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New York International Chapter News

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of the New York State Bar Association

Message from the Chair

"NYSBA INTERNATIONAL" AT 21

Twenty-one years ago, Lauren Rachlin and a group of like-minded individuals won approval from the NYSBA leadership to unite the International Law and International Practice Committees of the NYSBA into one unified section, the International Law and Practice Section (recently renamed "the International Section"). As the Section approached its 20-year anniversary in 2006, Chair Jack Zulack, and Chair-elect Ollie Armas, announced at the Executive Committee's Annual Retreat the launching of Task Force 2026 ("Long-Range Planning Task Force of the International Law and Practice Section / The Next 20 Years")—a project aimed at imagining and planning for what this Section might and should look like twenty years into the future. Under Chair Marco Blanco's leadership in 2008, the Section focused strongly on articulating the mission and goals of our Committees, revived our Foreign Lawyers Committee (formerly the "Counsel of International Legal Consultants") and, with the assistance of Executive Vice-Chair (now Chair-elect) Steven Krane, established formal ties with the International Bar Association.


Michael W. Galligan

This year, we are working to bring this Section to a new level of effectiveness and impact by moving vigorously in two superficially contradictory, but profoundly complementary, directions: to increase the Section's level of service and involvement with the legal community of our home state of New York and, at the same time, to expand and fortify the Section's outreach to legal communities throughout the world. Just as the deep roots of the great maple trees that grace the broad landscape of this state support the wide expanse of their

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branches, we aim to intensify and expand our activities and profile in this state in order to also support the vigor of our outreach to South as well as East Asia, Eastern as well as Northern Europe, Africa as well as Latin America and the Middle East.

Our efforts to intensify and expand our activities and profile in New York include:

1. Leadership and support from this Section to afford continuing international legal education in New York that is practical and concrete. We began this year with plans for two full-day programs in the Spring: (1) Fundamentals of International Practice, primarily designed for new attorneys and seasoned attorneys who are for the first time dealing with cross-border clients, legal issues or transactions that involve the law of different countries, and (2) the International Practice Institute, designed for attorneys with at least some experience in international practice, which was to focus on the new issues and prospective challenges to the transnational practice of law posed by the Great Credit Crisis of 2008 and 2009. The Fundamentals program was a great success but, surprisingly, drew very strong attendance from the more experienced attorneys, who were expected to be more attracted to the Institute. The Institute, which offered a wide range of panels and sessions related to the Great Credit Crisis but took place only two weeks after Fundamentals, regrettably drew a lower than expected registration, causing us, in connection with the NYSBA CLE Department, to have to cancel the event to contain any financial losses for the Association. We know from the very favorable reception to Fundamentals that there is a real need and interest in strong and vigorous CLE in the international arena. It may be that the more interdisciplinary and interactive format that framed the Institute is more appropriate for colloquia for specially invited international practitioners. Thus, while our first experience in offering these types of programs was not an unalloyed success, we have learned valuable lessons that we can use as we continue to plan for strengthening our educational offerings to the New York international Bar.

2. Leadership from this Section to make the law of this state affecting cross-border commerce, dispute resolution, communications, and personal relationships as good as it can be. "International Law" surely affects multinational enterprise, commerce and investment but it just as assuredly affects thousands upon thousands upon thousands of businesses, families and individuals throughout New York. Possible topics of study include the enforcement foreign currency judgments in New York courts; the qualification of foreign persons as guardians of minor children residing in New York; correlating Articles 8 and 9 of the New York UCC with the laws of non-U.S. jurisdictions (most noticeably Ontario law); developing guidelines for discovery in international arbitration; streamlining procedures for transfers of bank accounts of foreign decedents to heirs in civil law countries, and the registration of trusts in New York to secure U.S. taxpayer status.

On the federal level, there are also opportunities to help fashion and improve international law. To take one example suggested recently by our Committee on the International Intellectual Property Law, there may be significant work to be done in trying to harmonize the disparate treatment of intellectual property assets in the bankruptcy proceedings of different countries. I believe that this Section should be at the forefront in the fashioning of whatever legislation eventually emerges in response to the continuing efforts of the Organisation for Economic Co-operation and Development (OECD), especially through the Financial Action Task Force, to more closely scrutinize and track the activities of private companies, partnerships and trusts to prevent private entities from becoming conduits to finance terrorism and money laundering. Embedded in at least some of these proposals are "gatekeeper" provisions that could seriously impair the principles of client-attorney privilege and confidentiality: to these provisions we must be willing to give intense scrutiny and a spirited defense of the core principles of our profession.

No less important is the work of our Committees dedicated to the work of public international law, human rights and international organizations—particularly the United Nations, the most visible and the most important (even if at times controversial) of today's international institutions, which is headquartered in our own State and City of New York. Notwithstanding the private practice focus of perhaps the majority of our members, a vibrant law-based, global society can only flourish in a world where war is prevented, human rights protected and worldwide mechanisms to support civil society as well as personal freedom, creativity and originality are promoted.

Our efforts to strengthen and vitalize our outreach to the many jurisdictions outside our state and national borders include:

1. Strengthening the Section's extensive network of Chapters outside the United States, with special attention to the Chapters the Section approved in 2008, such as India, Thailand and Vietnam, and in 2007, such as Australia, Finland and Iceland. This year, we seek to expand our network of Chapters in Asia, Eastern Europe, Africa and the Middle East. Moreover, this year, our annual Fall Meeting will take place in Singapore, poised at the intersec-

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Note from the Editor

Dunniela Kaufman

As the current economic downturn underlines, the world no longer operates in neatly separated jurisdictions. As lawyers engaged in international activity, this is something that has been apparent to us for sometime, but in the current context, its relevance somehow increases, and with that, so does the ability of our Section to reach more members of the New York State Bar Association in a meaningful way.

This sentiment is borne out in our Chair's note to the membership. This is a very exciting time for the Section. We should give our current leadership credit for capitalizing on the framework established in the past to reach new levels of activity. As this newsletter sets out to highlight, there has been a remarkable increase in programming and outreach, which promises to become more pronounced as time goes on. It is within the context of increased outreach and relevance that we put together this Edition of the *Chapter News*. In that regard, in addition to highlighting recent activities of the Section, and in an attempt to help members share their experiences, this edition of the *Chapter News* sets out to underscore some of the effects that the current economic downturn is having on member's practices from the perspective of your colleagues around the globe.

As always, I hope that you find the information contained in our newsletter to be informative and insightful but I also hope that it inspires you to utilize this medium as a means to share your perspective, thoughts and news with the rest of the Section.

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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).

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Of International Interest

NYSBA Survey Proves the Economy Is the No. 1 Issue

A sign of how tough things are for global in-house counsel came in September with the publication of the New York State Bar Association's first Global Change Survey. Almost 40% of the global in-house counsel surveyed voted the economic downturn as the single largest factor affecting their legal department.

At the NYSBA International Section meeting in Stockholm in September, a panel of in-house lawyers joined me to discuss the results of the survey. Allison Tomlinson, a member of the NYSBA's Internal Section executive committee and Senior Associate Counsel at US engineering and infrastructure company Parsons Brinckerhoff, said: "There is always pressure on in-house counsel to be efficient and prove their worth . . . but the economic downturn has increased the pressure on them to show added value, which can be hard to quantify, and to do it on a lean budget."

As well as identifying the immediate focus of in-house lawyers on the current economic climate, there were a number of other interesting findings:

- 90.9% of in-house lawyers think compliance is more of an issue for them than it was five years ago.
- The countries which cause the most compliance concerns for those surveyed were North America (46.8%), China (26%) and South America (14.3%). Western Europe, Africa and Russia scored equal for compliance risk with not one person concerned about the Baltics despite the location of the conference!
- The majority of in-house counsel feel there has been a rise in litigation affecting them in the last two years, with 15.8% regarding that as a big rise.
- Despite the rumored rise of procurement in the legal function, only 2.6% thought this the major issue for their in-house team.

The second biggest pressure point for in-house counsel was a recent regulatory issue (18.2%) followed by rising cost (14.3%) and the pace of global growth (10.4%). Here the survey contrasts with a similar survey conducted by Eversheds and the Association of Corporate Counsel's Greater New York Chapter at their conference in New York in June of 2008. The June survey found that the pace and scope of global growth was of the greatest concern for in-house counsel, even greater than rising law firm costs or the economic downturn. Thirty-eight percent of in-house lawyers attending the June event ranked the pace of global growth as having the biggest impact on them. Next was the rising costs of outside counsel (20%), followed by the economic downturn (14%). The statistically small samples of both surveys may explain the difference between the two but equally the contrast in those surveys might show us just how acutely the economic downturn has been felt over the summer with the resultant increased pressure on in-house counsel to reduce costs. What seems clear is that economic pressures on in-house counsel are apparent now as never before.

What the NYSBA survey did not show was any consensus on the single major compliance issue for in-house lawyers. Responses ranged from the general (such as "regulatory issues" or "EU") to the specific (such as "New York City Building Code regulations"). While there was no real commonality issues like data security and data protection, the cultural aspects of compliance and the challenges of differing employment laws were a recurrent concern. Other issues featured more than once were customs, FCPA and anti-money laundering legislation.

