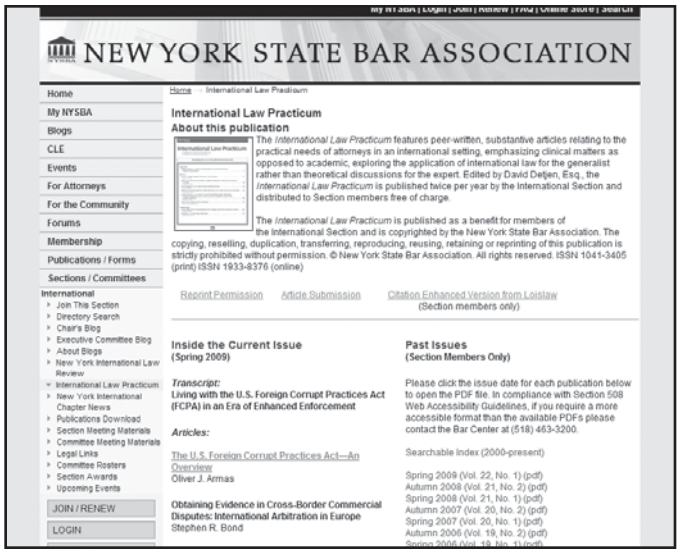

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