All of this evidences the fact that while the spread of compliance topics and the geography covered by in-house lawyers is ever greater, resources to address the same are, in many cases, contracting rather than increasing. Another of the speakers at the Stockholm conference, Ulf Lindén, Senior Legal Counsel of GE Healthcare Life Sciences, spoke on this point:

> The vast number of different compliance issues reflected in the survey just shows how fragmented and complex this field is. I would say that this is the top challenge for in-house departments and especially if you work for a global business. More regulation is a trend not only in the industrialized part of the world but also in the emerging markets.

As the global economic crisis continues, so the pressure on in-house teams grows. In-house lawyers are used to "working smarter" and in many cases there will be little they can do to add to that which they are already doing. Some in-house teams are, however, looking at measures they can take to reduce costs and even generate revenue. My own firm, for example, has been working with a number of in-house teams to audit its brand registrations. A policy of release, reduce and resell for brand owners can not only cut costs but, for those fortunate enough to be sitting on a large trademark portfolio, bring in much-needed cash.

What is common across in-house teams is that they will need the co-operation of external law firms that un-

derstand the new dynamics and can offer flexibility and cost-effective support in these troubled times. The legal profession is in leaner, meaner times and we all have to work together to get through them.

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The Indian Economy and Legal Sector Post-Economic Slowdown

The global financial crisis has had an impact on the Indian economy and the Indian legal sector, albeit not to the same extent as other parts of the world. This article considers the impact of the slowdown on the economy, and then looks at its effect on the legal market in particular.

Fortunately, the current global financial meltdown has not affected the Indian economy as much as it has other economies, partly due to the overall strength of domestic demand. In October 2008, the International Monetary Fund predicted that the Indian economy was likely to grow at 7.8% in 2008 and 6.3% in 2009. As opposed to other economies which appear to be facing the prospect of negative growth and recession, India is predicted to only face a slowdown in economic growth. Although there has been a reduction in foreign investment in India, according to the Securities and Exchange Board of India (SEBI), the stock market regulator, foreign institutional investors (FIIs) continued to enter India with 120 new FIIs registering themselves between September and November 2008. SEBI believes that Indian stocks will be the first to bounce back from the current financial crisis. Given that India has the third largest investor base in the world, with 10,000 listed companies across 23 stock exchanges, one would not want to bet against SEBI's prediction.

Effect on the Market for Legal Services in India

The market for legal services almost always closely reflects the trends prevalent in the economy. The upturn or downturn in the activities of a particular sector are reflected by the consequent increase or decrease in the legal work pertaining to that sector. Thus, the current slowdown has had its own reflection in the legal services sector.

While one can still project a positive image of the Indian economy despite the financial crisis, research suggests that there has been a reduction in the number and value of M&A deals in the country, although the extent of the reduction is likely to be less than elsewhere. Deals that previously would have proceeded are now perceived as being too risky due to increasing financial costs. This reduction in the volume of corporate deals and private equity investments has led to a reduction in work for corporate lawyers. In this regard, there has been greater impact on firms that heavily rely on foreign work. However, the endeavor by industry and businesses to stay afloat by cutting costs has led to some restructuring work for corporate lawyers. One recent trend, strongly perceived in the last two years, is that of Indian companies seeking to aggressively acquire overseas businesses in a role reversal of sorts. This work has also taken a major beating. This is more so because, while India may just be facing a slowdown, much of the world is facing a recession that is now being compared to the Great Depression of 1929, and these much-feted acquirers are now struggling to keep the targets afloat.

The challenges resulting from the liquidity crunch are immense. Companies that need to refinance are limited by the sources of finance that are available, as there has been a reduction in lending by banks and in capital markets. The disappearance of wealth at the hands of the stock market has seen investors wary of making any investments, despite statements from the Indian Finance Minister that it is the right time to invest if one has the money. The meltdown in the stock market has shrunk the country's primary market over 10 times during the period April–August 2008 compared with the corresponding period in 2007.[1] The bearishness in the stock market has meant that several Initial Public Offerings (IPOs) that were lined up (Wockhardt Hospitals, Emaar MGF, UTI Asset Management Company, Mahindra Holidays & Resorts, Godrej Properties, etc.) have been put off for periods of more than six months.[2] These realities have led the SEBI to approve a proposal that extends the validity of an IPO approval from three months to one year, following requests from issuers.[3] Thus, the practice of legal work relating to capital markets has also seen a severe downturn in recent times. It is likely that companies will look to existing shareholders through rights issues, and to private equity houses through placings in the near future.

Capital markets and the practice relating to the same is not the only area of legal practice that has taken a hit due to the state of the economy. Equally volatile has been the fortunes of the real estate sector and the legal practice pertaining to this area. After climbing the dizziest of heights, the severe liquidity crunch has seen this sector witness a free-fall. New Delhi-based realty firm BPTP is seeking to dissolve a nearly Rs 5,000-crore deal for 95 acres of prime commercial land in Noida, which it won in an auction last March. This was to be India's and Asia's most expensive land deal ever. The real estate sector is in a slump as demand has dramatically shrunk and credit remains unavailable to developers. Almost all real estate firms have reported massive declines in profits and revenues. DLF reported a decline of 69% in profit, while Unitech's profit fell 74%. Smaller players such as Parsvnath and Omaxe fared even worse, with 95% declines

in profit.[4] Thus, while the recent upswing led to tremendous legal work in the real estate sector, at present there is a dearth of legal work. Whereas earlier the legal work in this sector related to foreign investors scouting opportunities in construction projects and seeking information on the restrictions imposed on such funding, the legal advice currently sought is more in the nature of exit options or securing of investments already made and facing a lock-in.

One silver lining to the dark cloud of recession is the possibilities that it has created for start- ups. With the slowdown leading to reductions in job creation and heavy casualties among favoured recruiters, such as investment banks, there is an available pool of educated fresh graduates, and sometimes even experienced personnel, willing to grab any job. Coupled with falling interest rates and private equity funding scouting for new opportunities, this is the chance for aspiring entrepreneurs with a credible business plan to start off. Simultaneously, downsizing has led to the practice pertaining to employment law to see a rise in activity as companies approach their lawyers to ascertain the legal issues involved in downsizing, especially on account of the complexities involved in labor legislation in India.

Drying up of jobs has also encouraged a sense that this is the best time to prepare oneself for life after the slowdown by acquiring better qualifications. Thus, increasingly people are turning toward education, particularly technical upgrades of qualifications that will eventually lead to better job prospects. This has meant that there is a window of opportunity to create educational ventures in association with industry that would assure people of their suitability and increase their prospects once the economy turns around. Therefore, in recent times, legal work that synergizes the needs of industry, students and education providers has increased.

Other areas of legal practice that may grow include project finance, as infrastructure and energy projects are usually long-term projects that are rarely affected by the fluctuations in the market. In addition, restructuring and insolvencies are on the rise, especially in sectors reliant on consumers such as retail. Legal work in relation to insolvencies could increase if banks continue the practice of not lending to each other or other businesses.

The main area of growth in legal practice is likely to be in litigation. Given the prediction that there will be an increase in the number of bankruptcy claims, one can imagine an increase in the number of defaults in repayments of loans. In all probability, these consequences will be faced to a greater extent in the U.S. and Europe rather than in India.

While U.S. and European firms seek to reduce costs, it is anticipated that there will be a large growth in outsourcing legal work to India. India is an attractive destination for legal process outsourcing (LPO) for a number of reasons and the LPO industry in India is already witnessing a boom of sorts. As more legal work is outsourced to India, there are positive effects on the LPO market. In the next two years, it has been predicted that there will be a demand for 15,000 new jobs. Further, the average salary benchmark has increased by 30%-45% on average.

While the downturn in the economy has seen many sectors witness a dramatic fall in their fortunes, there are certain areas that are witnessing unexpected growth. New windows of opportunity have opened up and possibly many more such vistas are waiting to be identified, sought and explored. The same would require the close cooperation and coordination of industry, the legal services sector and, of course, human serendipity—if not imagination.

Endnotes

1. *The Economic Times,* Nov. 14, 2008.
2. *Id.*, Sept. 19, 2008.
3. *Id.*, Dec. 5, 2008.
4. *Id.*, Feb. 5, 2009.

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It Was the Best of Times, It Was the Worst of Times . . . Practicing Employment and Labor Law in Canada in 2009

The seismic shifts in the global economy have significantly affected the practice of employment and labor lawyers in Canada.

In Ontario, the most populous province of Canada, where the economy has traditionally relied on manufacturing, employment lawyers have watched the unfolding of a series of dramatic changes. In the 1980s and early 1990s, we watched a significant part of the manufacturing sector depart the province of Ontario for less expensive off-shore manufacturing facilities. Many of these companies left behind a distribution network, warehouses and sales representatives, but not much else.

Since the Fall of 2008, instead of the outright plant closures and off-shoring of the previous decade, employment lawyers are seeing a new type of work, which is discussed below.

Since last Fall, there has certainly been an increase in plant closures and headcount reductions. I should note at this point that in Canada, a reduction in force is a fairly

complicated legal undertaking as there is no employment at will in any part of the country. Employment law is governed by federal law for a few national industries and by provincial or territorial law for most industries. In total, we have 14 sets of employment and labor statutes. We also have limited use of formal written employment agreements, with the result that the statutory requirements and the common law (the civil law in the province of Québec) will define what a reasonable severance package is. The statutes are fairly simple to comply with. In small group dismissals, the statutes impose straightforward severance formulas based solely on length of service, typically running from one to eight weeks of termination pay. However, in the case of a "collective dismissal" there are varying notification requirements to the provincial, federal or territorial governments, enhanced notice to the employees or the unions, and some jurisdictions require employer cooperation with respect to worker readjustment or transition services.

It is the common law which really dictates severance costs north of the 49th parallel. The courts require "reasonable notice" of termination of employment (absent a specific contractual severance term). This is an entirely individual calculation based on the particular employee's age, length of service, promises made upon hiring, pay level, re-employability, position held, degree of specialization, availability of comparable employment, and any other factors that counsel may bring forward to a judge which the judge finds relevant in calculating what would be "reasonable." Courts have been astonishingly generous and, as a result, Canadian employees tend to be quite fairly litigious at the time of dismissal.

When I say that the courts have been generous, I am referring to judgments of up to 34 months of severance pay, although it is rare to find many over 24 months. Severance pay is calculated on total average compensation including salary, average incentive compensation or commission payments, and continuation of group health benefits. We do not have COBRA legislation here and, as a result, the courts actually impose a requirement to continue the benefits following the date of dismissal.

Unlike the U.S., we do not require a severance plan or equitable treatment of employees or even disclosure to employees of statistics about the reductions at the time of a dismissal. As indicated above, it is a highly individualized assessment. In actual practice, we find that use of a severance formula, which incorporates a number of the factors described above, leads to the best results in the case of a large group dismissal. The employees are likely to compare packages with each other and consistency helps to increase acceptance by the affected employees.

What practitioners are finding different in 2009, compared with previous times of recession, is a real attempt by many employers to avoid wholesale headcount reductions. Many companies previously pared their workforce down to a fairly minimal level and are finding little to cut this time around. Instead, we have employers taking risks that would not have been contemplated before this year. Until this year, the Canadian law on constructive dismissal was quite plaintiff-friendly. A constructive dismissal is generally described as a unilateral adverse change by an employer to a fundamental term or condition of employment to which the employee has not consented. The obvious changes are decreases in pay, commission plans or bonus plans. However, any actions viewed as causing a demotion, significant change in responsibilities, reporting relationship, geographic location or a "loss of prestige" were also found to constitute a constructive dismissal. A constructive dismissal allowed the employee to leave employment and to sue for the equivalent of the common law reasonable notice period described above. I would note that, as in the U.S. in the case of a unionized work environment, changes cannot be implemented that would violate the collective agreement and employers generally have to wait until they are back at the bargaining table. Most unions have been more accepting of cutbacks and minimal wage increases—with the notable exception of the Canadian Auto Workers representing workers at the Big Three automakers.

This year, employers have overcome their fear of constructive dismissal claims because they are finding that employees are simply not quitting over such changes. Employees are generally relieved to find they still have a job and we have seen few cases where an employee will actually resign in this marketplace and become willfully unemployed. Employment lawyers are assisting employers in redesigning terms and conditions of employment and can also provide a valuable service in advising on the communication plan and ensuring that changes do not violate anti-discrimination laws.

As a result, Canadian employers are finding more flexibility to deal with decreasing revenues and, like their American counterparts, are implementing a range of measures including pay cuts, decreases in bonus plans, reduced hours, reduced work weeks, unpaid days off and even, in extreme cases, unpaid leaves of absence.

The previous threat of a constructive dismissal claim, which placed a real chill on employers' attempts to change job responsibilities, transfer employees and change compensation plans, has been seriously reduced and employees are more accepting of changes they would not have accepted two years ago, because the alternative is bleak.

What is unknown at this point is whether the courts will become ever more generous with their concept of "reasonable notice." The Ontario Court of Appeal in 1983 in a case involving Storwal International Inc. agreed that reasonable notice needed to be reasonable from the perspective of both parties to the employment relation-

ship. (Leave to appeal to the Supreme Court of Canada denied.) In that case, Storwal was losing money, and management had been mandated to bring the company into a break-even position. The company had reduced its workforce by 90 employees between the date of the plaintiff's dismissal and the trial date. The following year, the Court of Appeal again noted that employers have a right to reduce their workforce at a reasonable cost. These two cases have largely languished in obscurity during the economic boom of the past decade.

If these cases are resurrected and followed during the current recessionary times, it will allow employers to further cut costs by reducing severance packages. On the other hand, plaintiffs' counsel are likely to argue in court that a reasonable notice period has to be far *greater* than previously because the individuals will take longer to find re-employment due to the economy. Cases have not yet proceeded to trial so we do not know how this tension will be resolved. The practical result at this time is that many employers are being forced to offer severance packages that are significantly less than those they would have offered two to three years ago. While employees have been accepting these packages in greater number than previously, we await with bated breath the first trial on this issue.

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In Bad Economic Times, Mexico Is Here to Help

The Ciudad Juárez-El Paso Region Is the Ideal Location

During the current economic slowdown, U.S. companies need to find ways to reduce their costs in order to continue being competitive. In this regard, outsourcing has proven to be a reasonable alternative. In the last few years, outsourcing has gained enormous importance to the world's economy. Although outsourcing is a controversial topic, the fact is that, in a globalized economy in which companies and individuals compete with everyone from everywhere around the world, it is a reality that all countries are now facing. Even India—known for being the world´s outsourcing recipient—is now "outsourcing outsourcing" to countries like Mexico.[1] Because of its proximity to the U.S., Mexico is still an optimal location to help U.S. companies reduce their costs by establishing Business Process Outsourcing (BPO) operations. The U.S.-Mexico border, in particular, is the ideal location for BPO operations. U.S. companies would be remiss not to pay close attention to the binational metropolis of Ciudad Juárez, Mexico and El Paso, Texas.

At the midpoint of the U.S.-Mexico border, a binational metropolitan area has emerged as a world-class manufacturing and outsourcing center. Ciudad Juárez (known as "Juárez") and El Paso comprise the so-called *borderplex* with a combined population of over 2.5 million people, which also includes prosperous suburbs in the state of New Mexico. Both cities—connected by bridges used annually by 15 million private vehicles—operate as one metro area that comprises almost 20 percent of all the U.S.-Mexico trade. Juárez, which is home to dozens of *maquiladoras* (manufacturing factories located mostly in Mexican border cities), is now Mexico´s fifth most populous city and the largest employer in the manufacturing industry. The *Foreign Direct Investment Magazine*—a publication of the Financial Times group—designated Juárez as the "city of the future" due to "its growing importance as a regional industrial and logistics centre on the border."[2] Historically, manufacturing activity has taken place in Juárez, but recently companies in the outsourcing services industry have established an important presence. Its sister city, El Paso, which is one of the fastest growing cities in the U.S., operates as a major logistics hub in which distribution centers are located to support the *maquiladoras* in Juárez. Both cities possess a sophisticated binational product-sharing system in which operations take place on both sides of the border.

Juárez offers numerous benefits to companies establishing BPO operations. Its proximity to the continental United States is definitely the most important advantage. A facility in Juárez is typically only a few miles from a U.S. port of entry. In addition, the proximity results in convenience for executives of U.S. companies. For instance, hundreds of these executives live in El Paso and commute to Juárez. The fact that El Paso Airport offers non-stop flights to major U.S. cities normally allows executives visiting facilities in Juárez from other regions in the U.S. to fly back home the same day. Besides these benefits, Juárez offers a very competitive and experienced labor force at lower costs.

Customer Care Outsourcing is an area in which Juárez may offer numerous benefits. For instance, under this area, sales support may help U.S. companies reduce their costs. Mexican nationals who are raised in Mexico´s border cities have a good understanding of the U.S. culture and traditions. According to a *New York Times* article, the *borderplex* possesses "the largest bilingual, binational work force in the Western Hemisphere."[3] Because the U.S. Hispanic market is the fastest growing segment of the population and its purchasing power is in the hundreds of billions of dollars, excellent Spanish speakers in Juárez, who understand the American culture due to its proximity to the U.S., may be the most suitable to serve this profitable market.

Transaction Process Outsourcing (TPO) is another area in which Juárez may offer some advantages. TPO may include data entry centers, processing of credit card applications, transfer of payments, records management, document processing, and order processing. An important company in the business process industry has a significant presence in Juárez, relying on "the educational and training facilities, talent pool and positive business climate" of Juárez.[4] A Fortune 500 company that provides BPO services also operates in Juárez. Some of its services include transaction processing, finance and accounting, and call centers. In addition to TPO services, Mexico is also attracting engineering and design centers to support U.S. companies. For example, a world´s major automobile parts supplier, which employs thousands of workers in manufacturing facilities in Juárez, possesses a sophisticated technical center in Juárez which employs dozens of Mexican engineers and design experts.

A foreign company will typically create a subsidiary in Mexico to operate an outsourcing facility. The foreign company, as a shareholder or partner of the subsidiary, is ordinarily not liable for corporate indebtedness in Mexico. The most common business entities in Mexico to establish a subsidiary are the *Sociedad Anónima* (S.A.) and the *Sociedad de Responsabilidad Limitada* (S.R.L.). Both entities may be 100-percent foreign-owned. The latter has become popular for U.S. companies due to the "pass through" benefits that it offers with respect to the U.S. entity. The S.A. provides free transferability of ownership interests through share certificates. In the S.R.L., some restrictions may apply in the transferability of ownership interests. The subsidiary is a legal entity in Mexico that is taxed as is any other business entity, but the foreign company is not considered a taxpayer in Mexico. The subsidiary may purchase (or lease) land directly for its operations anywhere in Mexico. If the property is located in the *zona restringida* (restricted zone),[5] the subsidiary may purchase the land as long as it is for commercial or industrial purposes.

The Mexican government continues providing incentives to the manufacturing industry coming into Mexico. In the last few years, Mexico´s Ministry of Economy has issued various decrees specifically directed at the manufacturing industry. Because the government is aware of the importance of BPO services, the current applicable decree for the industry—*Decreto para el Fomento de la Industria Manufacturera, Maquiladora y de Servicios de Exportación* (IMMEX)—also covers BPO services. On July 6, 2007, the government published in the *Diario Oficial de la Federación* (Mexico´s Federal Register) regulations that enumerate various BPO services that may obtain the benefits of IMMEX.[6] IMMEX provides benefits with regard to import duties and *Impuesto al Valor Agregado* (IVA)—Mexico´s sales tax payable on imports and purchases. Mexico´s IVA rate is 15 percent, but it is only 10 percent if the company is located in a border city like Juárez. With respect to IVA, IMMEX allows inputs and components (incorporated into exported manufactured goods) and equipment and machinery (used in the production process) to be IVA exempt. In reference to import duties, NAFTA countries are exempt for inputs and components. A non-NAFTA country may be exempt from import duties on inputs and components if the country has a trade agreement with Mexico that provides an import duty exemption. In addition to IMMEX, the *Programa de Promoción Sectorial* (PROSEC) offers other benefits with regard to importing materials from a non-NAFTA country at a reduced or exempt duty.

Outsourcing is now a world reality. Companies and individuals compete with everyone from everywhere around the globe. The *borderplex* offers excellent benefits for U.S. companies by providing them a venue to reduce their costs by establishing outsourcing facilities in the region. Some of the additional benefits include a reduction of transportation costs, proximity to the U.S., travel and residence convenience for executives, competitive labor force at lower costs, and experienced legal and customs services. In addition, as explained above, the Mexican government provides IMMEX and PROSEC as business-friendly incentives to entice companies to establish themselves in Mexico. By shortening the supply chain, U.S. companies may significantly reduce their costs when they establish outsourcing operations in the Ciudad Juárez-El Paso metro area.

Endnotes

1. Anand Giridharadas, *Outsourcing Works, So India Is Exporting Jobs*, The New York Times (Sep. 25, 2007).
2. *North American Cities of the Future 2007/08*, fdi Magazine—Foreign Direct Investment Magazine (published by the Financial Times group) (April 25, 2007).
3. Lisa Chamberlain, *2 Cities and 4 Bridges Where Commerce Flows*, The New York Times (March 28, 2007).
4. Genpact press release, *Genpact to Open Latin America Headquarters in Juárez, Mexico; New facility doubles existing capacity* (Sept. 18, 2007), http://www.genpact.com/genpact/pdf/pr/Genpact_Latin_America_headquarters_Mexico_091807.pdf.
5. *Zona restringida* is the area of 50 km (31 miles approximately) inland from the coastline and 100 km (62 miles approximately) from any border. For residential purposes, foreigners may acquire the effective use of land in the *zona restringida* only through a trust.
6. Acuerdo por el que la Secretaría de Economía emite reglas y criterios de carácter general en materia de Comercio Exterior, Anexo 3.2.4, Diario Oficial de la Federación (Mexico´s Federal Register) (July 6, 2007).

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"Out-of-the-Money" Options and Tax Hikes in the U.K.

As with many other jurisdictions, the U.K. is suffering from the global recession.

Employees holding stock options have been hit particularly hard as share prices have tumbled and options granted to them under Employee Incentive Programs have assumed a "worthless" status once the share price dips below the exercise price.

On top of this, the U.K. Government has also announced that it proposes to increase income tax rates to a new high of 45% (for individuals earning over £150k) and that employee's and employer's social security tax would each be increased by half a percent.

Clearly the proposed changes, if they come into being as proposed, for tax years on and after April 6, 2011, will have a detrimental impact on senior executives and their employer.

The aforementioned has lead to a number of developments for employee stock incentives.

Mitigating the Increased Tax Burden

As a result of the proposed tax hikes, it is likely that there will be a sharp increase in the number of companies seeking to rely on tax-approved stock incentive schemes that facilitate capital gains tax treatment (rather than income tax treatment) in an effort to help reduce the impact of these changes for the executives concerned, and their employer.

Some ways to achieve this would be:

- take advantage of an HMRC-approved company share option plan (CSOP), which will enable options to be granted up to £30k worth of shares per individual. Any gains made on the exercise of such options should only be subject to capital gains tax at the new flat rate of 18%; and / or
- think about operating an HMRC-approved Share Incentive Plan to deliver shares to employees—for instance, partnership shares under such a plan are purchased from pre-tax salary and so there can be significant savings for the employer company in terms of employer's social security at the current rate of 12.8 percent (and the proposed new rate of 13.3 percent).

In light of the proposed tax increases, many U.S. and Canadian multinationals with a significant presence in the U.K. are already thinking about moving away from traditional restricted stock awards and unapproved options to take advantage of the approved CSOP. As the cost of setting up a CSOP sub-plan to be operated in the U.K. is not huge and the benefits in terms of overall tax savings can be high for both the employee and the company, it is not surprising that this is the case.

Dealing With Out-of-the-Money Options

Like the U.S., it is not possible to "re-price" options in the U.K.

Fortunately though, in the U.K., unlike the U.S., the grant of a deeply discounted option to an executive does not give rise to an immediate tax charge on vesting. It is possible to grant a stock option with an exercise price set at zero without incurring any tax liabilities until the point of exercise when the executive actually receives benefit.

Employers are therefore also considering, and in fact implementing, zero-cost stock options because:

- with no exercise price payable, these options can never go "out of the money";
- a lesser number of shares need to be used (than would be the case with a traditional stock option involving an exercise price) in order to deliver the same economic value to an employee—which helps with dilution; and
- as fewer shares are used, a zero-cost option is likely to have less of an impact of earnings per share.

Although the use of zero-cost options does not deal directly with the existing underwater options, at least it softens the blow and can be used very effectively to re-motivate, retain and incentivise employees holding underwater options.

At the same time, many companies view the bear market and depressed share prices as giving rise to an ideal opportunity to grant further options with an exercise price set by reference to the current market value of the shares. While the stock price is low, there could be considerable upside for employees when the bull market returns.

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* * *

The Global Financial Crisis in Brazil: Effects and Opportunities

Introduction

The international media have constantly wavered in their opinion of the Brazilian economy. Consequently, the

reports of the last four months are hardly a good guide for investment decision-making; editorials from reputable outlets have vacillated between praising Brazil's economy as resilient, and damning it as doomed. To some extent, this reflects the confusion surrounding a global crisis that has reduced even the boldest of economists to silence for fear of making forecasts that prove incorrect. But the flip-flopping has seemed more pronounced over Brazil than any other emerging market.

Rather than proving a deterrent, the current crisis may actually provide opportunities for law firms operating in Brazil or planning their entry. The country remains generally attractive to foreign investors, but complex conflicts can easily arise in the current context; legal services may benefit from this combination.

To shed some light on the issues, this article begins with a brief examination of the effects of the financial crisis on local economic activity in Brazil and assesses some of the decisions taken by Brazilian conglomerates and their managers in the face of the current, more challenging operating environment. The piece also looks at how the government is responding to the shifting scenario presented by the crisis.

The Effects of the Global Economic Crisis

While Brazil has so far coped better with the downturn than the U.S. or Europe, December was a landmark month that showed that the country's immunity to the crisis had expired. Monthly industrial production fell by 12.4% from November, the biggest drop since 1991. After the excitement that followed record GDP growth of 6.4% from September 2007 to the same month in 2008, the government is beginning to tone down its rhetoric. Figures also show that this global recession is different from previous ones; calling it a "financial crisis" severely underestimates the impacts that it has had on the real economy. In short, 2009 will be a tough year for everyone, Brazil included.

In actual fact, even before December's poor figures were released, there were clear signs of the local economy being affected. Within a matter of weeks of the U.S. financial debacle in mid-September, the stock market dropped 60,000 points to close at 24,600 points. For 40 days, the São Paulo Stock Exchange (BOVESPA) fluctuated intensely and the Brazilian Real depreciated rapidly, going from nearly BRL1.60 to the dollar to BRL2.40 / US$ (it is currently at BRL2.27 / US$).

Although the rapid currency depreciation has had a positive effect on manufacturers' competitiveness, it has also brought complications. Many companies had contracted exchange-derivative operations—a simple measure aimed at protecting their assets from the increasing value of the local currency. The exchange rate when President Luiz Inácio 'Lula' da Silva assumed his presidency in 2003 was BRL3.53 / US$, but before the crisis it had risen to BRL1.63 / US$. Many senior executives expected this appreciation to continue, and were taken by surprise when the Real devalued in a matter of weeks in late 2008, losing a lot of money in the process.

The automobile industry saw a sharp fall in sales and was pushed into offering collective holidays to workers and reducing production to lower the stock levels at concessions and factories. This fall in sales had the pervasive effect of lowering credit offerings from financial institutions, along with a reduction in financing terms and tighter conditions for clients who were looking for credit. At present the auto industry appears to still be on its feet and sales have picked up, but uncertainty remains in the air.

The civil construction sector has also felt the pinch of the downturn in the last trimester, even if it retains healthy figures year-on-year. A number of new property contracts have been cancelled and there is fear over future compliance amid tighter credit conditions. Normally in Brazil, property purchasers pay between 20% and 35% of the value of the property during the construction phase, and can finance the rest from the moment they take up residence. Many people had bought their properties two years prior to the crisis, anticipating continued economic stability, but are now struggling to find banks willing to finance the rest of the transaction.

On the other hand, the local financial system has shown itself to be fairly resilient. Financial institutions are regulated conservatively by the Central Bank of Brazil and so far do not appear to be feeling a severe impact upon their activities. While in many other countries banks can give more than 30 times of their own capital in loans, Brazilian banks cannot lend more than three times their capital. The indebtedness of companies is also monitored by the Central Bank to prevent one outfit contaminating the financial system by obtaining multiple loans from different banks.

Business Actions

To some extent, Brazilian conglomerates are used to periodic crises. All of them have, in some form or another, faced the domestic phenomena of hyperinflation, exchange rate devaluations, recessions, changes in currency units and high unemployment rates—all within little more than a decade between 1986 and 1998. Moreover, many of these companies have felt the spillover effects of international financial crises in the recent past. Based on those experiences, managers have taken a number of preventive measures in the new context.

Actions have been diverse across sectors, though there are some common traits. Most company boards, for example, are aiming at increasing the availability of treasury funds (i.e., spare cash). With credit scarce, managers

have been more diligent regarding daily movements of funds and compliance by suppliers and clients; consequently, legal departments have been much more attentive to potential signs of insolvency.

A connected development is the fact that CEOs are becoming ever closer to the operational matters of their businesses as opposed to the strategic aspects that they were involved with during the boom period. Boards have focused attention on cutting budgets, particularly in relation to non-vital spending—Christmas parties and other social events, or business-class travel for personnel are among the items being dispensed with in harsh times. To avoid appearing insensitive over these cuts, senior executives' schedules have adapted to include more day-to-day contact with employees: visits to factories to speak with production staff and meetings with strategic suppliers are becoming common features on top managers' agendas.

Given the uncertainty of the global business environment, a number of managers have opted to protect their assets through legal means, seeking the Brazilian equivalent of Chapter 11 bankruptcy protection in the U.S., in the form of Judicial Recovery. January saw a significant increase in such requests.

However, these cautionary measures do not necessarily mean that Brazilian companies are dormant or are only focused on survival. Indeed, a number of multinationals that had maintained healthy levels of treasury funds prior to the crisis are taking the opportunity to acquire new assets and players that have run into deficit. Mining giant Vale's recent acquisition of Rio Tinto's operations in Canada, Argentina and Brazil, and the merger between banks Itaú and Unibanco typify this trend. Therefore, while for some the crisis spells doom, others have treated it as a window of opportunity.

Government Actions

Lula's original argument that, while other countries face a tsunami, Brazil will only feel a "small wave" is undoubtedly an understatement. At this point, even the government acknowledges the naivety of its original position, and after a brief period of euphoria, the overly optimistic stance has been replaced by a more sober one. Indeed, the government has walked a fine line with its anti-crisis agenda. While it acknowledges the need for firm action to avert a downturn, it has also consistently sought to prevent panic and defend the view that, despite alarmist media coverage, Brazil is relatively well placed to face the turmoil.

In this context, the first measures implemented were palliative and directed toward the financial sector: most actions revolved around the Central Bank pumping liquidity into the market and guaranteeing lines of credit by reducing the percentage of obligatory deposits. This was followed by more direct action, with tax cuts and increases in benefits given to workers who were made redundant, along with sector-specific moves, including special credit lines for banks to finance vehicle acquisitions, increased credit lines for house-buyers, and additional financial backing for exporters. These measures are likely to intensify in the coming months, particularly after December's weak economic indicators.

Slower growth is inevitable, but the government's measured stance has some justification—the country has several attributes that may help it to weather the storm better than developed countries. A robust internal market, a conservatively run financial system and large-scale infrastructure investment by the National Development Bank through the flagship Growth Acceleration Programme (PAC) will provide a cushion for hard times. Perhaps more importantly, credit plays a much smaller role in the local economy than in any other developed market. Less leverage in terms of GDP—considered a weakness before the credit crunch—has actually become a blessing as problems in the credit markets have fewer negative spillover effects on the real economy, in stark contrast to what is happening in the U.S. and Europe. Another crucial, often overlooked detail is that even when the country was heavily hit by financial crises in the past (for example, the Asian crisis of 1998-99), it avoided recession.

In the longer term, Brazil is emerging as an oil powerhouse, even at a time when oil prices are low. International oil companies are quite confident about the country's prospects and seem keen to invest. Venezuela and Mexico, the traditional oil hotspots in Latin America, are losing ground to Brazil, which presents a more stable situation in terms of politics and security. This trend is likely to have little impact this year, but paints a favorable picture in the medium-to-long term.

Opportunities

During recent visits to law firms in São Paulo, we have noted that they have not felt the pinch of the economic crisis. What has changed, though, is the scope of their work: Whereas in the last few years most legal outfits were snowed under with work on mergers and acquisitions, these days litigation is taking a larger piece of the pie.

As companies are inevitably more worried about their health than expansion, law firms in Brazil have often acted in generating judicial, arbitrational or extrajudicial solutions to any conflicts that have arisen over the interpretation of payment obligation contracts. Disputes can vary from derivative transactions and unauthorized financial transactions to unapproved payment discounts. Another line that might demand increased legal assistance is requests by companies for judicial recovery. On

one side, law firms are needed to help companies prepare to claim for legal protection of assets and the suspension of debt payments, while on the other side are offices monitoring the actions of these companies, ensuring that they honor their agreements.

Moreover, when businesses cut expenditures in times of crisis, a significant amount of internal irregularities are uncovered. Criminal lawyers are therefore presented with a vast number of diverse opportunities, from internal fraud to questions over compliance with the Foreign and Corrupt Practices Agreement (FCPA). These opportunities had been hidden prior to the crisis, when businesses were concentrating on expansion and growth.

Even for those businesses that saved up during the boom and still have ambitious expansion plans, legal, fiscal, accounting and reputational due diligence investigations prior to any business transaction are just as important—if not more so—than they were before the crisis. Falsification of financial results, use of illegal means to reduce tax bills, and the involvement of businesspeople and their partners with political agents remain common threats in the Brazilian business environment, making tight oversight a necessity rather than a luxury.

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Committee Focus

Insurance and Reinsurance Committee

Update: Costa Rica to Allow Private Insurers to Set Up Shop; CAFTA Comes into Force; Licensing Regulations Issued

As informed in Volume 13 of the *New York International Chapter News*, the most significant development in Costa Rican insurance and reinsurance law in many years is the elimination of the current state monopoly on insurance in the context of the Central American Free Trade Agreement (CAFTA).

CAFTA contains a series of clauses regarding the Costa Rican insurance market. These commitments, agreed to in the framework of Chapter 12 (Financial Services) of CAFTA, require Costa Rica to allow competition in insurance services. They are further specified through a special Annex named "Specific Commitments of Costa Rica on Insurance Services" (hereinafter "Insurance Annex"). These special obligations can be categorized as general commitments and specific commitments; the first group is contained in Chapter 12, while the second group is provided for in the Insurance Annex.

The general commitments assumed by the parties are national treatment, most favored nation treatment and market access. "National" and "Most Favored Nation" treatment stipulate that investors from the other CAFTA countries be treated no worse than local ("National") investors and investors from any third-party ("Most Favored") nation. The "Market Access" clause prohibits exclusionary practices or quotas. These three concepts can be summarized as commitments to "level the playing field."

The text of the Insurance Annex establishes a mechanism through which the opening of the Costa Rican insurance market was to be achieved in an organized, programmed and gradual manner. However, since the approval of CAFTA has required more time than expected, most of the dates contained in the Insurance Annex have come and gone. (CAFTA was approved in Costa Rica by popular referendum on October 7, 2007 and came into force on January 1, 2009.)

Section II of the Insurance Annex indicates the obligation of Costa Rica to establish an "independent insurance regulatory authority" no later than January 1, 2007. Under CAFTA, this regulatory authority is required to act consistently with the "Core Principles" of the International Association of Insurance Supervisors (IAIS). These standards will ensure that Costa Rican supervision is in line with the latest international "best practices."

Section III of the Insurance Annex contains the specific commitments detailed by type of activity and date of liberalization, according to two major categories: cross-border commitments and right of establishment.

Cross-Border Commitments

At the latest on the date CAFTA enters into force for Costa Rica (i.e., January 1, 2009), Costa Rica must allow a series of cross-border activities. These include:

a. **The purchase of insurance services abroad**: This means that persons situated in Costa Rica (regardless of nationality) and Costa Rican citizens can buy any insurance product abroad from foreign insurers, except for mandatory auto insurance and mandatory workers' compensation insurance. However, Costa Rica is not required to allow those foreign companies to "do business" or "solicitation" of insurance business in Costa Rica. The definitions of "doing business" or "solicitation" can be established by Costa Rica freely in its legislation, subject to respecting CAFTA commitments.

b. **Cross-border sale of certain inherently cross-border or international insurance services**: Costa Rica must allow providers of insurance services located in the territory of one Party to sell in the territory of the other Party, on a cross-border basis, the following insurance services:

   1. Insurance for the launching of space cargo (including satellite cargo), maritime shipping and commercial aviation.
   2. Goods in international transit.
   3. Reinsurance and retrocession.
   4. Services necessary to support global accounts. From the text of the Insurance Annex it is understood that a "global account" is not really a cross-border insurance contract *per se*. It is a (global) master policy signed between a foreign insurer and a foreign insured in a territory other than Costa Rica. It is assumed that it is a non-regulated contract in Costa Rica that will be regulated and interpreted in accordance with the laws of another country. The only contact with Costa Rica refers to the location of certain risks covered under the contract, which are generally in the country because a company

related to the insured exists and is included in the coverage offered.

5. Services auxiliary to insurance. CAFTA defines services auxiliary to insurance as those provided by advisors and actuaries, as well as evaluation of risks and loss adjustment, among others.

6. Intermediation services provided by brokers and agents outside Costa Rica, only in reference to the cross-border services listed above.

Additional Cross-Border Commitments

Subsequently, the gradual opening process that CAFTA mandated was to continue on July 1, 2007, when Costa Rica was required to permit the establishment of representative offices and the cross-border sale of the following services:

1. Services auxiliary to insurance for all the lines of insurance.

2. Intermediation services provided by brokers and agents outside of Costa Rica for all lines of insurance.

3. Surplus lines. Surplus lines refer to insurance that is not available in the local market. CAFTA defines surplus lines as those lines of insurance (products covering specific sets of risks with specific characteristics, features and services) which meet the following criteria: (1) lines of insurance other than those that INS provides as of the date CAFTA is signed, or lines of insurance that are substantially the same as such lines; and (2) that are sold, either (i) to customers with premiums in excess of U.S. $10,000 per year, or (ii) to enterprises or (iii) to customers with a particular net worth or revenues of a particular size or number of employees. As of January 1, 2008, surplus lines are defined as "insurance coverage not available from an admitted company in the regular market."

Right of Establishment

As indicated, the other main category of specific commitments in the Insurance Annex refers to the right of establishment. As the next stage of the purported gradual opening of the area, the right of establishment means that Costa Rica is obligated to allow "insurance service providers of any Party, on a non-discriminatory basis, to establish and effectively compete to directly supply consumer insurance services in its territory." At the latest on January 1, 2008, any other insurance provider that meets Costa Rican legal requirements for the issuance of a license must be allowed to offer and sell all lines of insurance (*except* mandatory auto insurance and workers' compensation insurance). Finally, no later than January 1, 2011 they must be able to offer and sell all lines without exception.

Costa Rican law establishes the requirements to obtain authorization to become an established provider of insurance services in the country. These requirements were enacted as the Insurance Market Regulatory Act," signed into law on July 31, 2008 and in force since August 7, 2008.

Pursuant to the Insurance Market Regulatory Act, the existing Pensions Superintendent (SUPEN) has been temporarily appointed as the Insurance Superintendent for a transition period of up to 18 months. The regulatory authority has issued two regulations: the first deals with the requirements to obtain authorization to operate as an insurer, reinsurer, intermediary or provider of services auxiliary to insurance, while the second deals with solvency and capital adequacy requirements. These regulations came into force on September 24, 2009. These regulations must conform to international standards because Costa Rica has committed to adopting regulations that are consistent with the Core Principles of the International Association of Insurance Supervisors.

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Meeting News

The International Section's Annual Program and Luncheon

New York Marriott Marquis—January 28, 2009

Marco Blanco

The Section's Annual Program and Lunch, held as always in connection with the NYSBA's Annual Meeting, was hosted at the New York Marriott Marquis in Times Square for the last time. It will be moving to the Hilton Hotel in 2010. It was a worthy farewell. Neither Mother Nature's sudden harsh winter snow nor the equally merciless credit crisis could prevent a packed house. And the audience did not regret that they came.

Former Section Chair Oliver J. Armas (Chadbourne & Parke LLP, New York City) took the lead in putting together a very distinguished and inventive program on compliance and enforcement issues under the Foreign Corrupt Practices Act (FCPA)—especially timely in light of recent record sanctions and the unmistaken announcement of the U.S. Justice Department that compliance enforcement will remain a top priority in 2009. The Section also conferred the Association's Annual Award for Distinction in International Law and Affairs on the Honorable Jon O. Newman, one of the most distinguished Judges of the U.S. Federal Courts of Appeal, honoring his important contributions to the law and procedure of international human rights.

Oliver Armas

Annual Program: "Living With the U.S. Foreign Corrupt Practices Act in an Era of Enhanced Enforcement"

Outgoing Section Chair Marco Blanco (Curtis, Mallet-Prevost, Colt & Mosle LLP, Paris) and his successor, Michael W. Galligan (Phillips Nizer LLP, New York City), graciously welcomed the audience before giving the floor to Ollie Armas, who chaired the event. Unfortunately, Isabel C. Franco (Demarest & Almeida Advogados, São Paulo), who had helped Ollie develop the program, was not able to attend.

Lisa Kate Osofsky

The first panel gave a general overview of the statute and informed the audience of the latest developments in FCPA-related enforcement and compliance issues. Panelists Kevin T. Abikoff (Hughes Hubbard & Reed LLP, Washington, D.C.), Lisa Kate Osofsky (Control Risks, London) and Wendy H. Schwartz (Reed Smith LLP, New York City) highlighted recent cases such as Siemens (which paid more than $1.3 billion in fines) and Halliburton (which paid more than half a billion dollars) and in so doing, definitely caught the audience's attention.

Michael Galligan

Building on the groundwork laid by the first panel, the second panel offered an entertaining and insightful role play on both compliance and enforcement. Simulated situations included counsel advising a client on an internal FCPA investigation and a follow-up meeting between counsel and the U.S. Department of Justice to discuss a voluntary disclosure. Moderated by Ollie Armas, the cast of characters included William P. Barry (Richards Kibbe & Orbe LLP, Washington, DC), Angela M. Fifelski (Associate Counsel, Compliance, Zimmer Inc., Warsaw, Indiana), and Barry M. Sabin (Latham & Watkins LLP, Washington, DC, formerly U.S. Department of Justice, Criminal Division).

Kevin T. Abikoff

Additional practical insight on living day-to-day with FCPA compliance was provided by the third panel. Skillfully moderated by Carole L. Basri (Adjunct Professor, University of Pennsylvania Law School, New York City), Rick F. Morris (Global Compliance, Goldman Sachs & Co., New York City), Piyush Sharma (Pfizer Inc., Corporate Counsel, Corporate Compliance, New York City), and Abby C. Fiorella (Group Head,

Jane Wexton

Global Compliance and Forensics, MasterCard Worldwide, Purchase, New York) added the corporate counsel perspective.

A lively Q&A session with a captive audience ended the substantive program.

Annual Award for Distinction in International Law and Affairs: Hon. Jon O. Newman

In keeping with tradition, during the luncheon that followed, the International Section conferred the Association's Annual Award for Distinction in International Law and Affairs. This year's recipient was the Honorable Jon O. Newman, Senior Judge, U.S. Court of Appeals for the Second Circuit. Judge Newman is the first sitting federal judge to receive the Award in its 20-year history, an honor he duly noted in his acceptance speech. Judge Newman was honored for his contributions to the jurisprudence of international human rights in the courts of the United States and the important role he has played in promoting the consciousness in the international legal community about the need to provide more effective remedies for egregious violations of international human rights law, highlighted by his 1996 proposal for the establishment of an international civil court.


Hon. Jon O. Newman and Michael Galligan

Perhaps most notably, Judge Newman was the author of the Second Circuit's seminal 1995 decision in *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *rehearing denied*, 74 F.3d 377 (2d Cir. 1996), *cert. denied*, 518 U.S. 1005 (1996). In that case, the Court of Appeals, consistent with its landmark 1980 decision in *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), held that the U.S. Alien Tort Claims Act affords civil remedies to victims of genocide, even when the perpetrators claim not to be acting under state authority. In his remarks, Judge Newman gave a rare and fascinating insight into the thought process of the court, including how the court dealt with the position taken by the U.S. government, and how—of outmost practical relevance—Mr. Karadzic was served.


Marco Blanco and Michael Galligan


Hon. Jon O. Newman

Judge Newman was a U.S. District Court Judge for the District of Connecticut when he was appointed to the U.S. Court of Appeals for the Second Circuit in 1979, serving as Chief Judge from 1993 through 1997 and as Senior Judge since 1997. He received his undergraduate degree from Princeton University and earned his law degree from Yale Law School. Judge Newman was honored by a special edition of the *New York Law School Law Review* in 2002. In 2006, on the occasion of the 50th anniversary of his graduation from Yale Law School, a group of his former law clerks and friends established the Judge Jon O. Newman Global Justice Lecture series at Yale Law School.

Previous recipients of the Association's Annual Award for Distinction in International Law and Affairs include: The Lawyers and Judges of Pakistan, represented by Aitzaz Ahsan; the Honorable Thomas Buergenthal, U.S. Judge on the International Court of Justice (The Hague); the late Arthur C. Helton, director of Peace and Conflict Studies at the Council on Foreign Relations (untimely deceased in the 2003 bombing of U.N. Headquarters, Baghdad); Peter Pfund, former Assistant Legal Advisor to the U.S. Secretary of State for Private International Law; Gillian Martin Sorensen, Senior Adviser at the United Nations Foundation; Cyrus R. Vance, former U.S. Secretary of State; and Javier Pérez de Cuellar, former U.N. Secretary General. Alice Henkin, Director, Justice and Society Program, the Aspen Institute, another previous recipient, attended the luncheon in person and applauded the Section's choice.

This year the Section's Annual Program and luncheon did not disappoint. It provided attendees with useful and timely information, while simultaneously honoring a man whose commitment to international human rights is something that all members can strive to emulate, regardless of their passion or focus.


Oliver Armas and Michael Galligan

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Recent Events

As indicated herein, the Section has been more actively reaching out to members. Below is an example of some recent activities. If you have any ideas for programming, we would be anxious to hear from you.

- International Women's Rights committee had its kickoff event on March 3, 2009.
- Conference call meeting of the International Section European and Middle East Chapter Chairs, March 5, 2009 11:30 a.m.
- The International Banking, Securities, and Financial Transactions Committee, March 10, 2009, Duane Morris LLP, 1540 Broadway, New York, N.Y.
- Committee on International Arbitration and ADR held brown-bag luncheon from noon to 2:00 p.m. on Tuesday, March 31, at Baker & McKenzie's New York office located at 1114 Avenue of the Americas, 4th Floor.
- Committee on International Privacy law held a breakfast meeting on April 17, 2009 from 8:30 to 10:00 a.m. at the law offices of Hunton & Williams LLP, 200 Park Avenue New York City.
- Committee on Insurance / Reinsurance met on April 17, 2009 at the offices of Schindler Cohen & Hochman LLP, at 100 Wall Street, 15th Floor, at 9 a.m.
- First Annual Fundamentals of International Practice was held on April 30, 2009 at the Yale Club of New York City.

While this edition of *Chapter News* is undergoing publication, the India Chapter Meeting was held in New Delhi, India on June 4-6. This two-day program epitomized the strength and diversity of the section. At this Meeting, attendees learned about:

i) the importance of New York law as an International Standard and the Role of Chapters;

ii) international taxation and trust planning;

iii) dispute resolution;

iv) labor and employment; and

v) investing in the United States and India,

among many other interesting issues that transcend today's multinational legal and business transactions—of course, highlighting the intersection between the United States and India.

Chair Michael Galligan publicly expressed his excitement for this meeting and in so doing stated his gratitude to all the people who brought this meeting together. In an e-mail to members he stated:

> I would like to say a special word of thanks to the Chair of our India Chapter, Kaviraj Singh, for having the idea of this Meeting and for his continuing dedication to seeing the idea become a reality. I would also like to thank Manishi Pathak of Kochbar & Co., who is India program Co-Chair with Kaviraj, as well as James P. Duffy III, our New York Co-Chair, for all of their hard work in preparing for the Meeting. A very, very special word of thanks to the two sponsoring firms—Singh & Associates (www.singhassociates.in) and Trustman & Co. (www.trustman.org), whose generosity has enabled us to dispense with any registration fee! And thanks to Linda Castilla of NYSBA headquarters for designing the beautiful Program.
>
> We are hoping not only that this Meeting will be a great success but that it will be an inspiration for similar chapter meetings in many other regions and countries of the world where our Section has chapters!

As Michael expressed, we hope that this Meeting serves as a template and inspiration for other committees. We of course also hope to be able to bring you details of this program, as well as the many others that the Section and its subcommittees are holding, in the next edition of the *Chapter News*. (i.e., if you attended one of these programs, please draft a blurb to share with your colleagues.)

Committee News

An E-mail from Michael Pisani to the Reinsurance Committee dated November 13, 2008

Dear Committee Members:

It is my great pleasure to announce that, at the Section's Executive Committee Meeting yesterday, the Committee unanimously accepted my motion to have Howard Fischer become the new Co-Chair of the Committee on Insurance & Reinsurance. He has been an active and innovative member and moderated two excellent programs this Fall and will now team with Co-Chair Chiahua Pan to continue to provide you with solid leadership; first-rate, timely and relevant programs; and attention to your comments on how best your Committee can serve your needs. I know you will join me in giving Howard your full support and cooperation as this Committee, now numbering 41 members, continues to grow!

As my last duty with this Committee as outgoing Co-Chair (I will remain an active member and provide whatever assistance I can), I want to welcome our latest new member, Mark Pring, from the Dubai offices of Chadbourne & Parke—his e-mail address is mpring@chadbourne.com. Welcome, Mark—I know that you and the Committee will gain great mutual benefit from your participation on this Committee.

I also want you to know that in my new role in the Section (newly renamed the International Section) as Vice-Chair, Committees, I may from time to time elicit input from you all as to how our Section may best serve your interests, and in particular how those of you in the U.S. and those in other countries might best interact through such methods as scheduling regular Webcasts or Webinars, meetings with visiting attorneys, special events or programs, etc. I welcome any ideas you may have to make membership in the International Section and your Committee relevant and responsive.

One last word on the Committee I now co-chair. Its Mission statement is as follows, and again I look forward to any input you may give that will make the goals below attainable:

The Committee on Committees reviews the activities of the various Section committees, and recommends to the Executive Committee whether (a) additional committees should be appointed to foster the goals and purposes of the Section, (b) existing committees should be terminated where their work is complete or no longer significant to the Section's achievement of its overall goals and purposes, (c) the scope or purposes of any existing committee should be revised to enhance the operations of the committee and the goals and purposes of the Section, and (d) existing committees should be integrated or combined to promote the goals and purposes of the Section.

So in closing, welcome aboard, Mark, and congratulations and good luck to Howard!!

Warm regards,
Mike

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Message from the Chair

(Continued from page 2)

tion of so many trade, financial and personal and passageways between and among the diverse countries, cultures and religions of the region, as well as China, India, Australia and Oceania. We hope that this meeting will be not only a splendid opportunity for legal education and client development but also for building a long-lasting network of Asian jurisdictions for which the support of this Section and the law of this state of New York is significant. Plans were also in place for the first "All India NYSBA International Conference," sponsored by our new India Chapter, which took place in New Delhi from June 4-6. Several NYSBA International members from New York and abroad traveled to New Delhi to assist with the programming.

2. Leadership in the effort to coordinate the work of the State Bar Associations throughout the United States that have Sections or divisions dedicated to some aspect of what we comprehensively refer to as "international law." We have approached the leadership of each of the other 29 State Bar Associations that appear to have some form of multinational or foreign law sections to work with this Section in learning about the structure, purposes and program of each Section and in finding ways in which we can assist and support each other. The first telephone conference was scheduled for May 21. It is too early to predict the shape that these contacts may take. However, I propose to you that, in a nation that ratifies international treaties and conventions much less frequently than it signs or even proposes them, our State Bar Associations are uniquely situated to educate local communities throughout our country about the contributions to their own well-being, even at the most local and domestic levels, that international law can make.

Let me conclude by mentioning two particular innovations taking place this year that, perhaps more than anything else already mentioned so far, will "change the face" of this Section: our new Announce List-Serve, which was initiated on March 9, and our new Web site membership directory, which will be launched momentarily. The Announce List-Serve allows every one of our 2,200 members to have up-to-date information and news about our Section that only our Executive Committee had a few months ago. The directory will be a particularly good tool for legal referral and networking needs, complemented also by the "Linked-In" NYSBA International discussion group initiated by James P. Duffy III and Jonathan Armstrong.

In concluding, I would like to acknowledge and thank the many members of the NYSBA Headquarters staff who have been very resourceful and cooperative in dealing with the "winds of change" coming from the International Section this year—of course our Section and Meeting Liaison, Linda Castilla, and also Terry Brooks and Linda Staub (CLE), Barbara Beauchamp (Web) and Megan O'Toole (Membership).

Michael W. Galligan

From the NYSBA Book Store

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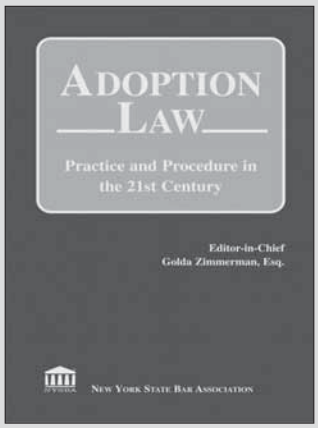
Practice and Procedure in the 21st Century



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Adoption Law: Practice and Procedure in the 21st Century is here to lead your way. Written by adoption law experts from across the country, this text of first reference will guide adoption lawyers through the many challenges they face practicing in the area of adoption law. It includes comprehensive coverage of agency adoptions; private-placement adoption; interstate adoptions; federal laws and regulations governing intercountry adoptions; adopting a foster child; homestudy; contested adoptions; the Indian Child Welfare Act; wrongful adoption; facilitators; assisted reproductive technology and the law; adoption assistance and the special needs of children; adoption mediation; sibling rights; and over 250 pages of forms. This is an indispensable resource for any attorney practicing in the adoption law arena.

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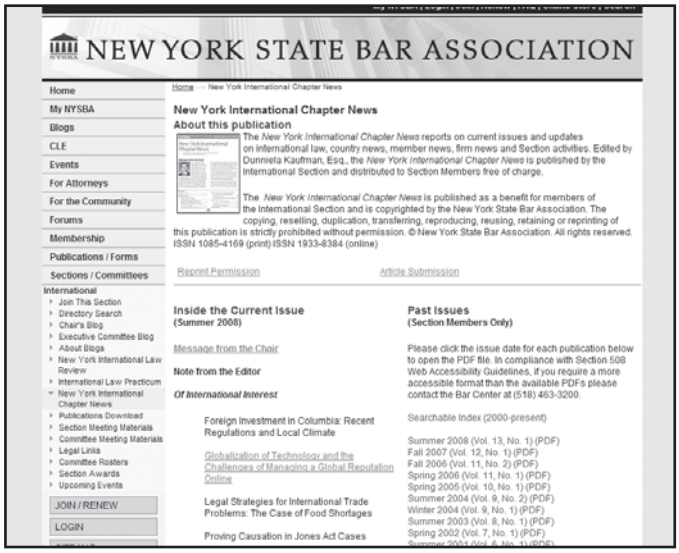

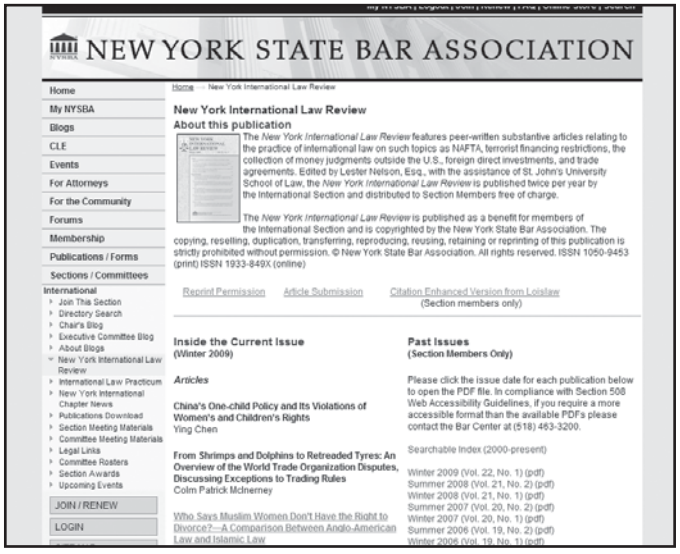

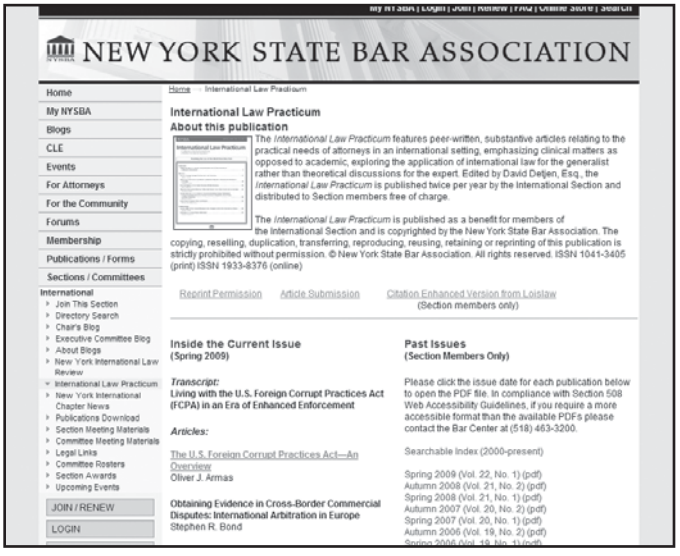

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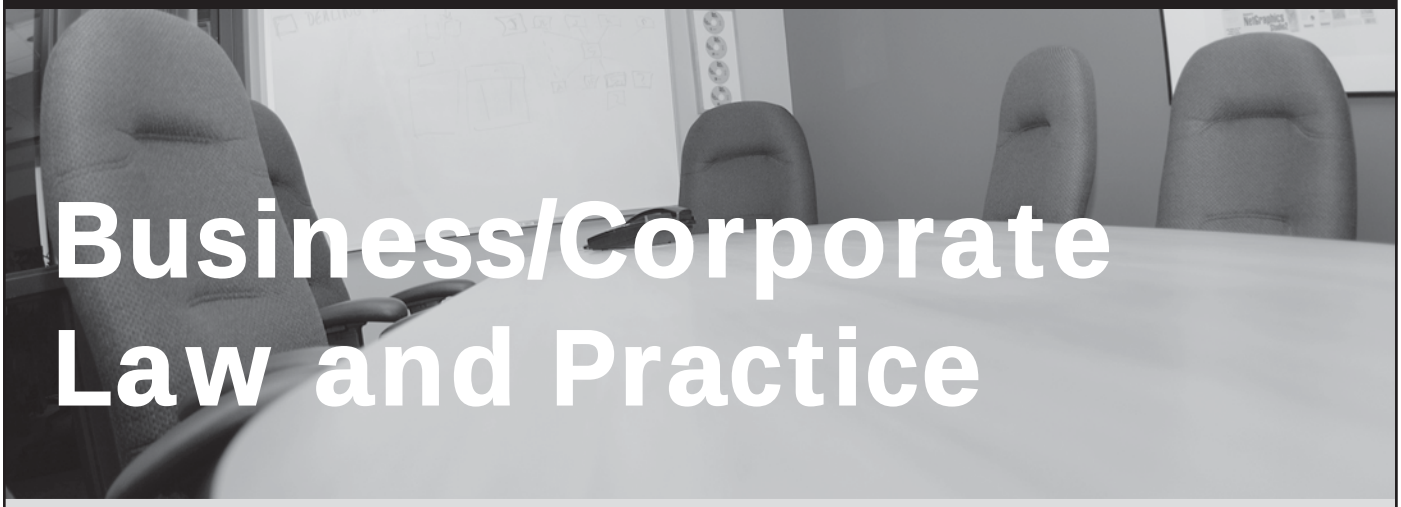

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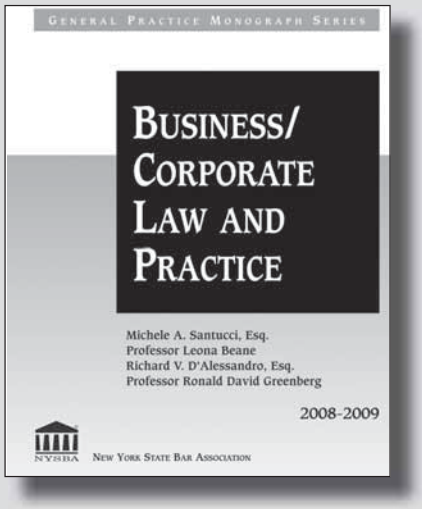

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